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1 Introduction

The national reports are available for downloading at www.iasaj.org

The International Association of Supreme Administrative Jurisdictions held its 11th Congress in April 2013 in Cartagena, on the theme «*The administrative judge and environmental law*». To prepare for this event, a questionnaire was sent out to all the members of the association[1]. This general report contains a summary drafted on the basis of the 45 national reports received in response to that questionnaire.

⌘ Diversity: a source of wealth and complexity

The forty-five national reports presented at the Cartagena Congress inevitably reveal great diversity resulting, in particular, from two factors: the considerable disparity in the legal systems of the nations that responded to the questionnaire; and the varying degrees of development of environmental litigation.

Firstly, the diversity of legal systems, which stems from the multiplicity of legal cultures and traditions, is striking.

Civil law and common law traditions are mainly represented in the national reports, but other traditions have also shaped certain legal systems, such as the influence of Confucianism on Chinese law for example[2]. This diversity also arises from the multitude of administrative organisations (the unitary, regional or federal nature of the State for example) and judicial organisations (particularly the existence or otherwise of duality of jurisdiction). These factors, and many others, give rise to singular contexts that form the backdrop of the national reports.

[1] See the questionnaire in the appendix.
[2] See H. P. Glenn, Legal traditions of the world, Oxford University Press, 2010.

But the diversity also lies in the degree to which environmental matters carry importance in the country and, in consequence, the level of development of environmental litigation.

Some countries thus report in their introduction that very few or even no environmental cases have come before their administrative courts[3]. In other countries, on the other hand, environmental litigation is highly developed. And these differences sometimes render comparisons between countries difficult.

Although it is a source of wealth, diversity can also generate complexity.

While the answers to certain questions show that some issues and thrusts are common, this is not always the case. The realistic picture thus becomes impressionist. It reflects the variety of legal organisations and systems of law. Like in biodiversity, however, this diversity is a sign of wealth and a number of original and innovative solutions are outlined throughout the reports, some of which will be taken up here. Lastly, this report does not purport to be exhaustive and presents a view which may not be free from the subjective eye of the writer.

⌘ Objectives

«*The administrative judge and environmental law*» is a key theme.

The emergence of environmental issues in the 1960s did not leave the world of law indifferent and, in 1970, an extensive legal movement gave rise to numerous substantive and procedural standards aiming to achieve a better balance in the relationship between man and his environment. «*A lawyer is carried along in the acceleration of history by the facts he works on,*» wrote Dean Savatier[4]. This is the trend that environmental law has followed in recent decades. The emergence of these new issues has been a foreign aspect that legal systems have gradually had to integrate in order to regulate and control human behaviour via law, with the aim of protecting and preserving the environment.

Within this framework, both the questionnaire and this report attempt to shed some light on two main questions.

The first is whether or not, at present, administrative judges have the tools they need to fully take the specificities of environmental cases into account and address them effectively and, if not, which solutions could we find to remedy the situation. In other words, is the judge well-equipped to effectively deal with the environmental disputes submitted to him?

The second, more general question, amounts to examining the extent to which legal standards have had to be adapted or revised to incorporate the specificities of environmental law and the role that administrative judges have played in these changes. Has the applicable law

[3] Case of Burkina Faso, the Ivory Coast, Mauritania and Senegal.
[4] SAVATIER (R.), « *Le droit et l'accélération de l'histoire* », Recueil Dalloz, Paris, 1951, chron., p. 30.

been adapted, or should it be adapted, in the light of the singularities of environmental cases and, if so, what role has the administrative judge played, or should play, in these changes?

Furthermore, addressing the question of administrative judges and environmental law is also, quite simply, a way of illustrating the various thrusts and singularities that, in general, characterise the legal systems of the respondent nations and, in particular, their administrative litigation.

The questionnaire successively covers four themes which are addressed in this report. These themes are: the sources of environmental law (**2**), the competence of the administrative judge in the environmental field (**3**), the proceedings (**4**), and the enforcement of the court decision (**5**).

2 The sources of environmental law

The sources of environmental law are largely similar to the conventional sources of general law. However, while national sources other than constitutional (**B**) and international instruments (**C**) are prominent in the environmental field, the constitutional reference is unequally shared (**A**), as is the existence of a fundamental right to a healthy environment (**E**). Administrative judges also contribute, in most countries, to developing and establishing general principles of environmental law (**D**).

A | Unequally shared constitutional sources

Not all countries have chosen to anchor environmental law in their Constitution and, where they have, these sources still vary considerably.

Among those that have a written Constitution, some countries have not included any provision relative to the environment therein[5]. However, the number of such countries appears to be diminishing and quite recently, environmental provisions have been added to the fundamental instrument of several nations. This is particularly the case of France since 2005, Belgium since 2007 and Mauritania since 2012.

Where constitutional provisions do exist, they may establish rules of competence (competence of lawmaker, of federal government or of local governments) or substantive principles. Regarding the former provisions, we shall note that many unitary States have asserted the lawmaker's competence, and even that of the Government compared to other public entities[6], the main function of regulatory power then being to enable the application of this legislation. In the case of federations, the distribution of competence between federal government and the States results most often from the Constitution, under varied and sometimes extremely detailed provisions[7].

[5] Case of Algeria or Malta for example.
[6] Case of Poland and Romania.
[7] Case of Austria for example.

Where substantive provisions relative to the environment are contained in the Constitution, two main frameworks can apply.

It may be a framework wherein there are one or more provisions that do not correspond to an intention to create a system. In other words, the constituent authority has not sought to establish a complete system of environmental standards[8]. These provisions may then be very general. Germany's fundamental law thus states that «*Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*», whereas the Indonesian Constitution emphasises that the national economy must be organised, inter alia, with regard for the environment. Such constitutional provisions may also simply make reference to a right, such as the right to a healthy environment, like the Indonesian and Senegalese Constitutions, and/or to duties. The Constitution of Romania thus provides, after asserting the right to a healthy environment, that «*Natural persons and legal entities shall be bound to protect and improve the environment*».

In some countries, however, the Constitution is a more complete source and illustrates the constituent authority's aim to cover the environmental field more broadly. This is the case for example of Burkina Faso, France, Lithuania, Portugal, Russia and Thailand. The Colombian Constitution stands out as an example in this regard, by the number and wealth of environmental provisions it contains, bearing witness to this country's commitment to correctly manage its natural resources.

The different frameworks identified (absence of constitutional provisions, simple provisions or a more complete framework) are the result of factors specific to each constitutional history. Furthermore, constitutional models change, either owing to the environment being included in the Constitution, or due to the provisions becoming more precise. Costa Rica is an interesting example since, following the creation of the *sala constitutional* in 1989, which totally changed citizens' relationships with their basic law, a fundamental right to the environment emerged in 1993 and, in 1994, a constitutional revision led to the inclusion of more legally precise provisions in addition to a very general existing reference.

The observer cannot fail to be struck by the new prevalence of constitutional sources in the environmental field. Although it is unequally shared, the environment nonetheless now has a place in the basic law of a growing number of countries which rely increasingly on this source. Constitutional standards thus rank above the other national sources, which are obviously very developed.

[8] Example of Belgium, Cameroon, China, the Czech Republic, Germany, Greece, Indonesia, Italy, Luxembourg, Mauritania, the Netherlands, Romania, Senegal, Sweden and Turkey.

B | The other national sources

The other national sources are primarily based, in environmental matters, on written law, even in countries where unwritten law retains a certain place, like Norway.

These sources are mainly legislative and regulatory.

The great majority of countries have particularly extensive legislative sources. In some, these sources have been codified or an environmental code has been adopted, or even a general or framework law on the environment[9].

There are also very many regulatory instruments covering all the fields of environmental law. These texts may be general or sector specific. But numerous related instruments also include environmental provisions, particularly those concerning water, mines, energy, land-use and urban planning or forests. These texts clearly illustrate the idea that environmental law is a «crossroads» law which, although it has its own substance, is at the junction of numerous areas of law.

In addition to the national sources, international law also plays an inevitably significant role in environmental law, given the global nature of environmental issues.

C | The major influence of international sources

The international scene is particularly propitious to the development of environmental law which, for its instruments to be effective, requires an approach that reaches beyond national territories.

In 1972, the United Nations Conference held in Stockholm focused international attention on environmental matters, particularly those of environmental deterioration and cross-border pollution. Twenty years later, in 1992, the United Nations Conference on Environment and Development (UNCED) led to the Rio Declaration, which sets out 27 universally applicable principles, and to the Convention on Biological Diversity and the Framework Convention on Climate Change. At the same time, many treaty instruments were adopted, at both international and regional levels, through multilateral or bilateral agreements, together with numerous declarations, recommendations and other soft law instruments.

The integration of these sources into domestic law, a matter which is not specific to the environmental sphere, depends on whether the country's legal system is monistic or dualistic.

In many countries, where the approach is monistic, the treaties they regularly ratify, subject to a certain number of conditions, directly produce their legal effects[10] and, generally,

[9] See, for example, Burkina Faso, Cameroon, France, Mauritania, Senegal, Slovenia, Sweden and Switzerland.
[10] It is the case in Belgium, Burkina Faso, the Czech Republic, France, Mauritania, Portugal, Slovenia and Ukraine.

prevail over the law, even where it is adopted later. In countries with a dualistic approach[11], a transposition into domestic law is however necessary for these instruments to be effective.

Lastly, certain countries, including Austria or China, insist on the importance of the system of compliant interpretation whereby judges must, as far as possible, interpret national instruments in accordance with international law to avoid any conflict between these standards.

The international conventions most frequently mentioned as being applied by administrative judges include: the Convention on Wetlands of International Importance (Ramsar, 1971), the Convention on International Trade of Endangered Species of Wild Fauna and Flora (Washington, 1973), the Convention for the Protection of the Ozone Layer (Vienna, 1985) and its Protocol on Substances that Deplete the Ozone Layer (Montreal, 1987), the Convention on Biological Diversity (Rio, 1992), the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 1994), the Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 1997) and the many conventions relative to protection of the marine environment against pollution, particularly the conventions on the establishment of compensation funds for oil pollution.

A great many regional instruments on environmental protection have also been developed, within various institutional frameworks.

This is the case of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979), the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 1998), the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West, Central and Southern Africa Region (Abidjan, 1981), the Phyto-Sanitary Convention for Africa South of the Sahara (London, 1954), many agreements on the protection of the subsoil and forest resources signed by the Member States of the Commonwealth of Independent States or the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena, 1983). There are also many bilateral treaties generally signed by neighbouring States to address an issue common to them.

Several countries underline, lastly, that soft law, in particular declarations of principles and recommendations, of which there are many in the environmental field, are quite important for administrative judges who use them as guidance in their interpretation of environmental standards[12].

Within the international sources, European Union law represents a special case. Since 1986, the EU has pursued the aim of protecting the environment by means of a specific

[11] Like Israel, Norway, Switzerland and the UK.
[12] Hungary or Poland as an example.

policy, confirmed by the constitutive treaties. Since 1992, such treaties have set forth the guiding principles of this policy. The European Union has adopted many texts – around 250 to date – covering multiple fields. Particular focuses include the protection of wildlife, water, the air, waste treatment, the management of potentially dangerous substances and organisms, including genetically modified organisms and chemicals, impact studies, public information and participation and environmental liability. The environmental law of EU Member States is therefore currently very much based on European law and, as a result, it is remarkably consistent in this geographic area.

International environmental law is also distinctive by the fact that it has helped shape the general principles of environmental law which have progressively been disseminated in national legal systems, thanks in particular to the intervention of administrative judges.

D | Administrative judges and the general principles of environmental law

Most countries underline the role that administrative judges have played in developing the general principles of environmental law, even though certain reports state that as judges are bound by the rule of law, they may only apply them if they have given rise to a written instrument. This is the case in Belgium where, according to the Council of State, these principles serve only as general principles in environmental policy and must be implemented in directly binding standards. Some countries also emphasise the fact that the application of these principles depends on the activism of the judge[13], while others, like Burkina Faso, the Ivory Coast and Indonesia consider that while administrative judges have not yet had the opportunity to apply these principles, there is no reason why they should not do so in the future.

The direct application of these principles to judge the lawfulness of an act is a common way of proceeding[14]. Such principles may be specified by the judge who is able to find other new principles. In Greece, the principle of the duty to plan land use was deduced from the principle of sustainable development. These principles also serve as guidance for interpreting the legislative and regulatory provisions on which a judge bases his decision, as the report from Canada points out.

The most frequently mentioned principles are those of prevention, precaution, polluter pays, priority for corrective actions at source, environmental damage and participation.

Some principles are not universal. This is particularly the case of the standstill or non-regression principle, which is recognised in the Netherlands and Belgium, the principle of the disturber in Swiss law, whereby the operator or owner of hazardous property must pay for the necessary preventive measures, or the principle of common but differentiated liabilities in the Czech Republic. Sustainable development is sometimes elevated to a legal principle, like in Greece or Thailand for example.

[13] Case of Cameroon and China for example.
[14] See, for example, Colombia, Finland, France, Greece, Luxembourg, Poland and Tunisia.

But the development of general principles of environmental law by administrative judges has sometimes been criticised as precedential activism like in Greece.

The general principles of environmental law are often of great importance. In addition to the fact that they guide the action of governments and can generally be invoked before an administrative judge, they also provide consistency and guidelines for a field of law often criticised for being too technical. The same is true regarding, not a principle, but a right, and one that is asserted more and more: the right to a healthy environment.

E | A fundamental right to a healthy environment?

Effective protection of the environment does not imply the establishment of a fundamental right to the environment, particularly at a constitutional level, and this is proven by the absence of recognition of any such right in several States[15]. Conversely, many countries have, however, established a fundamental right to the environment[16]. The expression the most commonly used is the right to a healthy environment[17], sometimes clarified by another adjective[18] or phrased so as to be directed at the protection of the human and natural environment[19]. Such a right has, furthermore, been brought out by case law[20]. A right to the environment is sometimes also deduced, as is the case in Cyprus, from the right to life.

Another interesting example is the case law of the European Court of Human Rights. Failing any provision relative to a right to the environment in the European Convention for the Protection of Human Rights and Fundamental Freedoms, to make up for this shortcoming, the Court has based decisions on the right to respect for private and family life and the right to life.

Two emblematic cases illustrate these steps forward.

In the *Tatar* vs. *Romania* ruling first of all, handed down on January 27, 2009 and concerning the use of sodium cyanide for ore mining, the Court considered that the existence of a serious risk for health and wellbeing entailed a duty on the part of the State to assess the risks and take appropriate measures «*capable of protecting the rights of the parties to respect for their private life and their home, and more generally, the right to the enjoyment of a healthy and protected environment*».

Similarly, in its decision *Oneryildiz* vs. *Turkey* of November 30, 2004, the Court specified that the duty on the part of States to take all necessary measures to protect life applied in the particular field of hazardous activities, such as the exploitation of a rubbish tip. This judgment is extremely important for the forty-seven Member States of the Council of Europe.

[15] Case of Algeria, Denmark, Israel, Lebanon, Malta, Sweden and Switzerland.
[16] Like Burkina Faso, Chad, Costa Rica, Egypt, France, Hungary, Italy, Ivory Coast, Portugal or Russia.
[17] Particularly Burkina Faso, Cameroon, France, Indonesia, Norway, Romania, Senegal and Slovakia.
[18] As an example, the adjectives «*healthy and respectful of biodiversity*» used in Canada.
[19] See the case of Luxembourg.
[20] Like Lithuania.

On occasions, it is expressly cited in national decisions (in Poland or in the UK for example).

Recognising such a fundamental right has a variety of effects.

In some countries, recognition of this right is contingent upon legislation, i.e. it only applies «*to the extent and according to the standards provided for by law*» as per the provisions of the Constitution of Canada[21] . In other countries, texts may provide, like in Malta, or the judge may deduce, like in Cameroon, that this right may not be raised before national courts or that it may not, in any event, create a subjective right for individuals. In Belgium, this right does not correspond to a subjective right but allows a relaxation of environmental standards compatible with the Constitution if there are imperious reasons. In France, the *Conseil Constitutionel (i.e the Constitutional Court)*, has deduced a general duty of care, based on the activity carried out, incumbent not only upon the public and administrative authorities, but on any other person. Thus, the right to live in a balanced environment that is respectful of health is recognised as a right with horizontal effect and direct application.

Generally, it nonetheless seems that the legal effects of establishing a right to the environment as a fundamental right are quite weak; this may be partly due to the fact that not all the conclusions have yet been drawn from it.

Regarding the sources of environmental law, two general and complementary impressions emerge from the national reports.

The first lies in the still changing nature of the sources of this law. Environmental law is indeed not built on long-standing, consolidated foundations. Its sources therefore evolve fast as illustrated for example by the development of the general principles of environmental law and the assertion of constitutional sources.

Secondly, these sources are increasingly complete and, as they develop, they are forming a finalised system in which environmental issues can be effectively addressed.

[21] Also see for example the Czech Republic.

3 Judicial organisation and competence of the administrative judge in the environmental field

The specific nature of environmental litigation only has a slight impact on the competence of administrative judges and on judicial organisation (**A**). Internally, however, it leads to a form of specialisation of the administrative courts (**B**).

A | A slight impact on judicial organisation and on the competence of administrative judges

The specificity of environmental cases seldom leads to the traditional rules of competence being called into question.

It is particularly noteworthy that, in the great majority of countries with duality of jurisdiction, the rules of distribution of such cases between the courts are not changed, for example by allocating a part of or all environmental cases to a single type of court. Environmental cases therefore never fall solely within the remit of the administrative courts, and neither do they come exclusively under the competence of the administrative divisions of ordinary courts in States with no duality of jurisdiction.

Some countries state, however, that administrative judges are primarily competent to hear environmental cases[22]. Two other fields of litigation are nonetheless particularly dynamic: cases heard by the criminal judge, as indicated by Tunisia for example, and also cases within the remit of the constitutional judge, as noted by Germany and France. The civil law judge is also a natural judge of environmental cases.

[22] See, for example, in Czech Republic, Finland, Germany, Romania and Switzerland.

In the vast majority of countries, to determine the competence of administrative judges, reference must be made to general rules governing competence. On this point, the general report can but refer readers to the national reports, given the variety of judicial organisations and criteria applicable to the distribution of jurisdiction.

In a few countries, the specificity of environmental litigation has influenced the judicial and quasi-judicial organisation. The ex nihilo creation of courts specialising in such matters is rare – at the most we can mention the Environmental Court of the flemish region in Belgium, whose competence is limited to the administrative fines imposed in environmental matters. Some countries point out that while the legal bases necessary to create specialised courts do exist, this possibility has yet to be implemented[23] or would run counter to the general trend observed in the court system concerned[24]. Lastly, in other countries, competence in environmental matters has been absorbed by courts or divisions initially specialised in other fields, such as the commercial courts in Russia.

This significant lack of specificity in terms of the distribution of jurisdiction does not, however, generally preclude a certain form of specialisation within the courts themselves.

B | Relative internal specialisation of courts to hear environmental cases

Courts are more often specialised internally, although this is not always the case[25].

Thus, many countries have divisions specialising in environmental disputes[26]. In China, the development of such chambers was recently approved by the Supreme Court.

Two countries in particular stand out by the specialisation of their judicial organisation in the environmental field.

In Finland, only one regional administrative court is competent to hear all disputes relating to enforcement of the environmental protection law and the law on water. This Court is specific in that it comprises legal experts as well as specialists in ecology, natural sciences and technology.

In Sweden, the organisation of judicial authority also reserves a place for environmental cases which, at first instance, are heard by the regional land and environment courts, of which there are five and, on appeal, by the Court of Appeal in Stockholm which also serves as the Land and Environment Court of Appeal. While, according to the national report, these courts cannot be fully described as specialised courts and are more specialised components of the

[23] Case of Lithuania.
[24] Example of Luxembourg.
[25] Like the UK.
[26] This is the case in Austria, in France, in Greece, in the Netherlands and in Chad.
In the latter State, the Chamber of Accounts of the Supreme Court has specific competence for questions relating to the shrinking of Lake Chad.

general court system, they nonetheless apply different rules of procedure and are composed in a specific manner. The question of whether they are part of the general court system or the administrative court system has also come under debate. One of the reasons they were established within the general court system was that a similar special structure for courts handling cases concerning water environment issues already existed within that system.

One last kind of specialisation can be identified as concerns the judges themselves. Many countries mention the fact that administrative judges may or must attend training courses in environmental matters. The most striking example is Indonesia. Since 2013, only judges who have done a specialised course in environmental law and ecology, and have passed an exam, may hear environmental disputes.

Regarding the distribution of powers internal to the administrative courts, once again the situations vary greatly, particularly depending on whether or not courts of first instance and appeal exist. Where they do, it is nonetheless generally possible to initiate proceedings before the supreme administrative court, so that it rules at first and last instance, where the case is of a certain importance.

Lastly, outside the court framework strictly speaking, quasi-judicial administrative entities, specialising in the environment, have emerged. This is the case in Denmark where the Environmental Board of Appeal examines administrative remedies for all issues relating to the environment. In Malta, the Environment and Planning Review Tribunal is a quasi-judicial entity with competence to hear most environmental disputes. Consisting of three members (one environment and planning expert, one legal expert and one architect), the decisions of this administrative body may be appealed before the ordinary courts.

The specificity of environmental disputes has, in fact, only had a slight impact on judicial organisation and the competence of administrative judges. Cases in which competences have been grouped together in one court are also few and far between. On the other hand, internal specialisation of courts is more frequent and appears to enable these disputes to be dealt with more effectively.

4 The proceedings

Analysing the efficiency of proceedings with regard to the specificities of environmental disputes and assessing the possible adaptation of administrative litigation law to take these specific features into account is no easy task. In environmental actions, one first difficulty emerges in the very conditions of access to justice and particularly in the determination of standing (**A**). The applicable procedures and, above all, questions relating to the existence of appropriate preliminary administrative review procedures and expeditious procedures are also very important (**B**). Lastly, there is the question of the powers that administrative judges actually have to effectively deal with environmental cases (**C**).

A | Access to justice and the question of standing – two major issues

In the environmental field, there is some conflict between the generally individual and personal nature of the standing needed to bring action before a court and the most often general and collective dimension that environmental matters present. The question of standing is thus at the heart of issues regarding access to justice in environmental matters and this is where the most noticeable difference between countries can be seen. Rules of litigation have therefore often been adapted to take these issues into account, particularly as regards standing of environmental protection organisations. Some international legal instruments also address these questions specifically.

> *The particular case of Aarhus Convention Member States and European Union Member States*

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was opened for signing in Aarhus on June 25, 1998, for Member States of the United Nations Economic Commission for Europe. All EU Member States and the European Union are parties thereto.

Access to justice in environmental matters is the third pillar of the Aarhus Convention. Pursuant to the provisions of the Convention (Article 9), access to justice must be guaranteed to members of the «*public concerned*», i.e. the public affected or likely to be affected by, or having an interest in, the environmental decision-making process, where such members have, within the framework of domestic legislation, a sufficient interest or maintain an impairment of a right. The Convention specifies that the latter conditions must be assessed consistently with the objective of giving the public concerned wide access to justice. The Convention also encourages access to justice for persons other than those belonging to the "*public concerned*".

The European Union has made access to justice in environmental matters a priority, and all the more so as it is a Party to the Aarhus Convention. Several texts have been adopted in this respect, some provisions of which transpose or specify the requirements of the Aarhus Convention. Directive 2003/35/EC of the European Parliament and the Council of May 26, 2003 thus provides for public participation in the development of certain environmental plans and programmes and amended, as regards public participation and access to justice, the prior directives (Directives 85/337/EEC and 96/61/EC of the Council). The Court of Justice of the European Union has also, on many occasions, specified the purport of European provisions in this field and the stipulations of the Aarhus Convention.

In this context, some countries have been forced to change their legislation and their practices. In general, there is a tendency to more broadly allow environmental reviews in Aarhus Convention Member States and particularly within the European Union[27].

Now the specific situation of EU Member States and parties to the Aarhus Convention has been established, how is standing assessed for applicants other than non-governmental organisations?

> *General assessment of standing in environmental matters*

The national reports reveal two main categories of legal systems as regards standing in environmental matters: countries which, mutatis mutandis, apply the same rules as for general litigation and those in which there are specific rules of admissibility.

In a first group of countries, standing in environmental matters is not assessed differently to standing in general.

However, two sub-groups can be identified within this first group, depending on whether standing is assessed broadly or not.

The first sub-group thus comprises countries in which standing to apply for cancellation of an administrative decision requires proof of an impaired interest, generally assessed in a flexible manner, but not of infringement of a subjective right[28]. Being affected by nuisance or

[27] On this point, particular reference should be made to the general report of the ACA-Europe seminar.
[28] Case of Algeria, Belgium, Egypt, France, Israel, Italy, Luxembourg, Sweden, Switzerland or Turkey.

being geographically located near a project is therefore generally sufficient to consider that a person has standing to proceed against an administrative act. In the UK, a similar solution consists in assessing the concept of «*sufficient interest*».

The Netherlands are however a specific case. In general, standing there is subject to the existence of an interest directly impaired by a decision, a condition that is broadly interpreted. However, before July 1st, 2005, a form of actio popularis was available against land planning and environmental decisions, whereby the persons who took part in preparing these decisions could contest them before a court. On grounds of restricting judicial reviews, a change of legislation was nonetheless made, but as the popular action available at the time had been used little, this change had a limited effect in practice.

A second sub-group consists of countries where standing is more strictly assessed and where there are no specific rules applicable in environmental matters. In Germany, impairment of a subjective right is a condition of admissibility and national or European environmental protection provisions are traditionally regarded as protecting collective interests that cannot grant individual rights. Applicants must therefore invoke the breach of a right recognised by the Constitution or by law to bring an action for cancellation or failure to act. In other States, standing in environmental matters does not differ from general litigation and is assessed more restrictively than in countries in the first sub-group[29].

Several countries have however developed specific conditions for assessing standing. These are mainly countries which apply a strict assessment of standing in general administrative litigation.

An *actio popularis* is above all available in certain countries.

In Costa Rica, the environment is the only area in which such an action is available. In Colombia, natural persons and legal entities, particularly non-governmental environmental protection organisations may bring a popular action for breach of a collective right. Popular action is also a process available in Portuguese law, especially in environmental matters. In Finland, a form of actio popularis is provided for by the law on municipalities concerning extraction permits and land use plans. The existence of provisions such as «*everyone has a duty to contribute to protecting the environment*» does not however necessarily lead to standing being recognised for any person[30].

Without going so far as to recognise an action to safeguard a collective interest, other countries have defined specific rules of standing in environmental matters either in general or in certain specific cases. This is the case in Slovenia, when there is or is likely to be a direct threat on life or health or where an action could have excessive ecological consequences. In Finland, many specific provisions clarify the notion of standing.

[29] See particularly in Denmark, Hungary, Malta, Norway or Slovakia.
[30] See, on this point, the French report in particular.

But an applicant's standing may also, in specifically identified cases and particularly in connection with major land planning projects, be linked to his/its participation in the preparatory phase of passing the administrative decision in dispute. This is the case, for instance, in Croatia, Malta or Poland. In the Democratic Republic of the Congo, where the model is quite different, collective rights, particularly forest rights or the customary environmental rights of local communities, may be defended by the representative of a group on its behalf.

Some specifically designated persons do sometimes have standing in environmental matters, like the Ombudsman in Poland or Slovenia.

In the end, two conclusions appear to stand out.

Firstly, there is no immediate correlation between the way a country assesses standing and the existence or otherwise of specific rules in environmental matters. In particular, the fact that standing is assessed in a restrictive manner in general litigation does not necessarily determine the existence of more flexible rules in environmental matters. Several legal systems do however have specific rules providing better access to justice in this area.

Secondly, a general trend seems to emerge in favour of a flexible and accommodating assessment of standing in environmental matters. Several countries emphasise this trend, such as China and Thailand, in addition to Aarhus Convention Member States.

Other reports refer to legal problems yet to be solved but which could tend towards a more flexible assessment of standing, like, in Burkina Faso, the question of the link between impaired interest and a constitutional provision that recognises a right of class action to object to actions causing damage to the environment.

Only two examples seem to run counter to this trend: the abandonment of the actio popularis in the Netherlands, even though this procedure was used little in practice, and the restrictions made on standing in urban and land planning litigation in France. However, these changes concern countries in which the concept of standing is traditionally taken in the broad sense.

This general trend towards a more flexible assessment of standing is even more marked in respect of non-governmental environmental protections organisations.

> Standing of non-governmental environmental protection organisations

Non-governmental environmental defence and protection organisations are key players in the defence of ecosystems and natural resources and their role is frequently underlined in important instruments (certain Constitutions and international conventions in particular). As such, do they enjoy special access to administrative proceedings?

In a big minority of countries, conditions of access to justice for environmental protection associations are similar to those applicable to other persons[31]. This is also true in countries where the actio popularis is available[32].

However, in most countries, environmental protection associations, or some of them, have easier access to justice to contest acts and doings of the public authorities that have environmental consequences. Several countries point to a general trend along these lines[33]. This may stem from case law, like in Italy where the precedential theory of interests referred to as «*widespread*», and then «*collective interests*» led to easier recognition of standing for these associations, before the law acknowledged a presumption of standing. Most of the time, nonetheless, in domestic law, legislative provisions determine these specific conditions of access, either through general legislation, or under sector-specific legislation like in Finland. Legislation not specific to environmental law is more rarely the case.

Easier access to justice for these organisations sometimes results in them being granted, under certain conditions, a presumption of standing[34], particularly in countries which have introduced a system of approval of these associations[35], or simply to a less restrictive assessment of standing[36].

This tendency to render the assessment of standing more objective is found in numerous cases in which standing to proceed against a decision or an act is assessed in the light of the environmental aims pursued by the association. This condition is, where applicable, combined with other criteria such as the geographical scope of action, the durability or the representativeness of the organisation. In Lebanon, the association's objectives are decisive, whereas in addition to this criterion, Hungary assesses the geographical scope of action. The condition of effectively carrying on activities is required in the Netherlands or in Indonesia, where NGOs must prove that they have been conducting environmental protection activities for at least two years. The association must also, in most countries, have been duly declared[37].

In other countries, a system of approval or registration on a list gives associations easier access to the courts. This is particularly the case in France, Italy, Luxembourg, Slovenia and Switzerland. Again, conditions concerning the purpose, length of existence, representativeness and/or geographical area must be met to decide whether the associations can be approved. Once these associations are identified, they have a right of action that is open to varying degrees. Recognition as an approved association means that the association in question no longer needs to prove its standing in the areas approved. Its standing is then presumed. In Luxembourg, while the law provided solely that approved associations could bring an action against regulatory acts, given that the law was otherwise silent, the courts have extended this ability to individual decisions.

31 Case of Austria, Belgium, Burkina Faso, Cameroon, Canada, Lebanon, Malta, Romania, Russia, Slovakia, UK or Ukraine.
32 See *infra*.
33 Particularly China, Thailand or Turkey.
34 Like Algeria, Cyprus, France, Italy, Romania or Sweden.
35 See *infra*.
36 Like Denmark and the Netherlands.
37 In the Ivory Coast for example.

Finally, we shall note that some States have specific rules governing access to justice for environmental protection associations when they took part in developing the decision, which is particularly the case where the decision has been made following an impact study. This approach, which no doubt stems from the transposition of the Aarhus Convention, is found in Lithuania, in Poland and in Slovenia.

It transpires from the above that the right of environmental protection associations to take action is often specifically addressed by national legislation or, when that is not the case, wide access to the courts is guaranteed. The special treatment granted to environmental protection associations is thus confirmed by a comparison of national laws, the aim being in general to ensure they have the greatest possible access to the court. In a minority of countries only, access to justice for environmental protection associations is not facilitated in environmental matters owing to a strict assessment of the condition of standing.

Access to the courts in environmental matters is a question which has not been neglected. On the contrary, it has been the topic of numerous studies that have led to advances both in legislation and legal precedents, particularly as regards access to justice for non-governmental environmental protection organisations. This is, undoubtedly, one of the areas of administrative litigation that has undergone the most adaptation to take certain specificities of environmental matters into account, namely the collective nature of environmental damage, and to facilitate access to the courts. It would seem that no other court procedures have undergone such widespread and extensive adaptation.

B | The Procedure

In terms of procedure, the specific nature of environmental cases leads to systems of adapting and adjusting existing rules. However, no independent procedural law has emerged in any country. Adaptation of the existing law is therefore often moderate, as the application of compulsory preliminary administrative reviews and expeditious procedures shows. Yet this does not mean that existing rules are not adapted to this kind of litigation, quite the opposite.

> Moderate adaptation of existing procedural rules

Except for the question of standing examined above, it appears that no country has a procedural law totally specific to environmental litigation.

Rather than dissociating and creating a new law, each system has responded to the salient questions in this area by adapting existing procedural rules, a fact which is not surprising, for at least two reasons.

Firstly, the environment is not a sufficiently closed and specific field to give rise to entirely special rules. For example, between the fight against pollution, the protection of biodiversity and the relationship between urban planning and the surrounding environment, there are too many different legal systems and particular problems for any consistent procedural law distinct from general law to emerge.

Secondly, the application of general procedural rules most often enables environmental cases to be dealt with satisfactorily, solely by being adapted and adjusted to varying degrees depending on the legal systems.

The extent to which general procedural rules are adapted varies greatly depending on the country. The procedural specificities inherent in environmental litigation can therefore be very limited[38].

They are, however, more marked in other countries.

The provisions cited as an example are disparate and do not follow any overall logic. They tend to result from the aim of taking into account, often in a very pragmatic manner, issues specific to certain countries and to certain political and legal circumstances. In view of the urgent need to rule in environmental matters, some countries have sought to speed up the proceedings, either by stipulating that rulings are handed down at first and last instance like in Germany, or by accelerating the process of certain actions like in Colombia as part of a popular action.

Regarding the rules governing applications, in addition to standing and the possible requirement of a preliminary administrative review, the time limits for initiating actions sometimes vary, either to restrict the time generally allowed, like certain disputes in Luxembourg, or on the other hand to ensure that interested parties will not be time barred[39].

During the proceedings, some States limit the possibilities of raising certain grounds, particularly to avoid any late and venial challenging of urban planning documents leading to the cancellation of building permits[40], to avoid any grounds on which the court has already ruled being raised again by another applicant[41] or to reduce obstacles to economic activity[42].

The difficulties relating to establishing evidence in environmental matters are addressed by certain procedural systems, by reducing or even reversing this burden[43].

Regarding the decision handed down by the administrative judge, it is possible, in Portugal for example, for the illegality to be restricted to the applicant's case so as not to impede the implementation of certain projects.

38 See, particularly, Canada, Cyprus, the Ivory Coast, Russia, Senegal or the UK.
39 Case of third parties with respect to facilities involving an environmental hazard in France.
40 Like in France.
41 System applied in Germany.
42 Pursuant, for example, to the Crisis and Recovery Act in the Netherlands.
43 Case of Colombia and Costa Rica for example.

Lastly, some countries seek to foster the settlement of environmental disputes outside courts by allowing greater recourse to mediation, like in Austria, or to compromise and arbitration, which is the case in Cameroon.

Indonesia and Thailand have used soft law to emphasise to judges the specificities of environmental litigation, establishing a non-binding best practices guide on procedural rules to be followed in such cases.

The adaptation of litigation rules is therefore generally moderate. The same is true for the use of compulsory preliminary administrative reviews.

> *Compulsory preliminary administrative reviews*

The existence of a compulsory preliminary administrative review in environmental matters hinges on two key factors in the various legal systems.

The first, quite naturally, is the obligation or not to resort to this kind of review prior to any judicial action, irrespective of the field of law concerned. This major factor comes with a second more minor one: the modification or otherwise of existing practices to respond to the specific problems inherent in environmental cases.

Most countries do not require a preliminary administrative review as a compulsory obligation prior to initiating judicial action.

However, such a review is the rule in the Democratic Republic of the Congo, in Germany, in Hungary, in Israel, in the Ivory Coast, in Mauritania, in the Netherlands, in Poland, in Russia and in Slovenia. In some countries, as there is no general applicable rule, reference must be made either to the applicable laws[44], or to the disputed decision where it is the responsibility of the public authority that made it to decide whether or not such a review is required[45]. Lastly, the existence of a compulsory preliminary administrative review may also arise as a result of organisational specificities. This is the case in Sweden when the authority competent to make the disputed decision is an agency or, in Malta with the Environment and Planning Authority when a public authority dedicated to controlling decisions made by the government has been established.

Whatever the law that applies, in several countries it has been adapted in environmental matters and these adaptations appear to pursue various aims. The importance of the challenged decision can thus lead to imposing an administrative review so as to avoid the potentially devastating effects of a judicial action. This appears to be the case in Luxembourg where, to challenge urban planning documents, a double administrative review is required, firstly

[44] Like Lithuania.
[45] Example of Norway.

before the town, and then before the State. Similarly, a preliminary administrative review has been mandatory since 2011 in Colombia, prior to initiating a popular action, unless there is an imminent danger of irreversible damage.

Conversely, in Germany and the Netherlands, no preliminary administrative review is required when certain decisions are at issue, i.e. decisions made after procedures in which wide public participation was ensured. This no doubt reflects an underlying aim of avoiding slowing down already lengthy procedures, and recognition of the idea that since the administrative authority made its decision after careful consideration and once everyone had had the opportunity to voice their opinion, compulsory preliminary administrative review is of little use.

Lastly, several countries do not have any specific rules governing compulsory preliminary administrative review in environmental matters[46].

> *Expeditious procedures*

Even more than preliminary administrative reviews, expeditious procedures are extremely important in environmental matters. The potentially irreversible character of environmental damage indeed implies, for the judicial action on the merits to be fully effective, that the disputed decision can be suspended under certain conditions, to limit its effects.

Now, in a great majority of countries, legal proceedings do not suspend execution of the challenged administrative decision[47].

However, and except for the Democratic Republic of the Congo, specific procedures do exist whereby a provisional legal decision can be expeditiously obtained pending a decision on the merits.

It can take two main forms: either it suspends execution of the challenged administrative decision, or it stipulates provisional conservatory measures that may go beyond mere suspension. Administrative judges generally have these two possibilities. But the stipulation of provisional or conservatory measures other than simply suspending the decision is not always possible, like in Russia for example. In any case, the time necessary to obtain a ruling is short or even very short, ranging from a few days to one or two months. Some countries report that use of such procedures is quite widespread or even quite intensive[48], while others say they are unusual or infrequent[49]. Some also indicate the possibility for the court to order a suspension not only at the request of one of the parties but also *ex officio.*

[46] This is the case in countries which, in general, do not have this kind of review, such as Algeria, Burkina Faso, Cameroon, Cyprus, Costa Rica, Denmark, France, Lebanon, Slovakia and Tunisia.
[47] This is the case in Belgium, Burkina Faso, Cameroon, Canada, Chad, Costa Rica, Czech Republic, Democratic Republic of the Congo, Denmark, Egypt, France, Greece, Israel, Italy, Lithuania, Mauritania, Norway, Portugal, Senegal, Slovakia, Sweden, Tunisia, the UK and Ukraine.
[48] Like Belgium, France and Italy.
[49] Case of Cyprus and Denmark.

Moreover, specific summary procedures may exist in environmental matters.

For example in France, two summary procedures can be used to obtain the suspension of the administrative decision in the absence of a prior public enquiry or in the event of adverse findings by the investigation commissioner in a public inquiry. These procedures are however much less frequently used than ordinary law procedures. A specific procedure also exists in Denmark. A rather different solution is applied in the Netherlands where some decisions, relative to land planning and made after a specific procedure, only come into force once the time limit for legal action has expired or once the judge has ruled on the merits of the actions initiated.

The question is much different in countries where legal proceedings suspend the challenged decision, like in Finland, Germany, Slovenia or Switzerland. In a sometimes quite counterintuitive manner, however, more or less developed exceptions to this rule exist in environmental matters, particularly to avoid delaying the implementation of land planning projects. This is namely the case in Germany. A decision made after a specific procedure involving extensive public participation, is thus not suspensive. It is however, always possible to obtain conservatory measures via an expeditious court procedure.

The conditions that enable a court to rule on the suspension or other measures vary, but generally, in environmental cases, urgent action must be required to prevent serious potential consequences of a decision against which a serious ground of legality is raised. Expeditious procedures must enable a situation to be avoided wherein the disputed decision would already have produced its effects and where any annulment decided on the merits would only have limited impacts in practice. The judge thus focuses on the practical effects of his decision.

Lastly, we shall note that, to foster the swift settlement of some environmental disputes, accelerated procedures for settling disputes on the merits have sometimes been introduced (Luxembourg, concerning public access to environmental information, and Belgium).

Leaving aside the question of standing, the pre-litigation procedure (compulsory preliminary administrative review) and court procedure has therefore only undergone moderate adjustments: they have been targeted and pragmatic, to lead to changes on precise points which, in practice, have proved to cause difficulties. This does not mean that the court procedure is not adapted to environmental disputes, but rather that these rules enable such disputes to be dealt with satisfactorily. But, can we say the same about the powers of administrative judges?

C | Powers of the judge

The difficulty of environmental cases stems from several factors.

Firstly, there is the technical nature of the cases submitted, which often require expert appraisal or specific investigation measures and thus require knowledge and skills other than legal.

Then, environmental law cases often involve both national and international law. The rapid changes occurring in this applicable legal framework are also a factor of complexity.

Similarly, the fact that decisions are made following sometimes long and complex administrative procedures means that judges must first examine compliance with numerous procedural requirements before assessing the actual environmental situation. The difficulty assessing certain standards specific to environmental law, such as the beauty of a landscape or the remarkable nature of a site, is also mentioned.

Lastly, the underlying economic and social issues often make these cases quite tricky to examine. Given all these factors, and particularly the relative difficulty establishing the facts and measuring the consequences, both legally and on an ecological and scientific level, the question of the investigation powers that administrative judges have and that of the verifications they make or the measures they may order are central issues.

> *Appropriate investigation powers*

Regarding the investigation powers of administrative judges, there is a major difference between countries in which the proceedings are adversarial and those in which they are non-adversarial.

In the case of adversarial proceedings, the judge's involvement in establishing the facts is minor and the onus is on the parties to produce the necessary evidence. Therefore, in principle, the judge does not «*exercise investigation powers*»[50]; at the very most, he may direct such measures.

In Costa Rica, Denmark and Norway for example, the court may ask the parties to furnish evidence on the points under discussion. In Canada, while on-site visits are possible, the observations made during them are not evidence but may simply steer the course of the hearings as questions raised on this subject are admissible. Given the specific nature of environmental disputes, these adversarial proceedings are sometimes criticised, particularly by doctrine. The technical nature and the cost of the evidence to be produced can indeed be an obstacle to initiating an action, not to mention that the applicant may find himself facing polluters who not only have more financial means, but may also be the only ones capable of conducting certain investigations.

[50] Like Belgium, France and Italy.

However, in most countries, proceedings are non-adversarial. The judge is then in charge of directing the investigations. The parties must produce the evidence, but the judge must take the necessary measures to gain sufficient knowledge of the facts. In practice, this leads to the possibility of automatically taking investigation measures to shed light on the facts. Many national reports thus highlight the broad, or even extensive, powers of the judge in conducting investigations[51]. The use of expert appraisal, hearing of witnesses and visits to the sites are the most frequently mentioned procedures. The amicus curiae procedure, whereby the court may seek observations from any person having the skill and knowledge necessary to inform it on general questions, is less widely used. For example, in Austria, Germany or the Ivory Coast, it does not exist. Norway has only had this procedure since 2005 and France since 2010.

But are these means of investigation frequently used?

A number of countries emphasise that, in most environmental cases, the documents filed and the discussion between the parties are sufficient for the case to be judged as it stands. Burdensome means of investigation, such as expert appraisal, are apparently therefore used sparingly, which is underlined for example by Belgium, France, Greece and the Netherlands. We should no doubt not be surprised at the low statistics here. Like in any litigation, many cases do not involve any difficulty establishing the facts and, given the costs of certain investigation measures, they are only used with restraint, i.e. only when the measure is absolutely necessary to settle the dispute.

Lastly, we note the special case of the Netherlands where, at the request of the administrative courts, an independent body prepares the appraisals necessary for the court proceedings. The Council of State of the Netherlands uses such appraisals in approximately 2.5% of environmental and land planning cases.

> The types of verifications that administrative judges make

The question of the types of verifications that administrative judges make in respect of the challenged decision does not, in general, involve any specific response in environmental matters. But for a few cases, they are the same as those traditionally made by the courts in question. They will verify both the formal legality of the decision and its substance. Where the judge rules as a supreme appeal judge, such verification is naturally limited to questions of law, save exceptions, like the «distortion of the facts» in France or the assumption that the «facts have been established in a manifestly arbitrary manner, in an incomplete manner or in breach of fundamental procedural provisions» in Switzerland.

Regarding more precisely the extent to which such verifications are made by the judge, the methodology calls for precaution. It is difficult to identify the extent of the judges' control, as extremely diverse situations are reported and can only be fully understood in the light of the particular legal system of which they are a part.

[51] See, particularly, the reports of Algeria, Belgium, Burkina Faso, China, Czech Republic, France, Germany, Italy, Ivory Coast, Lebanon, Lithuania, Luxembourg, Portugal and Slovenia.

However, two cases should be mentioned: firstly, when the public authority applies technical skill and, secondly, when it has discretionary power.

As an introduction, we must no doubt underline the multiplication of standards under which decisions are verified. The significant and ongoing development of environmental law indeed entails a considerable increase in these reference standards. Without being directly linked to the more precise question of the extent of the judges' control, there is no doubt that the normative drive in this area induces increasingly extensive examination by administrative judges. Broadly speaking, the reports also underline a tendency to more thorough control of administrative acts, subject to two cases in which the verification is more lax, precisely when the public authority applies technical skill or when it has a degree of discretion.

Decision-making in environmental matters requires the public authority to implement extensive technical and scientific skills. The results thus obtained then serve as a basis both for individual decisions, such as the authorisation to exploit a hazardous facility or to market a dangerous product for example, and for regulatory acts concerning in particular the classification of a zone as a zone benefitting from particular protection.

To what extent, then, do administrative judges verify these technical assessments, i.e. the very substance of the studies conducted by the public authority?

For a full understanding, we shall add that this question is distinguished, without however being totally different, from the question of legal characterisation of the facts, i.e. the legal judgment that the public authorities make on the basis of those facts.

Many countries emphasise that administrative judges show some restraint in their verification of technical studies conducted by the public authorities. In Canada for instance, «*deference will be paid to decisions on facts and subjects that fall within the specialized expertise of the decision-making body*», and the Swiss report mentions a «*certain restraint*» in verifying specific technical knowledge. The report of Poland also states that it is impossible for the judge to check, for example, the content of an impact study. The judge is not however totally powerless in this case. He is most often described as being restricted, i.e. limited to verifying a manifest error[52].

In Germany, the judge applies a special test to check the authority's diagnosis of the effects of an environmental measure. Administrative judges are thus restricted to verifying that the public authority has complied with applicable legal requirements by answering three questions:

1 - Is the diagnosis based on precise and relevant facts?
2 - Have best practices been applied in establishing this diagnosis?
3 - Is this diagnosis compatible with the principles of precaution and prevention?

[52] Case of France.

The verifications thus made, even if they are less thorough than for other measures, nonetheless allow the public authority's technical activity to be overseen without the judge having to assess complex scientific issues in detail, while legitimately leaving the public authority and its technical services some room for manoeuvre.

The reports show that when the public authorities have a degree of discretion, which is a remarkably consistent but unsurprising feature, administrative judges must check the legality of the acts submitted to them but not the appropriateness thereof.

Whether or not a choice is appropriate is indeed the responsibility of the administrative and/or political authorities. This dichotomy is sometimes directly linked to the principle of separation of powers[53], whereas other countries simply state that the administrative authorities are legally competent to assess the appropriateness of a decision[54]. In principle, administrative judges do not check the appropriateness of the decision, as this comes under the discretionary power of the public authority. Many reports emphasise that the judge applies a certain degree of self-limitation, where the public authority has real discretionary power.

The absence of any check on the appropriateness of decisions submitted to them, and respect for the authority's discretionary power, do not however mean that judges do not make any verifications.

Many national reports indicate that the limit beyond which a judge will sanction public authorities in the use of their discretionary power depends on whether or not the action is reasonable[55]; it may even result from a «*principle of what is reasonable*», giving rise in Belgium to a verification of the «*manifestly unreasonable nature*» of the measure or, in Switzerland, to a check of the arbitrary, a notion referring to the manifestly erroneous nature of a measure. Some countries also mention, within this framework, the importance of the proportionality principle whereby appropriateness is assessed between the measure taken and the public interests pursued[56]. The control of the outcome in French law whereby the public interest of a project can be judged is a special case. For example, a project can only be declared as being in the public interest if the trespass to private property and the financial, ecological and social drawbacks do not outweigh the advantages it brings. Examples of annulments based on this method of control are however few and far between and, in reality, they reflect the restricted verifications that judges make.

Administrative judges therefore fulfil their role without verifying the appropriateness of the decisions submitted to them, while being careful to preserve the discretionary power of public authorities, thus illustrating the expression of Professor Delvolvé that there is never any control of appropriateness, there is always appropriateness in the control[57]. After making these checks, what measures may the judge adopt?

53 Refer to the report by Luxembourg.
54 See, in particular, Austria, Thailand or Turkey.
55 See the example of Belgium, Canada, Israel, the Netherlands or Norway.
56 For example, the Czech Republic, Lithuania and Luxembourg.
57 P. Delvolvé, «*Existe-t-il un contrôle de l'opportunité ?*» in Conseil constitutionnel et Conseil d'Etat, LGDJ Montchrestien, 1988, p. 269.

> Measures that judges may adopt

Depending on the legal systems, and on the disputes submitted, the powers of administrative judges can vary greatly. This is also true in environmental matters. Yet, given the specific nature of this litigation, some measures appear, prima facie, to be more suitable from an environmental point of view than others. Thus, it is preferable for the judge to be able to order the restoration of a site rather than award damages which, given the principle of their non-allocation, will not necessarily be used to restore the polluted site. The kind remedy, rather than by equivalent, is also strongly encouraged by certain instruments – this is the case in the European Union with Directive 2004/35/EC on environmental liability.

All administrative judges do have one power in common, irrespective of the legal system: that of annulment. This is the core feature of their position. Depending on the country and the competence of administrative judges, this power is sometimes the only one they have. However, in most cases, they also have the possibility of either issuing injunctions, sometimes limited to an injunction to re-examine like in Hungary for example, or of enlightening the public authority on the action to be taken following the annulment[58]. Some countries do however state that administrative judges do not have the power to enjoin the public authority to take a determined course of action or to re-examine the case[59].

As for the possibility of altering the administrative decision, this is much less frequent. In many countries, administrative judges do not have any such power[60]. Some reports indicate that this limit on the judge's powers stems mainly from the principle of separation of powers.

In most countries in which it is available, the power to alter the administrative decision remains limited.

It may therefore only exist in certain kinds of disputes. This is the case in countries where the judge may only alter a decision as part of subjective litigation, in which he must rule on the parties' rights and obligations. However, this power cannot be used in litigation described as objective, wherein the judge rules on the legality of an administrative decision. This distinction between objective and subjective litigation partly covers the difference that some countries draw between actions based on ultra vires – or actions for cancellation – and full remedy actions[61].

In Luxembourg, another distinction prevails between regulatory acts and individual acts, the judge only being able, in principle, to alter the administrative decision in disputes concerning the latter type. Full remedy actions, i.e. those seeking the cancellation of the decision but in which the judge has broad powers, also exist, illustrating the porosity of these distinctions. Power to modify the decision may also be limited by conditions on the use of it, which are generally quite strict[62].

58 Case of Germany or Lithuania.
59 Like Lebanon or Senegal.
60 This is the case in Algeria, Belgium, Cameroon, Canada, Chad, Czech Republic, Germany, Israel, Ivory Coast, Mauritania, Slovakia, Tunisia or Turkey.
61 Refer to the report by Burkina Faso and France for example.
62 Particularly in China and Slovenia.

Administrative judges' powers to modify decisions can however, in some countries, be very broad. This is the case in Colombia within the framework of popular actions. The most significant feature is the possibility that the judge has of ruling ultra or infra petita when, based on the facts and the evidence produced, he believes it necessary to guarantee the integrity of the environment and the rights established by the Constitution.

Other countries, like the Netherlands and Portugal, further state that administrative judges are not asked to cancel the decision but, where possible, to provide a solution to the disputed situation.

In the Netherlands, judges thus have extensive power to modify decisions as well as the possibility of enjoining the public authority, after ruling by a provisional judgment specifying the defects affecting the decision, to make another decision within a given time limit, failing which the judge will hand down a final decision.

Liability litigation, and thus the power to award damages, is sometimes outside the remit of administrative judges. In this case, the applicant must file his submissions seeking compensation before a judicial court[63]. In most countries, however, the administrative judge has the possibility of awarding damages, when such claims are submitted to him.

The possibility of ordering a restoration is not a power that all administrative judges share either. In some countries, this power is not available to administrative judges[64]. At the very most, the judge may rule on the restoration measures decided by the public authority[65]. Where this power does exist, it is sometimes regulated and may only be exercised within the framework of precise legal provisions[66]. Directive 2004/35/EC on environmental liability, which establishes the choice of favouring, where possible, in kind remedy of environmental damage, is also a framework for developing cases in which the judge may order the restoration. Lastly, other countries take a wider approach to the judge's possibility of ordering such restoration, like Colombia within the framework of popular action, Costa Rica, Italy and Lithuania.

The reports do not mention the difficulties that judges face in obtaining the necessary evidence to come to a decision on the facts in environmental disputes. It is true that, at least in countries where the proceedings are non-adversarial, the judge is most often likely to initiate thorough investigations so as to fully assess the cases submitted. Where proceedings are adversarial, it would appear that inequality between the parties can sometimes be heighte-

63 Case of Belgium and Luxembourg.
64 Case of Austria, Belgium, Germany, Luxembourg or Senegal.
65 Like Switzerland for example.
66 Case of Algeria, Cameroon and Tunisia.

ned by the specificity of environmental disputes, even though systems to correct such an imbalance are sometimes put in place.

Having generally adequate powers of investigation, the judges exercise a power of verification similar to the one they exercise generally. They thus examine the decision fairly in depth, except in cases where the public authority applies technical skill or has a significant degree of discretion.

Lastly, the measures that the judge may decide on vary greatly, extending most often beyond his core role, i.e. the possibility of cancelling a decision, enabling him in some cases to order measures which, ecologically speaking, are fully justified, like in kind remedy.

While problems can still arise and questions still remain unanswered, the general impression is that the judges' powers are relatively well suited to the specificity of environmental disputes thanks, in particular, to pragmatic adjustments focusing on problematic issues.

One last point remains to be examined: that of the enforcement of administrative judges' decisions.

5 Enforcement of decisions

No national report mentions specific enforcement procedures applicable in environmental matters. In general, the implementation of enforcement procedures requires the parties to file an appropriate application to the administrative judge[67]. The judge does not therefore automatically examine whether or not the public authority implements the decision handed down.

In most countries, administrative judges have a power to enjoin and/or to order penalty payments. One variation of such penalties is the possibility of fining the administrative authority[68] or of sentencing the party failing to implement the judgment, for contempt of court[69]. While penalty payments are mostly applied to public entities, they may be recovered directly from the government officers responsible for the failure to execute the decision[70] or such officers may themselves be fined[71]. Some reports also emphasise the importance of the judge explaining, in his decision, the attitude that the public authority should adopt[72].

Within the framework of a popular action, the Colombian courts have original powers.

The judge may decide to create a committee responsible for enforcing his decision, such committee including the judge and the parties as well as the public entity in charge of managing the resource or collective interest at issue, the Ministry of Justice and a non-governmental organisation working in the field in question.

Some countries, however, state that they are not able to order penalty payments or injunction measures[73]. Some systems do however make up for the lack of such powers. In

67 For an opposite case, see in particular the report by Thailand.
68 Case of Germany and Lithuania for example.
69 On this point, refer to the report by Canada.
70 Case of the Netherlands.
71 See the example of Costa Rica.
72 Case of Germany and Portugal.
73 Case of Burkina Faso, Cameroon, Cyprus, the Czech Republic, Norway, Slovakia or Tunisia.

Tunisia, for example, failure to execute constitutes gross negligence by the public authority for which it may be held liable. In Luxembourg, the inexistence of these powers is offset by the possibility of appointing a special commissioner, chosen from among the senior officers of the supervisory authority or the Ministry governing the authority to which the case has been referred or, where that is not possible, from among the members of the court. This commissioner is responsible for making the decision in lieu of the competent authority and at the latter's expense. His appointment removes the case from the initially competent authority. In Belgium, a penalty payment may only be ordered if the cancellation inevitably results in a new administrative decision being made. Furthermore, while the judge does not have a power to enjoin, he may however order the authority, under penalty, to withdraw the decisions made if the ruling requires that the public authority refrain from acting.

Lastly, in some countries, non-judicial means are implemented to enforce decisions, like in Austria for example with the involvement of the Ombudsman.

6 Conclusion

The emergence of environmental issues has been a major factor in changes to the law as illustrated, for example, by the increasingly accomplished development of sources of environmental law. While the courts' recognition of these issues has not led to a Copernican revolution, it has led to adjustments being made so that the specific features of environmental disputes can be taken into account either within the existing legal framework, or via the creation of new instruments.

Several points can be underlined in this respect.

Firstly, the changes made have been very pragmatic and have very often stemmed from a search for pragmatic solutions to clearly identified problems.

This pragmatism does not preclude, firstly, the existence of major thrusts of environmental law resulting either from general principles, or from legal instruments addressing certain topics in detail, like the Aarhus Convention as regards access to justice. Neither does this pragmatism prevent the emergence of sometimes highly original solutions to respond to environmental issues – the most pertinent example no doubt being the popular action in Colombian law.

Lastly, in general, administrative judges appear to be relatively well equipped today to effectively deal with environmental disputes. Admittedly, this has not always been the case. But satisfaction would appear to prevail over reasons given for dissatisfaction in the national reports. On the whole, it seems that, after several years of handling environmental cases and after a few initial tentative steps and hesitations, legal systems have adapted, the necessary

instruments have been introduced and administrative judges have been converted to ecological questions.

A number of questions are still unresolved and certain changes still expected.

Some have been mentioned in this report and others were discussed at the meetings and debates held in Cartagena during the 11th Congress of the International Association of Supreme Administrative Jurisdictions. On this point and in the face of any such question, the national reports should, through the experience gained by other legal systems, provide inspiration to continue to progress towards appropriate integration of the specific features of environmental disputes.

Doctor Marco Velilla Moreno
Councillor of State at the Council of State of Colombia
Rapporteur

Minutes of the Commissions Work

The work of the Congress was organized around three commissions – commission about water, about waste and about biodiversity and protection of nature –.

The conclusions of which as well as the debates were the following.

⌘ Introduction

Contribution of Doctor Juan Gabriel Uribe (Colombian Minister for the Environment)

1 / The environment and particularly sustainable development have become key areas which, of themselves, justify the creation of an international court along the lines of those already set up by the United Nations to deal with other difficult issues. This was the case, particularly, of the International Criminal Court, which was a response to the need to provide better protection for human rights.

Respect for the environment undoubtedly constitutes a human right, whose protection should be guaranteed at international level.

The time will surely come when the global community will recognise the need for an international court dedicated to the environment.

Colombia is currently setting up a political program with a view to achieving a balance between the environment and sustainable development, drawing lessons from experiences in other states.

2 / This makes Colombia a pioneer in terms of environmental law.

The country originated in the wealth and diversity of its natural resources, and it was thanks to these resources that Colombia was able to break away from Spain two centuries ago. In other words, the birth of the Colombian state came about, at least in part, as a result of its great natural wealth.

This is why Colombia, in 1974, was the first country in the Americas to adopt a Natural Resources Code.

The issue of environmental law was then taken up in the 1991 Constitution – also known as the 'ecological Constitution' – which devotes no fewer than 45 articles to the environment. Articles 79, 80 and 81 also deal with sustainable development.

The Ministry of Ecology has now existed for nearly 20 years, since the coming into force of Law 99/1993. While the Ministry was subsequently attached to the Ministry for Housing, the Ministry for Mines and the Ministry for Agriculture, it became a separate Ministry once again when President of the Republic, Juan Manuel Santos, took office. Its independence

is entirely justified, as the area for which it is responsible should not have to compete with conflicting interests in the same Ministry.

It is the role of this Ministry to think about the resources required to ensure development, starting from the concepts of environmental sustainability and resource preservation. Clearly these resources must still be there for future generations and must not be irretrievably exhausted by the present generation.

A balance must be achieved between, on the one hand, the fight against poverty and the right to work and, on the other, respect for the environment.

The Colombian Constitution provides a first response, by obliging the state to protect the environment while ensuring sustainable development.

However, the struggle does not end there.

3 / Climate change is another major challenge.

Far from being a passing fad, climate change has become a variable as much for Colombia as for the rest of the world. The consequences for the planet affect not only states' legal agendas, but also the general environmental agenda.

Colombia has now set up an authority with responsibility for issuing environmental licences. It authorises projects that will have repercussions for the environment, and monitors compliance with those licences under the direction of the Ministry for the Environment.

A cautious approach is taken to environmental issues.

This caution is reflected in the precautionary principle whose aim is to prevent environmental issues from coming before the courts. A sufficiently powerful and engaged executive is indispensable to the effective protection of the environment in the face of political and legal tensions which can be at play in different regions.

While Colombia benefits from 10-12% of worldwide biodiversity over 0.7% of total land mass, it is also the third country in the world most affected by climate change, after Pakistan and India.

As such, whether in terms of the construction of roads, protection of biodiversity, creation of parks or protected spaces, everything is now linked to the issue of climate change. As a result, the protection of the Paramos [neotropical high mountain biome with a vegetation composed mainly of giant rosette plants, shrubs and grasses] is a constitutional obligation, as is the protection of humid areas.

The powers of the environmental authorities should therefore be enhanced.

Certain actors engaged in “open development”, i.e. uncontrolled development, do not wish such imperatives to be overriding, as environmental protection has a price.

4 / The environment now requires a collective approach, which must involve the creation of a mechanism that would allow each state to measure the impacts of its own policies on other countries, and allow for the preparation of a universal benchmark to which national courts, all dealing with similar issues, could have recourse.

Certain cases, such as the Gulf of Mexico, have become massive, and it is not an isolated incident. On the contrary, it must set the direction for environment ministries and the courts when they intervene. This point is essential.

Sustainable development has multiple objectives in Colombia.

They relate to water, energy, climate change, food security and sustainable cities.

The world is preparing to face a number of water-related problems and to commence a difficult battle in this domain. Every country must defend its water resources above all other considerations, whether the exploitation of mines or oil reserves.

River basin management is therefore of primary importance.

In a developing country such as Colombia, there is a willingness to manage river basins. Colombia has five macro-basins (very important rivers), and 134 micro-basins, each of which is organised by ecological and ecosystem services. For each river basin this means ensuring that water uses, i.e. industrial, human consumption, agricultural and cities are clearly defined, in terms of both participation and management.

In consequence, in terms of sustainable development, water, waste and pollution will be the first issues that have to be dealt with. States should come together to agree what measures need to be taken in each of their territories in order to preserve the natural aquatic resources that are now under threat, and whose availability in 2050 will pose huge problems when the world’s population exceeds 9 billion. This 2 billion increase in the population will bring increased needs, in terms of both food and water. This will mean, particularly for Colombia and the other 12 countries located in areas of aquatic wealth, a duty to rise to the challenge of its management and safe-keeping.

5 / In terms of biodiversity, Colombia now has a “*Manual de las compensaciones*” (Compensation Manual), which can be used to determine the consequences of any given economic plan, in terms of ecological damage, and thence to determine the amount of the compensation payable.

This manual is a response to the need to repair damage to biodiversity, so that the ecosystem will not be affected.

It is a first step, as it is currently impossible to measure the dimensions, quantity or value of the environment. It will be a while before the value of an ecosystem can be assessed in scientific and economic terms.

However, this manual is a first response. It is used in Latin America and the United States, and shows that it is perfectly possible to compensate for environmental damage, in order to prevent irreversible harm to the ecosystem.

6 / What should be the role of the administrative judge, when confronted with damage to the ecosystem or biodiversity? How can the damage be assessed?

The judge must call upon the services of those with technical expertise. The damage done can only be assessed by scientists. However, assessments of this type require competences that are not available today.

Meanwhile solid waste, which is found in landfills or comes from hospitals, and which can cause serious health problems, raises thorny issues.

The Dona Juana landfill in Colombia is a striking example, since it has a direct impact on more than 60,000 individuals. These people have begun class actions in order to obtain compensation.

But how can they be compensated? In other words, how can the damage that they have suffered because of the existence and operation of the landfill be quantified?

Such issues fall within the remit of the administrative judge, and should also be the subject of state policy.

Similarly, in the future, a strategy to deal with mercury will also have to be devised. The danger that it presents for water for human consumption, for health and for fishing is widely acknowledged.

This is an issue that is of interest to all states.

Colombia has chosen to legislate. A bill aiming to gradually ban mercury in mining operations is under discussion in Parliament.

It will still be necessary, at an international level, for such a ban to be imposed by international treaties, under the supervision, where appropriate, of an international court.

The protection of the Amazon should also be deemed to be of permanent judicial interest, falling within the remit of the administrative courts. While the Amazonian countries are all aware of the importance of this forest, they remain opposed in terms of the actions to be taken to ensure its protection.

Only concerted action by all of these states will provide an adequate response to the various problems, and it would not be in vain if these efforts to protect the rain forest were backed up by bilateral and multinational legislation, which states could use to halt the smuggling of timber and the constant deforestation of the region. This does not only concern Colombia, which already protects about 84% of its sector of the Amazon. It also concerns other states that are only protecting 60%.

International laws, courts and judgments in this field must ensure that the attacks on this "lung" do not amplify the effects of climate change.

⌘ Commission about water

Contribution of Doctor Marco Velilla Moreno (Colombian State Councillor)

7 / The Water Commission focused on two case studies.

The first case concerned the protection of water from pollution deriving from agricultural nitrates. It appeared that the Minister for the Environment had taken a decision limiting their use in agriculture, against which a legal challenge had been mounted seeking to have the decision set aside, as this decision threatened the economic interests of farmers.
This challenge was supported particularly by a national union of farmers.

Procedural questions were dealt with first of all.

In discussions between France, Tunisia, Egypt, Chad, the Netherlands, China, Canada, Thailand, Finland, Lebanon and Portugal it was decided that cases of this type should be heard by an administrative court, given that the central issue was a ministerial act.

In principle, this case would be judged by an administrative court, subject to appeal.

Nevertheless, in France the case would be heard directly by the Conseil d'Etat, ruling at the first and last instance.

8 / With respect to those who had standing to be heard, it appeared that apart from the farmers, the trades unions and local districts would also be entitled.

It was, however, necessary for the trade unions, in countries such as France, to show that they were motivated by the desire to defend interests damaged by the decision challenged. In Chad, the admissibility of the action of a trade union is dependent upon the condition that the personal rights of its members are directly concerned.

To summarise, the intervention of trades unions appears to be possible in the majority of states, even if they are sometimes obliged to demonstrate a real interest with respect to the question at issue.

Meanwhile, the standing of districts is recognised in most states. In France, this standing is nevertheless denied if their aim is not to defend their own interests, but rather to defend the interests of third parties such as farmers.

By contrast, it was not possible to identify a general rule governing the possibility for environmental protection associations to take action. In China, particularly, such associations have no standing, except when the interest concerned is expressly recognised by a legal text. In Canada, however, no limit exists. In the Netherlands, the association must act in accordance with its object

9 / Finally, when environmental laws and regulations appear to be obscure, the approach seems to be teleological.

Egypt nevertheless stipulated that the rules of interpretation of a law were defined by the law itself and that in consequence it fell to the judge to respect the prescribed method.

In the Netherlands, in the case of a judicial lacuna, the judge analyses the parliamentary debates in order to ascertain the objectives that the legislature intended to pursue.

10 / However, over and above these procedural questions, the case study invited the Commission to analyse the rights that might be asserted.

Firstly, the applicants were, as a general rule, able to argue that there had been a violation of property rights.

The courts then assess this violation in the context of the theory of expropriation. In Portugal only a finding of expropriation gives rise to a right to compensation. The problem lies in knowing which acts are equivalent to expropriation. Canada stipulates that, in the case debated by the Commission, the action would not be classified as expropriation but simply a restriction imposed upon property rights. China, meanwhile, considers that this case should not be seen as a violation of private property.

11 / The second issue to be considered was whether it was possible to rely upon the principles of precaution and prevention.

In most states these principles are linked to preventive measures that fall within the remit of the administrative authority. In Tunisia, they are applied when the administrative judge reviews the assessment carried out by the authority. In Canada, these principles are not recognised, while in the Netherlands, judges only apply such principles when necessary and, in any case, exceptionally.

Therefore it appears that in most states these principles are applied by reference to the preventive measures that are adopted with the aim of mitigating harmful effects for the environment. Their application, however, remains exceptional.

12 / Thirdly, the issue of the consequences of a violation of a procedural obligation by the authority upon the legality of a ministerial decision was debated.

It appears that in certain situations, the fact that a body has not been consulted, when such consultation is mandatory, is capable of rendering an act taken in fine by an administrative authority illegal, and therefore capable of justifying its cancellation. This is particularly the case in Chad.

In France, on the other hand, the cancellation of such a decision due to a procedural defect is not justified, unless the absence of consultation was capable of modifying the meaning of the decision taken or deprived the interested parties of a guarantee.

13 / Finally, the Commission had to think about the extent of the powers of the administrative judge.

In its discussions, it clearly came to the conclusion that administrative judges cannot substitute their own decision for that of the authority, notably by modifying the areas affected by the pollution that were defined at the outset. As such, judges can do no more than review the legality of the decision.

Nevertheless, in Egypt it is possible for judges to modify the selected areas by excluding some of them. While they cannot include new areas, they are free to make suggestions to the authority.

In China, judges can make recommendations that are not binding on the government. French administrative judges, meanwhile, are free to indicate, in their decisions, those areas that are included and those that are not. As a result of this, they have considerable power when it comes to defining the areas affected by the pollution, in their decisions.

The Netherlands explained that a new procedure has come into force, under which it is up to the judge to take the final decision instead of the administrative authority, after the authority has been invited to modify its initial decision, where appropriate.

14 / The second case study considered the central question of the consequences of the oil spill in the Gulf of Mexico in April 2010.

The Commission's discussions first considered the competent court. Several participants said that the administrative judge could be competent if the state itself was a party to the litigation. By contrast, if the victims sought damages only from those responsible for the pollution, their action should then be heard before the civil courts.

Canada remarked that it was necessary to distinguish between damage caused to the environment and damage caused to individuals. In Thailand, the case would be heard before a civil court when damages were caused to natural persons. Chad took the same approach.

Consequently, according to the role played by government agencies, the competent courts would sometimes be civil, sometimes administrative, without their competence being exclusive of each other.

15 / With respect to standing, in France all victims of the damage, such as the local authorities, the state, or even environmental protection agencies, would be entitled to bring an action. As for the defendants, responsibility would fall, particularly in Portugal, on all businesses involved in the oil operation. In consequence, these companies could be sued.

It should be noted that in Thailand, the state can be sued by reason of its responsibility to ensure that the persons who caused the damage properly compensate the victims.

In the Netherlands, the state has no standing to claim compensation for the loss or reduction of revenue coming from the oil industry.

The Democratic Republic of Congo stipulated that it was necessary to establish new principles of liability, given that the state was involved in the exploitation and, in the event of negligence on its part, it should be held liable for the damage caused. If the state had not provided adequate protection for the environment, particularly by authorising exploitation to take place in inappropriate conditions, it should be held liable.

In this context, many participants stressed that as the guarantor of a healthy environment and as the authority granting exploitation licences, the state must accept liability.

The identification of defendants therefore depended significantly on their degree of responsibility for the occurrence or prevention of the damage.

16 / The assessment of the extent of the ecological damage is a very difficult issue, since it means taking account of multiple factors and since it should not result in merely compensating the damage effectively sustained by the victims.

The compensation should neither unduly impoverish nor enrich the victims.

In general, the restoration of natural resources was proposed, in addition to compensation for damage caused to natural persons. The affected resource should be compensated in full or it should be replaced, where compensation was impossible. The Democratic Republic of Congo indicated that exceptional compensation could be made to natural persons, where the damage suffered had unprecedented consequences. In Switzerland or the Netherland, the oil companies had set up policies that were designed to compensate for any damage that might result from their activities.

The real assessment of environmental damage depends on numerous factors, which go beyond the technical competence of the administrative judge. The criteria diverge as to what in fact constitutes environmental damage. It seems, nevertheless, that environmental damage is damage which is separate from that caused to affected persons, whose compensation is determined by civil courts.

In countries such as Canada and Switzerland where compensation funds have been set up in order to remediate damage caused by oil activities, the judge cannot order other funds to be created.

In Colombia, when the type of damage and the resulting compensation are considered and assessed, the administrative judge takes account of the fact that such damage can have global repercussions and may affect present and future generations.

In consequence, classic legal principles of liability must be transcended in order to respond to situations of ecological damage at a global level. Therefore, damage assessment should be tackled on two specific fronts: the ecological damage as such, and the damage caused to mankind.

⌘ Commission about waste

Contribution of Ulrich Maidowski (Judge at the German Federal Administrative Court)

17 / The Waste Commission brought together representatives from Egypt, Tunisia, Luxembourg, Switzerland, France, Germany, Turkey and Colombia. Its lively discussions can be summarised under three different headings.

These are, firstly, the solutions found for the questions posed by the case studies; secondly, the questions that deserve more in-depth consideration by the courts; and lastly, the lessons that can be drawn from these discussions in terms of environmental disputes.

18 / Firstly, and as a preliminary remark, it is appropriate to note that environmental law has a specific feature, namely the ever growing number of laws, directives, regulations and treaties pursuing obvious, common goals: the protection of the natural world, the prevention of damage and the need to protect future generations. The guiding principles that support such goals are, however, very general: prevention, the precautionary principle, the polluter pays principle, etc.

Nevertheless, administrative judges must deal with particular cases that involve natural persons. They are therefore habitually confronted with specific problems that make it necessary to go beyond simple, general principles.

Basically, the acceptance of the ideas that underlie environmental law by all persons affected by court decisions will depend upon the balance that the judge is able to strike between public and private interests, between the polluters and the victims of pollution, as well as public entities. Questions concerning human rights raised by cases involving environmental law require a focused analysis of the details of each one, in the context established by another institutional actor – the legislature.

The key issue therefore is perhaps not merely whether administrative judges are able to protect the environment, but whether they are able to render decisions that strike a fair balance between the different interests at play and protect the environment.

This is at the very heart of the notion of environmental justice.

19 / With respect to the case studies, the first was relatively classic, as the facts on which it was based resembled those that administrative judges regularly have to deal with.

It involved the serious pollution sustained by a river bed and the subsequent decisions of the government to close the neighbouring private landfills, in order to improve the water management system and to increase the frequency of waste elimination.

However, it appeared that despite these decisions, the situation remained unsatisfactory and several parties asked the government to take additional measures. However, they received no response, even though decisions should have been made by the state to remediate the damage caused by the pollution, to restore the site to its previous condition, prior to the pollution, and to prevent the pollution from getting worse.

This situation generated two questions that an administrative judge might have to deal with could the government be required by an administrative court to act in a certain way, and who would have standing to take action against a refusal by the state to act.

The answers give reasons for hope.

20 / All the participants agreed that, in such a context, an action against the government would be admissible, and that the administrative courts would be competent to deal with it. It should nevertheless be noted that among these courts, the court with competence at first instance varies depending upon the state.

The inhabitants of the area affected by the pollution, independent of their status as owner or tenant of the housing that they occupy, are deemed to have standing in such a situation.

Associations may also take action, provided their articles of association mention environmental issues. In this regard, little importance seems to be attached to the local or national character of the association. However, in Switzerland, actions by local groups are more likely to be admissible when the majority of their members are affected.

In most jurisdictions only applicants whose individual rights have been infringed have standing before the courts. Therefore, a person spending their holidays in the affected region from time to time, without living there, would not be admissible to take action, for lack of standing. The Colombian system, however, reasons differently, as it authorises compensation for damages in a very broad sense, in the context of an action which is close to an actio *popularis.*

21 / This then raised the issue of whether a foreign state whose territory was affected by the pollution could take action before the national courts of the responsible state.

The answers varied.

In certain states, the foreign state could not take such an action, and only an action based on international law before the International Court of Justice would be possible. In other states, familiar with transnational participation, particularly in planning matters, such actions might be admissible.

It was clear from the discussions that there was a tendency to consider standing in a broad sense, but this does not mean that standing will automatically be granted to every claimant.

22 / The first case study required an analysis of the legal basis of the dispute.

Legal systems are taking more and more notice of ecological issues, which means that we are seeing more and more legislation concerning environmental issues. The right to live in a healthy environment seems to be recognised everywhere, at constitutional, legislative, international and European level. It is, however, more difficult to determine whether such a right, because of its abstract nature, creates a need for administrative judges to deal with the cases before them.

This is even more true to the extent that certain jurisdictions are reluctant to use abstract principles in a manner which they consider to be premature. This analysis is not, however, shared by all countries.

23 / Another question concerned the practical aspects of procedures involving environmental issues, particularly the way in which facts and causation should be materially established and analysed.

All of the participants agreed that it was the task of the administrative judge to establish the facts, using all means that appeared to be appropriate. The danger confronting judges when a case exceeded the limits of their understanding was also mentioned. This could happen when a judge was presented with very technical details, such as the energetic value of waste or the topic of nuclear energy.

Several solutions have been envisaged, such as shifting the burden of proof, reliance upon the precautionary principle, or making the judge an 'expert of common sense', following the French notion. The judge's task would then consist of limiting uncertainties and determining cases, without necessarily being a specialist.

Other questions concerned the powers of the judge with respect to the legality of decisions to increase a local tax on waste, in the context of this case. Even though it seemed that the principle of the polluter pays was capable of providing a sufficient legal basis, it was nevertheless stressed that, in this area, the state had a wide margin of discretion when it came to deciding the rate of the tax.

24 / With respect to urgent proceedings, there were important differences between legal systems, originating from the differences in national procedures.

25 / Finally, the compensation of victims appears not to fall within the jurisdiction of the administrative courts in every state. However, it could become a reality in all EU member states by virtue of European law.

26 / The second case study referred to an event that occurred in Colombia at the main landfill site of the city of Bogota, which was operated by a private company under the supervision of the district of Bogota, and which receives more than 5000 tons of waste every day.

Subsequent to a change in the technical processes used, which was unilaterally decided by the company without the authorisation of the authority, more that 1.2 million tons of accumulated waste collapsed, resulting in the pollution of adjacent, densely populated areas. According to ministerial estimates, more than 70,000 people were affected, particularly people living in extreme poverty.

This case raised issues that most participant states have not yet had to deal with. A civil action could be brought against the company concerned. However, such an action might be similar to the Bhopal situation, in which numerous powerless victims faced a never-ending judicial process against a powerful profit-making entity, with the risk that the liable company would not survive the proceedings financially, and would therefore be incapable of paying any compensation.

27 / The best option therefore seemed to be an action against the public authorities for negligence, on the ground that the district of Bogota was not in a position to monitor the business responsible for the management of the landfill site adequately.

The claimants would have to prove:

> first, the existence of an offence and then the negligence of the public entity;
> next, damage to their legally protected interests;
> and finally, a causal link between the violation and the damage.

This is the traditional reasoning of the administrative judge.

However, the damage seemed to go well beyond ordinary damage, just as the violated rights did. As a result, account had to be taken not only of the violation of property rights and the harm to the health of the inhabitants of the areas in question, but also of the destruction of the public infrastructure in areas where the state might be reluctant to undertake the necessary works, at speed. This was also the case for the damage to the environment.

28 / Furthermore, the victims could not be clearly defined. They were not in a position to fully vindicate their rights, as some of them were too poor and not sufficiently educated to personally bring a legal action.

In a decision of December 2012, the Colombia State Council tried to bring balanced responses to this extraordinary situation.

The decision made two major innovations.

The first innovation was to have accepted, upon the basis of certain provisions of the Colombian constitution, the admissibility of a class action, so that nearly 2,000 victims were able to assert their rights, seeking more than just compensation for the damage caused to them personally. On the contrary, they claimed compensation for the damage to the environment and for the elimination and remediation of the indirect effects of the incident.

The claimants were thus able to demand compensation for the damage caused, not only to their personal interests, but also to the collective interests that transcended them.

In most states, the applicable laws would not allow the solution adopted here to be applied. However, in some states, such as Turkey, class actions are possible. These allow for a great many claimants to make a single claim, when there is a common interest and a common legal ground.

The significance of these proceedings is much less than the fact that it is now possible to bring a class action in Colombia. However, it was a first step.

Other states, such as Germany, prefer the so-called representative action. An action of this type allows the burden of proof to be shifted to the benefit of the claimants.

Nevertheless, none of these alternative solutions to a class action can resolve the difficulties facing victims of accidents, who are suddenly and for a long period deprived of their livelihood and not able to enjoy a healthy environment.

The necessary corrective measures go far beyond any that can be ordered in civil proceedings or proceedings seeking to have the state held liable.

29 / The second innovation of the Colombian State Council's decision was the fact that it ordered the defendant—the district of Bogota—to pay a sum of around 120 million dollars to a fund destined for redistribution.

Above all, victims who had not taken part in the proceedings that led to the State Council's decision were allowed a period of 20 days to join the claimants, running from the public announcement of the decision.

Meanwhile the operator of the landfill site was obliged to reimburse the district of Bogota for the damage caused by the decision it had taken without obtaining the necessary prior authorisation.

30 / During the discussions, it appeared that one of the concerns of the administrative judge was to determine how to assess the damage suffered by the victims.

It was envisaged that the judge would use as a reference the minimum salary over three months, multiplied by the number of persons belonging to the claimant group, linked to an approximate estimate of the necessary financial aid.

However, in the absence of a precise legal basis, it seems impossible for a court to adopt such a method. This also applies to the possibility that was granted the victims who had not sought to assert their legal rights, to join the claimants after reading the court's decision.

This is why, at the end of the commission's discussions, points remain which justify in-depth examination.

31 / The first point concerns the access of foreign states to a court dealing with environmental matters. This is a fundamental point, as pollution frequently has no regard for borders. Therefore the fact that it is impossible for a foreign state to be a party to proceedings is a major obstacle to the effective application of environmental law.

Similarly, the interest and legitimacy of the precautionary principle are once again insufficiently established, so that one might wonder if an express intervention by the legislature will be necessary in order to determine how this principle could be applied, principally in situations where scientific proof of causation cannot be found.

Finally, the general application of the class action, as perceived by the Colombian jurisdiction, should be examined. Even if it was possible to adapt current proceedings making full use of the existing legislative and regulatory framework regarding the admissibility of actions, it would require prior action by the legislature, in any event.

⌘ Commission about biodiversity and protection of nature

Contribution of Konstantinos Menoudakos (former President of the Greek State Council)

32 / The Commission on Biodiversity and the Protection of the Natural World involved judges from Germany, Austria, Belgium, Brazil, Chad, Chile, Colombia, Spain, France, Greece, Indonesia, Lebanon, Poland, Sweden and Thailand. They looked at two case studies, the first inspired by a decision of the French Conseil d'Etat and the second inspired by a judgment of the Supreme Court of Chile.

33 / The first case study concerned a decision taken by the Minister for the Environment, who estimated that the bear population in a particular region was insufficient to ensure the survival of the species, authorising the reintroduction of five new specimens.

This decision was challenged in court by both natural persons and legal entities, more particularly, groups concerned with the exploitation of pasture land, districts with territory in the area where the bears were to be reintroduced, the inhabitants of these districts, local support centres for young farmers and an environmental protection agency.

Firstly it was necessary to determine whether the case fell under the jurisdiction of the administrative courts, that of the ordinary courts or that of a specialist court.

In states with two types of courts, namely administrative and ordinary courts, the administrative court was competent to deal with cases of this kind, while in other states, cases of this kind fell within the jurisdiction of specialist sections within the ordinary courts.

34 / The next issue was the standing of the various applicants. The participants decided that all of the abovementioned applicants would be entitled to bring an action. However, in Belgium and Indonesia, only natural persons would have sufficient interest to bring a case. In other countries, such as Brazil, Chad and Chile, legal entities would not have standing unless they satisfied special conditions laid down by statute or case law.

In any event, there appeared to be a very clear trend towards a relaxation of the rules regarding who could bring an action in environmental matters.

35 / With respect to the admissibility of an action that might be brought after the Minister had announced his decision, but before the decision was made formal, the responses were varied and contradictory.

By contrast, there was unanimity in considering that the admissibility of an action seeking to have a decision set aside was not dependent upon the claimant first appealing to a higher administrative authority. In fact, an appeal of this type is never necessary, even in states such

as Germany in which an appeal to an administrative court is, in principle, conditional upon the claimant first appealing to the authority in question.

36 / With respect to the judge's power to impose provisional measures, this power is recognised in all states, the judge being able, at the applicant's request and under certain conditions, to suspend the execution of the challenged decision. In Sweden, the suspension can even be decided on the court's own initiative. In Germany, the judge does not have to order such measures, given that the introduction of a legal challenge will, in principle, automatically suspend the decision in question.

37 / The discussions also provided an opportunity for the participants to consider the question of the direct effect of an international agreement under whose terms each contracting party is required to encourage the reintroduction of indigenous species of flora and fauna.

In most states, international agreements are recognised as being directly applicable, under certain conditions, for example that its provisions are sufficiently clear. Against this background, in order to assess whether a convention can be applied directly, French judges can consult the case law of the supreme courts of EU member states, when these states are themselves parties to the convention in question.

38 / With respect to the seriousness of the judicial review of the challenged decision, there are notable differences from one state to another. In all cases, however, the limits of judicial review are determined by reference to familiar concepts, such as proportionality, objective general interest or even the manifestly unreasonable act.

When reaching the decision that is the subject of the first case study, the French Conseil d'Etat reviewed its proportionality, which should be understood as a cost-benefit analysis.

In this decision, the Conseil d'Etat came to the conclusion that the decision taken by the Minister for the Environment did not excessively infringe the rights of the applicants and that its aim was to foster the general interest, so that the result was positive and there was no justification for setting the decision aside.

In any event, the participants were of the opinion that, when reviewing an administrative decision, judges must not take the place of the authority and should not, therefore, assert their own opinion against that of the authority. This is why judges do not have the power either to complete or to revise a challenged decision. They can only set aside the decision in whole or in part.

39 / Finally, the participants turned to the costs of court proceedings. It appeared that, in environmental matters, these costs are particularly low, even non-existent.

40 / The second case study concerned the situation of a state agency that had taken legal action against a private company that was in charge of an approved landfill, so that the company would be ordered to remediate the environmental damage that it had caused on account of its serious failings.

As a preliminary point, it should be noted that this situation is particular to Chile and certain countries in South America in which the state does not have the power to force a person responsible for environmental damage to remediate that damage and must, in order to do this, take legal action.

The determination of which court was competent to hear such an action gave rise to major differences.

In most countries, this case would come within the jurisdiction of the civil courts. However, in Greece, the case would certainly have been classified as administrative and would, in consequence, have been heard by an administrative court. For the French Conseil d'Etat, cases concerning the control of waste fall within the jurisdiction of the civil courts if the defendant is a private company, and to the jurisdiction of the administrative courts if the defendant is the state.

41 / With respect to environmental liability, the question arose of who was entitled to be compensated for damage to the environment. It appeared that compensation for such damage does not prevent the victim from claiming damages intended to compensate, personal, non-pecuniary loss, inter alia.

Other discussions concerned the applicability of the ordinary law rules to, firstly, the proof of damage for which compensation is claimed and, secondly, the determination of a causal link between the triggering event and the resulting damage.

To summarise, it appears that environmental liability and the rights and obligations that flow from it are new legal concepts, which are still insufficiently interpreted and applied by the courts, even if, within the EU, there is a directive that aims to provide a framework for and facilitate the work of the courts.

Contribution of Pierry Arrau
(Chilean Supreme Court Judge)

42 / In order to show how damage caused to biodiversity is assessed, we can take the example of damage caused by a natural person on their own property. This occurs when such a person cuts down an indigenous forest.

The state demands that the person in question remediate the damage, i.e. replant the forest, and also financially compensate the state, because they have attacked the environment which is state property. In Chile at the present time there are no precise rules for the assessment of this compensation. Nevertheless, the idea has taken root that the amount should be very high, so as to dissuade those responsible from committing such illegal acts again.

Contribution of Noel Kilomba Ngozi Mala
(Judge at the Supreme Court of the Democratic Republic of Congo

43 / In environmental matters, the responsibility of the state is certain, especially given that the state has a tendency to exploit the environment while pursuing objectives other than environmental protection. It appears that no state can preserve its environmental resources indefinitely, as in exploiting them, it helps to improve the living conditions of its people.

Contribution of Jean-Marc Sauvé
(Vice President of the Council of State of France)

44 / With respect to the issue of environmental liability and the assessment of environmental damage, it must be recognised that judges, especially in the context of the EU, have very little to go on. This issue must be tackled with a great deal of prudence and modesty. While administrative judges are perfectly familiar with the evaluation of civil damages for losses suffered by natural persons, economic operators or public authorities, such as districts or regions, when it comes to the assessment of environmental damage, judges are on the brink of a new era, bringing what will probably prove to be major change in judicial orders and in the case law.

45 / Meanwhile, after about 10 years of negotiations, the EU adopted Directive 2004/35/EC on 21 April 2004, which deals with environmental liability. In some respects, this directive bypasses the problem of the evaluation of environmental damage, by setting up a monitoring regime under which public authorities may impose different measures requiring actors that have damaged the environment to compensate for the ecological damage.

There are a number of different compensation mechanisms.

Compensation could be provided financially, or in kind, or the site could be restored as it was before the damage occurred.

However, the commissions found that there was no relevant case law, in either the EU member states, or at the level of the European Court of Justice.

Given that a directive has existed since 2004, why is there so little case law up to 2013? The answer is quite simple and can be found in the EU legislation that applies in areas such as water or waste. The EU now has a number of highly efficient, preventive measures, which means that, as a general rule, the administrative courts do not have to deal with major ecological damage which could give rise to actions for damages and which would involve findings of environmental liability.

However, disasters are still possible, either because preventive measures were non-existent or because they were too weak.

This is particularly true when it comes to the sea.

46 / In France, following the sinking of an oil tanker and the spillage of its cargo of fuel on the beaches of a number of districts on the French coast, various affected parties, such as hoteliers, tourism operators, fishermen, shell collectors, fish farmers and numerous persons living off maritime activities brought a civil action. Actions were also brought by districts and associations for the defence of the natural environment against the oil company responsible for the transportation.

The French civil court, under the control of the Cour de cassation, admitted the existence of ecological damage for the first time.

This meant that a wide variety of organisations were able to rely upon ecological damage as a cause for action, ranging from environmental protection organisations, such as a bird protection society (Ligue de protection des oiseaux), to the coastal districts that had suffered damage. It was because these districts had powers, obligations and responsibilities with respect to environmental preservation that they were able to obtain compensation for the ecological damage. The damages consisted of financial compensation for all the expenses that they had incurred in order to compensate and repair the damage caused by this marine disaster.

Similarly, the bird protection society, which tried to clean the birds and took various initiatives to protect them, was able to obtain compensation for the loss they suffered.

47 / In the current state of the case law, the French administrative courts have never

recognised ecological damage nor granted compensation for it, nor environmental damage. However, the case law does allow for the compensation of personal non-material damage suffered by legal entities that have powers in the environmental domain. The compensation, however, is minimal.

This situation is, however, changing rapidly.

As a general rule, preventive measures mean that administrative judges have no cause to compensate ecological damage. However, when disasters do occur, it is appropriate, firstly, to apply the European directive and, secondly, to take account of the decisions reached by the civil courts, which have already, in certain exceptional cases, ordered those liable to pay compensation for environmental damage beyond ordinary civil losses suffered by the economic actors.

Contribution of Doctor Marco Velilla Moreno (Colombian State Councillor)

48 / The balance that must be reached between economic development, social impact and the protection of the environment is an ongoing work, which necessarily involves a change in the mentality of judges.

This no longer means simply reacting and indemnifying.

It also means ordering measures permitting a return to the situation that existed before the damage was done. On numerous occasions in Latin America, we have tried to remediate things that could no longer be remediated. This applies particularly to the cultural and historical heritage which has inevitably been destroyed.

Account must be taken of new concepts, such as evolving damage. This kind of damage cannot be readily understood by administrative judges, as it involves technical and scientific issues that are outside the judges' areas of competence. This also applies to the causal link in cases involving environmental law, where the establishment of a link does not rely on legal documentation, nor legal tradition. It is scientific and can only be established with technical and scientific expertise. Judges cannot measure decibels. They cannot determine the percentage of contamination in a water source, at a given moment, and the extent of a company's liability.

49 / The assessment of compensation is also difficult. New kinds of damage have appeared, such as the non-financial damage suffered by a group of people. It appears that certain communities take pride in different birds, which are incarnations of themselves. In Colombia, the eagle, which is present on the national flag, has this function.

In consequence, the fact that a disaster can lead to the migration of eagles or to their disappearance constitutes a non-financial loss that is capable of being compensated. This would mean compensating the damage to an element of national pride.

In the same way, the right to enjoy the beauty of a place means that compensation is payable when that place is polluted. It also means that compensation is payable if the damage caused deprives the local community of an integral part of its heritage. This would be the case if the beach of Cartagena were to be contaminated. This beach characterises the historic city, which is a World Heritage site. If it were polluted, this would damage the place in itself, and would simultaneously threaten the very characteristics of the city to which it belongs, and of which it is an identifying part.

50 / To summarise, it is now important, in the field of environmental law to distinguish between several types of damage. One of these is pure economic loss, which results from damage to the ecosystem. The assessment of quantum requires scientific expertise, and various questions must be asked: could the damage recur? Would it be possible to restore the site to the pre-existing situation? if yes, how much would this cost? Finally, how could compensation be made?

There is a type of damage that is distinct from pure ecological damage. Namely the repercussions of the environmental damage on the community, as, particularly in Colombia and Brazil, the environment is a collective right protected by the Constitution.

The damage suffered goes beyond this. There is also damage caused to national pride, to the health of individuals, and to the health of the fish contaminated by mercury which then contaminate the people who eat them.

Contribution of Ulrich Maidowski (Judge at the German Federal Administrative Court)

51 / Within the framework of EU law, when the construction of a motorway is under consideration, it is important to carry out an environmental impact assessment for every element of the infrastructure.

Specialists have set up a system that makes it possible to compare the ecological importance of natural resources that will be damaged by a project. This means that every tree to be felled for the construction of a motorway has to be counted, as along with the smallest piece of the natural world that will have to be destroyed, in order to determine whether the operator with responsibility for the project is in a position to compensate for the environmental damage at the affected location by improvements elsewhere. If this is the case, permission may be granted. If this is not the case, the costs of reproduction may still be determined. This system can only operate on a very small scale, if no species is at risk of extinction.

However, this is a first step which deserves to be developed, in order to provide judges with means of quantifying environmental damage.

Contribution of Olivier Fuchs
(First Councillor to the Administrative Court of Appeal of Nancy, France)

52 / Faced with all of these questions, administrative judges are a little lost, as they are neither naturalists nor economists. However, in all of these disciplines there are ways of assessing the monetary value of the natural world. In a rather schematic way, it is possible to distinguish three different ways.

The first is economic.

This is the method used by the Circuit Court whose geographical jurisdiction included the territory of Puerto Rico when the Zoe Colocotron, an oil tanker, was beached spilling its cargo of oil. In order to calculate the ecological damage, the Court decided to take the market price of fish as a basis and to multiply it by the number of fish.

This is a basic method which has certain inadequacies, but which was used at the beginning of the 1980s. This was one of the first attempts by a judge to evaluate ecological damage.

53 / The second method is similar to sociological evaluation.

This method must make it possible to evaluate what a natural protected area represents, or the eagle for a country whose the symbol it is, or the Grand Canyon for the people of America. Again, it was an American court that relied on this method. The court relied on enquiries on the ground, which involved asking a representative sample of people how much each one would be ready to give to save the Grand Canyon.

This more sociological approach is also seriously inadequate.

54 / The third is more ecological.

This is certainly the most interesting method for a judge, as it relies upon concepts that judges will certainly have to apply soon, such as the concept of ecological services, which designate the services that a species would have provided for the whole of an ecosystem, if it had not been destroyed, or the concept of ecological potential, which concerns everything that might have happened during the time when, because of environmental damage, the ecosystem was not able to function properly.

This last concept is also found in Directive 2004/35/EC. These concepts will soon be relied upon before the courts. Judges will then have to provide compensation not only for the damage caused, but also for everything that would have happened if the damage had not occurred.

This opens up endless realms of perplexity. How can one evaluate everything that might have happened? Methods exist, such as the one that is sometimes used in France, known as the Léger-Huet-Arrignon method, by which it is possible to determine that in a certain spawning ground, with a certain type of fish, and if life had continued, a certain kind of ecosystem would have come into existence.

55 / All these methods, economic, sociological and ecological, are in themselves inadequate. The most recent approaches, adopted by economists, try to combine them within quite complex models, which judges may one day have to implement.

While the traditional system provides monetary compensation for damage, it would still be very beneficial if, with respect to ecological damage, it was possible to provide compensation in kind. Since Directive 2004/35/EC, in Europe, a certain number of companies have begun to specialise in this kind of remediation of the natural environment.

A new trend is emerging at international level, namely the introduction of the market to remediation mechanisms.

There will no longer be damage remediation, but compensation.

If a unit of biodiversity is destroyed—the term “unit of biodiversity” is taken from the preparatory works of the European Commission on a directive on the securitisation of the environment—it is up to the person responsible for the destruction to buy such a unit from an appropriate organisation. In France, a biodiversity subsidiary of the Caisse des Dépôts et Consignations is currently creating units of biodiversity so that these units can eventually be purchased by polluters.

In this field, it would have been interesting to have a representative from the United States, who would have been able to explain the mechanism that was set up in the 1970s, through the Clean Water Act, involving the purchase of humid areas as compensation for damage caused.

This is an underlying trend. It involves the securitization and commoditisation of ecological damage, so that compensation for ecological damage will be made by polluters purchasing a number of “green securities” or securities representing the natural world.

Contribution of Pierre Blais
(former Chief Justice of the Federal Court of Appeal of Canada)

56 / Administrative judges have a limited role. It falls to governments to take adequate decisions at the level of existing regulations, preventive measures and rights. Any judge, when giving judgment, can convict a person who has committed a crime. In order to do this, the judge must examine the evidence before the court. They may order the defendant to pay a sum of money to someone whose house or property has been damaged, but they can only do so on the basis of the evidence available.

The judge is limited in this way.

It is important to humbly acknowledge that the judge's role consists of considering the evidence adduced by the parties and determining which solution should be applied to the case, in the light of the applicable legal rules.

Even in new areas, such as the environment, judges converge. But it is up to the states to decide whether judges should be stricter in environmental matters.

In Canada, it is no longer possible to build a house without first obtaining planning permission and licences for water or for waste. Building is controlled. Companies that wish to build a factory must obtain prior authorisation, as they could endanger an ecological element, in one way or another. Numerous permits must be obtained if a structure is to be built near a water flow. These will be issued following assessments at the level of the plants, of the ecology and of the protection of endangered species. If it is possible to prevent construction or an ecological error, the preventive protection of the environment is strengthened.

This will not prevent accidents from happening and this is why it is up to the government to lay down the applicable norms and regulations. Judges must listen and render judgments, basing their decisions on and deciding between reports submitted by experts as to the causes and extent of the damage.

The judge should not stand in for the government.

Contribution of Doctor Marco Velilla Moreno
(Colombian State Councillor)

57 / It is important to add some nuances to the Canadian position. It appears to be essential, as the great French philosopher and sociologist Edgard Morin would say, for the judge to "ecologise" the discipline, i.e. to regard the structure and architecture and understand the environment as a process, as a world within a world. We often note that a world encompasses other smaller worlds, there are containers and content, like a Russian doll.

In consequence, once judges try to work in an organisational way, identifying the architecture and engineering of an ecosystem, they cannot be content to simply corroborate the facts.

With respect to bioethics, conservation or the preservation of species, judges are confronted with the difficulty of the points of reference on which they can base their reasoning.

How can a judge quantify a given species and determine at what moment its development constitutes a danger for other species? In the same way, how can a judge assess the need for regulatory measures intended to ensure that the species will not put an end to the ecosystem itself? The difficulty lies in the fact that the actors are living creatures. It is therefore a scientific problem. It can be tackled by reference to technical regulations. But judges cannot restrict themselves to an insignificant role that leads them to simply mechanically apply a legal rule after a consideration of the facts. The facts are complex.

There are no simple answers, as a simple answer to a complex problem could lead to the destruction of the ecosystem.

58 / It is therefore imperative to respond to complex problems with complex solutions.

These solutions require the expertise of a number of disciplines and techniques, which make it possible to determine what the appropriate rule is. This cannot result from either a literal interpretation of a rule or from legal documentation. Determining the rule in environmental matters means remediation.

It therefore falls to judges themselves to establish the principles and the steps through which the environment as a legal subject will develop. The author of damage must first clean it up. They must then neutralise the damage and finally provide remediation.

This succession of obligations is not obvious, because if the author makes a mess of the clean up, or if they fail to neutralise the consequences of the damage on a technical and scientific level, or if they do not remediate, order will not be restored.

Contribution of Konstantinos Menoudakos (former President of the Greek State Council)

59 / As the Canadian representative put it, it is not up to the judge to take measures to stop environmental damage from happening in the first place. This requires a political decision.

Judges can adopt measures in order to paralyse those that they think are dangerous for the environment.

They can do this by legal means, particularly on the basis of constitutional texts, now that most constitutions contain provisions concerning the protection of the environment. They can also rely upon international conventions, even if fewer and fewer conventions relate to the environment. In EU Member States, they can also apply European law.

Beyond this, remediation measures must be taken, even if it is not certain that there is a real possibility of remediation. This is why it is fundamental to prevent damage from occurring.

Contribution of Ulrich Maidowski
(Judge at the German Federal Administrative Court)

60 / Any consideration of environmental law necessarily involves defining the role of the judge.

Judges must not sit by quietly, waiting for the experts. They must work with them and formulate questions to which they must respond. They must no longer wait for the intervention of the government or legislature in the vain hope of getting the best laws or best regulations. This will not happen.

Therefore, in order to assess the extent of the damage remediation, they must adopt an approach based on market prices. So long as there are market prices, judges can use them. It is up to them to decide the cases that come before them in reasonable time periods, without waiting for the intervention of experts..

Contribution of Georges Ravarani
(President of the Administrative Court of Luxembourg)

61 / There is no real contradiction between the positions developed by each of the contributors. It is merely necessary to distinguish between the various elements. Governments have the responsibility and obligation to act preventively, to issue authorisations and to define obligations before ecological damage occurs, so that it does not happen.

But if ecological damage does occur, it is then the role of the judge to sanction and to order remediation. The government and the legislature must provide for civil and criminal rules and give judges the instruments they need to penalise those responsible for the damage caused, whether under the civil or criminal law.

Judges must then be inventive and should not decline to reach a decision on the pretext of a lack of clarity in the law. They must resolve the cases put before them. When the rules

lack substance, they must stretch the rules a little, by relying, for example, on the major principles of precaution and proportionality.

Judges have a role to play.

While they must not interfere with established rules and must not contradict the law, they may still complete it. This is the judge's role and they enjoy a certain amount of discretion with which to do it.

Contribution of Doctor Marco Velilla Moreno (Colombian State Councillor)

62 / It seems to be difficult for judges to propose preventive measures, if they do not understand exactly how damage occurs.

In other words, if judges do not understand the architecture of the damage, they will not be able to determine whether a measure intended to prevent the occurrence of ecological damage is disproportionate, or if it might hinder economic development for no good reason.

Contribution of Alberto Oliveira (Vice President of the Supreme Administrative Tribunal of Portugal)

63 / The issue of damage caused due to the enactment of new regulations should not be overlooked. When the state decides to adopt new rules, particularly concerning land-use planning, in order to prevent ecological damage, it bans what was previously authorised. This is exactly what is happening today in Portugal.

In consequence, a large number of companies or major landowners claim compensation from the state for the loss they suffer on account of these new rules.

The judge must then determine whether these new rules are equivalent to expropriation measures. If that is so, the claimant has suffered expropriation and the judge must assess the damage and the compensation to be awarded.

If that is not the case, the judge must then ask whether these rules do not still confer a right to compensation, in view of the protection afforded to property rights.

Contribution of Pekka Vihervuori
(President of the Administrative Supreme Court of Finland)

64 / In the Nordic countries, most cases before the courts relate to the preventive protection of the environment. These disputes arise when plans are being prepared and permits issued. Claims for compensation and/or cases relating to the restoration of sites are a smaller part of the environmental cases.

In order to resolve such cases, different types of expertise are generally necessary.

Expert evidence is presented by the parties, the public authorities, individuals or associations. But it is presented to courts composed, in environmental matters, notably of scientific experts. Even if these people are not lawyers, they nevertheless sit in the judgment panel and participate in the deliberations with weighted votes.

At the Finnish Supreme Administrative Court, they do not carry out this function full time. They are usually professors of ecology or technology who carry out these judicial duties in addition to their university functions. However, before regional courts, these experts sit full time and are ordinary judges

Contribution of Noel Kilomba Ngozi Mala
(Judge at the Supreme Court of Justice of the Democratic Republic of Congo)

65 / In the Democratic Republic of Congo, there is a Forest Code, an Agricultural Code, a Mining Code and a Hydrocarbon Code. A Water Code is in preparation.

However, if governance is to be improved in the mining, forestry, agricultural and environmental, hydrocarbon, water and town and country planning sectors, not only will these codes have to be revised, so will all the agricultural legislation.

In fact, there is a problem due to the superimposition of concessions in one territory. Therefore, in one forestry concession, it is possible to identify mining and agricultural concessions.

When damage occurs, it is up to the judge to determine what the law says. The judge must apply the law, but must not make it. When the law is silent, the judge can rely upon general principles of law, doctrine and case law. But first of all, the judge's intervention will only be effective when agricultural legislation has been unified.

Contribution of Georges Ravarani
(President of the Administrative Court of Luxembourg)

66 / Consensus can be found in these discussions.

The role of the judge is, first of all, remedial. When damage is caused to the environment, the judge must penalise the perpetrator and ensure remediation.

Nevertheless, the judge's role is also preventive.

Firstly, when dealing with actions that challenge decisions granting permits or refusing them, judges act preventively, by confirming or cancelling such decisions, since they prevent future damage.

Secondly, this preventive role results not from an individual judgment, but from the case law that judges develop.

When companies know that they could suffer severe penalties if they damage the environment, on the basis of a previous judgment, these companies will think twice before taking decisions for which they could, by virtue of the case law, be penalised. It is therefore on account of the case law in ecological matters that judges have a preventive role: not by individual decisions, but by the body of decisions that have been handed down and published and which complete legislation.

2015

The administrative judge and environmental law

Cartagena Congress
(2013)

Questionnaire

⌘ The sources of the environmental law

1) What are the national sources of environmental law (Constitution, Parliament Act,…)? Which authorities are competent for enacting them (government, parliament, State governments, agencies, local authorities, …)?

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

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

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

⌘⌘ 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?

2) What are the criteria of competences between administrative courts, judiciary courts and specialized courts?

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

⌘⌘⌘ 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, actio 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?

2) The procedure

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

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, …)?

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

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

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 appropriatness?

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, …)?

⌘⌘⌘⌘ 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?

Sub-themes

1) Water
2) Waste
3) Biodiversity and Protection of Nature