COUNTRY REPORT: ARMENIA
Risk-Based Environmental Control and Locus Standi Jurisprudence

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Risk-Based Environmental Control System to be Enacted in 2013

This first part of the Country Report discusses the new environmental control system that will come into force in Armenia in 2013. This establishes a completely different system that considers the environmental risk of industrial installations as a guiding factor for designing the timetable for state environmental control. Public hearings on the draft Methodology of environmental control were held at the Environmental Law Research Centre (Yerevan State University), and the main ideas underpinning the draft Methodology are presented in this Report.

Current State of Environmental Control in Armenia

The system of state environmental control in the Republic of Armenia operates under the principles derived from the traditions of Soviet Union control system. It is commonly accepted that environmental control has two main goals: to uncover deviations from approved rules; and to improve the environmental performance of relevant entities. While the first goal is being addressed largely by State Environmental Inspectorate of the Ministry of Nature Protection, the country faces greater difficulties in seeking better environmental performance of companies (and also controlling unlawful intervention by public authorities).

Environmental control in Armenia is underpinned by the law *"On Environmental Control"*. The law came into force in 2005. The general framework for the environmental inspection system is established by the Law *"On State Environmental Inspection"*.

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In brief, the following remain on the agenda for the improvement of state environmental controls in Armenia:

- Developing an environmental governance system in more strategic and purposeful directions;
- Elaborating recommendations on improving environmental performance of the private organizations, based on information accumulated from the governance of natural resources;
- Gradually introducing best available technologies to improve the environmental performance of private organizations; and
- Improving the status of the environment system.

To pursue these outcomes, the Government of the Republic of Armenia has initiated a law-making process to make its environmental governance more systematic and strategic.

Main Features of the New System

The new legal framework to be enacted uses a range of new approaches to optimize the system of environmental controls. To this end, the environmental risk of an industrial installation is considered as the main decisive factor when establishing the inspection timetable for assessing whether the entities have respected their environmental legal requirements of the legislation. According to the current legislation, environmental performance of all installations is subject to annual inspection. The new system enables the authorities to differentiate the frequency of inspections based on the environmental risks posed by the installation. Under the present Methodology, industrial installations are classified into three categories: (1) high risk; (2) medium risk; and (3) law risk. The higher the risk level, the more frequent the business has to undergo environmental inspections.

The risk analysis Methodology is a specific requirement within the national environmental control system and therefore requires definition in national legislation, particularly for environmental risk. Generally risk is defined as a measureable likelihood for adverse effects to take place. The Methodology localizes the general definition of *risk* by underlining its relevance to adverse environmental effects that can arise by virtue of activities of the licensed entity.

The new system control is expected to ensure:

- improved efficiency of inspectorate revisions to the license conditions of industrial facilities;
- assessment of licensed installations based on environmental risk indicators;
- formation of a unified database and better classification of installations;
- the possibility to elaborate new risk-based models of environmental control in the future; and
- transparency of the control system.

How is the Risk Measured?

The Methodology establishes differentiated layers of risk assessment. This enables the public authority to distinguish between installations not only by their enterprise activities but also taking into consideration specific indicators such as their consumption of natural resources, emissions and other potential adverse impacts on the environment.

As in many other spheres, the environmental control system aims to assess the risk based on conventional units, which are calculated for each installation, and the final amount of which indicates the risk level possessed by the specific installation.

The risk for all installations arises from two major factors: sectoral risks and individual risks. While the sectoral risk units are automatically identified by virtue of the company acting in a certain activities, individual enterprise risks are based upon environmental characteristics of the specific activities it conducts. This implies that in specific cases, responsible behavior by the business may reduce the risk level of the installation (and vice versa for less responsible management). Individual enterprise risks are calculated based on two sources of information: (1) information provided by the entity; and (2) information collected by inspectors based on checklists. The checklists are to be elaborated for certain types of activities (i.e. mining, forestry, agriculture). These documents contain various questions as well as references to relevant legal instruments establishing mandatory and optional environmental protection measures.

Benefits for Environmental Protection?

During the public hearings discussion of the implications of a new Methodology raised many questions, among which is whether the new system will ensure improvement in the quality of the environment. The answer can be indicated by the main objective of new system, which is

to move the focus of license revisions from a fixed timetable to a flexible risk-based schedule and approach. The system does not aim to improve the state of environment directly. However, optimization of the inspection revisions and the elimination of corruption risks is expected to have an indirect positive impact on the state of environment through raising the responsibility of (particularly) more environmentally risky enterprises.

Conclusion

A risk-based environmental control system is based on good governance principles and, surely, is an improvement on the existing model. Moving to a more flexible approach demonstrates acknowledgement by the public authority of the specific needs and specialist tasks of environmental control. At the same time, the risk based control model will enable future links between the environmental governance system with such tools as EIA, IPPC and environmental insurance. However, this does not imply that the system has no shortcomings and drawbacks that will require further investigation and new solutions.

Access to Justice in Environmental Matters: Legal Standing of Non-Governmental Organizations

The Republic of Armenia became a party to the *Aarhus Convention* in 2001. Article 9 of the *Aarhus Convention* contains binding requirements for environmental law. By virtue of article 6 of the *Constitution of Armenia*, the provisions of the *Aarhus Convention* have a direct domestic application in Armenia. The national legislative framework that provides access to justice comprises of the following laws:

- *Constitution of the Republic of Armenia* (articles 18-19);
- *Law "On Human Rights Defender" of the Republic of Armenia*;
- *Law "On Prosecutor General's Office" of the Republic of Armenia*;
- *Law "On Administration and Administrative Procedure" of the Republic of Armenia*;
- *Law "On Non-Governmental Organizations" of the Republic of Armenia*;
- *Code of Administrative Procedure of the Republic of Armenia*;
- *Code of Civil Procedure of the Republic of Armenia*; and
- *Code of Criminal Procedure of the Republic of Armenia*.

The bulk of environmental cases in Armenia relate to administrative review of government decision-making in terms of the *Code of Administrative Procedure of the Republic of Armenia*.

The requirements of the *Aarhus Convention* mandate adequate and effective remedies, including injunctive relief as appropriate, and that these be fair, equitable, timely and not prohibitively expensive. Under article 9, decisions of courts and other bodies shall be in writing, and whenever possible, be publicly accessible. The provisions contained in the *Aarhus Convention* are codified in Armenia's procedural legislation listed above.

Despite the comprehensive legal framework, case law on environmental matters is underdeveloped in Armenia because of circumstantial reasons. Within the past 4-5 years, there has been a consistent growth in the number of cases initiated by citizens and non-governmental organizations aimed at protecting human environmental rights. Currently, the legal standing of non-governmental organizations (NGOs) before the courts in public interest environmental litigation is subject to judicial consideration. The national legislation of Armenia, particularly the *Code* of *Administrative Procedure*, does not grant standing to NGOs when there is no direct infringement of its own rights or that of its members. According to the article 3 of the *Code of Administrative Procedure*:

> 'Every natural or legal entity is entitled in accordance with this Code to apply to the administrative court, if he/she/it considers that the public authorities or local self-governance bodies or their officials, administrative acts, actions or omissions … (1) violated or may have directly violated the Constitution of the Republic of Armenia, international treaties, laws and other legal acts of the rights and freedoms set forth.'

In its judgment VD/3275/05/08 of 30 October 2009, the Cassation Court reversed the decision of the Administrative Court of the Republic of Armenia of 28 July 2009 that initially dismissed the Ecodar (NGO) cause of action.[1] The Cassation Court stated that:

> 'Ecodar NGO is an entity established in accordance with *RA Law "On Non-Governmental Organizations"*, meets the requirements of national law and promotes environmental protection based on charter mission and objectives. Considering the aforementioned the RA Cassation Court finds Ecodar NGO concerned organization

[1] VD/3275/05/09, of 28 July 2009. *Ecodar NGO & Assembly Vanadzor Office NGO vs. the Government of the Republic of Armenia, Ministry of Nature Protection of RA, Ministry of Energy and Nature Resources of RA and Armenia Copper Program CJSC* (available at www.datalex.am).

> in the meaning of the Aarhus Convention, hence it possesses the right to access to justice before the courts in environmental matters.'

The Cassation Court referred to the *Law "On Non-Governmental Organizations"*[2], the relevant provisions of the *Aarhus Convention* and the articles 3 and 79 of the *Code of Administrative Procedure*.[3]

When the case was considered admissible by the Cassation Court of Armenia and was returned to the lower instance court (Administrative Court of Armenia), according to the requirements of the *Code of Administrative Procedure* (Chapter III), it was only empowered to examine the case merits, namely the substantive issues of the case. Whereas, the RA Administrative Court ignoring the requirements of the legislation in its Decision of 24 March 2010, reflected once again procedural issues of the case, particularly the legal standing of NGOs. Considering superfluous any comments on the subject and the background of the appeal, we would like to argue that there is a violation of article 3 of the *Constitution of the Republic of Armenia* that states that:

> 'State and local self-government bodies and public officials are competent to perform only such acts for which they are vested in by Constitution or laws.'

Being dissatisfied by the judgment of the Administrative Court from 24 March 2010 the NGOs brought an appeal before the Cassation Court of Armenia against the Decision of the RA Administrative Court of 24 March 2010.[4] The Cassation Court's Decision was released on 1 April 2011, and in general, it has a lack of any grounding and contains only reference to:

- *Code of Administrative Procedure Code of RA*;
- Decision of the Cassation Court of RA of 30 March 2010; and
- Decision of the Constitutional Court of RA N 906.

Earlier than the Decision of the RA Cassation Court of 1 April 2011, the phrase "his/her" following the word "breach" of the *Code of Administrative Procedure* (article 3) had become a

[2] Adopted on 4 December 2001. Entered into force on 27 December 2001, *Official Bulletin of RA* 2001.12.27/42(174), art. 1034.
[3] Adopted on 28 November 2007. Entered into force on 1 June 2008, *Official Bulletin of RA* 2007.12.19/64(588), art. 1300.
[4] VD/3275/05/09, of 1 April 2011, *Ecodar NGO Case* (supra note 1).

subject of Constitutional justice. As a result of analysis of the RA Constitutional Court Decision N 906[5] we will emphasize the following two statements:

> 'Having in regard the role of NGOs in the state and civil society development and aiming to increase the efficiency of their activities RA Constitutional Court finds that the RA CAP may encompass the occasions of bringing cases before the court by concerned NGOs (on the basis of the Charter) for the purpose of public interests protection. For this reason the current developments of the institute of "action popularis" in Europe should be taken into consideration. This kind of regulation will both promote the protection of violated rights, lawful interests, and will increase the role of NGOs as a substantive part of civil society.'

> 'The actio popularis should be excluded without sufficient interest. The Constitutional Court concludes that for the purpose of increasing the effectiveness of social control over the state and local authorities, and for guarantying the implementation of the main functions of NGOs the further law-making developments should take into account the stated legal position of the Court.'

At the same time, the Constitutional Court concluded that article 3 of the *Code of Administrative Procedure* complied with the RA Constitution. For several reasons we share the position of the Constitutional Court. Recognizing the phrase "his/her" in the article 3 as unconstitutional would have led to the whole system establishing the right of access to justice in the Armenian Administrative Court as being unconstitutional.

Having in regard to the aforementioned developments, in particular the Decision of the Constitutional Court, the legal matter of NGO's standing is expected to be thoroughly resolved by the new *Code of Administrative Procedure* and *Law "On Environmental Impact Expertise"* drafted respectively by the Ministry of Justice and Ministry of nature protection having in regard the position of the Constitutional Court set in the Decision N 906.

[5] RA Constitutional Court Decision N 906, of 7 September 2009 (available at www.armlaw.am).