Strategic Litigation to Protect Environmental Rights and Environment

ICO «Environment – People – Law»

Strategic Litigation to Protect Environmental Rights and Environment

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У посібнику подаються визначення та критерії стратегічної судової справи, визначаються очікувані результати та цілі судової справи для суспільного інтересу, тестової або стратегічної, розглядаються можливості створення таких справ, які б просували далекоглядні стратегічні цілі організації чи окремої особи, обговорюються можливості ведення стратегічних справ, які сприятимуть перетворенню України у таку країну, яку омріяли громадяни України для себе, своїх дітей та онуків. Посібник буде цікавим для юристів громадського інтересу та всіх, хто, прагне досягати системних змін для покращення суспільного життя загалом та захисту екологічних прав та збереження довкілля зокрема.

The handbook provides definition and criteria of strategic litigation, expected outcomes and goals of public interest litigation, test or strategic litigation, reflects upon opportunities of creating such cases which will promote forward-looking strategic goals of an organization or an individual, discusses possibilities of strategic litigation cases that will contribute to transformation of Ukraine into such a country, which Ukrainian citizens have pictured in their dreams for themselves, their children and grandchildren. The handbook will be of interest for public interest lawyers and all those who want to achieve systemic changes to improve social life in general and protect environmental rights and conserve environment in particular.

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Contents

Abbreviations

HCCU — the High Commercial Court of Ukraine

SCU — the Supreme Court of Ukraine

ComPCU — the Commercial Procedure Code of Ukraine

SCN — State construction norms

Ecolitigation National Platform — National Platform on Strategic Litigation for Protection of Environmental Rights and the Environment

EPL — International Charitable Organization «Environment – People – Law»

EU — the European Union

ECHR — the European Court of Human Rights

CSO — Civil Society Organization

CALPU — the Code of Administrative Legal Proceedings of Ukraine

CCU — the Constitutional Court of Ukraine

CCPU — Code of Criminal Procedure of Ukraine

NECU — All-Ukrainian Public Organization «National Ecological Centre of Ukraine»

UNO — the United Nations Organizations

Register — the Unified State Register of Court Judgements

CNR — Construction norms and regulations

SLAPP — Strategic Lawsuits Against Public Participation

US — the United States of America

CCU — the Civil Code of Ukraine

CPCU — the Civil Procedure Code of Ukraine

The top performance
of a judge is not to use the
legislation which is not law.

Introduction

People often think that social changes happen due to the new state policy adopted by the parliamentary majority. Recent events of 2013–2014 showed that people can make significant changes only by stating their position and expressing their desire to have one's say. We think that courts can be another important means to support those fields of state policy which are required by the public.

The handbook focuses on the ways of using litigation system different from those which are commonly used by lawyers after graduation from law schools. The handbook is an attempt to encourage Ukrainian lawyers to go beyond the limits of individual lawsuits and take into account what society they, their clients and their children want to build in future.

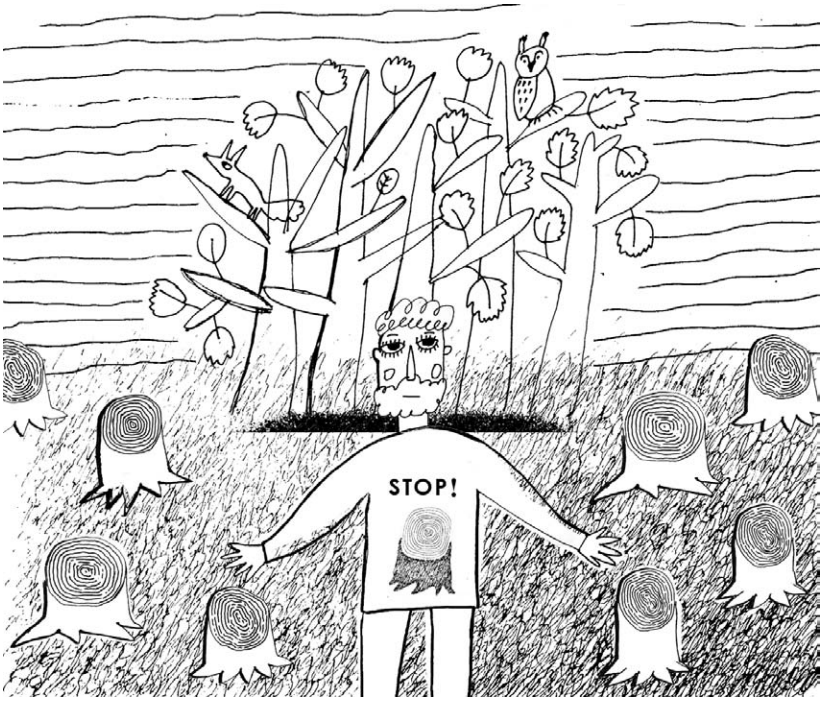
Winning a case for a client to protect his/her environmental rights should not always be a primary goal for the environmental lawyer who is guided by the strategic goal — the rule of law for the sake of the environment.

Are you surprised or even shocked with such a statement regarding the lawyer's role? Yes. The majority of lawyers will say that it is important to take into account the wish of the client, they will talk about the lawyers' ethics. This statement can be surprising for both lawyers and their clients. However, understanding that winning a case is not your final goal can open new opportunities for the lawyers and their clients in achieving the goals of strategic litigation which are more important than the goals of ordinary

lawsuits. Long-term impact on the future of the society can be more important than winning the litigation regarding insignificant violation of environmental rights of a certain client where the interests of the client also will be protected. Sometimes real interests of the client are deeper and more fundamental than the surface ones. Sometimes even the lost case can be important for achieving the rule of law for the sake of the environment and promotion of democratic values. And sometimes winning a lawsuit using a certain strategy is more important than winning a case in any possible way.

These ideas make the essence of the public interest case to ensure the impact of a test or strategic case. Understanding these notions is a crucial factor for the most important legal victories and for Ukraine to become a modern state that values the rule of law, the rights of people to a safe environment. These values are necessary elements of the society we are striving to build.

This handbook will first of all define the expected outcomes and goals of a public interest case, test or strategic case. Further on, we consider how to create such a case that would promote far-reaching strategic goals of the organization or an individual. Finally, we discuss how to conduct strategic litigation or a public interest lawsuit to make Ukraine a country with perfect living conditions for Ukrainian citizens, their children and children from other countries. The handbook will be a useful means to understand strategic approaches to the resolution of the problems, which is vital under conditions of a number of social challenges Ukraine is currently facing and the necessity to make rapid systemic changes in different fields of social life.



Chapter I. Definition of a strategic case

1. What is a strategic case?

A strategic case is a lawsuit planned within the framework of a focused strategy and used to establish court practice (precedents), forming (trying out/testing) mechanisms of legal remedies or getting any other public interest outcomes envisaged by the strategy (interests beyond the resolution of an individual case) and/or prevention of legislation breach or violations of rights, freedoms and interests of other people.

Thus, we take a legal action to get socially significant legal **effects** which will encompass unlimited number of people and will be spread in time and/or space beyond an individual case.

Vision of a strategic case (hereinafter — SC) lies in achieving systemic changes in political, social and legal fields in the public interests.

Vision of a strategic case forms the goal, aims and criteria of every specific strategic case.

EPL has identified the following criteria of a strategic case:

- changes in the public opinion;
- changes in legislation and law enforcement;
- elaboration of a new methodology of using legislation as a means of achieving certain goals. As a rule, it is new in the court practice and/or regarding the subject-matter (the subject of a lawsuit, grounds of a lawsuit, substantiation);
- changes in the legal practice at the national level;
- strategic object of SC, significance;
- the model of strategic case resolution is used in subsequent cases;
- SC focuses on creating law, during litigation the lawyers try not to apply the legislation which is not part of the law;
- the case is related not to private interests, but a significant number of people or society in general (for instance, the people of Ukraine);
- broad long-term impact on the system;
- teamwork of lawyers and experts from other fields.

It is clear that this list is not an exhaustive one and can be extended by the all members of the Ecolitigation National Platform, public interest lawyers beyond it, scientists, etc.

It does not necessarily mean that all strategic cases on protecting environmental rights and environment protection will have all the aforementioned criteria. Let us consider the goal of a specific

SC and its criteria on the basis of a strategic case of EPL against NNEGC Energoatom (Tashlyk PSP)[1].

One of the aspects of organization activity is legal work in the field of energy, nuclear safety in particular. The aim of such an activity is to ensure compliance with the rule of law for the environment during decision-making processes, any activities in the field of energy, nuclear energy in particular.

To enhance productive capacity and reduce peak night loads at the South-Ukraine NPP, its energy complex, already including Olexandrivka HPP with water storage basin, was extended and Tashlyk PSP was constructed several years ago. To supply water to the foot of Tashlyk PSP the level of Olexandrivka water storage basin was raised by 16 meters. At the same time, this raise brought about flood to the large area of the Regional Landscape Park «Hranitno-Stepove Pobuzhzhia». Energy issues in Ukraine have become top priority and have got significant support by CEBs, therefore, despite vast protests of ecocommunity, valuable lands have been flooded, which constituted violation of citizens' rights to a safe environment and preservation of protected areas of Ukraine. EPL together with its clients started a SC.

The aim of the strategic case regarding Tashlyk PSP was restoration of the violated rights of citizens to a favourable and safe environment; preservation of protected areas fund of Ukraine and biodiversity protection during operating activities of Tashlyk PSP.

Thus, goals of a SC are the following:

Ensuring compliance with the rule of law for environment protection, namely: cancellation of illegitimate regulation of the Cabinet of Ministers of Ukraine regarding giving the land plot of nature reserve fund of the Regional Landscape Park «Granite-Steppe Lands of Buh» in permanent use of the SE NNEGC «Energoatom» to

[1] http://epl.org.ua/pravo/uchast-gromadskosti/spravi/tashlicka-gidroakumuljujucha-elektrostancija-tashlicka-gaes

extend OlexandrIvka water-storage basin; cancellation of the act for the right to permanent land use, restoring the land plot to its initial condition to be used by the RLP «Granite-Steppe Lands of Buh», stimulating NNEGC «Energoatom» and State Nuclear Regulatory Inspectorate of Ukraine (SNRI) to the search for alternative ways of energy sector development that comply with both local and international environmental legislation.

There were three lawsuits in the process of strategic litigation. Two lawsuits were related to administrative legal proceedings (cancellation of the CMU's regulation on transfer of land plots in permanent use and cancellation of environmental conclusion, another one was related to commercial legal proceedings (cancellation of the state act for the right to permanent land use).

Litigation on CMU's regulation cancellation was used to form new public opinion: the right of any person to file lawsuits to protect NRF objects as objects of national legacy, which are owned by the people of Ukraine was recognized; practice of protecting the right to the land plot of NRF objects was established on the basis of the projects related to NRF objects territory organization.

A case on cancelling state acts on the right to constant land use established new methods of applying legislation as an aim-achieving tool. In particular, the case used the provisions of the law on exemption of court fee payments, settlement of a case via video-conferencing; it was proved that the case is not about the private interests but is related to the interests of a significant number of people (the people of Ukraine).

Thus, among criteria of strategic litigation defined by EPL in the case of Tashlyk PSP one can single out the following criteria:

- changing public opinion (NRF objects are of the same importance as energy facilities (court fee, right to a trial);
- elaboration of a new methodology of using legislation as a tool of achieving one's aim/elaboration of innovative legal arguments that

can be used in similar trials in future (argumentation based on the Constitution of Ukraine and the Law of Ukraine «On Nature Reserve Fund of Ukraine»);
- accumulation or change of court practice at the national level (cancelling illegitimate regulations of the CMU, state acts to the right on permanent land use);
- strategic object of a case, significance (biodiversity, unique nature complexes);
- litigation is related not to the private interest but a significant number of people or society as a whole (the people of Ukraine);
- the litigation model is used in future court processes (the algorithm of protecting the right to NRF objects' lands is established, the rights of filing CSI's cases in the interests of a large number of people);
- joint activities of lawyers and experts of other specialties, namely environmentalists, biologists, journalists.

Thus, a strategic case differs from the ordinary case. Organization that is working in the public interests and is located in Hungary explained that SL is different from ordinary litigation, as such cases are initiated to achieve goals that go beyond the case won for an individual client. In the ordinary case a lawyer is trying to solve the problem only for his/her client. For instance, the client lost housing due to operations of the mining industry that caused ground displacement. If the case against a mining company or an authority that gave a permit results in client's receiving damages, the client may be satisfied and the lawyer will consider the case to be a winning one. However, such a case cannot be called strategic.

Unlike the aforementioned case, a strategic case is initiated to make a broader impact that goes beyond the immediate case. For this reason such a case is called «an impact case»[2]. Strategic litigation can play an important role by generating positive impacts for broader population. In a mining case the lawsuit won for one

[2] European Roma Rights Center, Manual, Strategic litigation of race discrimination in Europe: From principles to practice, ERRC/Interights/MPG 2004.

client will not help others who also lost their housing and will not change mining practice, let alone ban underground mining in this region. To achieve one of broader outcomes a case of one client — a woman who lost her housing — should have been transformed into a case that claims damages for all the people who «live in similar conditions» or it is possible to claim banning of a certain mining method or mining in the vicinity of private houses. Such approaches would transform this case into strategic one with a broader and long-term impact.

In other words, the goal of a specific strategic case is to win a litigation process but in certain cases the goal is also to change legislation, policy or practice by other means.

Public interest lawyer and Professor of Law Jack Greenberg from Columbia University in the United States explained two uses that public interest litigation makes to the judicial system[3]. First of all, a lawsuit can urge the court to redefine rights in the constitutions, laws or international treaties to better address the wrongdoings of governments or society in the field or rights protection[4]. If such efforts are successful, the constitutions, laws or international treaties can be used in future in the same way by other members of society. Even if such efforts prove to be unsuccessful, the lost case can help identify legislation drawbacks that should be addressed by means of amendments or supplements. Another use of strategic litigation can be stimulating courts to apply rules or laws that were underutilized or ignored without new interpretation of these rules or laws[5].

Public interest legal work or public interest litigation does not always mean strategic litigation. Not all the cases on environmental rights protection and environment conservation are strategic ones.

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[3] Edwin Rekosh, Kyra Buchko, Vessela Terzieva, Pursuing the Public Interest — A Handbook for Legal Professionals and Activists.

[4] Ibid. P. 81.

[5] Ibid. P. 81–82.

A strategic case is usually planned in advance as an impact case that reaches beyond providing help to an individual client.

Any client, in case of necessity, can substantiate how his/her ordinary case can cause real changes in society. However, the very fact that a client can substantiate the importance of his/her case for society and not only for one person does not make this case strategic. The basic point is that organization or a lawyer define the problems and goals of strategic litigation even before the first potential client files a lawsuit. It is a rare case that accidental and unexpected client comes with such an issue resolution of which becomes a strategic priority for the organization.

Frequently, when there is a litigation or even a legal consultation to a client that does not have any money to pay the lawyer's fee, this professional legal aid is called public interest work or *pro bono publico* (Edit.: Lat. pro bono publico — for public good). This can be important work for a lawyer and it is really worth being called public interest legal activity. At the same time public interest strategic case means totally different issue. Despite the fact that legal aid as described above may have similar goals to those of SL, for instance, social changes resulting from litigation, it does not automatically become a type of strategic case. In strategic litigation there are attempts to use a law as a lever and the litigation process as a supporting point. By applying all one's strength to a lever one can change the legal system in such a way that it reaches more strategic goals on changing policy for the future[6]. Only when the case is solved and achieves results that go beyond obtaining positive judgment for one client it can be called a strategic one.

According to the authors, in the field of environmental rights protection and environment conservation one can single out three main groups of cases. But only some of them are proper candidates to become strategic cases.

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[6] Edwin Rekosh, Kyra Buchko, Vessela Terzieva, Pursuing the Public Interest — A Handbook for Legal Professionals and Activists. — C. 81–82.

- A lawsuit can be filed against the state body (a body of power) due to its illegitimate decision or action. These are cases when the decision or action is about a specific private enterprise, for instance, when a state body issues a license or a permission or when broader strategic decisions are meant, for example, passing a certain regulatory document.
- A lawsuit can be filed against the state body due to its not implementing a strategy or program which are to be implemented according to the law (contesting inaction).
- A lawsuit can be filed against a private enterprise or against a neighbour due to such unlawful actions as, for instance, river pollution, cutting down trees, construction, being unable to restrain an aggressive dog that is attacking people, etc.

From these three groups cases from the first group are most likely to become strategic ones as court decision about unlawful action of the state body can clarify the real meaning of the law for other people. Cases from the second group might become strategic if the decision of the court or social pressure on the government made the latter start implementing the program as it is required by the law. The third group — cases against private entities or persons — are unlikely to become strategic cases as there are few chances that the consequences defined by the court will have a comprehensive impact that will help others or radically change the behaviour of the defendant. Still these cases can also become strategic if they illustrate new legal tools that help solve typical problems and by doing so will pave a new way of their resolution in the court.

2. Educational goals of a strategic litigation realized by raising public awareness

An effective strategic litigation can also result in raising public awareness regarding a certain issue, its foregrounding in a state or at international level. This result may take a form of a reinforced social movement or political pressure on the government aimed

at triggering legislative changes. Gesine Fuchs writes in her considerations on a strategic litigation for protection of women's rights in Poland: the aims of strategic legal aid can include rising awareness of the citizens and/or formation of a political order for political pressure to facilitate legislative changes and to strengthen marginalized groups. Often, strategic litigation is chosen as political tactics when a certain legal issue concerns an important social problem. In a situation like that, court rulings may have bigger influence and potential to attract more attention of the public and mass media[7].

For strategic litigation to perform its function of public awareness raising, it is important to use other means except preparation of procedural documents and participation in court sessions. Educational function should be accompanied by such means as campaigns in mass media, publication and prompt information sharing about the course of the proceedings in articles, on web-pages, in social media, newsletters, and in other publications about those bigger social problems, at resolution of which the court system is aimed, in presentations at conferences and workshops for lawyers, judges and civil society institutions that engage in environmental cases, environment protection, and protection of environmental activists.

One of the public interest lawyers from Latin America characterized such use of litigation for raising public awareness as a «teaching» method. This approach presupposes that general public, interested public, legislative bodies, and other lawyers or even judges are the «students». In other words, planning and implementation of a litigation and media associated with it can sometimes indirectly achieve a significant effect in the area of state policy, legislation, and

[7] Gesine Fuchs, «Using strategic litigation for women's rights: Political restrictions in Poland and achievements of the women's movement,» European Journal of Women's Studies, 2013. University of Zurich, Switzerland. — P. 23.

civil society activity, which exceeds the boundaries or the results achieved by a successful court case[8].

Below you will find some potential educational goals of a strategic litigation:

- attraction and/or retention of attention of the public to a certain environment-related topic/problem,
- creation of awareness of different social actors in similar or connected situations, which can require a court ruling,
- creation of stimuli for establishment and support of social organizations (such as civil society institutions (CSI)).

This educational function extends also to the judicial area. Judge Kenneth Kakaru of the Court of Appeals of Uganda noted that a strategic litigation for public interest has a potential to allow the society to rationally involve the judicial sphere into the process of social changes[9].

We all have heard about vicious circles, the situations where one negative moment leads to another one. But the opposite is also possible. Ideally, educational effect of a well-planned strategic litigation can lead to a circle of positive interaction between the law and the society. As a researcher and practicing lawyer of public interest from Asia put it: on the one hand, a burning need in legal reforms in public interest stimulates strategic litigation. On the other hand, the legal measures themselves stimulate social reaction, demands of a community and protests, and supports what can cause social and legislative changes[10].

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[8] Ana Milena Coral-Diaz, Beatriz Londoño, Lina Muñoz, «The Concept of Strategic Litigation in Latin America: 1990–2010» Instituto de Investigaciones Jurídicas de la UNAM. 2010. — P. 53.

[9] Judge Kenneth Kakaru, «Strategic Public Litigation in Uganda,» East Africa Public Interest Environmental Law and Litigation Workshop and Seminar. June, 2013. — P. 14.

[10] Po Jen Yap, Holning Lau, «Public Interest Litigation in Asia,» Hoboken, Taylor and Francis, 2010. — P. 82.

3. Some examples of strategic litigation

Strategic litigation Salaz vs Argentina

The case of Argentina illustrates a strategic litigation in ecological context. This case is also a sample of «victory» by asserting the existing legal obligations, but it is also a «victory» due to increased public awareness of this problem.

By reason of deterioration of Argentine woods, federal legislators adopted a law stipulating protection of forests. Unfortunately, federal and province authorities failed to enforce the law. The problem of forest deterioration aggravated even more. Consequently, a coalition of local communities and CSIs filed a petition on injunction to the Supreme Court of Argentina. The Court ruled in favor of the coalition and demanded enforcement of the strategies for protection, and made local authorities abide by the previously adopted laws[11].

In this case, pressure was successfully made at the level of province combined with publicity and lobbying on the part of CSIs to ensure observation of other key provisions of the law that were not the subject matter of this lawsuit. Essentially, the case attracted broad attention to this issue and made pressure on public officials of all levels in terms of improvement of efficiency of their work[12]. These results exceeded the boundaries of an individual legal action and turned it into a strategic litigation.

Strategic litigation in connection with forestry pesticides (USA)

This example from the United States of America illustrates how a regular court case turned into a strategic one. The case that started

[11] Salas, Dino Y Otros C/ Salta, Provincia de Y Estado Nacional s/ amparo. Jucio Originario S. C., S.1144, L.XLIV.

[12] Di Paola, Vinocur, Needle — Using Strategic Litigation to Implement Environmental Legislation: The Salas Case for Native Forests in Argentina, The Ninth International Conference on Environmental Compliance and Enforcement 2011.

as legal action of one person in regard to protection of his family's health turned into a case that eventually put an end to spraying national forests in the USA with pesticides from helicopters.

Paul Merrell initiated a litigation against the USDA Forest Service in connection with spraying herbicides (pesticides for spraying broadleaf plants) over the forest near his house in Oregon. The Forest Service used this spraying to speed up the growth of transplanted trees after the trees that grew there initially had been cut down. Mr. Merell appealed against the environmental impact assessment done by the government to support the aerial spraying program. He won the case.

Despite the fact that the plaintiff asked to suspend the whole spraying program, the US government persuaded the judge to stop spraying only in the area of 2 km around Merell's house. Next year, Mr. Merell's lawyer addressed the court with a similar request on the part of another 15 homeowners from a broader area. In response to that, the judge determined the non-spraying areas around these 15 houses.

At this stage, the environmental law program of the University of Oregon School of Law and the lawyer filed a case at the US Court of Appeal adding clients from other national forests. They claimed that as the trial court ruled that the assessment of the environmental impact of the spraying program was inappropriate, the whole program was illegal, and not just the spraying around the houses of the people who went to court.

The Court of Appeal agreed and issued an injunction (an order to stop spraying over all national forests in two US states). In response to that, the USDA Forest Service completely stopped aerial herbicide spraying all over the country. This nation-wide decision has been in force in the United States of America for almost 30 years. Instead of chemicals the Forest Service uses other methods of vegetation control.

Consequently, a litigation initiated by one person who wanted to stop aerial spraying near his house was transformed by the lawyers into a more extensive and long-lasting result. This transformation turned an ordinary case into a strategic one.

Strategic litigation on behalf of the children to protect future generations (Philippines)

Tropical forests of Philippines are home to various rare and unique species of flora and fauna. These tropical forests are characterized by a number of irreplaceable genetic, biological, and chemical factors. They are also the place of residence for aboriginal Philippino cultures that date back to ancient times. Research data presuppose that to maintain a balanced and healthy environment, the land in the country should be used in the ratio of 54% for forests and 46% for agricultural, residential, industrial, commercial, and other users. Disturbance of this balance resulted in deforestation which, consequently lead to a number of environmental disasters, such as (a) water shortage… (b) massive erosion and, as a result, loss of fertility and agricultural productivity, …(c) threat to and extinction of unique flora and fauna species, (d) disappearance of authentic Philippino cultures, (e) decrease in the soil's capacity to process carbon dioxides that lead to disastrous climate changes.

Over the last 25 years the area of tropical forests decreased from 53% of the overall area of the country to 4%. With such deforestation rates Philippines will lose their forest resources by the end of the next decade or even sooner. A forestage permission from the government on the basis of the license agreement on harvesting of wood would cause great harm and irreparable losses for citizens, especially the minors and their descendants who may lose the possibility of ever seeing, using or enjoying this rare and unique natural treasure.

The minors (duly represented by their parents) as main plaintiffs filed a civil suit in Philippines. They claim that «they represent their generation, as well as unborn generations». The petition

of the minors is based on the right to a balanced and healthy environment which the plaintiffs especially associate with both notions of «responsibility between generations» and «justice between generations». The plaintiffs argued that the actions of the defendant constitute illegal acquisition and/or damage of natural resources which were entrusted to him by the underage plaintiffs and the coming generations.

The plaintiffs demanded the ruling to:

… make the defendant, his agent, representatives and other persons acting on his behalf,

1) terminate all wood harvesting agreement existing in the country;

2) stop and refrain from issuing, adopting, processing, renewing, and approving new license agreements of wood harvesting

and provide the plaintiffs with «…other respective compensations according to these provisions».

Hearing the case, the court concentrated on the issue of whether the ground «to prevent acquisition or damage» of Philippino tropical forests and «to stop unseen exhaustion of the main life-sustaining systems of the country and constant raping of Mother Earth» is appropriate for a legal action.

The plaintiffs claimed that the complaint explains the ground of action clearly and faultlessly, for it contains enough substantiation of their right to healthy environment. The defendants, in their turn, stated that the plaintiffs had not indicated what right was violated and with what law they associated the possibility of being compensated for such violation. The plaintiffs insisted that the complaint is based on a concrete fundamental right — the right to balanced and healthy environment, which was integrated into the fundamental rights for the first time in the constitutional history of the country. Section 16 of Article II of the 1987 Constitution clearly states:

Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

This right is combined with the right to health that is guaranteed by the previous section of the same article:

Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

In regard to this case the Supreme Court of Philippines recognized that the claim is based on «one concrete fundamental right — the right to a balanced and healthy environment» and thus confirmed that the «right to a balanced and healthy environment» is a «fundamental» one and that consequently it has become a constitutional right.

As a result of this case, the administrative ruling No. 24 of 1991 cancelled a legislative possibility of further granting undisturbed forests to concession. It also brought about changes in the policy of natural resource use, as logging of undisturbed forests was replaced by logging of secondary forests. In 1992 a law on providing for the establishment and management of national integrated protected areas system (Republic Act No. 7586) was adopted, under which the rest of the undisturbed forests became the primary part of the natural reserve fund.

Strategic litigation on environmental protection and protection of cultural heritage (Mexico)[13]

General context of the case

On 1 October 2008, the Ministry of Ecology of Mexico published in its newspaper that Punta Brava project, a project of

[13] The case was conducted by the Mexican ecology and law NGO «Environment Conservation in North-Western Region». The data are taken from the e-mail correspondence between EPL and Fernando Ochoa (Фернандо Очоя) (preserved at EPL).

construction of housing and a golf complex with financial and informational support on the part of Tiger Woods, a famous golf player, was submitted for environmental impact assessment. The implementation of the project threatened to exterminate one of the last coastal shrubbery ecosystems of the California peninsula and eliminate one of the most important architectural monuments of the Baja California State.

Despite the illegal nature of the project, the Ministry granted a permit for it. After 4 years of litigation, the ecological permit was withdrawn on 13 July 2013 and the project was suspended.

Preventive measures

«Experience and scientific expertise demonstrate that prevention of environmental harm should be the «Golden Rule» for the environment, for both ecological and economic reasons»[14].

Accepting this statement as a fundamental notion of environment protection, the Mexican environmental law organization «Environment Conservation in North-Western Region» (hereinafter — the Organization) made a request to the Ministry on behalf of the local community to determine the period for consultations with the public within the process of environmental impact assessment.

In November 2008, the Ministry determined the period for consultations with the public, which allowed the Organization to gain access to the environmental impact assessment (EIA) and to conduct a scientific and legal research of this document. As a result of research, they found out that the project was poorly planned, had substantial scientific and legal drawbacks, and had irreversible negative impact on critically important ecosystems and valuable archeological monuments.

[14] Training Manual on International Environmental Law. United Nations Environment Program. 32. Available at: http://www.unep.org/environmental-governance/Portals/8/documents/training_Manual.pdf

In December 2008 the Organization submitted its comments and remarks to the EIA requesting the withdrawal of the ecological permit.

In March 2009, when the environmental impact assessment was still going on, the Organization held a public event where lawyers and researchers explained the influence of the project and showed the participants the means the community could use to protect its rights and the environment.

The litigation

Five lawsuits concerning different aspects were filed. The main arguments were as follows: a) the impact on archeological monuments, b) irreversible impact on vulnerable ecosystems, and c) illegitimacy of environmental permits. It is this last argument that was used by the administrative court to withdraw the environmental permit and cancel the project.

In January 2009, the Organization submitted a constitutional application to the district court in order to obtain information about the activity aimed at preservation of the archeological monument done by the National Institute of Archeology and History.

Despite the fact that the project was illegal[15] and posed a threat to critically important ecosystems and important archeological monuments, the Ministry issued a permit for project implementation in May 2009. Therefore, in August 2009 the Organization, on behalf of the local community, filed an administrative claim appealing against the Ministry's permit.

[15] The project contradicted bylaws of Baja California. The developers planned to construct a golf course with 18 holes, a club building, a coastal club, a hotel, 77 villas, 51 residences, 1 treatment facility, and 1 demineralized water station on the territory where infrastructure development is prohibited because of geological peculiarities and earthquake threat.

At the end of January 2010 the Organization submitted a constitutional application to the district court requesting to incite the Ministry to issue a decree in regard to the administrative claim filed by the Organization in August 2009. The district court rejected this application, and the Organization filed a complaint at the Court of Appeal, which cancelled the ruling of the District Court in August 2010 and ruled in favor of the Organization ordering the Ministry to issue the decree.

Under the ruling of the Court of Appeal, the Ministry issued a decree confirming the issuance of permit to the project. As a result, the Organization filed an action at the administrative court appealing against this confirmation of the permit.

On 13 July 2013 the Administrative Court ruled that the project was unduly approved as it contradicts all local regulatory acts, and compelled the Ministry to withdraw the environmental permit. The developers appealed against this ruling in court, but their case was dismissed.

Strategic approach to case coverage

To determine which approach should be applied to case coverage extensive discussions had been held. It was decided that as soon as Tiger Woods is a very famous person enjoying great popularity, it would be unreasonable to hold a media campaign. Therefore, a decision was taken to address him directly. A letter to Tiger Woods was sent through his agent. The letter raised concerns of a number of local organizations about the impact of the planned project on local ecosystem and archeological monuments. This letter was also later sent by our US partner the Environmental Law Alliance Worldwide.

The next letter was sent with signatures of over 1,200 members of the community. This fact drew interest of the mass media and different regional and national newspapers wrote about it.

Conclusions

1. The determinant factor of success of the whole campaign was the **diversity of legal actions applied**: from first official addresses to environmental bodies concerning withdrawal of permits to administrative means and lawsuits in regard to different issues.

2. Although the informational component was not decisive for increasing the importance of the case, many issues concerning the public participation were highlighted in the media.

3. Although the informational component was not the determinant factor in reaching the final results of the campaign, several messages that appeared in newspapers clearly showed to the developers and authorities that the local community has its stand regarding this project.

4. The fact of participation of the community, as well as local and international organizations, also made the campaign more authoritative and prevented corruption from becoming the determinant factor.

«Sorokivka» strategic litigation (Ukraine)

At the beginning of 1996 the local environmental group «Pechenihy» addressed the citizens and civic organizations of Kharkiv region calling them to send letters of protest to the authorities in regard to the plans to build a solid household waste landfill (hereinafter — the landfill) with an area of 32 hectares in the vicinity of Sorokivka village, one of the most ecologically clean places of the Kharkiv district.

Civic organization «EcoPravo-Kharkiv» sent a letter of protest and decided to learn about the factual side of the problem in more detail. They invited the representatives of the civic committee of Olkhivka and Sorokivka villages residents for legal consultations. They brought a lot of documents to the meeting. These were mainly

appeals to the local authorities with multiple signatures of local residents and formal replies of the officials. But there were also legally important documents: the decisions of the Olkhivka village council and other local self-government bodies on prohibition of landfill construction.

While studying the materials of the case, the negligence of city and oblast authorities in their choice of the future landfill, low quality of the environmental assessment, and the imminence of the environmental disaster in the adjacent settlements in case of landfill construction hit the eye. The organization offered the public committee a plan of major activities. On 25 February 1996, a local referendum was held on the territory of Olkhivka village council. The overwhelming majority of residents voted against the landfill construction. The decision of the referendum became the main legal obstacle that prevented building organizations and executive bodies from landfill construction.

However, on 9 September 1996, the Chair of the Kharkiv Regional State Administration signed a resolution on provision of a land plot for landfill construction. The content of this document contradicted current legislation on local self-government, and ignored the norms of the environmental and land law. The only way out was to immediately appeal against this resolution in court. The lawyers of the organization decided to go both to general jurisdiction courts and to the system of arbitration courts.

Thus, Mykola H. Dohadaylov, a resident of Sorokivka village, filed a lawsuit at the Dzerzhynskyi District Court in Kharkiv to appeal against the resolution of the Chair of the Kharkiv Regional State Administration of 9 September 1996, and to request the withdrawal of this resolution due to its violating his environmental rights. In September of the same year, members of the public committee managed to persuade the session of the Olkhivka village council in the necessity to appeal against the abovementioned resolution at the Supreme Arbitration Court. The representation of interests of

the village council at the Supreme Arbitration Court was entrusted to the lawyers of civic organization «EkoPravo-Kharkiv». Certainly, the lawyers did not have high hopes in regard to the ruling of the district court when they appealed against the actions of the first person in the region. But this case allowed to win the time necessary to prepare the hearing of this case in Kyiv. In addition, filing of a complaint suspended the power of the document. On the basis of this procedural norm Mykola H. Dohadaylov received the respective statement of the district court, and by May 1997 this document constituted the main obstacle for landfill construction.

The Supreme Arbitration Court refused to accept the lawsuit of the Olkhivka village council referring to the fact that under active legislation such cases now belong to the jurisdiction of the Constitutional Court of Ukraine. But the Constitutional Court did not exist yet. There was only a law on it. The law was soon amended and the Supreme Arbitration Court had to accept the statement of claim. The hearing took place on 16 January 1997.

The lawyers of EkoPravo-Kharkiv, as the plaintiff's representatives, clearly grounded the demands of the Olkhivka village council referring to the fact that the owner of this land plot and its primary user had never given their written permission to seize this land for the purposes of landfill construction. On the contrary, they took multiple decisions on prohibition of this object construction. A referendum was held on the territory of the council, which also prohibited the construction, and the decision of the referendum can only be cancelled by the decision of another referendum, etc. The defendant's representative did not present any persuasive arguments in defense of the draft resolution prepared by her department, which was subsequently signed by the Chair of the Kharkiv Regional State Administration. However, the Supreme Arbitration Court dismissed the suit. Direct and clear proofs of the plaintiff that were presented in the statement of claim were not even mentioned in the court ruling. This was a gross violation of the requirement of full, legal, and comprehensive study of proofs

determined by the legislation on arbitration procedure in regard to the court rulings. The ruling of the Supreme Arbitration Court was immediately appealed against, but even before it came into force, it became the decisive trump card for the defendant's representative in the course of the judicial settlement at the Dzerzhynskyi district court in Kharkiv, whose judge refused to satisfy the legal demands of Mr. Dohadaylov on 25 April 1997.

A motion on the protest against the illegal ruling of the panel of judges of the Supreme Arbitration Court was sent to the Prosecutor General's Office of Ukraine and to the Chief Judge of the Supreme Arbitration Court. In addition, letters on behalf of the Olkhivka village council were sent to the head of the Parliamentary Commission on Lawfulness, and Law and Order; to the head of the Permanent Parliamentary Commission on Legal Policy and Legal Reform; and to the Minister of Justice.

In August 1997 the Verkhovna Rada of Ukraine ratified the Protocols No. 9 and No. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The citizens of Ukraine got the possibility to protect their rights at the Commission on Human Rights of the Council of Europe and in the European Court of Human Rights. Now, demanding from the permanent commissions of the Parliament and from the Prosecutor General's Office an objective and comprehensive audit of the legality of Rulings of the Supreme Arbitration Court, Olkhivka village council referred to its readiness to address the abovementioned structures of the Council of Europe for protection of their constitutional rights.

In addition, the civic organization «EkoPravo-Kharkiv» held active negotiations with the Institute of the State and Law of the National Academy of Sciences of Ukraine concerning a legal examination of the case materials preserved at the Supreme Arbitration Court of Ukraine and the Dzerzhynskyi District Court in Kharkiv. It is hard to say which argument was most persuasive, but the head of the Commission on Legal Reforms sent a request to the Supreme

Arbitration Court of Ukraine. The Chief Judge of the Supreme Arbitration Court requested the case and concluded that he has the grounds to pronounce a protest in order of supervision. The meeting of the Presidium of the Supreme Arbitration Court, where the protest was considered, took place on 26 December 1997. The Chair of the Kharkiv Regional State Administration did not show up, and the case was heard in absentia. The protest of the Chief Judge of the Supreme Arbitration Court, and, consequently, the suit of the Olkivka village council, was sustained.

The journalists of the First National TV Channel «UT-1» told about the events in Sorokivka on 10 January 1998. The whole Ukraine learned about the steadfast position and determination of the residents of this small village.

These people needed two years to secure a victory. And there really was much to congratulate them on. They have protected their right to live on clean land, drink clean water and breathe clean air. Hopefully, the example of Sorokivka residents will inspire other citizens of our country, and will make them believe that it depends on them what earth their children and grandchildren will walk on. Unfortunately, it is not that simple now either, but the acting legislation and the constitution give us such chance.

Strategic litigation on publishing the conclusions of the state environmental assessment on the web-site of the Ministry of Ecology and Natural Resources (Ukraine)

Before the 2012 reform, the conclusion of the state environmental assessment was one of the main sources of environmental information about the objects that pose an increased environmental hazard in Ukraine. A great number of requests for information to the bodies of power were sent by the public in order to obtain the conclusion in regard to this or that object. Unfortunately, information disposers often illegally denied the provision of these documents, entered them into the lists of official documents with a label «For Official Use Only», delayed the response time, provided

only introductory and substantive parts of the conclusion without the scientific assessment by environmental experts.

In view of the systematic violations of the right to information regarding the conclusions of the State Environmental Assessment necessary for EPL or other CSI or citizens, EPL planned and initiated a strategic litigation which resulted in 1) retrospective publication of over a thousand conclusions for 2009–2012, and 2) change of the administrative practice of the Ministry of Ecology, which has been publishing the conclusions of the assessment on their web-site ever since.

It was a thought-through strategic litigation with obviously well-chosen means of legal protection, which was initiated to change the practices of applying the provisions of the national and international legislation in the sphere of access to official documents finalizing the procedure of environmental impact assessment of the planned commercial activity by the Ministry of Ecology.

The ruling of the trial court was supported by all courts of higher instances. The case resulted in simple and free Internet access of any person to any conclusion of the State Environmental Assessment since 2009. These are hundreds of hours of time saved on preparation of requests for information, months of waiting for the response of the Ministry of Ecology, and years of litigation appealing against the illegal denial of information that was necessary for further work on preservation of the environment.

Strategic litigation to protect «Roztochchia» reserve from liquidation (Ukraine)

Natural reserve «Roztochchia» (hereinafter — the reserve) was established in 1984. In 2010 the Ministry of Education and Science of Ukraine adopted a decree on its reorganization. Thus decree presupposed termination of the existence of the reserve as a legal entity affiliated to the National Forestry and Wood-Technology University of Ukraine and its reorganization onto a subdivision of the abovementioned university.

Thus, according to this decision, the reserve would lose its status of a legal entity (a separate organization that has its own property, staff, and budgetary funding, etc) and turn into a structural subdivision of an educational institution. Change of the reserve status into an educational establishment would change the nature of this institution, weaken the requirements to organization and realization of its territory protection, i.e. it would have negative influence on preservation of a unique natural object. The Ministry grounded its decision by the necessity to stop violating the budgetary legislation, for there were some problems with budgetary funding of the reserve.

In the same year, employees of the reserve addressed the Charitable Fund of Dniprovskyi District in Kyiv «Kyiv Ecology and Culture Center», and then the civil environmental law organization «EkoPravo-Kyiv» with a request to provide them with legal assistance and protect the unique reserve from liquidation. It was also important to preserve the reserve status because of the planned inclusion of the «Roztochchia» natural reserve into the international biosphere reserve «Roztocze» together with the objects of natural reserve fund of the Republic of Poland. It was envisaged that this biosphere reserve would be protected by UNESCO and included into the All-European Eco Network.

An administrative suit against the Ministry of Education and Science of Ukraine was filed on behalf of the civic organizations. The plaintiffs asked to recognize the decree of the Ministry illegal and cancel it.

According to the mandatory requirements of part 3 of article 5 of the Law of Ukraine «On the Natural Reserve Fund of Ukraine», natural reserves are legal entities. This decree contradicted this norm. In addition, the decree was a regressive step on the way to development of the natural reserves of Ukraine, and the national and European ecological networks. The case is that after adoption of the Law of Ukraine «On the Natural Reserve Fund of Ukraine»,

the inefficiency of reserve management without the status of legal entity was recognized at the state level, and a number of bylaws were adopted in this connection aiming at granting the status of a legal entity to all reserves.

At the beginning of 2011 the trial court ruled to sustain the claims of civic organizations and cancel the decree of the Ministry. The case was reconsidered in the appellate and cassation instances, but the ruling of the local court was not changed.

This litigation allowed achieving the following strategically important results:

- the rulings of the courts of all instances recognized the rights of civic organizations to file lawsuits in regard to protection of national reserve objects, and that such civic organizations have their environmental interest in such cases which can be protected by the court;
- the level of trust to the judiciary on the part of the natural reserve objects of Ukraine increased, and they started protecting their rights and interests in court more actively;
- international processes, in which Ukraine participates, particularly establishment of the biosphere reserve, was recognized as being of great importance for environment protection and should be taken into account by the bodies of power when taking their decisions;
- by its ruling the court determined not only the illegal nature of the decree, but also the violation of the principle of decision proportionality, for the adoption of the decree by the Ministry resulted in violation of balance between unfavorable results for the reserve and goals at the attainment of which the decree was aimed (i.e. to eliminate violations of budgetary legislation), which is an independent reason for cancellation of the decree but is rarely used in judicial practice.

Strategic litigation concerning the cancellation of state registration and cessation of use of «Zinc Phosphide» (Zn_3P_2) pesticide (Ukraine)

In April 2012, Charitable Fund of the Dniprovskyi District in Kyiv «Kyiv Ecology and Culture Center» and the Civic Environmental Law Organization «EcoPravo-Kyiv» filed an administrative suit (case No. 826/6195/13-a)[16] against the Ministry of Ecology and Natural Resources of Ukraine at the District Administrative Court in Kyiv. The civic organizations requested to recognize illegal inaction of the Ministry and oblige it to act in regard to cancellation of the state registration of the zinc phosphide pesticide and all its formulations allowed for use on the territory of Ukraine, and exclude them from the State Register of Pesticides and Agrochemicals Allowed for Use on the Territory of Ukraine.

Zinc phosphide Zn_3P_2 is a poison, a pesticide that belongs to zoocides, namely rodenticide, i.e. chemical compounds used for protection of agricultural crops and their stocks from murine rodents. To increase effectiveness of the zinc phosphide it is produced in formulations (for example, powders, grain mixtures (lures), paraffin biscuits). Interestingly, according to the rules of application of such preparations, the lure in some cases should be put into the rodents' holes. However, in practice it is just scattered around the field, where it is eaten by animals, including those listed in the Red Book, which it is not aimed at.

As the pesticides are a poison, their use is allowed by the state and strictly regulated by the legislation. After positive tests, assessments and other measures proving effectiveness and safety of a preparation, the state recognizes the pesticide as such that can be used on the territory of Ukraine and registers it, and the preparation is included into the State Register of Pesticides and Agrochemicals.

[16] The information about this case can be found on the web-sites of the Charitable Fund of the Dniprovskyi District in Kyiv «Kyiv Ecology and Culture Center» and the Civic Environmental Law Organization «EcoPravo-Kyiv».

The decision on such state registration and on inclusion of the preparation into the State Register is taken by the Defendant. The decision is valid for a certain period of time: pesticides are registered for a period of up to ten years. The Special Procedure[17] envisages the possibility of early termination of state registration of preparation, particularly in cases some data about the danger of the preparation or the lack of biological efficiency for its targeted use that were not known before are revealed.

The plaintiffs, together with their like-minded colleagues[18] have been working on resolution of this problem in a pre-trial order and by collecting the necessary information[19], but concluded that it was necessary to resolve the problem in court.

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[17] The Procedure of holding state tests, state registration and re-registration, issue of lists of pesticides and agrochemicals allowed for use in Ukraine approved by the resolution of the Cabinet of Ministers of Ukraine of 04.03.1996, No. 295.

[18] Ukrainian Society for Bird Protection, All-Ukrainian Forum of Civic Organizations «Live Planet», All-Ukrainian Union of Public Organizations «Association of Animal-Protecting Organizations of Ukraine», environmental journalist of Ukraine Oleh Lystopad and others.

[19] The pre-trial resolution measures included addresses: 1) to the main research institution of Ukraine — the Shmalhauzen Institute of Zoology of the NAS of Ukraine, which confirmed rapid decrease of the country's biomass because of uncontrolled use of pesticides and its partial inclusion into the Red Book of Ukraine; the loss by vermins of their harm to the crops, as well as inefficiency of fighting them using of different pesticides; 2) to the Ministry of Agrarian Policy and Food of Ukraine, which confirmed the existence in Ukraine of safer and more efficient alternatives to zinc phosphide and supported the cancellation of state registration of rodenticides on the basis of zinc phosphide; 3) to the State Customs Service of Ukraine, which banned the import of zinc phosphide to the territory of Ukraine; 4) to commercial organizations that have certificates of state registration of preparations with zinc phosphide; 5) to specially authorized state bodies that confirmed in 22 answers the facts of lethal cases because of zinc phosphide poisoning of other animals which it was not aimed at. These were addresses to: 24 state administrations of environment protections in regions of the Ministry of Ecology and Natural Resources of Ukraine; state environmental inspections in the regions of the State Environmental Inspection of Ukraine; 25 Head Departments of veterinary medicine in the regions and the AR of Crimea of the State Veterinary and Phytosanitary Service of Ukraine (which has its regional state laboratories).

The statutory bar on use of zinc phosphide pesticide is envisaged by: 1) the Law of Ukraine «On Protection of Animals from Violent Treatment» of 21.02.2006 No. 3447-IV, which bans the use of inhumane methods of killing animals that cause their death through poisoning (paragraph 3, part 2 article 17); 2) The Convention on the Conservation of European Wildlife and Natural Habitats[20], which prohibits all forms of deliberate extermination of animals included into Appendix II to the Convention[21] and which determines that poison and poisoned lures are the prohibited means of exterminating mammals.

Initial proceedings were carried out by the district administrative court. In June 2013, Kyiv District Administrative Court passed the resolution which partially adopted the claim of NGOs. Apart from the Defendant, one of the companies which received state registration certificate of the preparation — Ukravit Company LLC — appealed a separate petition.

Kyiv District Administrative Court Resolution of 24/09/2013 upheld ruling of the first-instance court and completely rejected two separate appeals of the Defendant and of Ukravit Company LLC. The Resolution of the Higher Administrative Court of Ukraine of 17/04/2014 (cassation No. K/800/57513/13) rejected cassation appeal of the Defendant, while decision of the first-instance and appeal courts was affirmed. Due to unwillingness of the Defendant to immediately abide by the court's decision, plaintiffs jointly with their associates had to carry out a huge campaign to implement them[22].

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[20] Which Ukraine acceded under the law of 29.10.1996, No. 436/96-BP.

[21] And this is a significant portion of murine rodents that are subject to extermination by poisoning by zinc phosphide preparations.

[22] The company took the following measures: 1) filed an application to the District Administrative Court of Ukraine for explanation of the first instance court ruling (decree of the District Administrative Court of Ukraine of 11/12/2013 dismissed the claim); 2) numerous meetings with leadership of the Ministry and leaders of its structural subdivisions; 3) letters to all persons who received state registration certificate of zinc phosphide-based preparations; 4) four pickets: two picketing

On December 5, 2013 the Ministry passed a decree No. 500 «On cancelling state registration of pesticide zinc phosphide and all its preparative forms».

This strategic litigation turned out to be of special importance in the following issues:

- court's decisions in this case are of national interest, their scope applies to the entire territory of Ukraine and promotes wildlife conservation;
- the first legal precedent in Ukraine was established to judicially cancel state registration and exclude pesticide zinc phosphide and all its preparative forms from the State Register in view of obtaining previously unknown information on insecurity of the preparation and its insufficient target biological efficiency;
- per curiam, NGOs have the right to apply to court with similar claims and their environmental interests may be protected by the court;
- it gave the possibility of temporary alliance of public environmental NGOs and activists to settle a specific environmental problem;
- it helped develop trust in judicial authority among other public environmental NGOs, as well as on the part of state authorities and other institutions who supported Plaintiffs.

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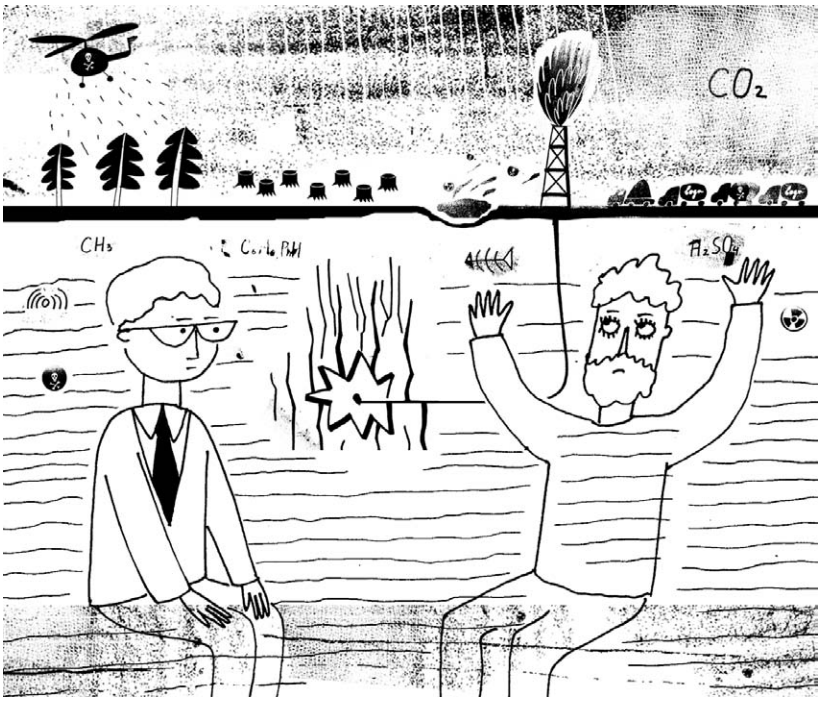
of the Defendant (Ministry of Ecology of Ukraine) in Kyiv, one picketing of the Cabinet of Ministers of Ukraine in Kyiv, and one picketing of the company which had state registration certificate of zinc phosphide-based preparations — NERTUS LLC in Kharkiv; 5) four press conferences in Kyiv and constant interviews with mass media representatives; 6) a joint raid with mass media representatives on «Lisovyi» market in Kyiv; 7) «freeing» the Internet from numerous proposals to sell zinc phosphide-based preparations (search of the objects who proposed selling of preparations, sending them letters with a request to remove announcements/ information, almost all of which were met); 8) auditing all oblast markets of Ukraine to identify sell of zinc phosphide-based preparations; 9) meeting with leadership of the Defendant a day before the third picketing of the Ministry of Ecology of Ukraine (during the revolutionary events in Ukraine in 2013).

Thus, it is crucial that definitions, criteria and general vision of strategic litigation are clearly understood for comprehending strategic approaches, protecting environmental rights, ensuring healthy environment and settling different social problems. Examples of strategic litigation, provided in this paragraph, help us realize this vision and reveal insights into the strategy and tactics of such cases and their methodology, which will be more thoroughly discussed in the next section.



Chapter II. Methodology for selecting strategic litigation

1. Selection of strategic litigation to reach strategic goals. Internal decision-making processes

Selection of strategic litigation is an essential stage in the activity of a public interest lawyer aiming to reach important social changes. Main task of such selection lies in determining well in advance what social spheres require strategic changes. Strategic litigation may be chosen in a number of ways. The first way is when a human rights organization is aware of certain social relations that require changes

and works independently on establishing strategic litigation; or knows a client whose protection of rights coincides with the tasks of strategic litigation. The second way — when in the course of providing legal aid to a client or a group of clients, including by means of compearance, it turns out that the problem is of general social importance and is beyond meeting interests of one client. Thus, litigation becomes strategic in the course of working on the case. Under the circumstances, interests of a client and organization may diverge, however, they should not necessarily be mutually exclusive. For example, as a result of activity of the mining industry, it will be enough for the client if he/she is paid for material or moral damages, however, for the organization it would be important to make the mining industry adhere to the national legislation and minimize its harmful effect on the environment.

Possible grounds for taking the decision on choosing a strategic litigation case:

1. Omissions of state authorities regarding fulfilling their tasks. State authorities ignore certain legislative provisions of general nature since they lack specification at the level of government decisions or instructions, etc. For example, the law stipulates issuance of a permit for keeping wild animals in captivity, while licensing authority does not issue such permits due to lack of a standardized procedure for issuing such a permit. Or, for instance, legislation includes provisions that could provide benefit for environment, however, officials or other entities do not implement them due to different reasons (financial, organizational, institutional, or material and technical); or, for instance, legislation stipulates for the right of the public to participate in the process of taking environmentally important decisions, however, state bodies do not involve the public when issuing licensing documents. EPL encountered such a problem when addressing the issue of exploration and production of unconventional gas in the country. Such problem can be the ground for filing a claim.

2. Establishing positive enforcement of a provision. State bodies might apply one and the same provisions of the law in many ways. For example, state ecological inspections in different ways apply legislative provisions on providing copies of certificates of inspection over adherence to the requirements of environmental legislation: some provide copies of certificates, while others do not, and different inspections explain their standing in different ways by interpreting one and the same legislative provisions. It is necessary to establish the correct law enforcement practice through court action in order to ensure principle of legal certainty on any issue.

3. The necessity of bringing legislation in line with international standards. Thorough investigation of national legislation provisions may reveal inconsistencies of certain provisions with international standards, environmental agreements or agreements in the field of human rights protection. Interpretation of these standards or agreements by state bodies or courts may be inappropriate, which can be a ground for initiating strategic proceedings.

4. Test cases (for revealing and eliminating violations). Strategic litigation might aim at introducing more open and democratic procedures based on international standards. This, first of all, concerns judicial procedures that are under the watchful eye of the public with a view to their openness, accessibility and efficiency. Thus, litigation may be initiated to reveal and eliminate barriers against access to justice, enhancement of efficiency of court procedures, or the use of alternative means of legal protection. CSI, for example, have filed different environment protection petitions to the court to reveal possible barriers to access to justice for the public.

Sometimes it is important to initiate a litigation case which will pursue not a final strategic goal, posed by a strategic litigation case, but rather interim goals. Such interim goals could be training and education of judges, the public, or officials; raising consciousness and awareness of a certain problem; receiving a court judgment that

would establish certain facts (for instance, the fact of existence of a harmful enterprise in the sanitary protection area), which, unless proven, would make it impossible to initiate a strategic litigation case. Thus, this important lawsuit becomes a logical part of strategic litigation case.

Internal decision-making processes, within the organization that provides free legal assistance to clients and other CSIs, are connected with choosing of strategic litigation case for reaching strategic goals, and require special attention. The quality of future strategic litigation cases will depend on them. Each organization must elaborate clear procedures for making such a choice. Authors of the textbook pay their attention to the practice of choosing a strategic litigation case by legal organizations, which, prior to meeting over discussing the lawsuits, appoint an opponent from among their legal consultants to oppose their colleague who plans to initiate a strategic litigation case. Such opponency will promote discussion among participants of the meeting, as well as a more detailed discussion of the future case and the criteria of its strategic importance.

Usually the procedure of decision-making depends on the internal policy of an organization. For example, yet in 2009 general meeting of EPL members, with a view of rational use of organization's resources, took the decision to initiate only strategic legal processes, which, alongside, allows legal consultants of the organization to provide legal assistance to individual customers and other CSIs, thus, promoting them to show more initiative and make independent efforts in settling the problem (i.e. legal consultants' task lies not in catching fish for clients but in giving them a fishrod and teaching them how to get this fish). Prior to initiating a strategic litigation case, EPL's legal consultant undertakes a research, collects material and prepares a report on the necessity of initiating a strategic litigation case during the next monthly meeting, dedicated to consideration of strategic litigation cases; or initiates an extraordinary meeting. After the legal consultant's report, a discussion takes place regarding the

necessity of initiating a new strategic litigation case, where all the arguments and counterarguments are analyzed. Thereafter, a voting is held. The decision is taken by the simple majority. However, it might contradict main trends of work set by annual strategic plans of organization's operation that were respectively approved by the Organization's Board and General meeting of organization. Apart from this, progress of all strategic litigation cases is under control of the Organization's Board, which must review and approve the report about organization's operation every four months.

Some organizations use verification procedure prior to initiating any strategic case in order to make sure that organization's resources will be used properly. For instance, Strategic Litigation Programme of the Helsinki Foundation for Human Rights in Poland uses «the specially appointed Advisory Board, whose function is to select cases which might contribute to the human rights protection»[23].

Commonly, organizations are guided by the elaborated criteria that the strategic litigation case should correspond to. This facilitates the decision-making process within organization and allows avoid conflicts between lawyers and clients, as well as between lawyers themselves regarding ineffective use of resources. This also contributes to democratic nature and openness of organization, narrows the subjective factor when choosing a strategic litigation case, and allows avoid compromises of organization's goals for the good of goals of a separate client.

If organization provides its legal services for free, there is always a risk of clients' abuse. Thus, availability of criteria for choosing a strategic litigation case, which the organization will litigate, are important for eliminating such risk. It is especially true for organizations oriented towards a long-lasting and strategic result (the changed policy, practice, or the important received precedents,

[23] Program Spraw Precedensowych, piątek, 02 grudnia 2011 07:50, http://www.hfhrpol.waw.pl/precedens/media-o-nas/about-us.html

etc.), instead of a short-term or individual one. Organizations that are oriented towards public changes should have a more clear and restricted list of strategic litigation criteria to achieve this or that strategic goal, and should strictly adhere to this list. In view of this, the lawyers should learn to say «no» to clients. Yet, this «no» does not imply a refusal to provide assistance. It means that legal consultant should provide legal assistance to the client in a way so as to channel settlement of the problem in the right direction and teach him/her to settle their problem independently, instead of solving it for them. Under proper supervision of a legal consultant, the client can solve it independently and learn to catch fish with a fishrod given by the public interest lawyer. This saves organization's resources for litigating strategic cases and simultaneously allows provision of legal assistance to all the clients addressing the organization.

2. Setting goals of strategic litigation

Goals of strategic litigation depend directly on the grounds of its selection, i.e. on the public life problems which it aims to settle.

We shall remind that CSIs can independently decide on the spheres (problems) of environmental protection and protection of environmental rights which require essential changes. This is also the case of independent choice of litigation tactics. Thus, organization may choose one of the facts of illegal change of borders of a certain nature and reserve fund object to launch litigation in order to stop such systematic violations in the future. Or, with consideration of clients' applications, or the fact of violation of legislation or citizens' rights, it may initiate a case to settle it judicially. This may bear a positive or even strategic influence on the analogous objects or legal relations, or may change administration of the law or operation of certain state bodies.

As mentioned in Section I, strategic litigation differs in a way from ordinary court case, since it particularly includes goals of such a case. Goals of strategic litigation are as follows:

• **Receiving a court ruling of a precedent nature**[24] or the one that could be used by the public or lawyers when dealing with similar cases. For instance, a positive court judgment on abolishing air pollution permits at the lawsuit of the public, which will confirm the right of the public to litigate such permission, might be used by the interested public when filing analogous petitions as an «example» of a positive court practice.

• **Upholding the principle of the rule of law.** Principle of the rule of law stipulates supremacy of law and benefit of human rights in the society. Inter alia, it consists of the principle of respect for human rights and freedoms, supremacy of constitution, legitimacy, restriction of discretionary powers, pro rata principle between the set goal, as well as methods and means of its achievement. Legislative interpretation of this principle is provided in article 8, part 1 of the Code of Administrative Proceedings of Ukraine, where it is indicated that **a person, his/her rights and freedoms are admitted to be the highest value and determine the content and orientation of country's activity**. Petition to the court to appeal against the decision of any state body to construct environmentally dangerous object in the highly populated area could aim at establishing the rule of law, since the challenged decision will apparently be more harmful for people and their health than economically beneficial.

• **Legal education.** Filing lawsuits in court regarding protection of environment or citizens' environmental rights quite often requires constant explanations on the part of the court and other trial participants about the basics of environmental legislation and international treaties ratified by Ukraine, since such cases are infrequent on judges' daily cause list. Provided that there is a correct information support of strategic litigation and a number of the public are involved as trial participants, a wide range of the community will be informed and taught about environmental legislation, and will be encouraged to appeal to a court to protect their environmental

[24] See Appendix 1 for a more detailed study of the role of precedent in the legal system of Ukraine.

rights. Quite often, even lost litigation may be an impetus for initiating a more successful litigation by the public in the future. The judges will also be more informed on such category of lawsuits and legislation.

• **Recording violation of the rights.** Litigation, regardless of its success, may aim to fix or disclose facts of violation of the rights of people with a view to further change the policy or legislation in a certain field . For instance, an appeal form one or several plaintiffs residing in the sanitary protection zone of a harmful enterprise, which entails violation of the right to life and health-friendly environment, might not end in resettlement of a plaintiff(s) or other changes. Though, such a lawsuit(s) filed in different regions by different plaintiffs will raise a topic of violation of rights of citizens, residing in the sanitary protection zones across Ukraine, to life and healthy environment. As a result, such lawsuits may cause even more systemic changes of legislation or practice, and enhance familiarity of the public with such problem.

• **Government responsibility.** Strategic litigation may also promote government responsibility for violation of citizens' rights or non-adherence to legislation in the part of environment protection, since there is an official behind each decision, action or inactivity of a certain state body, who must bear responsibility for his/her illegal actions. An important task that a plaintiff may pose to the court could be the issue of holding accountable an official who is guilty of violating plaintiff's rights or inflicting environmental harm, etc. Such a lawsuit will be a warning to officials and will then restrain them from further unlawful actions.

• **Changing or forming public opinion. Enhancing and inspiring population to protect environment and assert their rights.** Such aim may also justify recourse to the court. It is because the established public opinion may essentially influence the authority and policy conducted by this authority, and can also be an impetus for changing legislation, practice or standing, etc.

As a rule, nowadays the public does not trust the judiciary. It unwillingly files lawsuits in court and does not rely on the court to solve environmental problems. Positive court judgments, taken by the judges even contrary to political will or standing of state bodies, may restore trust in the judiciary. Positive experience of recourse against this or that decision may be an example to the public and inspire it to use courts to protect the environment.

- **Receiving evidence.** Sometimes, as mentioned above, a problem may arise with receiving evidence, documents, decisions, researches, or results of analysis that cannot be received in an ordinary way. Then, a litigation may be initiated, which will allow receiving such documents or information through court action. Such goal is not a strategic one, however, it is a first stage in implementing a strategic litigation and constitues its important component.

3. A plaintiff and defendant in strategic litigation. Peculiarities of selecting them

a) a plaintiff in strategic litigation

Who can be a plaintiff in strategic litigation case of protecting environmental rights and the environment? First of all, this could be a client who addressed you or your organization requesting legal assistance. A plaintiff could also be recommended by another CSI, legal assistance center, or a legal clinic. You can get to hear about him/her from mass media or during events with local population. However, not every client can be a plaintiff in strategic litigation. Selection of a plaintiff is influenced by:

Personality traits

Quite often the result of litigation significantly depends on client's persistence, initiative, and interpersonal skills. The client should possess certain leadership and public speaking skills, as well as the ability to clearly state his/her standing and be able to persuade people, including judges. Client's psychological health, his/her ability to endure possible harassment, intimidation or criticism is also of

importance. The cases where there were active and fearless clients who possessed leadership skills and were deeply environmentally motivated were the most successful strategic litigation cases.

Personal circumstances

It is important that a client has enough of free time to be dedicated to strategic litigation. Family circumstances of a plaintiff, his/her workplace and support of a local community, etc. should also be taken into account.

Education

Plaintiff's level and quality of education, understanding of a lawsuit and core of environmental problem, knowledge of chemistry, physics, hydrobiology, zoology, biology and other scientific branches, as well as understanding of production technology may be of help in the course of litigation.

CSI's institutional capacity

CSI may also be a plaintiff in case the respective rights allowing it to go to court to protect environment or rights of other persons are enshrined in its statute, and in case it possesses the necessary resources. Procedural legislation (article 6 of CALPU[25], article 3 of CPCU[26], and article 1 of ComPCU [27]) requires confirmation of violated (unrecognized or disputed) rights, freedoms and interests of a plaintiff. Thus, CSI should make it clear whether it can prove violation of its rights and interests. CSI's rights as a plaintiff include the one enshrined in environmental laws of Ukraine, e.g. in article 21 of the Law of Ukraine «On Environmental Protection»[28], and

[25] Administrative Proceedings Code of Ukraine. — Information of the Verkhovna Rada of Ukraine (VVR), 2005, No 35–36, No 37, p. 446.

[26] Civil Procedure Code of Ukraine. — Information of the Verkhovna Rada of Ukraine (VVR), 2004, No 40–41, 42, p. 492

[27] Economic Procedure Code of Ukraine. — Information of the Verkhovna Rada of Ukraine (VVR), 1992, No 6, p. 56

[28] Law of Ukraine «On Environmental Protection» of 25.06.1991 No 1264-XII. — Information of the Verkhovna Rada of Ukraine (VVR), 1991, No 41, p. 546.

article 13 of the Law of Ukraine «On Nature and Reserve Fund of Ukraine»[29]. CSI may initiate strategic litigation to protect its rights.

In regard to violation of interests, CALPU and CPCU stipulate the right to judicial protection of interests of a person, which may not be clearly stipulated by the law and, thus, significantly broaden the notion of plaintiff's interests. Interests of organization, which may require judicial protection, include (depending on a lawsuit): interests to preserve the environment and nature and reserve fund, as well as protection of objects listed in the Red Book of Ukraine.

In case rights, freedoms or interests of CSI were not violated by the challenged decision of a defendant, then one may refer to provisions of part 3 of article 9 of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), which was ratified by Ukraine[30] and is a part of national legislation. In line with the mentioned provision, the public, including NGOs, are entitled to go to court to contest activity or inactivity of private persons and state bodies who violate provisions of the national legislation on environment. If so, the fact of violation of plaintiff's rights is not required.

Example

In the Resolution of the Supreme Court of Ukraine of 29/05/2012 in the case at the lawsuit of EPL against the Cabinet of Ministers of Ukraine to challenge the Resolution of the Cabinet of Ministers

[29] Law of Ukraine «On Nature and Reserve Fund of Ukraine» of 16.06.1992 No 2456-XII. — Information of the Verkhovna Rada of Ukraine (VVR), 1992, No 34, p. 502.

[30] Convention ratified by the Law of Ukraine «On Ratification of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters» of 06.07.99 No 832-XIV. — Information of the Verkhovna Rada of Ukraine (VVR), 1999, No 34, p. 296.

of Ukraine «On Providing Land Plots for Permanent Use», the court has ruled: «Considering national social significance of the nature and reserve fund, the disputed legal relations are public, and, thus, an unlimited number of persons has the right to appeal to court to challenge the disputed decision». The challenged resolution pertained to providing 27 hectares of the nature and reserve fund land for permanent use by the National Nuclear Energy Generating Company Energoatom for the needs of Tashlyk PSP.

The authors pay attention to the possibility of a group of persons or several organizations to file a lawsuit. The increasing number of plaintiffs may positively influence progress of the procedure (by making abundantly clear the importance of subject of an action and guaranteeing continuation of a lawsuit in case some of the plaintiffs are being intimidated or withdraw their action) or, on the contrary, contribute to the protraction of a case.

b) a defendant in strategic litigation

Selection of a **defendant** should also be taken seriously, since the result of strategic litigation, its progress and court judgment may depend on it. Selection of a defendant depends on who exactly has violated the rights of your client or your organization; which body is responsible for ensuring adherence to these or those rights; securing environmental safety; or legal order, etc. Certain groups of defendants have their peculiarities that should be considered when initiating strategic litigation.

Governmental bodies. Their in-house lawyers usually are not that high level professionals as lawyers defending business structures and they infrequently defend their position reasonably from the viewpoint of legislation and the facts gathered. Apart from this, procedural legislation (e.g. CALPU) provides for a number of peculiarities concerning defendants — public bodies, which may facilitate your gowned war against them (imposing such defendants with an obligation to prove competence of their actions; limiting reimbursement of legal expenses a defendant has incurred, if a plaintiff losses a lawsuit). That is why, from the viewpoint of

adversary nature, you have procedural benefits in a litigation when dealing with administrative disputes.

It is worth mentioning that some governmental bodies have the opportunity of legislative initiative, participate in the process of formation and change of the policy, and have a greater influence on settling different environmental problems. Thus, if strategic litigation aims to change policy on a state level, central state bodies should be the defendants.

Bodies of local government and self-government in the role of defendants are usually represented by in-house lawyers who lack experience in strategic litigation processes on matters of protection of environmental rights and environment. They should be taken as defendants if your strategic litigation process aims to change local environmental policy or use of natural resources, and in case your problem can be solved at the local level. Such process may reveal an efficient way of solving similar problems in other regions of the country, or the possibility of using new tactics when litigating similar processes.

As a defendant ***business*** could pose a serious obstacle to positive settlement of your strategic litigation case. Their representatives in the court are professional and experienced lawyers, usually trying to provide as many evidence as possible, dragging out the trial and hindering consideration of your case by different means: judge disqualification; arguing expiration of the statute of limitations; etc. They are also trying to exert moral pressure on judges and plaintiffs arguing impossibility of positive settlement of your case; accusing plaintiffs of undermining energy security of the country; non-statehood thinking of CSI representatives; lack of deep expert knowledge of technological production process, which undermines trust in the judiciary; threatening and demanding refund of material harm and loss of profits; and exaggerating company's environmentally-friendly measures. Such defendants may bear financial risks for plaintiffs since they will not lose an opportunity to

demand reimbursement of their expenses, in case you lose, or may file a claim in return or a separate claim against your organization or your client. Business can involve significant funds and human resources, invite an expert or ensure an expert report to oppose your arguments. On the other side, a defendant company that cares about its market image is more vulnerable to action against it. Such vulnerability may be used to conclude amicable agreement to solve the problem.

Example

EPL filed a lawsuit to court against environmental permit of the French «Lafarge» company, a global leader in cement production that owned cement plant in the town of Mykolaiv, Lviv region. State Department of Ecology and Environmental Resources was a defendant, while the company was a third party and acted for the defendant. Having provided numerous evidence, a plaintiff proved violation of environmental legislation when issuing environmental permit for the cement plant. The company sent statement of obligation to the court and agreed to all the arguments provided in the plaintiff's statement of claim, committed itself to launch the procedure for receiving a new permission with consideration of remarks and complaints of a plaintiff, including those on reducing emissions of certain pollutants. As a result, the court concluded amicable agreement between the parties.

Individuals seldom become defendants in strategic litigation.

4. Selecting a court that will conduct strategic litigation

To secure success of strategic litigation in the court, jurisdiction should be carefully scrutinized. Particularly, depending on the parties and core of the subject, you can choose between economic,

civil and administrative legal proceedings. Sometimes you may choose a region, city or oblast where a case will be heard. Though, not all categories of cases allow this.

As mentioned earlier, strategic litigation may unite several judicial processes. That is why you may work in the courts of different jurisdiction in the framework of one strategic litigation case. For instance, if you have a problem you want to be settled through strategic litigation (e.g. withdrawal of confidentiality from the provisions of product sharing agreement that was concluded between the government and investor), then, when planning litigation, you can decide which parties you will have and what is the subject of the dispute. This will allow you choose «the necessary court» that will conduct a trial.

The following factors depend on the choice of the court:

- disposition time (sometimes economic courts investigate legal proceedings quicker than other courts);
- litigation costs (court fees for administrative claims are significantly lower than that for commercial)[31];
- burden of proof (in administrative procedure burden of proof lies with the defendant — the public body (article 71 of CALPU), while in CPCU and ComPCU each party should prove the circumstances it refers to as the grounds for its demands and objections;
- limitation of action rules (in administrative procedure limitation of action period is six months, while in civil and commercial — three years);
- requirements for the right to access to justice (the necessity of proving the fact of violation of defendant's rights or interests, the possibility of third party proceedings, or multi-party action, etc.);
- plaintiff's risks, including financial (articles 85 and 88 of CPCU stipulates refund of legal expenses, the defendant has suffered, in case of a loss. Article 49 of ComPCU also stipulates a refund to the

[31] For grounds for exemption from court fees see the fourth section of the handbook.

defendant, while article 43–10 provides for compensation of harm inflicted as a result of preventive measures);
- court location (affects not only the amount of travel expenses but also the attitude of judges to the environmental problem, which is the subject of the dispute);
- «mood», awareness and preconception of judges about the subject of dispute;
- previous judicial practice in environmental litigation;
- political and social factors (corruption, physical intimidation or responsible authority, etc.)

5. Importance of stable legal support of a case by a dedicated lawyer or institutionally stable CSI

Strategic litigation may last for years. In view of this, it is important to have a reliable plaintiff and institutionally stable CSI, legal consultants of which are ready to represent interests of a client or organization no matter how longstanding the litigation is. Despite of being reasonably skillful, educated and possessing litigation experience, plaintiff's representative in litigation should have deep internal motivation and should be «consumed with» the case in order not to leave such burden on halfway. Love to people and environment, devotion to environmental matters, a warm heart and icy intelligence are the guarantee of lawyer's reliability in strategic litigation case of protecting environment and environmental rights. Behind the back of such a lawyer there should be institutionally stable organization which possesses all the necessary resources to conduct a long-lasting litigation, and which, if necessary, can protect its lawyer and provide him/her with assistance in case of pressure on the part of a plaintiff.

Chapter III: Specific features of strategic litigation

1. Case strategy and tactics

a) evidence

It is self-explanatory how important evidence is for a successful case. Yet, due to lack of sufficient and cogent evidence many potential plaintiffs remain potential and cannot protect their environmental rights. For instance, owing to complicated procedure for obtaining evidence as to existing water, air and noise pollution, establishing causal relationships between health deterioration and

environmental pollution, citizens are unable to protect their rights efficiently and put an end to environmental pollution.

Evidence depends on the nature of dispute: some strategic cases require plenty of serious evidence while the others have a limited number of evidence. Inaction cases may be less complicated from the standpoint of evidence as compared to cases on illegal activity or harm infliction.

One of the primary pieces of evidence which may prove the position of a plaintiff in a case are official letters, documents, decisions of governmental bodies. Such evidence may be legally obtained by making a request for information or via access to such documents on websites of respective governmental bodies. Whether such evidence is received depends greatly on the questions being formulated clearly and correctly. When obtaining evidence this way it is important to remember that a period of six months is established for taking legal action at administrative court for protection of rights, freedoms and interests of a person, which unless otherwise specified, is calculated from the day a person found out or was supposed to find out about infringement of one's rights, freedoms and interests. Thus, it is necessary to estimate one's time and manage to file a motion within six-month period established in Art. 99 of the Code of Administrative Legal Proceedings of Ukraine.

Important evidence in cases pertaining to environmental pollution are water, air, soil and food test results. Such tests are conducted both by state-run and private laboratories which render their services for a fee. A problem may arise when obtaining test results from state-run laboratories with the reluctance of governmental bodies to disclose information on environmental pollution levels or provision of biased data as to environmental pollution levels which may be explained by the specific procedure of measurements or sampling conducted by state-run laboratories (warning of those polluting the environment, sampling with consent of the owner of object or landowner). Moreover, state-run laboratories sometimes

cannot test certain pollutants (for instance, dioxins). In such case it is possible to address private laboratories, provided that they have the right (respective official certificates) to run these or that tests.

Quite often there is a necessity to involve an expert in a case, therefore, a lawyer should find such an expert in advance for the former to answer questions which may arise in court as to the subject of claim. An environmental forensic expert evaluation[32] may be necessary for giving expert opinion in complicated cases pertaining to environmental pollution among others. Forensic evaluations are conducted by various state-run specialized institutions (for instance, Forensic Research Institutes of the Ministry of Justice of Ukraine) as well as forensic experts who are not employed by the above mentioned institutions. Yet, the plaintiff who files a motion for such evaluation must pay for it and preparation of the report significantly delays court proceedings. In addition, those filing motions for forensic evaluations cannot be sure of their results beforehand.

Environmental pollution data may be obtained not only from laboratories but also from other sources to be later presented to the court if official and objective data is impossible to get. For instance, such data may be obtained from statistical records, dissertations,

[32] Environmental forensic report in criminal, civil, commercial and administrative litigation may be commissioned as a procedural measure which lies in conducting a research by environmental forensic specialist on the basis of special knowledge in the field of environmental disciplines and some applied disciplines with the purpose of giving an opinion which is evidence in case pertaining to environmental safety breach. An environmental forensic report lies in research commissioned by investigating officer (court) to a specialist — environmental forensic expert — on the basis of material objects (physical evidence) as well as different documents (including investigation reports) provided in order to establish factual evidence in the case pertaining environmental safety breach. On the basis of research conducted an expert gives their opinion which is one of the sources of evidence according to the law and the factual data contained in it is considered evidence. (L. H. Bordiuhov. The Notion and Procedural Nature of Environmental Forensic Report / L. H. Bordiuhov // Law Forum. — 2009. — No. 1. — P. 70–77 [Electronic source]. — Available at: http://www.nbuv.gov.ua/e-journals/FP/2009-1/09blgcee.pdf)

scientific articles on pollution levels for analogous objects located in other regions, data on pollution levels for analogous objects situated abroad. Expert opinions of local or foreign experts can also be used; experts may be called to testify.

The biggest problems may arise when obtaining objective evidence as to actual morbidity rate at a certain territory, especially where morbidity rate is higher than the average rate for the area or region and indicate an increase of certain groups and types of illnesses. Obtaining evidence as to relation between the disease and functioning of certain harmful elements is even more complicated. As mentioned before, we may use data and research of scientists, international organizations, medical centres or universities, including world-famous, as to connection between certain diseases and pollution resulting from specific types of activities or specific substances. Numerous data and research of this kind are available on websites of World Health Organization (www.who.org) and US Environmental Protection Agency (www.epa.gov). Libraries can provide us with national literature on the impact of chemical substances on humans and human health. It is recommended, whenever necessary, to present the court with evidence created with the use of modern programmes (Google maps, https://www.google.com/maps/preview), equipment (GPS), photos and videos. At the same time, it is important to remember that data, certificates, tests maybe complicated for understanding so it is advisable to introduce information in a comprehensible way, present it to the judges with visualized explanations. We should be careful as to evidence presented to substantiate our position: the less complicated, the more visualized and precise it is, the more chances you have to be heard. It is important to learn to speak briefly and in a simple way about complicated things. For instance, a confirmation of water pollution with chemicals may be a glass of water in question brought to court hearing accompanied with a brief scientific yet understandable explanation.

A plaintiff in administrative procedure may seek help in provision of Art. 71 of the Code of Administrative Legal Proceedings of Ukraine which reserves the duty of substantiation in administrative cases on unlawful decision, act or inaction of governmental body for the defendant — government body — if the latter disputes an administrative lawsuit. Moreover, the court may assist a plaintiff in collecting evidence and obtaining it on demand. Yet, we should not rely either on this norm or the initiative of the court in strategic litigation. As a matter of actual practice the court and the defendant are not so full of initiative and very often neglect this norm, thus the plaintiff should be ready to prove the unlawfulness of defendant's position on their own.

Your opponent may also present the court with counter evidence, for instance, test results on absence of pollution, harm or lack of value of a territory. Consequently, a plaintiff should be ready for this and should try to undermine the trust of court towards such evidence and the persons who prepared it. For instance, when official or unofficial information on financing of such research by companies polluting the environment is given or when foreign certificates or research results are presented to the court in Ukrainian translation, it is helpful to find mistakes in such research and stress impartiality of those who conducted it.

Circuit court meetings, which a plaintiff(s) may petition for, can be very beneficial for a judge's understanding of the essence of complicated disputes on environmental protection and environmental rights. Such meetings may be organized in village councils, schools or other places enabling you to show the judges your reasons for seeking court action and helping to create their own vision and empathy towards plaintiffs and/or problem. If judges refuse to come to the site, it may be useful to provide the court with photos and videos, other visual materials which may illustrate pollution, physical damage, environmental and health harm: pictures of children without teeth and hair which fell out because of polluted water they had consumed (Sosnivka case),

pictures of dead animals, a bottle with polluted water taken from the barn where water from hydraulic fracturing is stored.

Example

In EPL case on the motion of citizens of the city of Mykolayiv against city council and Energoatom NAEK (National Nuclear Energy Generating Company of Ukraine) local court of general jurisdiction had a circuit meeting at Pivdenno-Ukrayinska Nuclear Power Plant, where land documentation was examined together with areas of Southern Buh river used by NAEK to create a reservoir. The decision in case was made in favour of the plaintiffs.

The plaintiffs also have the right to ask the court to provide evidence. **The following may be used as means to ensure evidence: questioning of a witness, commissioning a forensic evaluation, subpoena and examination of written and material evidence at its location. The court may resort to other actions aimed at recording information about facts of a future or already existing case.**

EPL practice shows that the most important role in collecting evidence is played by active clients who serve as guarantee for the success of their case. The clients themselves, who know all the aspects of the problem, are familiar with local authorities, specific features of the area, who communicate with employees on harmful and environmentally hazardous objects, must take an active part in the process and assist legal counsels in collecting evidence, inform of the changes in situation, record violations of their rights and environmental pollution. There are cases when other CSIs dealing with environmental protection approach EPL with environmental problems they wish to resolve by means of law, including strategic litigation. Such organizations approach EPL with an already solid

base of evidence which significantly simplifies the work of the organization and increases the chances for a successful settlement of a strategic case.

b) legal argumentation

Apart from the usual elements of a petition and other procedural documents, lawyers in a strategic case may resort to various «untraditional» remedies. Requirements for the court should be formulated in such a way that a positive decision not only has an individual impact but a further strategic result. (For instance, the duty of a defendant to build a water pipe which will supply fresh water to more than one individual plaintiff). Obviously, requirements of procedural law as to court competence must be taken into account. But we must look for an opportunity to use procedural law to expand this competence. (For instance, petition for a decision which will allow preventing harm or violation of rights in future).

It is usual for Ukraine to have defendants who do not execute, improperly execute or pretend to execute court decisions which is why a court decision on control over its enforcement may be beneficial.

Example

In the case of EPL vs Ministry of Ecology as to the duty to publish results of state environmental evaluations on the website of the Ministry of Ecology, the court passed a decision compelling the Ministry of Ecology to publish 1,293 conclusions of state environmental evaluation on their website as well as submit a report to the court on performance of this decision. It was during the stage of judicial control over enforcement of the decision that the local court established incomplete enforcement (publication of title pages of reports only) and made the defendant to place

full-text versions of all reports on their website within three months.

Today public interest lawyers and rights advocating CSIs cannot work in isolation to the rest of the world, thus when working on strategy and arguments for a strategic case they must take into account and use the decisions not only of national courts, but also of international courts and organizations.

The use of local court decisions

National procedural laws expressly establish the authority national court decisions have for courts in other cases.

Thus, procedural laws establish the right to be exempt from substantiating the facts which were already examined by the court and recorded in relevant procedural court documents (decisions). This rule may help you if you have a court decision confirming the facts you are referring to. Thus, before the proceedings begin, you should carefully review the existing and available base of court decisions which may record the facts important to your strategic case.

Despite the fact that a precedent is not a source of law in Ukraine, positive decisions of national judges may help judges «decide» on your case or convince them that the plaintiff is eligible for seeking court action. For instance, if a CSI acts as a plaintiff who disputes decisions, acts or inaction which do not violate the rights and interests of such organization, decision on the merits of the case may convince the judge to admit the case for consideration on merits and not to refuse the right to seek court action for protection of environmental rights. Even though procedural laws do not give a legal status to such court decisions, in practice submission of such decisions may give courage and understanding of environmental problems and environmental rights protection to the judges.

Apart from that, procedural laws assign mandatory character to legal views established in the decisions of the Constitutional Court of Ukraine, Supreme Court of Ukraine and decisions of European Court of Human Rights. Thus, it may be beneficial to support one's own legal position with extracts from the decisions of such courts.

The use of international standards

In case of complicated disputes connected with environmental pollution or harm to human health, it may beneficial to use or refer to international environmental quality standards, permissible environmental pollution level or human health effect levels. Knowledge of English will help a lawyer consult or analyze such databases of international standards as to correspondence of national standards or emissions of specific equipment to these standards. These include World Health Organization air quality indices, European Commission air quality standards, and best available technologies (BAT) for certain industrial objects and types of activities prepared by the European Commission for Implementation of Directive 2010/75/EC on industrial emissions, World Health Organization drinking-water quality guidelines, recommended United States Environmental Protection Agency water quality criteria, Agency for Toxic Substances and Diseases toxicological description of toxic elements and World Bank/IFC guidelines on environment, health and safety, noise exposure standards and their impact upon people and many others.

In context of European integration aspirations of Ukraine, reference to European Union standards which are to be implemented in the nearest future may become a decisive argument. Reference to international standards during court proceedings is possible not only in the sphere of ecology but also in the sphere of human rights protection and justice quality. Thus, in their petitions and other procedural documents lawyers may refer to and demand application of international agreement norms, recommendation norms and practices of international organizations in the field of

human rights. Such documents include International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolutions which have recommendatory character and other documents. For more information on the sources of such databases see Section IV.

The use of international court decisions

Enforcement of judgments of the European Court of Human Rights is compulsory in Ukraine. European Court practices are a source of law in Ukraine. In order for the public and lawyers to have access to court practices a relevant law[33] compels governmental bodies to arrange sharing of all judgments against Ukraine among lawyers and public. For the purposes of reference to court judgments and decisions official translations of the judgments published in *Official Bulletin of Ukraine* must be used.

Despite the fact that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain articles which affirm environmental rights of citizens, the European Court of Human Rights has already considered many «environmental» cases[34]. Such cases are based on violation of Art. 2 (right to life), Art. 6 (right to a fair trial), Art. 8 (right to a private and family life) of the Convention, Art. 10 (right to freedom of expression), Art. 1 of Protocol 1 to the Convention.

Reference to court decisions in cases where Ukraine was the defendant as well as cases with participation of other countries may

[33] Law of Ukraine «On Enforcement of Judgments and Implementation of the European Court for Human Rights Practices» No. 3477-IV dated February 23, 2006.

[34] For example: Dubetska and others vs Ukraine (http://zakon4.rada.gov.ua/laws/show/974_689), Hrimkovska vs Ukraine (http://zakon4.rada.gov.ua/laws/show/974_729), Fadeeva vs Russia(http://europeancourt.ru/resheniya-evropejskogo-suda-na-russkom-yazyke/fadeeva-protiv-rossii-postanovlenie-evropejskogo-suda/), Budaeva vs Russia (http://search.ligazakon.ua/l_doc2.nsf/link1/SO4649.html), Guerra vs Italy(http://europeancourt.ru/uploads/ECHR_Guerra_and_Others_v_Italy_19_02_1998.pdf), Lopes Ostra vs Spain (http://zakon4.rada.gov.ua/laws/show/980_348) and others.

become a useful and necessary element of your legal position in strategic case. The Supreme Court of Ukraine also urges the courts of lower jurisdictions to refer to judgments of the European Court of Human Rights in the resolutions to their decisions more often[35].

It is becoming popular among eco-communities to appeal to quasi court bodies (such as compliance committees) which are set up within the framework of international environmental conventions and are designed to help countries implement provisions of these agreements. Reference to conclusions of these bodies is also of use and may impact the outcome of your litigation, especially if such conclusions establish that Ukraine has violated provisions of conventions it is a party to.

Example

EPL in litigation concerning state environmental report on Danube-Black Sea Navigation Channel construction design across Danube Biosphere Reserve referred to the decision of On-Request Committee set up within the Convention on Environmental Impact Assessment in a Transboundary Context which established the possibility of significant potential transboundary environmental impact when constructing Danube-Black Sea Navigation Channel across Bystre Mouth.

Further appeal of the decision in court

a) in higher courts of Ukraine

Every lawyer knows how to use the right to appeal unlawful and unjustified court decisions in courts of higher jurisdiction. Frequent petitions filed with trial courts result in negative court decisions which is quite predictable. Yet, lawyers place higher hopes on

[35] Decree of the Plenum of Higher Administrative Court of Ukraine No. 7 dated May 20, 2013 «On Court Decision in Administrative Case»

hearing their cases in appellate and cassation courts, the Supreme Court of Ukraine. When developing a strategy for strategic case it is necessary to foresee a high probability of further dispute of trial or appellate court decisions. Besides, the higher jurisdiction of the court which passed a positive decision in case, the more important this decision is for the defendant and the society and the easier it is to initiate enforcement of such a decision.

b) in international courts and bodies

European Court of Human Rights

The strategy for holding a strategic case may be developed in such a way as to have a judgment of the European Court of Human Rights (ECHR) as the final outcome of your case or as to foresee such a possibility should Ukrainian courts pass unlawful decisions. Sometimes the European Court of Human Rights is the only institution which may restore justice and the violated right.

Appealing to the European Court of Human Rights and receiving a positive decision may be the objective of your strategic case since the competence of such court foresees obligation of a country to take general steps aimed at resolving complicated systemic problems in public administration. In order to restore the violated right of the plaintiff, along with individual measures the ECHR may adjudge general measures. General measures are those aimed at eliminating the systemic problem and its underlying cause indicated in the judgment, namely:

a) amending effective laws and their implementation practices;

b) amending administrative practices;

c) ensuring legal review of draft laws;

d) ensuring professional training and study of the Convention and court practice by prosecutors, lawyers, law enforcement professionals, migration service officers, other categories of employees whose

professional activities are related to implementation of law and keeping people in incarceration;

e) other measures established by defendant government to ensure elimination of systemic faults and termination of Convention violations caused by them as well as ensuring maximum reimbursements for these violations.

Owing to such broad competence the ECHR may assist in achieving strategic goals in your case and not just restore individual justice. It is important that the court can take statements from any person, CSI or group of persons who consider themselves wronged by violation of the rights established in the Convention and protocols to it by one of the member-states of the Convention.

If a group of persons wishes to file a motion with the court following the procedure established in Art. 34 of the Convention, then they need to comply with the requirements relating to the notion of «group». The Convention has no instructions as to such criteria, yet court practice indicates that it cannot be any group of persons. Existence of a group is connected with identical and simultaneous violation of the rights of persons making up the group. It cannot be a group created due to or after violation of rights under various circumstances and at different time, even if such violations appear to be identical. Court practice shows that on one occasion spouses were deemed as group, on the other occasion those where members of CSI who filed motions on their own behalf and participants of a demonstration (within terms of Art. 11 of the Convention — participants in peaceful demonstrations). Sometimes such a group can have numerous members[36].

If members of a CSI wish to file a motion with the ECHR they need to conform to the requirements and criteria established for such an

[36] M. V. Buromenskyi. Appealing to the European Court of Human Rights: Court Practice and the Specific Features of Ukrainian Legislation. Kharkiv Human Rights Protection Group, 2000.

organization. Even though Art. 34 of the Convention does not set out such criteria, we should follow the types and forms of «associations» (unions of citizens pursuant to terminology of Ukrainian laws) pursuant to Art. 11 of the Convention (CSI, political parties, trade unions, associations of entrepreneurs).

It is important to remember that it is possible to take a legal action with the ECHR only within 6 months from the effective date of final decision (for Ukraine these are decisions of higher courts). Moreover, such motions may be filed only after you have exhausted all effective national remedies (court motions, as a rule). Extrajudicial bodies (executive bodies, bodies of local self-government, prosecutor offices, Commissioner for Human Rights) are not considered to be the bodies appealing to which is necessary for exhaustion of national remedies.

It is also important to be aware that when there are no national remedies or they are ineffective, i. e. unable to ensure definitive protection of violated rights, you can appeal to the European Court of Human Rights without resorting to them. In this case 6-month period starts from the moment you have learnt about the decision or action violating your right. Thus, there is no need to seek action with national court if your right guaranteed by the Convention is violated by the law which you cannot appeal in court. You can also appeal to the European Court of Human Rights if national courts significantly delay decision in your case, without waiting for such a decision[37].

In Ukraine the ECHR judgments serve as ground for review of the decisions of cassation courts by the Supreme Court of Ukraine. This legal opportunity is foreseen by all procedure codes. Moreover, Clause 3 Art. 10 of the Law of Ukraine «On Enforcement of the Decisions and Implementation of the European Court of Human

[37] http://www.fair.org.ua/content/library_doc/4._European_Court_of_Human_Rights_2011_FINAL_.pdf

Rights Practices»[38] expressly foresees an opportunity for review of the case, including resuming of proceedings in case; review of the case by administrative body.

One of the problems which may arise when appealing to the ECHR is the duration of case hearing. Due to significant workload, case hearing may commence only in a year's time from the date a petition was filed and the judgment can be passed in several years. The ECHR may deem some petitions as urgent and consider them in order of preference, for instance when life or health of the plaintiff are at risk[39]. It is also worth mentioning that enforcement of the ECHR judgments in Ukraine as well as implementation of individual and general measures is unfortunately not exemplary — there are often delays or failures to enforce them. Yet, these difficulties should not hinder filing a petition with the ECHR since a positive decision obtained from the ECHR may be important in future when settling various disputes by national courts and the European Court of Human Rights itself.

UN compliance committees

It is becoming popular among lawyers and general activists to appeal to compliance committees which are set up and function under the authority of various international environmental protection conventions and protocols. Such committees are becoming increasingly open and accessible to the public seeking any kind of influence and pressure to be exerted upon its country because of violations of the provisions of international environmental agreements, proper government, democracy etc. Appeal to such bodies is free of charge, attorney is not mandatory and the knowledge of English is usually not required when filing a motion with such a committee. Increasingly simplified procedures of proceedings

[38] Law of Ukraine «On Enforcement of the Judgments and Implementation of the European Court for Human Rights Practices» No. 3477-IV dated February 23, 2006. — The Official Bulletin of Verkhovna Rada of Ukraine (VRU), 2006, N 30, p. 260.

[39] http://www.echr.coe.int/Documents/Questions_Answers_UKR.pdf

initiation enable the public to seek justice on international level. The drawback of such committees is their extrajudicial and consultative nature which results in difficulties when trying to implement their decisions.

Thus, if there are violations of the provisions of convention or protocol in actions of government authorities, natural persons or legal entities, you may appeal to compliance committee (or other body) if such was created within the framework of the international agreement in question. Such bodies exist within the framework of the following international agreements:

1. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Issues (Aarhus Convention) — Compliance committee.
2. Protocol on Pollutant Release and Transfer Registers to Aarhus Convention (PRTR protocol) — Compliance committee.
3. Convention on Environmental Impact Assessment in a Transboundary Context (Espoo convention) — Implementation committee.
4. Convention on the Protection and Use of Transboundary Watercourses and International Lakes — Implementation committee.
5. Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes — Compliance committee.
6. Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention) — Standing committee.
7. Convention on International Trade in Endangered Species of Wild Fauna and Flora — Standing committee.
8. Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal — Compliance committee.
9. Cartagena Protocol on Biosafety to the Convention on Biological Diversity — Compliance committee.

10. Montreal Protocol on Substances that Deplete the Ozone Layer — Implementation committee.

11. Kyoto Protocol to the United Nations Framework Convention on Climate Change — Compliance committee.

12. Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention) — Standing committee and others.

Specific measures to be applied by a committee depend on its competence. Some committees may offer and provide financial or technical assistance in implementation of the provisions of international agreements, the others may demand enforcement and reporting on performance of measures assigned by them, declare a country as offender, give warnings and as measure of last resort suspend rights and benefits of a country within the agreement.

The most important issue is whether citizens or CSIs can initiate case hearings in such committees. There is no uniform approach here and each committee has its own rules and procedures. As of now most committees set up within the framework of regional international agreements (particularly the agreement under the authority of the United Nations Economic Committee for Europe) permit CSIs to initiate proceedings. Global international agreements set up committees which do not offer open access to the public[40].

It must be noted that even though the public has no access to such bodies, it must use other possibilities and convince eligible subjects — their own or other country, secretariat, to file a petition or initiate a case with the committee. It is important that the use of national remedies is not mandatory for appeal to such committees.

[40] Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements, edited by Tullio Treves, Laura Pineschi, Attila Tanzi, Cesare Pitea, Chiara Ragni, Francesca Romanin Jacur, Asser Press, 2009. http://air.unimi.it/bitstream/2434/57918/2/treves_240109.pdf

Example

EPL in the case on construction of Danube-Black Sea Navigation Canal, also appealed to compliance committees of those conventions which were violated by Ukraine by such construction, Espoo Convention Implementation Committee, Aarhus Convention Compliance Committee, Standing Committee of the Bern Convention.

2. Strategy outside the courtroom

a) the role of CSIs

CSIs can play an important role in planning and conducting strategic litigation.

The role of CSIs is confined to the following areas:

- problem identification;
- conducting strategic litigation with participation of public interest lawyers;
- expert assistance of environmental CSIs to environmental and legal CSIs conducting strategic ltigation;
- sharing results.

CSIs may participate in identification of the problem for a strategic case by means of: situational testing, systematization arrangement and channelling of existing sources of petitions, setting up counselling offices, on-site visits or independent collection of complaints and counselling. A strategic case may be conducted by a CSI with engagement of a lawyer through networks of lawyers, organizations, university hospitals or in other ways.

CSIs may play an important role in collection of evidence for strategic litigation by doing analyses and tests; collecting statistical

data, results of examinations and investigations; preparing witnesses and clients. A CSI must also serve as significant support for clients, inspire them and respect their decisions as well as offer protection should they or their family members be harassed. Therefore, it is important for a CSI conducting strategic litigation to engage other CSIs which have necessary experience, opportunities and contacts for obtaining proper evidence in case, as well as those able to provide professional legal support to the lawyer handling the case.

Example

Strategic case against extension of Tashlyk PSP in Mykolayiv Region would not haven been so successful if EPL had not received numerous evidence of environmental laws violations in the process of such extension from the CSI working on this problem — National Ecological Centre of Ukraine, from the CSI of the city of Mykolayiv.

In order to share the results of strategic case a CSI may publish the information in mass media, prepare and share publications, put information into databases and conduct workshops for various audiences.

A positive court decision may not achieve the final aim of a strategic case if it lies in reforms and amendments to laws, thus a CSI initiating further changes on the basis and for enforcement of court decision in a strategic case must resort to various activities and actions, including lobbying, sharing experience and information, participation in working groups and commenting on draft laws, exerting public pressure upon government and lawmakers to initiate legislative changes etc. A CSI must create or strengthen already existing coalition with other CSIs for implementation of court decisions and initiation of further legislative changes or

implementation practices for current norms. This may be the perfect task for Ecolitigation National Platform, for instance.

b) mass media and publicity

For a successful settlement of a strategic case maximum publicity is important, which includes systematic informing of journalists and governmental bodies as to run of such case, interim stages, positions of parties etc. Such publicity will promote responsibility of judges and will help decrease the risk of impartiality or corruption of judges who will be more responsible for their behaviour and decisions. Public pressure and public opinion can also be important criteria for the success of a case. Yet, it is important to remember that publicity can both help and harm your client and the strategic case. Obviously, not all aspects of a strategic case, its tactics and strategy should be disclosed to the public not to give your opponents an advantage and an opportunity to prepare counterarguments. Your openness must not result in unfounded attacks, insults and accusations of the judges, on the contrary, you must be tolerant and demonstrate respect towards justice. Thus, information campaigns during pre-trial stage of information collection, strategy and tactics development are unnecessary. Information campaigns during other stages of a strategic case must be well-thought-out and must become an important component of strategic litigation as such.

Example

In EPL practice every stage of strategic litigation — from filing a petition(s) to receiving a court decision(s) and its (their) enforcement, is accompanied by press releases and news, articles published on the website of organization. Yet, before a petition is filed work on a strategic case is done without any information campaigns.

Important for the public is the publication of positive court decisions which helps to instill faith in justice, show the way to protection of human and environmental rights, gives grounds for demanding changes in the activities of governmental bodies in their regions.

Example

EPL systematically publishes full-text versions of positive court decisions and petitions in the section of «EPL Court Practice» of the «Environment. People.Law» journal, on its web page, its social network pages, in EPL special publications on access to justice, prepares analytical articles for professional legal publications, designs a registry of court decisions pertaining to protection of environmental rights and environmental protection which is available on the Internet etc.

Popularization of positive court decisions may also be conducted through inclusion of such decisions into various court decision databases.

Example

Positive decisions of EPL were submitted to Aarhus Convention Secretariat to be included into the database of court decisions related to implementation of Aarhus Convention. This database is available at: http://www.unece.org/jurisprudenceplatform.html EPL is working on its own database of court decisions in environmental cases available on-line with the possibility of uploading texts of court decisions.

Informing on positive court decisions in environmental disputes may take place among interested people during workshops,

trainings, conferences, TV and radio appearances, giving interviews, exchanging information with members of Ecolitigation National Platform, GUTA (Central and Eastern European Public Interest Lawyers Network) etc. It is particularly important to share information about such decisions among local citizens of the territory where the object of dispute or the defendant are located.

Information battles are as important as court battles, especially if opponents extensively use mass media to support their position, to misinform people, to create a negative image for organization conducting strategic litigation. If a CSI conducting a case lacks resources for systematic engagement with mass media and having media campaigns, they should approach those CSIs which specialize in it or have established contacts with journalists.

It should be noted that social network pages of a CSI can become a convenient means for popularizing information on the run and results of strategic cases as well as help find clients, witnesses, evidence etc. If your strategic case is aimed at legislative changes or changes of local or national policy, a mass media strategy must be developed in such a way as to share information about your case and its result with respective lawmakers and politicians. Lawyers and rights protection organizations should remember that the public and journalists are neither specialists in the field of law nor ecology, thus information about the run and results of a strategic case must be presented in a simple and comprehensible way, whenever possible trying to catch the interest of the public and encourage environmental protection, fulfilment and protection of human environmental rights.

c) maximizing otcomes of strategic litigation

The strategy of a strategic case should foresee events connected with enforcement of a positive court decision, its implementation and sharing the result of this process. If the decision in strategic case may be important for the judges in general (for instance, if it extends access to justice for specific categories of plaintiffs or

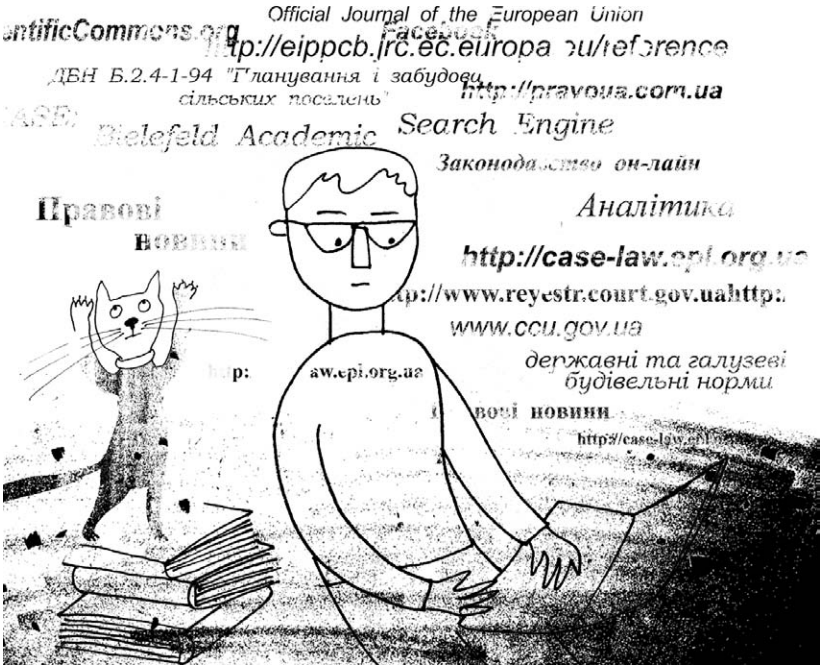
in specific categories of cases), integration of such a decision into training and refresher courses for judges may be beneficial. It can be done by contacting international donor organizations, such as USAID, which deal with upgrade of judges' qualifications, or institutions which hold trainings for judges on a permanent basis or prepare publications for judges. CSI coalitions may come in handy when lobbying more significant changes in public opinion, legislation, promotion of the level of environmental consciousness in interested parties, initiation of public discussion on matters pertaining to a strategic case.

It is typical for governmental bodies in our country to be unable to adequately perform their functions due to lack of proper financing. Thus, absence of adequate financial resources may become a reason for failure to execute a court decision in strategic case by the defendant represented by governmental body. This situation should not stop the plaintiff — CSI — and its clients from seeking court action and refusing a positive court decision. A professional CSI can help the defendant find alternative sources of financing for those measures prescribed by court. For instance, construction of a water pipe, installation of sewage pipelines on the territory. There are many available sources of financing effort in the field of energy conservation, drainage and water treatment, waste treatment as well as numerous legal instruments for attraction of private capital to finance infrastructure objects. If a CSI did not manage to find financing it is still possible to inform authorized officials of the defendant on positive examples from other regions and available financial resources. For instance, concessionary loans, grants.

Establishing contacts with the defendant to speed up creation of a working group on development of relevant policy or legislative acts or amendments thereof, with suggestions as to engagement of NGOs, presentation of positive international experience, are extremely important since court decisions may not be enforced due to absence of human resources, lack of qualification and experience of the employees of the defendant in initiating efficient legislative

changes or changes in policy in this or that sphere. CSIs can also organize round table discussions with specialists from various fields of science to discuss the problems reflected in court decision, generalize the results and submit them to the defendant.

Thus, as we can see, strategy and tactics of strategic litigation depend greatly on public understanding of the importance of environmental protection issues, conscious motivated clients, institutional capacities of rights protection CSIs, combination of deep knowledge, skills and abilities of public interest lawyers with their profound motivation, love for the environment and people, ability to cooperate with other CSIs, skillful use of advocacy.



Chapter IV. Resources Needed by Lawyers in Strategic Cases

The resources used by environmental and legal CSI and lawyers during strategic litigations are important aspects of conducting such strategic cases.

Further, the author will pay attention to the EPL legal resources that are the result of the organization's 20-year activity. All resources that come in handy in resolution of a strategic case may be subdivided into the resources for preparation of legal line of reasoning, preparation of evidence base, resources for finding like-minded persons for advocacy, and resources for shaping professional opinion.

a) resources for legal line of reasoning and advocacy.

One cannot imagine a litigation, including a strategic one, without the use of provision of law determined by the legislation. Of help here might be the web-resources of official bodies of state power. The Vekhovna Rada, the Parliament, is the only body of legislative power in Ukraine. We all know the web-page of the Verkhovna Rada of Ukraine[41]. It is a generally accessible open resource where one can find all legislative acts (codes, laws, resolutions, decrees, ukases), as well as international treaties, the agreement to whose compulsory nature was granted by the Verkhovna Rada of Ukraine, as well as Acquis Communautaire.

Example

While working on a strategic case, it is very often necessary to go beyond environmental legislation. Thus, for protection of the Regional Landscape Park «Znesinnia», namely a land plot with the area of 2,945 ha, the provisions of environmental law were supplemented by the provisions governing the issues of military property, regulating land relations, etc.

It is noteworthy that Ukrainian legislation is changing quite frequently, and, therefore, any printed legislative acts should be checked for any changes and their validity as of the moment the disputed legal relations appeared and as of the moment the statement of claim was filed.

For more professional preparation, the web-site of the information and analytical center «Liha»[42] is used. This web site is primarily convenient for work of firms, enterprises, institutions and organizations. The web site consists of the sections: «Legal News»,

[41] http://rada.gov.ua/

[42] http://www.liga.net

where you can find «Legislative News», «Analytics», «News of the Companies»; online conferences; «Liha Zakon» and «Legislation Online» systems. The system of information and legal support «Liha Zakon» provides highly professional services, prompt consultations and answers to the questions, which saves time spent for information search. It is not free. However, human rights institutionally stable CSIs have the possibility they should not lose. Official page of the European legislation[43] will be useful if it is necessary to apply the provisions of European legislation. Except the generally accepted search according to the essential elements, the page provides also an option of thematic search. For example, the section «natural environment» encompasses all documents in this area.

Internet page of the Cabinet of Ministers of Ukraine[44] is an important research tool, where one can follow the news about the adopted resolutions, newly approved programs of country development, etc. Considering the fact that the Cabinet of Ministers of Ukraine is a collegial body, which is formed by heads of all ministries, the Internet pages of all ministries that can be accessed through links on the web page of the Cabinet of Ministers of Ukraine are useful too[45]. Here you will find The Ministry of Agrarian Policy and Food of Ukraine, The Ministry of Internal Affairs of Ukraine, The State Fiscal Service of Ukraine, The Ministry of Ecology and Natural Resources of Ukraine, The Ministry of Economic Development and Trade of Ukraine, The Ministry of Industrial Policy of Ukraine, The Ministry of Energy and Coal Industry of Ukraine, The Ministry of Foreign Affairs of Ukraine, The Ministry of Infrastructure of Ukraine, The Ministry of Culture of Ukraine, The Ministry of Youth and Sport of Ukraine, The Ministry of Defense of Ukraine, The Ministry of Education and Science of Ukraine, The Ministry of Healthcare of Ukraine, The Ministry of Regional Development, Construction, and Housing Economy of Ukraine, The Ministry of

[43] http://eur-lex.europa.eu/

[44] http://www.kmu.gov.ua/

[45] http://www.kmu.gov.ua/control/uk/publish/officialcategory?cat_id=245427156

Social Policy of Ukraine, The Ministry of Finance of Ukraine, The Ministry of Justice of Ukraine.

The Supreme Court of Ukraine[46]. The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction. The judgment of the Supreme Court of Ukraine, adopted by the results of hearing a complaint on review of judgment for reasons of unequal application of the court (the courts) of the cassation instance of the same provisions of substantive law in similar legal relations, is mandatory for all power entities that apply the legal act containing these provisions in their activity, and for all courts of Ukraine. Court rulings, resolutions and generalizations of the judicial practice can be found on the web page of the Supreme Court of Ukraine.

Noteworthy is the analysis of practice of applying article 16 of the Civil Code of Ukraine in the process of protection of the violated rights by the courts[47]. Please, pay attention to the conclusions and recommendations envisaged by this analysis: «Determination of the means to protect civil rights and interests in article 16 of the Civil Code is important for implementation of the tasks of civil judiciary, i.e. ensuring timely hearing and solution of civil cases for protection of violated, unrecognized or disputed rights, freedoms, or interests of individuals, rights and interests of legal entities, the interests of the state. However, the demands of this article and article 4 of the Civil Procedure Code concerning the fact that the abovementioned rights and interests may be protected only in the ways stipulated by the law or agreement, result in refusal of protection of these rights and interests in legal relations that are not protected by the law.

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[46] http://www.scourt.gov.ua/

[47] https://docs.google.com/viewer?url=http%3A%2F%2Fwww.scourt.gov.ua%2Fclients%2Fvsu%2Fvsu.nsf%2F7864c99c46598282c2257b4c0037c014%2F6af1eba6df621dedc2257ce60053ffc3%2F%24FILE%2F%25D0%2590%25D0%25BD%25D0%25B0%25D0%25BB%25D1%2596%25D0%25B7%2520-%2520%25D1%2581%25D1%2582.16%2520%25D0%25A6%25D0%259A.doc

Provisions of these articles are inconsistent with articles 55 and 124 of the Constitution of Ukraine, the norms of which apply to all legal relations without exception that arise in the state, general principles of article 3 of the Civil Code on the right to go to court for protection, and does not correspond to the Convention for the Protection of Human Rights and Fundamental Freedoms, meeting the requirements of which is mandatory for Ukraine. Article 6 of the Convention recognizes the right of a person to access to justice, and article 13 — the right to effective protection of rights, which means that a person has a right to go to court with a request to protect their civil rights, which corresponds to the subject matter of the violated right and nature of the violation. Direct or indirect statutory bar of protection of a certain civil right or interest cannot be justified».

The Constitutional Court of Ukraine[48] is the only body with constitutional jurisdiction in Ukraine. The tasks of the Constitutional Court of Ukraine is to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the state on the whole territory of Ukraine. It is in the Constitution of Ukraine that the main rights of the citizens of Ukraine to environmental safety, natural resources, etc. are determined.

Noteworthy is the ruling of the Constitutional Court of Ukraine No. 15-pn/2004 of 2 November 2004[49]. According to this ruling, the principle of justice is determined and introduced into the legal doctrine of Ukraine.

Part one of article 8 of the Constitution of Ukraine recognizes the validity of the rule of law principle in Ukraine. Rule of law is the dominance of law in the society. The rule of law requires from the state to actualize it in legislative and law enforcement activity, particularly in laws that by their content have to be filled with ideas of social justice, freedom, equality etc. One of the manifestations of the rule of law is the fact that the right is not limited by legislation only as one of

[48] http://www.ccu.gov.ua/

[49] http://zakon.nau.ua/doc/?code=v015p710-04

its forms, but it includes also other social regulators, in particular the norms of moral, traditions, customs, etc. that are legitimized by the society and caused by historically attained cultural level of the society. All these elements of law are united by quality that corresponds to the ideology of justice, the idea of law, which is to a great extent reflected in the Constitution of Ukraine.

Such understanding of the law does not give grounds for its identification with the law, which may sometimes be unjust, and limit the freedom and equality of people.

The High Commercial Court of Ukraine[50]. Commercial courts are specialized courts that administer justice in the area of economic relations. Basing on the principles of the rule of law guaranteed by the Constitution of Ukraine and the laws of Ukraine they have to protect rights and interests of the participants of economic relations protected by the law. The Internet page of the High Commercial Court of Ukraine contains the rulings of the plenary session, explanations, letters, and conclusions.

The conclusions made by the High Commercial Court of Ukraine as a result of the round table discussion dedicated to disputes in the area of environment protection that took place in May 2013 is worth paying attention to[51]. In the course of the round table discussion, it was stressed that the basics of environmental law are determined by the Constitution of Ukraine. Thus, article 16 of the Constitution of Ukraine determines that the guarantee of the environmental safety and maintenance of environmental balance on the territory of Ukraine is the responsibility of the state, and article 50 of the Fundamental Law stipulates that everyone has a right to the environment that is safe for their life and health and to compensation of the damages inflicted by violation of this right. According to article 66 of the Constitution of Ukraine, everyone is obligated to avoid doing harm to the nature and to compensate the damages caused.

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[50] http://vgsu.arbitr.gov.ua

[51] http://vgsu.arbitr.gov.ua

The problem of legal groundwork for protection of objects of ecological interest, which include land, water, atmospheric air, flora, and fauna, is one of the most burning problems for Ukraine. At the same time, the practice of law application proves that the regulatory basis in the area of environment protection is now characterized by fragmentarity and object-by-object approach, the existence of internal contradictions, gaps and, sometimes, different legal approaches to its application.

Taking into account the rapid development of legislation and current economic processes that facilitated appearance of new types of disputes and, correspondingly, issues concerning the procedure of their resolution, the participants of the round table discussion agreed that the explanations «On some issues of practice of resolution of disputes connected with application of legislation on environment protection» of 27.06.2001 No. 02-5/744 (with further amendments and supplements) approved by the High Commercial Court of Ukraine require fundamental revision and update. Concluding the discussion, the participants of the round table discussion noted that the judicial community should concentrate its efforts on maximum protection of ecological interests of the population of our state and control over observance of norms of direct effect of part 7 of article 41 of the Constitution of Ukraine, according to which the use of property cannot damage the rights, liberties and dignity of citizens, the interests of the society, worsen the ecological situations and natural qualities of land, as well as provisions of article 66 of the Fundamental Law, according to which everyone is obliged not to damage the nature.

The web sites of the State Ecological Inspection[52], the State Agency of Land Resources[53], and The State Agency of Water Resources[54] may be useful for a lawyer working on a strategic litigation.

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[52] http://dei.gov.ua/

[53] http://land.gov.ua

[54] http://www.scwm.gov.ua/

The Unified State Register of Court Judgements[55]. The Unified State Register of Court Judgements (the Register) is an automated system for collection, storage, protection, record keeping, search and provision of electronic copies of court judgements. The rulings of the Supreme Court of Ukraine, high specialized courts, appellate courts, and local courts, i.e. sentences, rulings, resolutions, decrees, separate decrees of a court that were adopted by the courts in regard to criminal, civil, economic cases, in regard to cases on administrative violations, except rulings that contain the information, which constitutes a state secret, are entered into the Register. The court judgements entered into the Register are open for free round-the-clock access at the official web portal of the judicial power of Ukraine according to the Law of Ukraine «On Access to Court Judgements» of 22.12.2005 No. 3262-IV.

The register of court judgements is an interesting and useful resource, for the judgements of the courts that have come into force have prejudicial character. The decisions of previous trials that have already determined some facts should be used to prove one's position in a strategic litigation by providing this information to the judge who is hearing a case on certain legal relations for the first time. The texts of the judgements from Ukraine, sometimes from a different region, that explain the grounds for protection of the violated rights and interests that are similar to your dispute, provided to the court, have to receive a positive decision of the court.

The environmental lawyers will find the Register of cases on protection of environmental rights and the environment that would contain all important decisions in the area of environment protection useful. The peculiarity of this register will be the fact that it will be supplemented by lawyers and organizations that work in the area of environment protection and, consequently, it will contain more useful information, for it will be easier to find a necessary decision related to environmental rights. The register may be found at: http://case-law.epl.org.ua.

[55] http://www.reyestr.court.gov.ua/

Example

The judgement of the Circuit Administrative Court of the City of Kyiv of 9 November 2010 cancelled the Resolution of the Cabinet of Ministers of Ukraine No. 841 of 20 June 2006 «On Provision of the Land Plots for Permanent Use» (hereinafter the Resolution of the Cabinet of Ministers of Ukraine No. 841). The ruling of the first instance court was left in force by the Ruling of the High Administrative Court of Ukraine of 29 November 2011 and the resolution of the Chamber of Appeals for Administrative Cases of the Supreme Court of Ukraine of 29 May 2012.

The matter of dispute. Protection of the lands of the natural reserve fund from their illegal provision under the Resolution of the Cabinet of Ministers of Ukraine No. 841 for use to the NNEGC «Energoatom». The court judgement determined that on the basis of the Draft Planning of the Regional Landscape Park «Granite-steppe lands of Buh» (Mykolayiv region) the disputed land plots belong to the territory of the park and their designation is natural reserve fund. This judgement was used by the lawyers of the Regional Landscape Park «Znesinnia» to protect the rights of the park to the disputed land plot in 2014. Particularly, the judge of the Halytskyi District Court in Lviv City made a legal and grounded ruling that cancelled the resolutions of the Lviv City Council on transfer of almost 3 hectares of land of the Regional Landscape Park «Znesinnia» for construction works[56].

The State Construction Norms and Sanitary Norms and Rules are important legal resources for any public interest lawyer working in the area of environment protection.

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[56] http://epl.org.ua/pravo/uchast-gromadskosti/spravi/tashlicka-gidroakumul-jujucha-elektrostancija-tashlicka-gaes/

According to the Law of Ukraine «On Construction Norms»[57], state construction norms (hereinafter — SCN) is a regulatory act approved by the central body of executive power, which ensures formation of the state policy in the area of construction. The SCN can be found on the official web site of the Ministry of Regional Development, Construction, and Housing Economy of Ukraine in the section «Construction, technical regulation, norms, state and industry construction norms»[58]. According to the Law of Ukraine «On Assurance of Sanitary and Epidemiological Well-Being of Population»[59], the state sanitary norms and rules, sanitary and hygienic rules and norms, anti-epidemic rules and norms, hygienic and anti-epidemic rules and norms, state sanitary and epidemiological norms, sanitary regulations (hereinafter — the CNR) are mandatory regulatory acts of the central body of executive power, which ensures the shaping of state policy in the area of healthcare, which determine medical requirements of safety for the environment of life activities and its separate factors, failure to observe which poses a threat to life and health of people and future generations, as well as a threat of spread of infectious diseases and mass non-communicable diseases (poisonings) among the population. The CNR can be found at the web-site of the State Sanitary and Epidemiological Service[60] in the section of regulatory base, subsection on sanitary norms and rules.

To observe article 16 of the Constitution of Ukraine[61], which determines that the assurance of environmental safety and maintenance of ecological balance on the territory of Ukraine, mitigation of the Chornobyl aftermath, which was a catastrophe of a global scale, and preservation of the gene pool of the Ukrainian

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[57] http://zakon2.rada.gov.ua/laws/show/1704-17

[58] http://www.minregion.gov.ua/building/tehnichne-regulyuvannya-ta-naukovo-tehnichniy-rozvitok/normuvannja/derzhavni-ta-galuzevi-budivelni-normi/

[59] http://zakon2.rada.gov.ua/laws/show/4004-12

[60] http://www.dsesu.gov.ua/ua/normativna-pravova-baza/sanitarni-pravyla-i-normy

[61] http://zakon1.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

nation is the obligation of the state, the SCN and CNR are developed and determine admissible types of activity, as well as organize the activity of all subjects in a way that would ensure observance of environmental safety and ecological rights and interests.

Examples of SCN and CNR

State construction norms 360-92 «Urban development. Planning and development of urban and rural settlements»62 apply to design of the new and reconstruction of the existing urban and rural settlements of Ukraine. These norms are compulsory for bodies of state administration, local and regional self-government bodies, enterprises and institutions regardless of their subordination and form of ownership, public organizations and citizens who are involved into design, construction and provision of amenities on the territories of urban and rural settlements. These norms are elaborated for the transitional period — until the general concept of the regulatory base of Ukraine on urban development and capital construction is developed. While designing Ukrainian settlements, except the provision of these norms, it is necessary to follow the Sanitary Rules and Norms «Design and development of settlements in Ukraine», SCN Б.2.4-1-94 «Design and Development of Rural Settlements», the requirements of other current regulatory and guidance documents.

The state sanitary rules of design and development of settlements (hereinafter — the Rules) include main hygienic requirements to design and planning of both new and existing urban and rural settlements of Ukraine, their sanitary normalization and rehabilitation.

Observance of these Rules should ensure most hygienically favorable conditions for life of the population.

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[62] http://dbn.at.ua/load/normativy/dbn/dbn_360_92_ua/1-1-0-116

These Rules are mandatory for all state, cooperative, collective, and private enterprises regardless of their subordination or the form of ownership, as well as for officials and citizens of Ukraine, and investors who are the citizens of other states. When solving the issues of design and development of settlements, it is necessary to follow the requirements of the current construction norms and rules, and other guidance and methodological documents approved by the Ministry of Healthcare of Ukraine, which are used for the abovementioned purposes. The state control over observance of these requirements is done by the bodies, institutions and facilities of state sanitary supervision of Ukraine according to the current Provision on the State Sanitary Supervision. The persons guilty of violation of the Rules bear the responsibility according to article 80 of the Foundations of Ukrainian Legislation on Healthcare and articles 45–49 of the Law of Ukraine «On assurance of sanitary and epidemiological well-being of the population»[63].

While developing and reconstructing new rural settlements of Ukraine, it is necessary to observe the state construction norms on design and development of rural settlements SCN Б.2.4-1-94 «Design and development of rural settlements»[64]. These norms are mandatory for all state, cooperative, and public enterprises, organizations, and institutions regardless of their forms of ownership and subordination that are involved into design, construction and provision of amenities on the territory of rural settlements, as well as for farming enterprises and individual developers.

When designing rural settlements of Ukraine, it is also necessary to follow the SCN 360-92*, sanitary rules and norms on design and development of settlements of Ukraine, as well as the requirements of other regulatory and guiding documents.

Reconstruction and development of rural settlements should be done in accordance with the approved projects, master plans of

[63] http://zakon2.rada.gov.ua/laws/show/4004-12

[64] http://dbn.at.ua/load/normativy/dbn/1-1-0-103

rural settlements, detailed planning projects of rural settlements, projects of design and development of public center or other fragments of settlements, which are connected with projects of territorial development of rural administrative districts.

Having described a part of legal resources, we should draw your attention to some legal obstacles in terms of going to court and ways to overcome them.

One of the problems arising during strategic litigation is the payment of court fees. As practice shows, strategic court cases do not always effectively use the provisions of the Law of Ukraine «On Judicial Protection». According to article 5 of the Law of Ukraine «On Court Fees»[65] the following categories shall be exempt of the court fees: 7) state bodies, enterprises, institutions, organizations, public organizations, and citizens who, submitted to the court the applications on protection of the rights and interests of other persons, as stipulated by the law, as well as consumers in cases connected with violation of their rights. Thus, the legislator stipulates the possibility for the initiators of a strategic case not to pay court fees in full. In this regard, there is also a decision of the Constitutional Court of Ukraine in the case upon the constitutional plea of the association «The House of Music Authors in Ukraine» regarding the official interpretation of clause 7 of part one of article 49 of the Law of Ukraine «On Court Fees» in connection with provisions of clause «г» of part one of article 49 of the Law of Ukraine «On Copyright and Allied rights» of 28 November 2013 No. 12-рп/2013 in the aspect of constitutional plea of provision of clause 7 of part one of article 5 of the Law of Ukraine «On Court Fees» of 8 July 2011 No. 3674-VI with subsequent amendments in connection with provisions of clause «г» of part one of article 49 of the Law of Ukraine «On Copyright and Allied Rights» of 23 December 1993 No. 3792-XII with subsequent amendments should be understood so that the organization of collective management of property rights of the copyright and (or) allied rights proprietors,

[65] http://zakon2.rada.gov.ua/laws/show/3674-17

established according to part two of article 47 of the Law of Ukraine «On Copyright and Allied Rights» does not belong to the payers of court fees who are exempt of its payment in case of their filing claims concerning the protection of rights and interests of other persons in cases stipulated by the law.

Financial obstacles appear also when substantial amounts of funds should be paid for tickets and business trips. As of today, the participants of strategic litigation can participate in the hearing via videoconferencing. This right is stipulated by article 74-1 of the Commercial Procedure Code of Ukraine,[66] article 122-1 of the Code of Administrative Legal Proceedings of Ukraine[67], and article 158-1 of the Civil Procedure Code of Ukraine[68].

Having written a motion addressed to the court on participation in the hearing by videoconferencing, you should indicate the court, where you ask to organize the hearing for you. Not to spend money on business trips to the Mykolayiv region the EPL participates in a case heard by the Commercial Court of Mykolayiv Region in the Commercial Court of Lviv Region. The only inconvenience is the necessity to submit such motion before each hearing, and not later than 7 days before the hearing.

The advantages include the fact that the court and all participants are well organized; there is no free communication before the hearing, when one gets the illusion that the discussion was substantial, but only a part of the information gets recorded. Court hearings with videoconferencing mobilize all participants of the process, which facilitates a positive hearing of the case in substance.

b) resources for building evidence base

As it has already been mentioned by the author, strategic litigation on environmental rights protection and environment conservation

[66] http://zakon4.rada.gov.ua/laws/show/1798-12

[67] http://zakon4.rada.gov.ua/laws/show/2747-15

[68] http://zakon4.rada.gov.ua/laws/show/1618-15

are specific ones and require deep knowledge in different fields. What are the operation principles of the nuclear power station, what is the PET-bottles production technology, what emissions into the atmosphere are caused by waste incineration, how organic farming differs from non-organic, how genetically modified organisms can affect the environment and health of people, etc? Answers to these questions can be found at such reference resources.

Vernadsky National Library of Ukraine[69] has a large list of open access researches. BASE: Bielefeld Academic Search Engine[70] is one of the largest world search engines specializing in search for scientific documents openly available in the Internet. BASE operator is Bielefeld University Library (Germany). Google Scholar[71] is a search engine aimed at scientific literature from different scientific fields and various sources encompassing reviewed articles, PhD thesis, books, essays and reports published in scientific publishing houses, professional associations, higher educational establishments and other organizations. The database of scientific search engine Google Scholar also includes open access documents, as well as materials which are accessible for registered users. Sientific Direct[72] is a search engine designed exclusively for the search of scientific information, which allows users to find information in the academic journals, personal pages of scientists, universities and research centres.

ScientificCommons.org is a platform that provides open access to scientific researches in various fields which are published and placed in open deposits worldwide. ScientificCommons.org provides access to more than 29 mln. publications from 1056 archives of 53 countries. The project is aimed at structuring large amount of data which provides access to them by operating centralized search tools.

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[69] http://nbuv.gov.ua/node/532

[70] www.base-search.net

[71] http://scholar.google.com.ua/

[72] http://www.sciencedirect.com/

WorldWideScience.org[73] is a global scientific search engine that provides information search in national and international scientific databases and portals. Science[74] is an international weekly academic journal published by the American Association for the Advancement of Science (AAAS). Nature[75] is a well-known weekly scientific journal and a major journal for Nature Publishing Group (NPG). HINARI[76] — the programme HINARI was introduced by the World Health Organization (WHO) together with the key editors and provides access for the developing countries to one of the largest global collections of biomedical literature. More than 3750 journals are now available for the institutions in 113 countries which is beneficial for thousands of workers and researchers and in its turn promoting advance of information provision and improvement of health of population in these countries. FirstScience[77] is one of the best online popular scientific journals that publishes articles on important discoveries and scientific advances, latest scientific news, videos, blogs, poems, facts, games and other interesting science-based things. Section Science of *The New York Times* newspaper[78] publishes scientific news, comments and polemics. Particular attention is given to the role of science in society.

Directories of Open Access Journals (DOAJ)[79] are academic — peer-reviewed scientific journals — without embargo period — are free and open access journals available for any person in the world. Futurity[80] means research news from top universities of the US, Great Britain, Canada and Australia. Science News[81] is a public magazine that covers in easy language the latest news in science and society.

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[73] http://worldwidescience.org/
[74] http://www.sciencemag.org
[75] http://www.nature.com/
[76] http://www.healthinternetwork.org/
[77] http://www.firstscience.com
[78] http://www.nytimes.com/pages/science/index.html
[79] http://doaj.org
[80] http://www.futurity.org
[81] https://www.sciencenews.org

«Science and Technology of the Russian Federation — STRF.ru»[82] is an online edition, web-resource designed in 2005 under support of the Federal Agency on Science and Innovations and the Ministry of Education and Science of the Russian Federation: events, scientific news and articles. Ukrainian Technical Newspaper[83] includes interesting news, articles, reviews written in popular scientific language for the broad public mainly of technical direction; Russian-language research. BBC Science/Environment News[84] is a scientific news section of the *BBC* web-resource. New Scientist[85] is a journal «for those interested in scientific discoveries and their commercial application». Wired[86] is an online version of the same-name journal *WIRED* about technology and science.CEEMAR[87]— Central and Eastern European Marine Repository — is a thematic international repository which serves as an archive of publications from scientific institutions of Ukraine, Bulgaria, Poland and Russia. Among Ukrainian participants are Institute of Biology of Southern Seas at the NASU, Institute of Hydrobiology at the NASU, Marine Hydrophysical Institute, etc. arXiv.org[88] is an open access resource to 551,760 e-publications on physics, mathematics, computer sciences, computational biology, computational finance and statistics.

In complex disputes related to emissions, environmental pollution or impact on people's health it can be useful to apply and refer to the international standards of environmental quality, permissible level of environmental pollution or impact on a person. Knowledge of English or other foreign languages will enable a lawyer to refer to and analyze such databases of international standards with respect

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82 http://www.strf.ru

83 http://eutg.net

84 http://www.bbc.com/news/science_and_environment

85 http://www.newscientist.com

86 http://www.wired.com

87 http://www.ceemar.org/dspace

88 http://arxiv.org

to compliance of the national standards or emissions of certain facilities with these standards.

CSI lawyers will benefit from information on the Best Available Technologies (BAT) for certain industrial facilities and activities prepared by the European Commission on Implementation of Industrial Emissions Directive 2010\75\ЄС[89]. Drinking water quality standards of the World Health Organization[90], Recommended Criteria of Water Quality of the US Environmental Protection Agency[91], Toxicological Description of Toxic Substances of the US Agency for Toxic Substances and Disease Registry[92], Minimal Risk Levels of the US Agency for Toxic Substances and Disease Registry[93], the Environmental, Health and Safety Guidelines of the World Bank/IFC[94], Standards on Noise Standards and its Impact on Population Health[95]. Information on air quality indicators can be found on the website of the WHO[96], EU Standards in various fields[97], European Commission Air Quality Standards[98].

Under conditions of Eurointegraion aspirations of Ukraine reference to EU standards which we are to implement in the nearest future can become a winning argument. Referring to international standards in strategic litigation is possible not only in the environmental field but also in the field of human rights, judicial system quality. Thus, in the claim form and other procedural documents

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89 http://eippcb.jrc.ec.europa.eu/reference/

90 http://www.who.int/water_sanitation_health/dwq/gdwq3rev/en/

91 http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm

92 http://www.atsdr.cdc.gov/toxprofiles/index.asp

93 http://www.atsdr.cdc.gov/mrls/mrllist.asp

94 http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Environmental,+Health,+and+Safety+Guidelines/

95 http://ec.europa.eu/environment/noise/health_effects.htm

96 ttp://www.who.int/phe/health_topics/outdoorair/outdoorair_aqg/en/; http://www.who.int/mediacentre/factsheets/fs313/en/

97 http://ec.europa.eu/environment/index_en.htm

98 http://ec.europ a.eu/environment/air/quality/standards.htm

the lawyers can refer to and demand application of international treaties, recommendations and practices of international organizations in the field of human rights. To such documents belong International Pact on Civil and Political Rights, International Pact on Economic, Social and Cultural Rights, Resolutions of the UN General Assembly which are of recommendatory nature and other documents.

Useful resources for a public interest lawyer engaged in strategic litigation are also printed analytical editions. In particular, among Ukrainian ones worth mentioning are Pravo Ukrainy (the Law of Ukraine)[99], the Official Bulletin of the Supreme Court of Ukraine[100], Notary's Small Encyclopedia[101], Visnyk Advokatury (Bulletin of the Bar)[102], the Official Bulletin of Ukraine[103], Bulletin of the Ministry of Justice of Ukraine[104].

Among foreign ones are printed thematic editions of the European Court of Human Rights[105], decisions of Aarhus Convention Compliance Committee[106] and ESPO Convention Implementation Committee[107]. Official Journal of the European Union (OJ) is the official journal of European law (L series) and other official documents of the European institutions (C series and its supplements). The journal is published every day from Tuesday till Saturday in the official languages of the European Union and is available in different formats[108].

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[99] http://pravoua.com.ua/ru/

[100] http://www.scourt.gov.ua/clients/vs.nsf/(firstview)/vis.html?O

[101] http://yurradnik.com.ua/stride/men

[102] http://aau.edu.ua/ua/visnyk/

[103] http://ovu.com.ua

[104] http://ovu.com.ua/bulletin/posts/1179-viyshov-drukom-chergoviy-nomer-zhurnalu-%C2%ABbyuleten-

[105] http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf

[106] http://www.unece.org/contact/UNECE404.html

[107] http://www.unece.org/env/eia/

[108] http://publications.europa.eu/official/index_en.htm

Examples of using scientific resources in strategic litigation

Dubetska vs. Ukraine is a strategic case on protection of the Ukrainian families against negative impact of the Central Mining and Processing plant in the urban settlement Vilshyna. (One can find more details about the case on the EPL website[109]). The data on physical and chemical composition of water as well as scientific research on the impact of certain chemical elements contained in water were used.

Tashlyk Pumped Storage Plant (Tashlyk PSPP) is the case on NRF preservation and biodiversity protection. The case included scientific materials on the value of objects of the Nature Reserve Fund territories, impact of flooding of large areas of land onto ecosystems, researches on Red Book fauna, etc[110].

The strategic case «The Danube Canal — the Black Sea». One of the goals of one of the strategic litigations of this case is biodiversity preservation. During SL there were used scientific resources on searching the project feasibility study, search for alternative routes of the canal, analysis of impact on biodiversity, etc[111].

Thus, all the strategic cases require from the lawyer deep knowledge both of the law and corresponding fields of certain types of commercial activity, certain life processes. Only having in-depth knowledge of certain types of relations, not only legal ones, one can hope for a positive resolution of the case.

Particular attention should be paid to the thematic distribution and websites of advocacy CSIs. Peculiarities of CSI lawyers activity is that they all have one goal — achievement of the rule of law principle,

[109] http://epl.org.ua/ekologija/voda/spravi/vilshina/

[110] http://epl.org.ua/pravo/uchast-gromadskosti/spravi/tashlicka-gidroakumuljujucha-elektrostancija-tashlicka-gaes/

[111] http://epl.org.ua/pravo/dostup-do-pravosuddja/spravi/kanal-dunai-chorne-more/

protection of the violated rights and interests, achievement of the public good. Therefore, thematic associations are popular. For those who want to obtain useful information and have information to share it is a good idea to become members of certain professional associations. Participation in the professional associations will help formulate SL strategy, ways of organizing litigation process, proving violation of rights. It is possible to become members of professional associations by addressing existing organizations, coordinators of professional associations with a request to become a member of the corresponding association or network.

National Platform on Strategic Litigation in Environmental Rights and Environment Protection (hereinafter — Ecolitigation National Platform, Platform) is a form of voluntary cooperation and self-government of civil society institutes which work in the field of legal protection of environmental rights and environment conservation, as well as centres of free legal aid, law clinics that work in the field of human rights protection, workers of law firms and lawyers' associations, lawyers and advocates who are interested in human rights protection and environment conservation. Becoming a member of such Platform a lawyer gets access to the information resources with respect to getting legal ideas on human rights protection, can get a consultation, advocacy support, etc.

There is a large number of thematic subscriptions which unite experts in certain fields. By subscribing to a certain thematic mail you will have a chance to get more information on a respective topic, rely on the experience of the other members, share your own experience, inform about cases of certain violations of law, find common solutions for problematic issues. Among professional mail subscriptions there are climatic subscription, related to the issues of climate change, climate change adaptation subscription, energy subscription, in particular nuclear energy, subscription on the Red Book fauna protection, subscription on exploration and extraction on non-traditional carbohydrates, on issues of construction of small, mini — and macro HPP, forest protection subscription, etc.

One should pay special attention to the initiative Reanimation Package of Reforms[112] that was launched after Revolution of Dignity and united experts for conducting fast and high-quality reforms in society. One of the RPR groups is RPR-environment group which deals with elaboration and adoption of quality legislation in the field of environment protection.

There is a number of thematic pages in Facebook. Among them are the following: Water legislation of Ukraine within the context of its harmonization with the EU legislation[113], Strengthening Participatory Democracy for Effective Environmental Protection in Ukraine[114], Saving Cheremosh! (dedicated to small HPP)[115], etc.

Environmental Law Alliance Worldwide / ELAW[116].

ELAW was founded by public interest lawyers from 10 countries in 1989. These lawyers met at the conference organized by the Law Department of the Oregon University for public interest lawyers. They noticed that the public in their countries is faced with similar environmental issues and understood that if they share SL strategies

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[112] https://www.facebook.com/platforma.reform?fref=ts

[113] https://www.facebook.com/pages/%D0%92%D0%BE%D0%B4%D0%BD%D0%B5-%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%B4%D0%B0%D0%B2%D1%81%D1%82%D0%B2%D0%BE-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8-%D0%B2-%D0%BA%D0%BE%D0%BD%D1%82%D0%B5%D0%BA%D1%81%D1%82%D1%96-%D0%B3%D0%B0%D1%80%D0%BC%D0%BE%D0%BD%D1%96%D0%B7%D0%B0%D1%86%D1%96%D1%97-%D1%96%D0%B7-%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%B4%D0%B0%D0%B2%D1%81%D1%82%D0%B2%D0%BE%D0%BC-%D0%84%D0%A1/398973440248694?fref=ts

[114] https://www.facebook.com/pages/%D0%97%D0%BC%D1%96%D1%86%D0%BD%D0%B5%D0%BD%D0%BD%D1%8F-%D0%B4%D0%B5%D0%BC%D0%BE%D0%BA%D1%80%D0%B0%D1%82%D1%96%D1%97-%D1%83%D1%87%D0%B0%D1%81%D1%82%D1%96-%D0%B4%D0%BB%D1%8F-%D0%B5%D1%84%D0%B5%D0%BA%D1%82%D0%B8%D0%B2%D0%BD%D0%BE%D1%97-%D0%BE%D1%85%D0%BE%D1%80%D0%BE%D0%BD%D0%B8-%D0%B4%D0%BE%D0%B2%D0%BA%D1%96%D0%BB%D0%BB%D1%8F-%D0%B2-%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D1%96/388570371278713?ref=hl

[115] https://www.facebook.com/groups/318608194818363/

[116] http:/ www.elaw.org

and information from different scientific fields of knowledge that helps in strategic litigation, they will be more effective in protecting environmental rights. The founders agreed to cooperate, share successful environmental policies and learn from each other. They started their transborder cooperation via e-mail. Nowadays more than 400 public interest lawyers from 70 countries participate in ELAW network. ELAW headquarters provides assistance to all lawyers with respect to scientific substantiation of negative impact of certain activity onto environment and people's health. EPL is ELAW headquarters in Ukraine. An important network of public interest lawyers dealing with protection of environmental rights and environment is Association of Environmental Lawyers of the Central and Eastern Europe «Guta». The association was initiated by EPL founder Professor Svitlana Kravchenko. The aim of the Association is facilitation of regional cooperation in the field of reforming and protecting public interest environmental right, as well as nature conservation activity and strengthening the rule of law and participatory democracy. More detailed information on Association activity can be found on the EPL website[117].

Example

An interesting example illustrating the importance of cooperation and information sharing between CSI to achieve the rule of law for environment protection is the case of the CO «EcoPravo-Kharkiv». It should be emphasized that there was no litigation in the case. The strategic case was settled by means of legal tools in pre-trial order.

«Artemsil» (Ukraine)

The core of the problem. In winter 1995, a letter by Volodymyr Berezin, the Head of the ecological and cultural centre «Bakhmat» (Artemivsk, Donetsk region,) was published in the electronic

[117] http://epl.org.ua/en/guta/

newspaper «Ekoklub», which informed that in their region a project was being developed of burying radioactive waste (hereinafter — RW) in exhausted salt mines, and there was an appeal for help.

CO «EkoPravo-Kharkiv» decided to render legal assistance. First of all, it was necessary to receive information about these technologies and their safety/harmfulness. The information was gathered by submitting official enquiries to the state bodies and asking international colleagues for assistance. Since the authors of the project referred to the alleged existing experience of burying RW and toxic waste in Germany, we addressed the ecologists in Germany through ELAW network with the question about practice of burying RW in exhausted salt mines.

Information enquiries were sent to find out if there was ecological assessment of project materials as for the organisation of burying RW. Throughout this case, the position of public officials, typical of such cases, was demonstrated, who in response to enquiries try to conceal information which may be used by the interested parties for the protection of their environmental rights. For example, Director General of UkrNDISil Mr. H. M. Bezkrovnyi said: «Unfortunately, when preparing the enquiry on the abovementioned work, the reliable information was not used right in the institute. However, our offer also includes using mines for laying non-hazardous materials which will prevent land settlement and sinking, as well as for locating economic assets (industrial warehouses etc.)».

Thus, instead of answering specific questions, UkrNDISil stressed the problem of preventing land sinking; they said that they mainly plan to use mines for laying non-hazardous materials. As it was discovered, the answer was untrue because in the report on scientific and research work «To conduct the analysis of the inventory results of enterprises' industrial waste in Donbas northern region, mining conditions of Artemivsk deposit of rock salt and prepare offers as for the organisation of burying waste in salt mines», approved on 29 December 1995, it was mentioned that «in UkrNDISil's opinion, special mines-storages for the disposal of hazardous and toxic industrial waste may be created on these territories».

There is no doubt that they were going to bury RW. It was not out of pure curiosity that in February 1995 Design and Research Institute of Industrial Construction Donetsk «Promstroy Proekt» wrote a letter to the State Committee of Ukraine for Food Industry asking about the possibility to locate a sensitive site on the collection, original treatment and temporary storage of radioactive waste of Donetsk Specialized Plant of Ukrainian Association «Radon» in the exhausted salt mines of the corporation «ArtemSil».

Having studied the situation and having analyzed active legislation, a decision was made to offer to prepare and hold a local referendum in Artemivsk on the issue of the possibility to bury RW in exhausted mines. It was decided to use the possibilities to obtain information on waste burial granted by the law to the deputies of the councils of all levels, and there was a suggestion to bring the matter to the session of Artemivsk City Council. Of course, the draft decision was rather mild, however, a decision was adopted at the session with the help of the «green» deputies, which prohibits all kinds of works on placing toxic and radioactive waste in salt mines.

In order for the state bodies to implement and not omit the decision of the session, the lawyers of CO «EkoPravo-Kharkiv» suggested sending letters to the city administration of the Ministry for Environmental Protection and Nuclear Safety, district (environmental) prosecution office and Ministry of Agriculture informing them about the decision of the session.

Result. It was prohibited to locate radioactive waste in Artemivsk and a positive precedent was created of public participation in adopting decisions, which was further spread in other regions of Ukraine.

Lessons of the case.

1. *In order to solve a global ecological problem, CSIs of different countries may and should exchange electronic information, and with the help of legal mechanisms demand that the state bodies adopt decisions aimed at the protection of environmental rights of the citizens.*
2. *In order to protect their rights effectively and achieve victories in the fight against the arbitrariness of officials, NGOs and*

lawyers should penetrate deep in the problem and familiarize themselves with the national environmental legislation.

3. *CSI and lawyers should use only verified information and act in accordance with it. No positive result can be achieved without verified information. It refers not only to litigations, but also mass media campaigns. (For example, when publishing a statement, one local organisation referred to the non-existing Decree of the President, which enabled the officials to hold them liable for the dissemination of false information. The lawyers of CO «EkoPravo-Kharkiv» warned the head of this organisation in time about the possible negative consequences of such a step and about the necessity to publish refutation of this information.)*
4. *CSI should strategically plan their activity. The attempts to prohibit placing waste on separate territories do not solve the problem in general. First of all, it is necessary to fight not with waste, but with the very production which generates radioactive waste. It will be possible if there are combined efforts and we all use the possibilities granted by the current legislation to the full, and widely inform the citizens about environmental problems.*

Network «Justice and Environment» (J&E)[118] is a European network of environmental and legal organisations from different countries engaged either exclusively in environmental law or it is one of their activities.

EMLA[119] is a non-profit nongovernmental organisation of Hungary working in environmental law and environmental management on national, European and international levels. The main activities of EMLA are protection of public interest in environmental protection via legal advice and litigation, environmental legal research, consulting and education, and carrying out environmental management projects.

[118] http://www.justiceandenvironment.org/

[119] http://www.emla.hu/englishsite/

International public interest organisation «Environment-People-Law»[120] (hereinafter — EPL). EPL is a law organisation, which since 1994 h**as been protecting environmental rights, acting in the sphere of environmental protection, supporting, restoring and improving the environment and providing legal help in protecting other human rights, especially those which overlap with environmental rights.**

Bureau of Environmental Investigations[121] (hereinafter — BEI). BEI consists of lawyers, journalists, specialists in ecology, it invites to cooperate other journalists and nongovernmental organisations, and facilitates their own investigations and other activity aimed at protecting the environment and people's health; prevention of environmental problems. The main kinds of BEI activity include investigation, providing legal assistance in the field of protecting environmental rights, information and analytical work and assistance to the mass media.

National Ecological Centre of Ukraine[122] (hereinafter — NECU) is a nongovernmental environmental organisation of the national level, which aims at protecting natural territories, biodiversity, preventing global climate changes and negative consequences of energy sector. NECU was founded on 30 August 1991. It is one of the first environmental nongovernmental non-profit organisations of a national level, registered in independent Ukraine. Nowadays, NECU has 24 branches functioning all over Ukraine.

All-Ukrainian Environmental Nongovernmental Organisation «MAMA-86»[123]. In 1990, young mothers with university degrees, worried about the health consequences of Chornobyl disaster, united to protect the interests of their own children. At present, the organisation consists of 17 regional branches. The aim of All-

[120] http://epl.org.ua

[121] http://www.bei.org.ua/

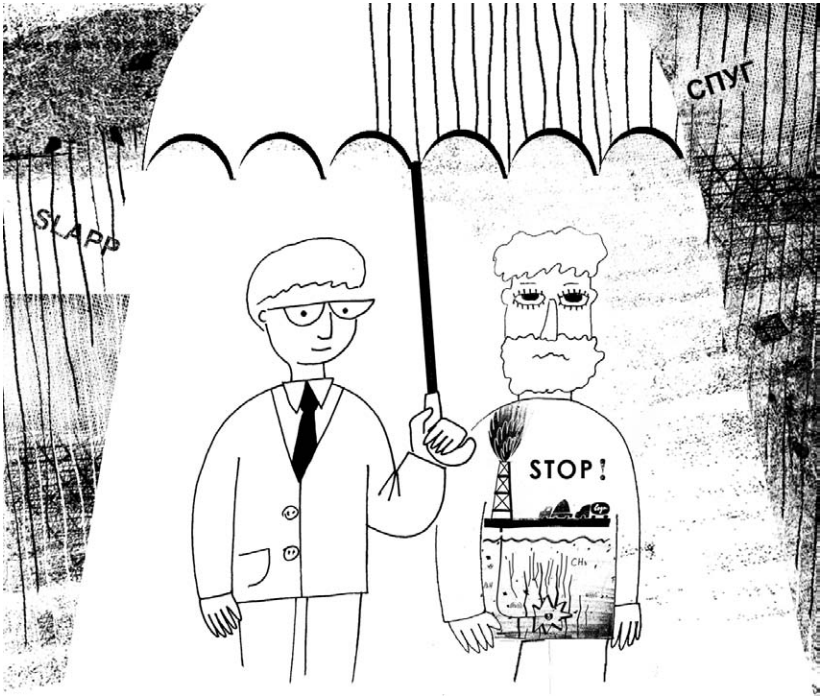
[122] http://necu.org.ua/about/

[123] http://www.mama-86.org.ua/

Ukrainian Environmental NGO «MAMA-86» is ecologization of politics and practice in Ukraine in order to transfer to sustainable development, i.e. the development that does not harm the present generation and leaves behind the world where one may live safely.

Of course, the list of CSIs which deal with environmental protection in Ukraine is inexhaustible. Ecological and environmental-legal movement in Ukraine is one of the most powerful parts of the civil society, therefore, it is practically impossible to provide their full list. Actually, this is not the aim of this chapter. The authors have mentioned several of them to encourage the readers to look for partners in their strategic cases.

Taking into consideration that a strategic case is a complex of intellectual efforts and decisions which allow choosing the best way to solve the case and is based on many elements (legal arguments, evidence, court practice, financial resources, political will, social awareness), the usage of the corresponding resources is one of the keys to achieving the expected result in the strategic case.



Chapter V. Threats connected with strategic litigation

In any part of the world, whether you work in Europe, America or Africa, conducting strategic litigation is connected with a number of serious risks both for clients and their representatives. The opponents in such cases resort to all kinds of intimidation: from obviously criminal, for example, bodily harm, to seemingly legitimate — for example, lawsuits about compensation of moral damage or lost profit.

The common feature of such means is their aim — to intimidate environmental activists and/or their representatives, detract them from a strategic case, bring down their spirit, exhaust them

financially and thus stop public debates on this or that socially important topic.

1. Physical threats

Even in the 21st century, active citizens, who criticize their governments or large companies, suffer from bodily harm. Protests against large mining or construction projects are often accompanied by beating, disappearance, raping and even murders of the protest members. According to the report Deadly Environment of the international human rights organisation Global Witness[124], murders of people who protect the environment and rights to land increased dramatically between 2002 and 2013 due to the increasing competition for natural resources. In this most comprehensive analysis of the problem, the researchers estimated that at least 908 people were murdered in this period. The report also mentions two murders of environmental activists in Ukraine — in 2009 and 2012.

a) case of an environmental inspector

At the end of 1990s, ICO «Environment–People–Law» (back then it was called CF «Ekopravo-Lviv») provided legal advice and legal representation of an environmental inspector, who, conscientiously performing his duties, recorded facts of gross violation of environmental legislation by the foresters in Lviv region. One evening after the inspection he was attacked near his house, bodily harm was inflicted. Moreover, another day, leaving the place of inspection in his company car, the inspector realized that wheel bolts in his car were undone. The man was lucky to avoid the car crash and possibly serious damage to health or even death. It was not difficult to connect these incidents with his professional activity, because numerous telephone threats testified to it.

[124] Deadly Environment, http://www.globalwitness.org/sites/default/files/library/Deadly%20Environment.pdf

b) property destruction of a reserve security officer

In 2007, ICO «Environment-People-Law» conducted several court cases for the protection of the director and deputy director of Danube Biosphere Reserve (hereinafter — DBR), as well as the very reserve — as a legal entity — against a number of lawsuits on spreading allegedly false information. The reason for the lawsuits was the publication of an article in the local newspaper by the reserve administration about repeated cases of illegal hunting by some officials in protected areas (the lawsuits are described further in this chapter).

However, it is impossible not to mention the incidents preceding this publication. According to the managers of the reserve, whom we have no reason not to trust, the reserve inspectors often observed known to them persons hunting (including the deputies of the Verkhovna Rada of Ukraine), but when they tried to duly record these facts, they faced resistance and their authority was not recognized. Once, in order to get rid of an inspector of the reserve security service, such persons inflicted bodily harm on him, took his company motorcycle and escaped in their cars. The damaged motorcycle was later found, that is why the militia refused to open a criminal case about hijacking a means of transport. The saddest thing is that a few days later, a private house of this inspector was set on fire and burnt. Both the victim and the reserve administration connect this incident with their active attempts to prevent poaching in the reserve, however, law-enforcement bodies did not consider this version.

c) murder of ecologist Honcharenko

In 2012 in Dnipropetrovsk, a Ukrainian ecologist, Head of the public movement «For the right of citizens to environmental safety», publisher of the newspaper «EKO Bezpeka» Volodymyr Honcharenko was brutally murdered.

When he was going to his summer house on 1 August 2012, his car was blocked by another vehicle. After that, several unknown

persons dragged him out of the car and brutally beat him. Two days later Honcharenko died in hospital due to severe traumatic brain injury.

At first, a case was open on the death of the activist under the article «intentional homicide with hooligan motives», but on 6 August it was reclassified and since then it was investigated as «intentional homicide by a group of persons pursuant to prior agreement».

One of the main versions of the investigation was that the murder was related to the environmental activities of the victim. The most famous investigations by Volodymyr Honcharenko were about burying radioactive waste at the polygons of Dnipropetrovsk region and an independent analysis of the quality of drinking water. Before his tragic death, the environmentalist was researching chemical and radioactive contamination of scrap metal. The last press conference by Honcharenko was dedicated to the illegal placement of about two hundred tons of chemically contaminated (with hexachlorobenzene) heat exchangers on the territory of Kryvyi Rih, which, according to the environmentalist, they tried to melt without prior purification.

Despite the protests by the colleagues[125] and the statements by the international community[126], addressed to the law-enforcement bodies of Ukraine, up till now those responsible for the death of the environmentalist were not identified.

It is important to stress that if there are unlawful acts aimed at you or your organisation, it is necessary to officially address law-enforcement bodies. Under the new Criminal Procedure Code of Ukraine, every report about a crime is to be registered, and after each report of this kind criminal proceedings are opened. Even if in one particular case criminal proceedings are closed, you will have

[125] Region prosecutor's office is demanded to investigate the murder of environmentalist Honcharenko, http://www.gorod.dp.ua/news/80550

[126] US State Department appealed to Ukraine to investigate the murder of environmentalist Honcharenko, http://www.ukrinform.ua/rus/news/gosdep_ssha_prizval_ukrainu_rassledovat_ubiystvo_ekologa_vladimira_goncharenko_1515590

an official confirmation of the systematic nature of such unlawful acts, which may play an important role in the future.

2. Legal threats

a) criminal prosecution of activists

No less cynical than physical violence is fabricated criminal prosecution. There are known cases when environmental activists were accused of insult, defamation (in the countries where such acts are criminally punishable), hooliganism, seizure of state or public buildings or even piracy.

Here is one bright example.

Example

«Arctic Sunrise» case
In June 2012, Greenpeace[127] launched a campaign «Save the Arctic», which was aimed at creating a global reserve around the North Pole and complete prohibition of oil drilling, fishing and military actions in this region, as it was done in the Antarctic.
On 18 September 2013, Greenpeace activists on the ship «Arctic Sunrise», registered under the flag of the Netherlands, made an attempt to hold a campaign on the platform «Prirazlomnaya» in the Pechora Sea, which belongs to the Russian company Gazprom. Earlier, in August 2012, the activists climbed one of the sides of this platform using the ropes and placed the banners «Save the Arctic» and «Freedom for the Barents Sea» there.
As the previous time, in 2013, before conducting the campaign, «Arctic Sunrise» came into contact with the platform and the coast guard and warned them about the peaceful nature of the cam-

[127] Greenpeace is an international environmental organisation founded in Canada in 1971. The main task of the organisation is to ensure environmental recovery and attract the attention of people and authorities to nature preservation.

paign, saying that the alpinists will do no harm to the platform or the personnel. After that, six activists left the ship and approached the platform on the inflatables. They all were wearing clothes with the logo of the organisation, a large inscription Greenpeace was on the sides of the inflatables.

Two alpinists tried to climb the side of the drilling platform. To prevent them from doing so, water jet streams were used from the platform, afterwards the activists were arrested by the officers of the special forces unit of the border administration of the Federal Security Service of the Russian Federation in Murmansk region.

On 19 September, the ship was stopped by the Border Guard Service of the Russian Federation. The assault team of FSB (Federal Security Service) of the Russian Federation landed on board the ship from the helicopter. The ship was towed to Murmansk. All 30 crew members were arrested. On 2-3 October all the arrested were charged with piracy.

Greenpeace regarded the incident as an illegal armed seizure of the vessel which did not enter the three-mile protected zone around the platform and all the actions of the crew both on board and outside it were legal.

On 9 October, the investigative bodies of the Russian Federation said that during the ship inspection drugs were found and that a part of the seized equipment had dual purpose and could be used not only for ecological purposes.

On 21 October, the government of the Netherlands addressed the UNO International Tribunal for the Law of the Sea about the seizure of the vessel «Arctic Sunrise» in the Russian Federation and the arrest of Greenpeace activists. In this connection, on 23 October, the Russian Federation reclassified Greenpeace activists' actions from «piracy» to «hooliganism».

On 6 November, the UNO International Tribunal for the Law of the Sea stated that «Russia should immediately release the ship and all the people who were arrested for financial guarantees from the Netherlands». In response, the officials of the Russian Federation said that Russia intends to «ignore» the decision of the International Tribunal.

However, at the end of November all crew members of «Arctic Sunrise», having spent more than two months in prison, were released on bail, and after the law on amnesty was signed to commemorate the 20th anniversary of the Russian Constitution, they received the orders about the termination of criminal proceedings due to amnesty. Before 29 December 2013, all foreign crew members left the territory of Russia. But the arrest of the icebreaker «Arctic Sunrise» was lifted only in June 2014.
In March 2014, all 30 crew members took legal actions against Russia to the European Court of Human Rights.

b) SLAPP-suits

One more method used by the opponents of environmental community are civil lawsuits. In American literature they are called Strategic Lawsuits Against Public Participation, abbreviated as SLAPP. For convenience we shall call them SLAPP-suits. Even in the US with its more than 200-year democracy that is proud of public participation in state management, thousands of environmental activists become targets of multimillion lawsuits. The activists are sued for such activities as distributing petitions, preparing letters for editorial boards, speaking out at the public hearings, notifications of violations of law, filing official complaints, legislation lobbying and other ways of expressing their views[128]. Such lawsuits are shocking violations of fundamental political rights — right to participation in state management, rights to freedom of speech and opinion, free expression of one's views and beliefs, right to recourse to bodies of power. It is such a gross violation that the US Supreme Court Judge described this phenomenon as follows: «Short of a gun to the head, a greater threat to First Amendmentexpression can scarcely be imagined»[129].

[128] SLAPPs: Getting Sued for Speaking Out, George W. Pring, — Temple University Press, 1996.

[129] Amendment to the US Constitution that guarantee freedom of speech and expression, freedom of the press, right to a peaceful assembly, right to file complaints to the government.

History of Ukrainian society democratization in the 20th-21st century is undoubtedly shorter but still it lasts for about a quarter of a century. The citizens have become more active in protecting their rights, more often appeal to the court. More than 20 years of EPL experience show that positive attitude of citizens to the judicial system as an effective tool of solving environmental problems is growing. Citizens and advocacy ecological CSIs more often contest by-laws and actions of state bodies, actions of polluting enterprises, claim damages for physical and moral losses. At the same time extending court competence onto all the fields of social life also extended court opportunities of counteracting environmental movement. Thus, Ukrainian courts also have lawsuits against environmental activists.

SLAPP-suits are civil (commercial) lawsuits on compensation of damages which, as a rule, are initiated by the big companies or top officials in state hierarchy against representatives of civil society who criticize them. The key goal of SLAPPs is under legal pressure and necessity to pay court expenses to make the defendants give up confrontation with the plaintiffs in exchange for amicable agreement or revocation of a lawsuit. In many cases victims of SLAPP-suits prefer not to go against the more powerful opponent and yield.

There are lots of types of such lawsuits. Some of them are considered in details below. Now we shall analyze features (peculiarities) of SLAPP-suits as legal phenomenon.

1) inequality of opponents

The power of litigants in SLAPP-suits are usually unequal. The plaintiffs in such cases can be private or state companies (usually big ones), top managers or investors of such companies, civil servants, and sometimes even the bodies of power. It is not difficult for such entities to file one or several lawsuits. As a rule, legal entities have their own in-house lawyers, therefore, preparation and filing of SLAPP-suits is used more and more often to suppress public opposition taking into account low level of expenses and high effectiveness of

such events. On the contrary, victims of SLAPP-suits are common citizens, activists, public organizations which, firstly, do not have any legal education to objectively evaluate potential danger and feel all the burden of SLAPP psychological pressure, and, secondly, they are forced to find and hire a lawyer that presupposes quire serious for such people financial expenses.

2) public interest

The lawsuit can be categorized as SLAPP if it resulted from the previous public discussion of a certain issue and is aimed at termination of such discussion. The lawsuit of enterprise A. to a citizen B. on compensation of moral damages caused by spreading unreliable information cannot be called a SLAPP-suit, if contested words and any other actions of a citizen B. happened as a result of commercial or private conflict between the parties (for example, unfair competition). At the same time, a lawsuit of enterprise director A. to a citizen B. on protection of honor and dignity in relation with a critical article published by a citizen B. in a local newspaper about the activity of enterprise A. can be a SLAPP-suit, if citizen B. wants to put the issue (on product quality, violation of nature conservation legislation, etc.) in the field of public discussion.

3) restraining effect

Irrespective of stated claims of a plaintiff SLAPP-suit has also a restraining effect on the direct defendant, as well as on the other participants of the public discussions between the parties or even on the society in general, intimidating the public «to speak out» on any issue. Thus, SLAPP-suits become a threat not only to some activists, but become a real obstacle for the development of civil society. Due to such peculiarity of a SLAPP-suit the legal system should recognize this legal phenomenon and duly respond to it.

4) inconsistency and groundlessness of a lawsuit

As a primary goal of a SLAPP-suit is not a victory, but intimidation, legal grounds of statement of a claim and actual substantiation of

such lawsuits are often weak and sometimes totally absurd. For instance, defendants in such cases often demand to compensate damages caused by legal actions (filing of complaints, legitimate demonstrations, etc.). And such mandatory element of bringing someone to civil responsibility as cause and effect relationship between a wrongdoing and caused damage is not reflected at all. Still these obvious drawbacks of SLAPP-suits are understandable only to lawyers and though being inconsistent and ungrounded, such lawsuits often achieve their goal of intimidation.

5) disproportionate amount of a claim

An obvious indicator of a SLAPP-suit is amount of compensation claimed by a plaintiff. In EPL practice there were cases when, for instance, a private enterprise sued nature reserve administration to the amount of one million UAH (at that time about two hundred thousand USD) or when the State enterprise «National Nuclear Energy Generating Company «Energoatom» was trying to sue a pensioner to the amount of twenty thousand USD. Undoubtedly, national legislation has requirements about fair and just amount of compensation, but such huge sums exert serious psychological pressure, let alone the fact that the higher the amount of a claim, the higher is the fee of a representative who is hired by the SLAPP-suit victim for defense.

в) some types of SLAPP-suits

1) suits on reimbursement of damages caused by protests, demonstrations, appeals to regulatory bodies, etc.

In Lviv region a private enterprise «X» filed a lawsuit against a citizen B., who while filing complaints to different types of regulatory bodies, was trying to protect her right and the right of her neighbours to a healthy and safe environment. The lawsuit of the PE «X» was based on the fact that such actions of citizen B. inflicted physical and moral damage to the enterprise. During examination of citizen B.'s complaints the enterprise business was interrupted which the enterprise estimated at the amount of ten thousand UAH.

Moreover, as it was indicated by the enterprise representative, PE «X» was also inflicted moral damage which meant discreditation of business reputation of the enterprise and resulted in worsening relationhips with business partners and was estimated by the enterprise at the amount of five thousand UAH more. On receiving such a suit, citizen B. focused all her efforts at protecting financial welfare of her family and terminated her activities on counteracting PE «X» till the interference of EPL lawyers. They helped her protect her violated right to a safe and healthy environment.

2) Lawsuits of reimbursing damage caused by spread of unreliable information (defamation)

The lion's share of SLAPP-suits make up defamation suits (defamation — Eng. «libel»). These are lawsuits against activists, journalists, CSIs and mass-media on refuting unreliable information and compensating moral damage inflicted to honour, dignity and business reputation. Such lawsuits are filed by private persons (mainly, by managers or investors of the enterprises, civil servants), as well as by the legal entities.

Example

Protection of the activists of CO «Ecology and the World» [130]
In 2008, a large oil depot was being built in a small village near the city of Rivne. Worried by such events, the local residents established an environmental civic organisation «Ecology and the World», on behalf of which they delivered speeches at the meetings of co-villagers, wrote petitions and complaints to state authorities, participated in the sessions of the village council.

[130] In this part of the handbook's chapter the examples illustrate the events which preceded and became the basis for SLAPP-lawsuits. Legal arguments, used by EPL lawyers for the defense, and the results of these cases are described in the next part — Counteraction: tools available under the national legislation

Unable to think of some other way to make the active environmentalists keep silent, the management of the oil depot filed a number of lawsuits in courts about the refutation of false information and compensation of moral damage, caused to the honour, dignity and business reputation for a total of forty thousand UAH.
The head of the civic organisation published an article in the local weekly newspaper, where she shared her concern with the readers about a complicated ecological situation in the region and in Ukraine in an abstract way without naming anybody. Another member of the same civic organisation, speaking at the session of the village council, made some estimation about the enterprise. Two lawsuits were filed against the activists, one from a natural person (the director of the enterprise) and one from the enterprise as a legal entity. Apart from the moral damage in an enormous amount, the plaintiffs asked the activists to recover the costs of the plaintiffs for court fees and legal assistance.

Example

«Honour» of Energoatom
In the district court of Mykolayiv, another case was considered. State enterprise National Nuclear Energy Generating Company «Energoatom», represented by a separate division of South-Ukrainian nuclear power station, filed a lawsuit for the protection of honour, dignity and business reputation, where it demanded the refutation of false in the opinion of its representatives information, spread by citizen M. and compensation of moral damage in the amount of one hundred thousand UAH. Energoatom took a legal action in connection with spreading false facts in the article published in the local newspaper, in which its author, citizen M., described the problems of providing nuclear and radiation safety at nuclear power plants of Ukraine, the development of nuclear power complex of Ukraine and the construction of Tashlyk Pump Storage Plant as a part of South-Ukrainian power complex.

Example

Danube Biosphere Reserve (DBR)

As it often happens, not all lands, which were mentioned as its parts in the decree about its creation, were handed over to DBR for usage. In case with DBR, Yermakov island remained under the jurisdiction of raion council, and later it was handed over by the council for long-term lease to LLC «Yermak» for economic activity — mowing. However, the entrepreneurs and reserve workers had different views about the usage of natural resources of the island. The management and investors of the enterprise illegally hunted on the island on a regular basis, forgetting that as a part of a biosphere reserve it is regulated by the corresponding legislation. The reserve administration tried to explain in vain to the management of LLC «Yermak» that such behaviour was unacceptable; they addressed complaints to law-enforcement bodies in each case. Unfortunately, it did not lead to any positive results.

On 29 August 2006, an article was published in the local newspaper «Dunaiska zoria» signed by DBR administration «Bullets were scattered on the water in all directions and fountains of water rose as if at war». Among other things, the article mentioned the facts of illegal hunting on Yermakov island by a certain person (let us call him person A.), who ignored the legitimate demands of the inspector of the reserve security service and beat him, and the violation of the requirements of environmental legislation by LLC «Yermak». In the article, the reserve administration appealed to the public and called upon the corresponding law-enforcement bodies to properly estimate and respond to the situation in accordance with the law.

In 2007, DBR addressed a letter to the raion council about withdrawal of its approval to hand over the island for lease and the initiative and arguments in favour of the necessity to terminate the lease of the territory belonging to the reserve with LLC «Yermak» .

Since then the lawsuits against the reserve appeared. At first, person A. filed a lawsuit with the local court of Kiliya raion, submitted to DBR administration and newspaper «Dunaiska zoria», about the protection of honour, dignity and business reputation and compensation of moral damage, caused by spreading false information in the amount of 100 000 UAH. Later, the very LLC «Yermak» filed a lawsuit with the Commercial Court of Odesa region to the same defendants about the protection of business reputation and compensation of moral damage, caused by spreading false information in the amount of 940 000 UAH (!).

3. Counteraction: Ukrainian and International Experience

1) instruments, available under the national legislation

If you received a notice to appear in court as a defendant irrespective of the category of the lawsuit, you should seek legal advice immediately. The judicial system of Ukraine will not provide you with proper defence even against a frivolous lawsuit without involving a competent lawyer. Below, there are several elements of defence strategy from SLAPP-suits which were used by EPL in the cases of defending our clients, as well as the experience of foreign legal systems in this sphere.

a) limitation period

By their nature, SLAPP-suits are filed not to protect the violated right, but to suppress public resistance. Therefore, the time of filing such lawsuits is connected not with the moment of «inflicting harm», but with the critical moment of public debates when an entrepreneur/civil servant decided to resort to such mean method of fight as SLAPP-suit. Sometimes such circumstances may be in favour of the victim, therefore, the first thing a defendant in SLAPP-suit should pay attention to is the limitation period.

The thing is that a limitation period — a period within which a person may appeal to the court for the protection of his violated

right — in the cases about refutation of false information placed in mass media is three times as short as a general limitation period. It is 1 year since the day of placing this information in mass media. For example, one of the lawsuits against the members of CO «Ecology and the World» was filed by the plaintiffs almost on the last day of the limitation period. But the lawsuit contained several mistakes. It was returned to correct the mistakes, which the defendants failed to respond to within the period defined by the court, therefore they had to turn to the court again[131]. But at that time the limitation period was over, that is why the court rejected the lawsuit.

b) amount of damage/court fee

As it was described above, the initiators of SLAPP-suits often ask for the compensation of astronomical sums. Undoubtedly, it is done to intimidate the opponents even more. However, they and the judges sometimes «forget» about the rate of court fees for filing lawsuits of such categories for large sums.

We remind that under the Law of Ukraine «On Court Fees», a court fee for filing a lawsuit of material nature (including damages) in a civil court (if at least one party of the lawsuit is a natural person) is 1 percent of the amount claimed, but not less than 0,2 minimum wage and not more than 3 minimum wages[132]. In a commercial court (if both parties are legal entities) — 2 percent of the amount claimed, but not less than 1,5 minimum wages and not more than 60 minimum wages.

Also, in order to protect activists and journalists from frivolous claims, the legislator prescribed higher rates of court fees for lawsuits about the protection of honour and dignity of a natural person, business reputation of a natural person or legal entity. Thus, for filing a lawsuit for the compensation of moral damage for the

[131] If the drawback is not corrected within the period defined by the court, the lawsuit is considered to be filed at the moment of primary submission, otherwise the case is left without action.

[132] Minimum wage in 2014 amounts to 1218 UAH.

amount claimed from 5 to 50 minimum wages, the court fee is 1 percent of the amount claimed; lawsuits for the compensation of moral damage for the amount claimed from 50 to 100 minimum wages — 5 percent of the amount claimed; lawsuits for the compensation of moral damage for the amount claimed over 100 minimum wages — 10 percent of the amount claimed. It is important that in this category of lawsuits there is no limit of maximum court fee.

Thus, for example, for filing such a lawsuit for the sum of 121 801 UAH[133], the plaintiff has to pay 12 180,1 UAH; for the sum of one million UAH — one hundred thousand UAH. This fact was overlooked by the managers of LLC «Yermak», who filed a lawsuit to the administration of DBR for the sum of 940 000 UAH. Their lawsuit was left without action, and later, since the drawback of the lawsuit (the court fee was not paid to the full) was not corrected, it was returned to the plaintiff.

Therefore, having received the lawsuit about the compensation of moral damage and having made sure that it was filed within the limitation period, it is worth checking if the plaintiff paid the court fee correctly. To find it out, one may have to go to the court and familiarize oneself with the case. But if the court fee is not paid to the full, it is necessary to point it out to the court orally or by submitting a request about leaving the lawsuit without action. At least it will give you some time to better prepare for the consideration of the case on the merits, and sometimes it will remove the question of a litigation at all.

c) legality of acts

Making sure that there are no procedural drawbacks of a SLAPP-suit, it is time to consider its main points. Under the general rule of the Civil Code of Ukraine, the compensation of material or moral damage is possible only in case of inflicting harm by unlawful conduct[134].

[133] 100 minimum wages plus 1 UAH

[134] Under the Law there are exceptions of the rule when also the harm inflicted by legal actions is compensated, but it does not refer to SLAPP-suits.

Thus, the first argument in the defence against a lawsuit about the compensation of damage, inflicted by your active social activities, should be the legality of actions. That is, if the plaintiff claims that the harm was inflicted by the downtime caused by the rally, appeals to the regulatory bodies, the defendants must insist that sanctioned rallies or appellations to any state bodies is the implementation of constitutional rights, that is legal actions. Even if it really did harm to the enterprise, such harm is not subject to compensation. In the context of the right to file individual or collective appeals to state authorities, the Supreme Court of Ukraine mentions, inter alia, that when a person appeals to these bodies with a statement containing this or that information, but during the verification this information was not confirmed, this fact itself can not in be grounds for the lawsuit, because in this case an individual constitutional right was implemented under Article 40 of the Constitution, and false information was not spread. According to the position of the Supreme Court of Ukraine, the appellation caused by the intention to fulfil one's public duty or to protect one's rights does not presuppose legal responsibility[135].

If the plaintiff filed a lawsuit about the protection of honour, dignity and business reputation, the defence should be based on the freedom of expression of views and beliefs. In such category of cases, damage is compensated only if the court finds the challenged statements not true. According to the position of the Supreme Court of Ukraine, information is considered false if it is not true or is falsely described, that is, it contains facts about events and phenomena which did not take place at all or which did not exist, but the facts about them are untrue (partial or distorted)[136]. Spreading true information which is negative, as well as spreading evaluative judgments is legitimate and does not presuppose the compensation of damage.

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[135] Resolution of the Supreme Court of Ukraine as of 27.02.2009 № 1 On judicial practice in the cases about the protection of dignity and honor of a natural person, as well as business reputation of a natural person and legal entity.
[136] Ibid.

d) fact of inflicting damage and the extent of damage

If you allowed spreading false information or committed other unlawful actions in the course of your public activity, the strategy of defence against SLAPP-suit will be denying the fact of inflicting damage and the extent of it. The Supreme Court of Ukraine believes that in determining the extent of moral damage courts should proceed from the principles of fairness, good faith and reasonableness. There is substantial judicial practice connected with it, so there is no point in repeating it here.

It is worth mentioning only one detail, specific of such category of lawsuits. Under the Law of Ukraine «On Information», the authorities that act as plaintiffs in cases of honour, dignity and business reputation protection may only demand through the court that speculations about them be revoked and may not require the compensation of moral (non-pecuniary) damage. However, there were such lawsuits in EPL practice.

e) international experience

Some legal systems of the world single out SLAPP-suits as a separate category of cases, and duly respond with the corresponding changes in the legislation and practice in order to suppress this negative phenomenon. In this handbook we briefly provide some examples.

1) special anti-SLAPP legislation

As far back as in 1992, the States of New-York and California adopted legislative acts specifically aimed at regulating SLAPP-suits. For example, the law of the State of New-York envisages the protection against lawsuits, filed by natural persons and legal entities — applicants to obtain permits from the authorities connected with spreading information, commenting, appeal, protests against such permits. This law does not protect the freedom of speech in general, however, it protects the right to apply and participate in

making decisions about issuing permits. For example, the lawsuit of a developer, who applied for a permit for the construction of a large shopping centre, to the local activists and owners of small shops, who are against the construction, belongs to this category.

In such cases the law of the State of New-York requires that the plaintiff (developer) should prove the malice of the defendant (activist) for the compensation of any damage. It is worth mentioning that in such category of cases, in ordinary consideration the law also allows the plaintiff to submit a motion to dismiss a complaint The plaintiff in such case has to prove that his lawsuit «has considerable legal grounds», otherwise the court grants a motion and closes the case. Such quick termination of the case allows the defendant to considerably save time, money and nerves.

Since under the general principle in the USA each party pays their own costs connected with the litigation, the law on SLAPP-suits allows the defendant (activist) — if a motion to dismiss a complaint is granted or the lawsuit is rejected in essence — to recover the costs from the plaintiff (court fees, fees of witnesses, experts, lawyers) connected with participation in such a process, and file a counter-suit about the compensation of moral damage, as well as punitive damages (if the defendant proves that malicious attempts to violate the right to freedom of speech or legal action was the only reason for filing the lawsuit). While in New York the court decides the question of these compensations (a right of the court, not its obligation), in California court fees are automatically awarded on the full amount to the defendant.

2) SLAPP-back

The English abbreviation SLAPP sounds in the same way as the word «slap». Therefore, in American literature dedicated to defence and fight with SLAPP-suits, the opinion is often expressed that if you were «slapped», you shouldn't turn the other cheek, it is better to slap back. This is how the name of such category of cases

appeared — SLAPP-Back. Professor Pring[137], a leading American researcher in this sphere, says that SLAPP-back suits — counter-suits or new lawsuits about the compensation of damage, filed by the victims of SLAPP-suits, is the most effective means to discourage such lawsuits.

Unlike SLAPP-suits, SLAPP-back suits in the USA are often successful. It is primarily due to the provisions in the legislation which envisages considerable sanctions for vexatious processes. For example, in Connecticut the law allows to recover double damages if a lawsuit is filed without sufficient legal grounds, and triple damages — without sufficient grounds and malice to unfairly annoy or disturb another person[138].

Example

One of the classical American examples of SLAPP-back suits is the following. In 1982, in California, three farmers published critical information in the newspaper about an agricultural company J. G. Boswell Company, which was against building a canal, which was to the advantage of small farmers. The company filed a defamation suit against the farmers. The court dismissed the suit, and the farmers filed a counter-suit, saying that the company's suit was unreasonable and aimed at intimidating the political opponents and making them keep silent. In 1988, the court awarded 13,5 million dollars to the farmers (later reduced to 11,1 million), 10,5 million of which were punitive damages[139].

[137] SLAPPs: Getting Sued for Speaking Out, George W. Pring, — Temple University Press, 1996.

[138] 2012 Connecticut General Statutes, Title 52 — Civil Actions, Chapter 925 — Statutory Rights of Action and Defenses Section 52-568 — Damages for groundless or vexatious suit or defense, http://law.justia.com/codes/connecticut/2012/title-52/chapter-925/section-52-568

[139] Punitive damages is monetary sum (fine) which is recovered from the defendant in addition to material and moral damage, aimed at changing unlawful behavior

Thus, despite their obvious attractiveness for the activists tired of court red tape in the USA, SLAPP-back suits presuppose one more round of lengthy and costly court battles. Even in the role of plaintiffs, such procedures may be unacceptable or inaccessible for many ordinary citizens and local groups. However, media attention to large compensations, awarded in such cases, as well as the possibility provided by the law to recover court fees from the plaintiff make SLAPP-back suits more and more popular, which in its turn effectively reduces the number of SLAPP-suits in the USA.

Thus, as we can see, SLAPP-suits is a negative phenomenon which appeared as a response of the state apparatus and business to the successful public activity. Nowadays in Ukraine, such lawsuits often achieve their aim, which is to intimidate and financially exhaust the activists, and therefore, they pose a serious threat for functioning and development of a civil society. Therefore, at present it is important for human rights organisations to recognize this phenomenon in order to develop efficient means of counteraction to protect both individual activists in particular cases and the civil society in general. EPL experience in judicial protection of environmental activists from SLAPP-suits is in most cases successful. However, in order to have proper development of democracy in Ukraine, legislative and judicial power should follow international experience and develop mechanisms which would prevent and reduce the number and efficiency of SLAPP-suits.

(prevent in future) of the defendant and other persons and prevent the activity which was the basis of the lawsuit. Although the aim of punitive damages is not to compensate the plaintiff, the plaintiff receives all or some part of punitive damages.

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