

Questionnaire EUFJE Annual Conference
"Climate Law and Litigation"
(October 24-25, 2022)

1. How has judicial decision-making on climate change issues evolved in your country over the last decade?

Recently, the number of climate change-related cases in Ukraine has been increasing.

At the same time, it is more correct to talk not about cases on climate change in a "pure" form, but about certain categories of disputes on violation of environmental laws (hereinafter referred to as climate cases), in particular, disputes:

- (a) in the field of atmospheric air protection;
- (b) on the use and protection of water from pollution, littering and depletion, as well as replenishment of water resources;
- (c) in respect of the ownership, use and management of forests;
- (d) concerning the generation, disposal, neutralization and burial of waste;
- (e) in the field of protection and use of territories and objects of the nature reserve fund and restoration of its natural ecosystems.

At the same time, common cases in Ukraine are cases based on claims for compensation for material and (or) moral damages caused by violation of environmental laws, as well as claims concerning recognition of the illegality of public authorities' decisions in the environmental field.

2. Before which type of courts is this type of litigation brought and by which type of plaintiffs?

The courts in Ukraine specialize in the consideration of civil, criminal, commercial and administrative cases, as well as cases of administrative offenses (Art. 18 of the Law of Ukraine "On the Judiciary and the Status of Judges" of 2 June 2016).

The distinction between the jurisdiction of national courts is structured as follows: all cases are subordinate to the courts of general (civil) jurisdiction, except for disputes that are within the jurisdiction of administrative or commercial courts¹.

At the same time, administrative courts consider cases of public-law disputes (disputes of individuals and legal entities with the subjects of authority concerning appeals against decisions, actions or inaction of the latter), and commercial courts consider cases of disputes in the field of economic activities (commercial disputes).

Therefore, depending on the essence of the disputed legal relations and their subject composition, claims about climate change can be filed to a court of general (civil) jurisdiction or to an administrative or commercial court.

A wide range of persons can be plaintiffs in climate cases – individuals, private entrepreneurs, commercial and non-commercial legal entities, that is, anyone who

¹In this questionnaire, there is no information about the cases on administrative or criminal liability for offenses in the environmental field considered by the courts of Ukraine.

consider their environmental rights violated. Public environmental protection organizations may also file an application to a court.

3. What are the opportunities to this type of litigation in your country?

The procedural legislation of Ukraine does not determine the peculiarities of proceedings in climate cases, they are in accordance with the claims procedure. The decision of the court of first instance may be appealed to the court of appeal, and in some cases to the court of cassation (after overcoming the procedural "filters" of the cassation appeal, which provide such criteria as the merits of the dispute, the price of filing a claim, etc.).

At the same time, an expert, i.e. a person who has the special knowledge necessary to clarify the relevant "environmental" circumstances of the case, can take part in the consideration of the case (including climate cases). The expert may be appointed by the court or engaged by the court at the initiative of the party to the case.

During the consideration of the climate case on issues that are or will be the subject of court proceedings, the court may appoint a forensic examination. This examination is based on special knowledge in the field of science, technology, art, craft, etc. of objects, phenomena and processes and conducted for the purpose of providing an opinion to the court. The Ministry of Justice of Ukraine approved recommendations on the preparation and appointment of forensic examinations and expert analysis, which contain an indicative list of issues that can be solved by the corresponding type of examination (in climate cases, as a rule, engineering and environmental expertise is appointed).

In order to determine the amount of damage inflicted on the environment, the Ministry of Environmental Protection of Ukraine approved special Methods for determining the amount of losses caused by (a) violation of laws on the use and protection of water resources, (b) illegal use of subsoil, (c) excessive emissions of pollutants into the air, (d) pollution and contamination of land, etc.

4. What are the challenges to this type of litigation in your country?

At times, problematic issues arise with regard to the delimitation of the jurisdiction of national courts concerning resolution of climate disputes, for example when it comes to compensation for damages caused by illegal decisions of public authorities.

As a general rule, a case for compensation for damages should be considered: (a) by a general (civil) court, – if the plaintiff is an individual (who does not have the status of an entrepreneur) or a non-profit legal entity, or (b) by a commercial court, – if the business entity (commercial legal entity, private entrepreneur) is filing a claim. At the same time, claims for compensation for damages caused by illegal decisions, actions or inaction of the subject of authority are considered by the administrative court, if they are filed in one proceeding together with the requirement to resolve a public-law dispute (Article 21 of the Code of Administrative Proceedings of Ukraine).

Sometimes national courts face difficulties in determining the proper plaintiff in climate disputes, in particular, when a claim is filed for the protection of environmental rights and interests of society as a whole or its individual members. In this regard, the Supreme Court, on the basis of the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in

Environmental Matters (hereinafter – the Aarhus Convention), expressed the legal opinion that public environmental organizations may file appropriate claims to the court. At the same time, in such disputes these public organizations actually exercise the powers of a public authority (as a subject of authority), which does not perform its functions properly (Resolution of the Grand Chamber of the Supreme Court of 11 December 2018 in the case No. 910/8122/17).

5. What is the average length of proceedings (including on appeal and cassation)?

The procedural laws of Ukraine prescribe that, as a general rule, the case should be considered by the court of first instance within 125 days starting from the date of opening of the proceedings in the case. At the same time, the courts of appeal and cassation have to review the court decisions in the case within 60 days from the date of opening of the appeal or cassation proceedings, respectively.

If an examination is appointed in the case, the court has the right to suspend the proceedings in the case until the expert's opinion is received.

Certain complex cases are considered for a longer time, within a reasonable period. The procedural laws determine such a period of time, which is deemed sufficient, taking into account the circumstances of the case, to perform the procedural actions, and which corresponds to the task of the proceedings, facilitates the exercise of rights and performance of obligations by the participants in the case.

6. Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

In the consideration of climate cases, the court protects the rights and interests of individuals and legal entities, as well as state and public interests in the manner prescribed by law or contract.

As for the remedies (methods of protecting rights), such categories as "relevance" and "effectiveness" are used to characterize them.

The relevant remedies are those that correspond to the content of the violated right, correspond to the method (nature) of the offence, take into account the consequences that the offense has caused and correspond to the legal purpose to which the subject of protection aspires.

At the same time, the use of an effective remedy leads to an actual restoration of the violated right (provides for the cessation of non-recognition or disputing of the right) or terminates the impossibility to satisfy the interest, or, if it is not possible to do so, provides for appropriate compensation.

The list of remedies is legally regulated and includes: a) recognition of the right; b) declaration of a legal action as invalid; c) termination of the action that violates the right; d) restoration of the situation that existed prior to the violation; e) enforcement of the duty in kind; f) change of legal relationship; g) termination of the legal relationship; h) compensation for damages and other ways of compensation for property damage; i) compensation for moral (non-property) damage; j) declaration of a decision, action or inaction of the public authority, local self-government body or their officials as illegal (Article 16 of the Civil Code of Ukraine).

At the same time, in the event that the law or the contract do not declare an effective remedy to protect the violated right or interest of the plaintiff, the court has the opportunity to declare another remedy in accordance with the requirement set out in the claim and which does not contradict the law.

Most often, while resolving climate disputes, courts in Ukraine apply such remedies as compensation for losses caused to the plaintiff by: a) emissions of pollutants into the air from stationary sources without a special permit, b) excessive emissions of pollutants into the air, c) pollution of soil, d) disposal of excess return water without a special water use permit, e) disposal of waste water exceeding the permissible concentrations of pollutants.

It is not uncommon to encounter claims regarding: a) the declaration of the actions of state authorities as illegal and the obligation of such authorities to take action (for example, to restore a solid waste disposal site); b) the revocation of permits for emissions of pollutants into the air by stationary sources; c) the declaration as illegal and cancellation of decisions of state tax authorities to charge an environmental tax for emissions of pollutants into the air.

On the contrary, claims filed to protect business reputation and refute false information regarding the assessment of the impact on the environment of the plaintiff's industrial enterprise are not common.

The grounds for courts' refusal to satisfy the claim (including climate cases) are: a) absence of the plaintiff's violated right; b) failure to prove the claims; c) suing an "incorrect" defendant (i.e. a person who did not violate the plaintiff's rights); d) addressing the court with an improper or ineffective remedy.

The laws of Ukraine also establish that an independent ground for dismissal of a claim is the expiration of the statute of limitations (which is 3 years), the application of which is declared by a party to the dispute (Article 267 of the Civil Code of Ukraine).

7. Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard?

To implement court decisions, including decisions in climate cases, the courts of Ukraine issue enforcement documents (writs of execution, court orders, rulings, etc.), which are submitted by the interested party (claimant) to be enforced by the state enforcement service body or a private bailiff (in the vast majority of cases – at the discretion of a claimant).

The legislation of Ukraine provides for special judicial control over the enforcement of court decisions. An interested person (both a claimant and a defendant) may file a complaint against the decision, actions or inaction of state enforcement service bodies or a private bailiff. The complaint shall be filed with the same court that issued the court decision.

Based on the results of consideration of the complaint in a court to which interested parties are summoned, the court, in case of establishing the validity of the complaint, declares the contested decisions, actions or inaction as illegal and obliges the state executive service body or private bailiff to terminate the violation (restore the violated right).

Moreover, there is a special mechanism of judicial control in administrative cases. The court, that delivered decision in the administrative case, may oblige the defendant – the public authority – to submit a report on the enforcement of the decision within the period established by the court. Based on the results of the report review or in case of failure to submit such report, the judge in his ruling may set a new term for submission of the report, as well as impose a fine on the head of the public authority, half of which is charged in favor of the plaintiff (Article 382 of the Code of Administrative Proceedings of Ukraine).

8. What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses?

When resolving climate disputes, the courts of Ukraine refer to the norms of national legislation in the field of protection and preservation of environmental rights: The Constitution of Ukraine, the Land, Water and Forest Codes of Ukraine, the Subsoil Code of Ukraine, the Laws of Ukraine "On Environmental Protection", "On Atmospheric Air Protection", "On Waste", etc. Provisions of international agreements and treaties are also used, including: The Aarhus Convention, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the UN Protocol on Pollutant Release and Transfer Registers of March 21, 2003, etc.

The Supreme Court has developed certain approaches with regard to consideration of climate cases, among which the following can be distinguished.

When resolving disputes on the compensation of damage caused to the environment, the courts proceed on the basis of the presumption of guilt of the defendant in causing such damage (i.e. it is the defendant who must prove the absence of his guilt). At the same time, in such cases it is mandatory to prove all the grounds for imposing liability on defendant for the damage caused by his actions, in particular: a) illegal behavior (for example, excessive emissions of pollutants into the air without the permits); b) the guilt of the defendant (conduct of commercial activity, which leads to excessive emissions in the absence of a necessary permit); c) the amount of damage (calculated in accordance with a special methodology); d) causal connection (damage caused specifically through unlawful conduct of the defendant).

In other categories of climate cases, the courts of Ukraine use the following approaches:

- a person to whom the measures of state supervision (control) are applied in the field of commercial activity, in particular, by means of suspending the special permit for the use of subsoil, should be provided with information about the application of the relevant measures and the date of their implementation in advance;
- payment of an environmental tax for emissions of pollutants into the air by stationary sources does not exempt the defendant from the obligation to compensate for the damage caused;
- the business entity must take care to extend the validity of the special permit for the use of natural resources in advance;
- unauthorized use of water resources is a separate basis for compensation of losses caused to the state as a result of violation of legislation on the protection and rational use of water resources;

- failure to complete the technical procedure for establishing the boundaries of the National Natural Park in its capacity as an object of the nature reserve fund does not change the intended purpose of its land plot in its capacity as a land of the nature reserve fund, on which it is prohibited to conduct commercial activities that can cause damage to the protected object and violate environmental balance; it is prohibited to change the boundaries of land plots and their use for any construction purposes.