Approaches to Access

Ideas and Practices for Facilitating Access to Justice in Environmental Matters in the Areas of the Loser Pays Principle, Legal Aid, and Criteria for Injunctions

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Introduction

This report represents a step towards meeting the goal of the Aarhus Convention Access to Justice Task Force to develop a set of good practices and analyses on three priority issues:

- **The loser pays principle**

Article 9(4) of the Aarhus Convention requires that procedures for obtaining access to justice must not be prohibitively expensive. In some legal systems, the loser of an administrative or judicial action must pay all, or a portion of, the winner's litigation costs. These costs may include court fees, attorney fees, witness fees, and various other types of expenses. The loser pays principle may lead to an inability to control or even predict exposure to risk, and thus unreasonably deter public interest environmental litigation. Good practices in this category are those that help potential public interest claimants manage their risk and prevent environmental legal procedures from becoming prohibitively expensive.

- **Legal aid and other methods of funding for public interest lawyers and NGOs**

One way in which many countries address the requirement that procedures not be prohibitively expensive is to provide legal aid, or some other method of funding. Good practices in this category are those that enable meritorious environmental disputes to proceed when potential claimants lack the funds to pursue claims on their own.

- **Criteria for injunctions**

Article 9(4) of the Aarhus Convention requires that access to justice procedures provide adequate and effective remedies, including injunctive relief. To be effective, procedures must provide a means for actually stopping an environmentally harmful activity or illegal administrative decision. Without the ability to obtain injunctive relief, serious and irreversible damage may occur before the legal dispute is decided. Good practices in this category are those that facilitate injunctive relief leading to an effective level of environmental protection.

Methodology

In April 2011, a survey was distributed to the National Focal Points and other Stakeholders to the Aarhus Convention, and many responded with descriptions of current good practices and ideas for solutions. Using these responses as well as previously existing reports and studies, this report presents concise descriptions of some of the ways parties to the Aarhus Convention are currently addressing the issues outlined above. It is in no way intended to be an exhaustive list. Rather, it hopes to facilitate productive communication about how solutions might be applied across different legal systems and identify areas in which additional study might be useful.

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Terms and Definitions

Terms often have slightly different meanings in different jurisdictions. For the sake of consistency, when used in this report, the following terms may be defined as follows:

Administrative appeal/action: a challenge or request for review of an administrative decision that is made to an authority within an administrative agency.

Judicial appeal/action: a claim, lawsuit or request for judicial review that is made to a court.

Civil case: a claim by a private party for infringement of rights for which money or remedies other than criminal penalties are sought. As opposed to an administrative case, does not include actions to demand, modify or annul an administrative decision.

Claimant/plaintiff: the party that initiates a complaint, action, proceeding or lawsuit.

EIA: an Environmental Impact Assessment. This is an analysis of the effect an existing or proposed development or project will have on the environment, often required to obtain various building or operating permits.

Inquisitorial principle: the principle that the court or other deciding body, rather than the parties, is responsible for investigating facts and collecting evidence and expert testimony relevant to the case.

Loser pays principle: the principle that the loser of a lawsuit or other proceeding must reimburse the winner for their costs in bringing or defending their case.

Limiting Loser Pays

One-way cost shifting

Addressing the Issue

One-way cost shifting modifies the "loser pays principle." It provides that parties in a dispute with an administrative authority or other government body will not have to pay the government's costs if they lose, but may still recover their costs if they win. This practice eliminates the financial uncertainty and decreases the overall financial burden plaintiffs would otherwise face in administrative disputes.

How It Works: Slovakia

The administrative body is always responsible for its own costs in administrative cases to which it is a party. If the opposing party wins, the administrative body may be ordered to pay costs. If the opposing party loses, it does not have to pay the administrative body's costs. If the administrative body fails to obey a court's judgment, it must pay all the other party's expenses for bringing the case a second time. In civil cases, the loser pays principle applies unmodified.

Additionally, NGOs, participants in administrative procedures, and some other parties are exempt from paying court fees in actions for judicial review of the lawfulness of administrative decisions.[i]

Case Study: Pezinok Landfill Case

Pezinok is a small town best known for its vineyards not far from Bratislava, the Slovakian capital. A company called Ekologická skládka, a.s. sought and received permission to build a waste dump near the town. There were several alleged legal violations during the approval procedure. A citizens' group and the municipality of Pezinok filed and lost a suit against the landfill in the Bratislava Regional Court. The plaintiffs appealed to the Supreme Court. The Supreme Court issued an injunction against the continuing construction of the landfill, and decided the case in favor of the plaintiffs a month and a half later. The Court awarded the plaintiffs €22.704 in attorney and court fees.

However, while this case illustrates the award of costs in an environmental case, it is not entirely a success story. The Constitutional Court abrogated the Supreme Court's decision, and the Supreme Court has requested a preliminary ruling from the ECJ. Meanwhile, the landfill has been completed and continues to be used in contravention of the Supreme Court decision.

How It Works: Estonia

Generally, the loser pays principle applies in administrative matters. However, administrative bodies cannot recover attorney fees for work within the scope of the body's usual activity. If the administrative body must justifiably hire outside attorneys because the case is particularly complicated or outside the scope of its normal activity, it may claim those costs from the loser.

Protective Cost Orders

Addressing the Issue

A Protective Cost Order (PCO) is an order by a court that caps the amount of the costs for which the losing party can be held liable. If granted early enough in the proceedings, PCOs can mitigate the uncertainty caused by the loser pays principle by letting plaintiffs know the maximum amount they will have to pay if they lose the case. This allows the plaintiff/applicant to make a calculated decision about whether it can afford to proceed with the lawsuit.

How It Works: England and Wales

Currently, judges in England and Wales have discretion whether to grant PCOs. The judiciary has based their decisions on principles promulgated in the 2005 Court of Appeals case *R (Corner House Research) v. Secretary of State for Trade & Industry*, 1 W.L.R. 2600. The test in this case allows judges to grant PCOs at any stage of the proceedings:

- in exceptional cases;
- when it is fair and just to do so; and
- the issues raised are of general public importance; and
- the public interest requires that those issues be resolved; and
- the plaintiff has no private interest in the outcome of the case; and
- taking into consideration the financial resources of the parties and the costs likely involved, the PCO will be fair and just; and
- without a PCO, the plaintiff is justifiably likely to drop the case.
- It is also a plus factor for granting a PCO if those representing the plaintiff are doing so *pro bono*.

The criteria arising from the *Corner House* case have been criticized as failing to comply with the Aarhus Convention both domestically in the *Sullivan Reports* and by the Aarhus Convention Compliance Committee (ACCC/C/2008/33). In particular, the requirements that cases be exceptional, that no private interest be involved, and the preference for pro bono plaintiffs have been identified as problematic. Other concerns include reciprocal cost caps, which are intended to promote fairness but may have the effect of limiting the ability of lawyers to take on public interest cases; caps being set quite high; and judicial discretion, the exercise of which has been found insufficient to comply with Aarhus Convention by the Court of Justice of the European Union (CJEU case C-427/07).

Potential resolutions include applying the factors from *Corner House* to environmental cases in a manner consistent with the Aarhus convention, creating a new test specifically for environmental cases, and replacing the PCO system with one-way cost shifting in environmental cases in which a public body is a party. There is also an idea to codify the current system, potentially with amendments that would extend to cases covered by the EC Public Participation Directive (2003/35/EC), i.e., cases involving EIA and IPPC activities. Others have suggested an entirely different system involving an objective test of costs, rather than a subjective test based on the individual characteristics or circumstances of the

parties, is needed in cases that fall under the purview of the Aarhus Convention. Currently, Lord Justice Sullivan's Working Group on Access to Environmental Justice, as well as environmental organizations such as the Coalition on Access to Justice for the Environment advocate adopting a system of qualified one-way cost shifting to resolve any insufficiencies of the PCO regime.

Case Study: Garner v. Elmbridge

In *R (on the application of Garner) v. Elmbridge Borough Council [2010] EWCA Civ*, the appeals court granted claimant Keith Garner a PCO of £5,000 (about €6.000 at the time of the decision) in a case that engaged the EIA Directive. The opposing party was granted a reciprocal cap of £35,000 (about €42.000).

In this case, Garner challenged a building permit that allowed the redevelopment of a site across the Thames from the Hampton Court Palace, a protected ancient monument. Garner, a former employee of the Palace and architect specializing in historic preservation, alleged that the Council did not consider the effect of the development on the setting of the protected monument as required by law. The request for a PCO was denied at the trial court level. On appeal, Lord Justice Sullivan, whose working group had previously criticized the use of the *Corner House* criteria when applied to environmental cases, wrote the decision. In granting the PCO, he found that the "general public importance" and "public interest" criteria were not applicable to cases that fell under the purview of the Aarhus Convention. He also found that an objective test for whether costs would be prohibitively expensive should be used, rather than a subjective test that considered a claimant's means. Using a subjective test would discourage potential claimants, he explained, because their personal finances would be publicly exposed.

While Garner won the PCO, he ultimately lost the case. He is reportedly considering an appeal.[ii]

Loser Pays Not Applied in Aarhus Cases

Addressing the Issue

Some countries use the loser pays principle, but do not apply it in particular types of cases within the scope of the Aarhus Convention. This allows for Aarhus compliance without unduly affecting other areas of law. Other countries do not use the loser pays principle in any administrative cases.

How It Works: Austria

Austria has an independent environmental tribunal (*Umweltsenat*) that hears EIA appeals. The loser pays principle is not applied to any cases before the *Umweltsenat*. The loser pays principle also does not apply in any environmental cases before the Independent Administrative chambers. Decisions by administrative adjudicators can be appealed to the Administrative Supreme Court, where a limited loser pays system is applied. If plaintiffs win against an administrative body in the Administrative Supreme Court, they receive a lump sum of approximately €2.500 to

reimburse their costs. If plaintiffs lose, they must pay a lump sum of approximately €1.300.

How It Works: Finland

In Finland, the loser pays principle is not applied to administrative law cases (with some exceptions for vexatious behavior—see below). Because claimants are also allowed to represent themselves without a lawyer, they can keep their costs to a minimum.

However, a negative aspect of the fact that no costs are awarded is that few specialized environmental lawyers are willing to work for public interest clients. Lawyers are not able to recover fees from the administrative bodies if successful. Further, paying environmental clients may shun lawyers who provide services for public interest clients. These factors make it financially difficult for lawyers to specialize in public interest environmental law.

Loser Pays Only in Vexatious Lawsuits

Addressing the issue

Limiting loser pays to vexatious lawsuits allows plaintiffs to control their costs while protecting the judicial system and government defendants from unmeritorious claims. Vexatious lawsuits may be defined as those with no basis in fact or law, or intended solely to harass or delay lawful activity.

How It Works: Netherlands

According to the General Administrative Law Act in the Netherlands, natural persons must pay procedural costs only if they bring a case that is an "obviously unreasonable use of procedural law." Only in rare circumstances is a losing party ordered to pay costs due to this criteria.[iii]

Legal Aid Strategies

Public Funding of Legal Aid Organizations

Addressing the Issue

The government may fund legal aid organizations. The legal aid organization may itself be a government body, or may be run by an outside body such as an NGO.

How It Works: Austria

The Austrian government gives grants to numerous environmental NGOs, some of which are used to fund legal aid programs. One organization that receives government funding is the Citizen's Initiative Fund, which underwrites participation in environmental administrative proceedings and lawsuits. Another is Ökobüro, which undertakes wide ranging activities related to environment, nature, and animal protection, and receives grant funding specifically for its legal aid program.

The grant for Ökobüro's legal aid program is funded by a project of the Ministry for Agriculture, Forestry, and Water Management. Ökobüro applies for funding annually. The application consists of a project proposal describing how many cases are expected to be aided. At the end of the project period, a report is filed which list the cases and their subject matter. While the grant must be reapplied for annually, funding has been renewed for several years, and appears likely to be renewed in the foreseeable future.

The number of cases for which Ökobüro provides legal assistance varies from year to year; in 2010, it helped 145 legal aid clients. The process for requesting aid is very informal; potential clients can seek assistance by email, telephone, or in person. Ökobüro has been able to provide assistance to nearly all those who seek it; exceptions being cases dealing with issues other than environmental law, and cases that involve only private interests.

Ökobüro employs several lawyers who provide legal advice. Besides giving general advice, the lawyers often also research legal questions and direct clients to needed forms and websites. Less frequently, they may prepare documents, refer clients to other experts or lawyers, or accompany clients to meetings. Ökobüro lawyers do not provide courtroom advocacy.

An example of a service Ökobüro frequently provides is assistance for NGOs and citizen groups in making information requests. Ökobüro provides help discerning what types of information can be requested, and a template for doing so. In most cases, the client then successfully makes an information request.[iv]

Direct Funding of NGO Participation in Decision-making or Access to Justice

Addressing the Issue

Several countries, including Sweden, Germany, and Canada, have funds that are used to finance NGO public participation or litigation.

How It Works: Sweden

The Swedish Environmental Protection Agency gives grants to environmental NGOs and other non-profit organizations for various purposes. The Swedish Society for Nature Conservation, a non-profit association, received a grant specifically for the purpose of appealing administrative decisions concerning permits, approvals and exemptions. NGOs have been successful, with at least some elements of their claims, in just under half of their cases between 1998 and 2004. Although these are the most current statistics, the trend appears to continue.[v]

Direct Payments to Lawyers

Addressing the Issue

The cost of legal representation is often the largest expense in bringing a legal dispute. Lawyers for low-income litigants may be paid directly by the state.

How It Works: Czech Republic

The court may, at the request of a litigant, appoint an attorney to represent him if he lacks sufficient financial resources to hire one. The attorney is paid directly by the government. If the opposing party loses, it must reimburse the government.

There are two major problems with this system as practiced in the Czech Republic. First, attorneys are appointed regardless of their areas of expertise, so someone with no environmental law experience may be appointed to an environmental case. Because environmental law can be a highly complex and technical field, an otherwise qualified attorney may be unable to satisfactorily represent environmental clients. A second problem is that the amount paid to appointed attorneys is below market rate, so some attorneys avoid appointments.

A potential solution is to allow plaintiffs to select their own attorney to be paid by the government upon approval. Another would be to chose appointed attorneys based on areas of expertise.[vi]

Fee Waivers

Addressing the Issue

Fees for initiating or undertaking administrative or judicial procedures range from nonexistent to quite significant. Nominal and moderate fees are unlikely to be prohibitively expensive, but high fees, particularly those based on the value of the case, may reach that level. Many countries combat this by granting waivers to certain categories of plaintiff.

How It Works: Hungary

Specific types of administrative and administrative judicial procedures have varying fees that are enumerated in law. Fees for EIA and IPPC procedures are in the thousands of Euros. NGOs are exempt from some types of fees. In some types of environmental procedure in which they are not exempt, NGOs pay only 1% of the regular fee if they are not the initiators of the procedure.[vii]

Environmental Ombudsman

Addressing the Issue

An Ombudsman is an independent internal review institution that aids individuals and entities in disputes with administrative bodies. Complaining to the Ombudsman is free to the complainer. In most jurisdictions, the Ombudsman is limited to reporting findings and issuing recommendations on administrative practices, though these recommendations are often regarded as mandatory by the administrative authorities. In other jurisdictions, the Ombudsman has actual legal authority. While the Ombudsman is not an administrative or judicial remedy, by providing the opportunity for no-cost assistance in resolving environmental disputes, it may nevertheless be a useful tool in effectuating the goals of the Aarhus Convention.

How it Works: Austria

Austria has specialized environmental Ombudsmen who use technical environmental expertise to resolve disputes with administrative bodies. Offices of the environmental Ombudsmen are independent agencies of the provinces, and are administered at the province level. In the province of Vorarlberg, the environmental Ombudsman is elected by local NGOs.

Some of the rights and duties of the environmental Ombudsmen are:

- advocating for environmental and conservation interests in administrative proceedings;
- providing expert opinions on proposed environmental laws and regulations;
- providing information to the public and to policymakers;
- resolving environmental conflicts through mediation; and
- enforcing environmental laws and regulations by bringing complaints as a party in administrative courts.

Law Clinics

Addressing the Issue

Law clinics are both a type of legal aid and a tool for training lawyers. Clinics are located in law schools and funded by a government body, tuition payments, private grants, or some combination of these. A school may have a single clinic that serves clients in several areas of law, or several clinics in subject specific areas of law such as environmental law. The clinic is staffed by students who act as lawyers under the supervision of an experienced legal professional or professor. Usually, clinics assist low-income individuals with various legal matters. Some environmental clinics, however, are structured more like consulting firms and write policy advice for NGOs or government bodies.

How It Works: Latvia

At the law clinic at the Faculty of Law at the University of Latvia in Riga, students gain legal experience while providing free services to low-income clients. The clinic operates as a separate structural unit within the school. It is administered by 2-3 people and staffed by students who earn school credit for participation. Before they interact with clients, students receive special training covering psychology, ethics, and other practical skills. They are advised by experienced lawyers who contribute their expertise *pro bono*. The clinic serves clients in many areas of law, including employment, housing, consumer rights, access to information, and environmental law.

The clinic partnered with an NGO to serve environmental law clients. The NGO referred cases to the clinic that involved issues such as territorial planning, construction permits, and protective zones (e.g. green belts around infrastructure objects or public waters). The students learned to handle basic environmental law matters, and clients received a level of assistance to which they may not have otherwise had access. The clinic is not currently involved in environmental law cases, but may be again in the future.[viii]

How It Works: Czech Republic

The Faculty of Law at the Palacký University Olomouc in the Czech Republic has an extensive clinical education program. The clinic is divided into specialized sections. Students in each section provide free legal assistance in that area of law to socially, economically, or otherwise disadvantaged clients.

Students receive training in case management, plus instruction in the specialized field of law. Under the supervision of an experienced practitioner, students interview clients, then determine how to aid them. Services provided include written and oral legal advice, as well as representation before administrative bodies and courts.

How It Works: Spain

The Tarragona Centre for Environmental Law Studies (CEDAT) at Universitat Rovira i Virgili in Catalan is a partnership between the University and several administrative authorities, including the local water board, city council, and public transit company. CEDAT offers a Master's degree in Environmental Law, which includes participation in the legal clinic. The focus of the clinic has been giving advice on environmental matters to public administrative bodies.

Pro Bono

Addressing the Issue

The phrase *pro bono* is short for *pro bono publico*, and means "for the public good" in Latin. It refers to the practice of lawyers volunteering their services. *Pro bono* has a more established tradition in the common law jurisdictions of the United States and the United Kingdom than in the civil law jurisdictions. It is forbidden in some countries, such as Germany and Greece, which, with a few exceptions, require legal

professionals to charge for their services. In most Aarhus countries, it is permitted but not promoted.

How It Works: United States

A brief description of *pro bono* in the United States is included, even though it is not a party to the Aarhus Convention, for illustrative purposes because it has a unique *pro bono* framework. The American Bar Association strongly suggests, but does not require, that lawyers perform at least 50 hours of *pro bono* work per year. Law firms may shift *pro bono* hours from one attorney to another—e.g., have a lower paid attorney perform 100 hours of *pro bono* and a higher paid attorney do none. A large law firm may have one or more attorneys solely dedicated to *pro bono* work. *Pro bono* cases are often used as marketing opportunities for the attorney or law firm.

How It Works: England and Wales

Pro bono is considered a social obligation in England and Wales. There are a number of organizations that provide *pro bono* services. Some are government funded advice agencies that are staffed in part by volunteers, such as the Citizens Advice Bureau Service and the Law Services Centers. Other major charities that facilitate *pro bono* legal assistance are the Solicitors' *Pro Bono* Group (operating as Law Works) and the Bar *Pro Bono* Unit. There are also many smaller *pro bono* organizations. The legal profession in England and Wales is bifurcated; solicitors generally directly assist lay clients with legal transactions and advice, as well as represent clients in lower courts, while barristers do not have direct contact with the public but work with solicitors to prepare cases for trial and advocate in the courtroom. Some charities provide advice and preparation assistance only, while others also (or only) provide courtroom advocacy.

These organizations each have their own guidelines for obtaining their services. For example, the Bar *Pro Bono* Unit, which provides no cost assistance from barristers, requires potential clients to obtain a referral from an advice agency or solicitor. Organizations seeking assistance may apply directly to the Unit without a referral. Applications must be made at least three weeks before the deadline for providing the needed services. A staff barrister reviews the application and decides whether to grant assistance based on the merit of the case, the financial need of the potential client, and how long the case will take. Cases that will take more than three days, including preparation, are generally not accepted. If the case is accepted, the staff barrister will look for a volunteer barrister registered with the Unit to accept the case. The volunteer is authorized to perform a specific piece of work for the client. The volunteer barrister then works directly with the client.

While *pro bono* work is valued by those who receive it, many NGOs have expressed that they do not view it as a viable mechanism for addressing prohibitive expense. *Pro bono* lawyers often agree to perform a clearly delineated piece of needed legal work, but for obvious reasons are unable to commit to lengthy trials. Also, there is little incentive for lawyers to become skilled in areas of law in which little paying work is available.

Qui Tam

Addressing the Issue

Qui tam actions allow claimants to bring a suit on behalf of the government, and earn a portion of money paid to the government as a result. This creates a financial incentive to bring lawsuits with no upfront cost to the government. *Qui tam* actions originated in England, but it appears they are currently only used in the United States. In some jurisdictions one may bring a civil environmental action or even a criminal prosecution on behalf of the public, but these differ from *qui tam* actions in that the claimants do not receive a share of monetary penalties (though they may be compensated for legal fees or other costs).

How It Works: United States

Qui tam actions are only available if provided for in statute. Currently, the United States allows *qui tam* actions only in cases of fraud against the government. Types of fraud against that government involving environmental issues may include falsely certifying compliance with environmental law, or billing the government for environmental services, such as waste cleanup, that are not properly performed.

The person who files a *qui tam* action is called a "relator," rather than a plaintiff, to indicate that he is suing on behalf of the government rather than himself. The claim must be based on information not already known to the government. This requirement ensures that the government does not have to share judicial awards or settlement moneys in cases it might have brought on its own. Once filed, the government must investigate the claim and decide whether to intervene in the case, decline to intervene, or dismiss the case. If the government dismisses the case, it cannot move forward and the relator does not receive any compensation. If the government decides to intervene, it may work in tandem with the relator, and the relator receives up to 25% of the government's ultimate recovery if the case is successful. If the government declines to intervene, the relator's share is 25-30% of the recovery. A successful relator is also entitled to reimbursement of legal fees and expenses.

The Inquisitorial Principle/Use of Environmental Experts

Addressing the Issue

Expert fees are one of the largest costs associated with pursuing an environmental lawsuit. Use of the inquisitorial principle reduces this financial burden on the parties by obligating the administrative authority or court to ascertain the facts of case. This may involve the use of outside experts, or environmental advisors employed by the court or administrative authority. The cost for this investigation is borne by the government.

How It Works: Austria

Austria's *Umweltsenat* is an independent tribunal that hears EIA appeals. It has 42 members. Ten come from the judiciary. The other 32 are lawyers with

environmental and administrative law expertise. The *Umweltsenat* decides cases in panels of three.

The *Umweltsenat* panel is required to verify that all facts relevant to a decision have been considered. It consults with environmental experts in making its evaluation. Often, these experts are official technical experts employed by the government, and may be the same expert whose opinion was used in the first instance administrative decision. The *Umweltsenat* can also hire outside experts who give sworn opinions. In rare instances where it finds the initial investigation was insufficient, it can also refer the case back to the administrative body whose decision is being appealed. The administrative body must then redo its investigation.

There has been some criticism that the public may question the neutrality of both the public servant experts and the experts for hire. It has been suggested that a panel of experts that worked directly for the *Umweltsenat* may have more credibility with the public.[ix]

How It Works: Denmark

Denmark has two appeals boards for matters relating to the environment, the Nature and Environmental Appeals Board and the Energy Appeals Board. For a modest fee, appeals of environmental administrative decisions can be made to one of these bodies, as provided by specific environmental laws. At the Nature and Environmental Appeals Board, the fee is about €70 for natural persons and about €400 for legal persons. Appeals need not have a high degree of specificity. The appeal is then reviewed by a tribunal of experts, or, in cases that concern only matters of law, by the appeals board president. If the Board decides in favor of the claimant, the fee is refunded.

How It Works: Sweden

Sweden has specialized environmental courts that have jurisdiction over most types of environmental disputes, both administrative and civil. There are five environmental trial courts, each made up of one judge, one environmental advisor (technical judge), and two experts. Each of these members of the court has equal weight in judging the case. The environmental appeals court is made up of three judges and one environmental advisor. Because experts are employed by the courts, the litigants do not have to spend money proving scientific elements of their cases.

The courts decide the cases on the merits in a reformatory procedure, that is, they can reconsider the facts and render a completely new decision, rather than just approve or annul the challenged administrative decision. The law states "The court shall ensure that the matter will be investigated so that its nature requires and that no unnecessary material is drawn into the matter. Through questions and observations, the court shall try to correct inaccuracies and omissions in the parties' petitions." By placing the burden of investigation on the court, claimants are relieved of having to use their own resources to prove their case.

How It Works: Finland

Most environmental decisions are appealed to administrative court. While there are eight regional administrative courts, Finland has designated the Vaasa Administrative Court (VAC) to hear appeals from decisions made under the Environmental Protection Act and Water Act for the whole country. These cases are judged by both members of the judiciary and non-lawyer environmental experts. The experts are full time employees of the court. The VAC hears other types of environmental cases, but experts do not act as judges for those cases.

Decisions of the VAC can be appealed to the Supreme Administrative Court (SAC). In appeals involving the Environmental Protection Act and Water Act, cases are judged by five justices and two environmental experts. These environmental experts are not full time employees of the court, but well regarded scientists working part time for the court. As in Sweden, the procedure is reformatory at both levels.[x]

How It Works: England & Wales

England & Wales recently started using a tribunal system. The Environment Tribunal started operating in April 2010 and hears only appeals of environmental sanctions. The tribunal is made up of six tribunal judges, who are lawyers, and ten non-lawyers who have environmental expertise. Cases are heard by panels of three: one lawyer and two experts. There are no filing fees, and an appeal before a tribunal is relatively inexpensive to conduct. In contrast to other types of legal proceedings, parties bear their own costs, except in rare instances of sanctions for unreasonable behavior.

Community Contribution

Addressing the Issue

In a community contribution approach to legal aid, members of a group likely to benefit from litigation may be asked or required to contribute towards its cost. Spreading the costs amongst multiple beneficiaries can prevent the litigation from being prohibitively expensive to any individual, while conserving state resources.

How It Works: England and Wales

Legal claims that are in the wider public interest may be eligible for legal aid. The body that administers legal aid is the Legal Services Commission (LSC). When making a request to the LSC for legal aid that asserts that the case is in the wider public interest, the applicant must explain what steps have been taken to seek funding from other sources and why funding has not been obtained. The applicant should have tried to obtain funding from other organizations or bodies that may have an interest in the case. If another organization has agreed to partially fund the litigation, LSC may agree to contribute the additional funds needed. If no such organization exists, but a "reasonably ascertainable group" of individuals that would benefit from the litigation can be identified, LSC can ask those individuals to contribute to the costs of litigation.

The LSC considers the means of the identified individuals, and the tangibility of the potential benefits, when determining what portion of the costs should be paid by those potential beneficiaries. A lower personal contribution is generally expected in environmental cases when the benefits to affected individuals are not easily quantified. LSC then limits the amount of public funding it provides based on the expected contribution of the identified individuals. Members of the group of identified persons or other advocates must then attempt to raise the rest of the required funding.

Injunctive Innovations

Suspensive Effect

Addressing the Issue

"Suspensive effect" refers to an automatic delay in the implementation of a permit or other administrative decision upon the initiation of an administrative or judicial procedure. Suspensive effect negates the need for an injunction because it maintains the status quo until the dispute is resolved.

How It Works: Sweden

Administrative decisions, including permits, do not take effect until the amount of time allowed for filing appeals has past. Appeals filed during that time period have suspensive effect. However, at the request of the applicant, permit decisions can be combined with "go-ahead orders," which give the permits immediate effect. If a go-ahead order is granted, the appellant can request an injunction.

Criteria: Reasoned Request

Addressing the Issue

The "reasoned request" test is a rather low threshold for granting injunctions. It facilitates the prevention of environmental harm during proceedings, while allowing the court to inhibit parties from using legal proceedings as unreasonable delaying tactics.

How It Works: Estonia

In Estonia, the court will grant an injunction at the reasoned request of a party, or of its own accord, if otherwise execution of a court judgment will be impracticable or impossible. The courts have generally considered environmental damage to be irreversible, and therefore claimants need only show it to be reasonably likely that environmental harm will occur without an injunction. Based on this standard, injunctions are frequently granted.[xi]

Criteria: Difficult to Repair

Addressing the Issue

Being granted an injunction nearly always requires some element of *periculum in mora*, that is, danger in delay. Often this element is stated as irreparable harm in the absence of an injunction. This can be a very high threshold, and damage that might theoretically be possible to repair is not likely to be repaired when doing so would be expensive. "Difficult to repair" is a more balanced standard when environmental damage is at stake.

How It Works: Poland

To be granted an injunction, the claimant must prove that there is a plausible threat of serious harm or damage that would be difficult to undo.

How It Works: Latvia

The standard is "significant" harm or damage that would require incommensurate resources to repair.

Requirement to Explain the Decision to Grant or Deny an Injunction

Addressing the Issue

If the body that decides whether to grant or deny an injunction must fully explain and publish in writing the reason for the decision, future litigants will have a better idea as to whether it is worth their while to expend resources pursuing an injunction. If requests for injunctions are not made when they are likely to be properly rejected, economic waste is prevented for both claimants and defendants.

How It Works: Belgium

The Belgian Council of State may grant an injunction against an administrative decision if it finds the grounds for challenging that decision are valid, if there is urgent necessity, and if the immediate implementation of the challenged decision may cause harm that would be difficult to remedy. The Council explains its decision whether or not to grant the injunction based on these factors in a written decision. The written decision is easily accessible to the public through an online database. Those considering requesting an injunction in future lawsuits can look up decisions of the Council of State involving injunctions, read the analysis, and decide whether to pursue their claim. In cases where an injunction is granted, the claimant ultimately wins the case over 90% of the time.[xii]

Case Study: *B. De Groof e.a.*

In Council of State, Number 153.771, 16 January 2006, *B. De Groof*, claimant Bartholomeus De Groof and several co-claimants won an injunction against a local land use plan for a redevelopment project in the municipality of Oud-Turnhout. The claimants were local landowners in the vicinity of the proposed redevelopment.

The Municipal Committee for Spatial Regulation had approved a local land use plan allowing for the redevelopment of Engelstraat (Angel Street), despite a possible conflict with the regional plan and concerns about traffic and parking on the street, amongst others. The developer presented a plan for minimizing impact, and the plan was approved by several levels of authority. The claimants appealed to the Council of State, arguing that the planning decision was not sound, and that the parking and traffic issues were not sufficiently addressed. They requested an injunction.

The Council of State's decision clearly stated the abovementioned test for granting an injunction. It then reviewed the facts of the case and decided the claimant's arguments were valid. Secondly, it decided that the potential damage

would be serious because the entire area covered by the local plan would be radically changed, both in appearance and in use, that air pollution, noise, and traffic would increase, that a wildlife park and beautiful green area would be negatively impacted, and that for these and other reasons the proposed redevelopment would create a nuisance for the neighboring land owners. Thirdly, it decided that the damage would be difficult to repair because the green areas that would be impacted could not be easily restored once buildings were erected, and even if new natural areas were built, the landowners would not be compensated sufficiently for the nuisance they would have endured. Further, the Council expressed the opinion that without an injunction, the developer would likely work very quickly to complete the proposed development, thus creating damage before the final decision would be rendered. The Council backed up these assertions with extensive analysis.

Ultimately, the Council of State annulled the local land use plan in Council of State, Number 170.723, 3 May 2007, *B. De Groof e.a.*

Request for Injunction Suspends the Contested Decision

Addressing the Issue

Injunctions as a remedy can be undermined if the decision whether to grant an injunction takes too long, because environmental damage may occur before the decision is made. By allowing requests for injunctions to suspend the contested decision, this problem is avoided. In effect, this type of rule shifts the default position to granting rather than denying injunctions.

How It Works: Netherlands

In the Netherlands, if requests for injunctions are made within a particular timeframe, usually six weeks, no action can be taken under the contested decision until the request for an injunction is denied.

Deadlines for Decision-making

Addressing the Issue

Some jurisdictions require decision-making bodies to make decisions regarding injunctions or other interim measures within a specified time period. As with the previous category, this practice prevents the injunctive procedure from being undermined by delay. Other jurisdictions have deadlines for final decisions, rather than interim decisions. While transparent and fair injunctive procedures are always desirable, mandatory completion of administrative or judicial disputes within a concise timeframe can reduce the potential damage from deficient or non-existent injunctive procedures.

How It Works: Lithuania

In Lithuania, injunctions are not available during the administrative procedure. However, the administrative appeal decision is generally made within two weeks, and must be made within four weeks. While it is certainly possible for

environmental damage to occur during this timeframe, it is less likely that, for example, a building project will be completed than it is in jurisdictions where decisions can take significantly longer.

Injunctions are available during appeals to administrative courts, which are also subject to strict timeliness requirements: the first instance decision must be rendered within two months, and the case must be completed in all instances within six months.

Next Steps

This short, survey based study is intended to continue the conversation about best practices for grappling with some common issues surrounding costs and injunctions, not to end it. The following are suggestions for further exploration.

- Value of the Case: In many jurisdictions, the fee for bringing an administrative or judicial action is based on the value of the matter in dispute. Further study of how environmental cases are valued and what the typical costs for different types of environmental cases are would help determine whether such costs are prohibitive.

- Environmental Legal Clinics: Clinical education is emerging as a means to educate new lawyers in environmental law, facilitate legal policy research, and provide legal aid to those who may not be able to otherwise afford legal services. Further exploration, perhaps in partnership with universities and NGOs, may help direct the development of this resource to its fullest potential.

- Experts and Costs: This study identified some of the ways experts are used by courts and other decision-making bodies to reduce costs to claimants. Further study of the role of experts in courts, tribunals, and administrative proceedings may help identify how experts can be used most effectively, both with respect to costs and to accuracy and efficiency of proceedings. Ways to address the cost of expert testimony in jurisdictions where they are not provided is another important issue.

- Other Issues Involving Experts: This study identified some other concerns about experts, such as a shortage of experts who make their services available to public interest claimants and concerns about bias. A more in-depth examination of this subject may help understand the extent of these problems and what measures would best alleviate them.

- Injunctions: This study identified some of the ways injunctions are made accessible to environmental litigants. A closer look by country-based experts may help determine what specific practices and procedures are most effective in promoting the fair and timely granting of injunctions. Suspensive effect, essentially injunction by default rather that by request, is a related topic that also warrants further exploration.

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This report is primarily based on responses to a survey of stakeholders to the Aarhus convention and follow up conversations. However, several other sources supplemented that research.

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[i] Thank you to Tatiana Tökölyová and Tatiana Plesníková (Slovakia Ministry of Environment) and Imrich Vozár (Via Iuris) for assistance preparing the material on Slovakia. For an additional case in which the Supreme Court awarded costs and explained how they were calculated, see LZ VLK vs. Ministry of Environment, 4Sžp/2/2010, available at http://nssr.blox.sk/blox/cms/portal/sk/rozhodnutia.

[ii] Thank you to Carol Day (WWF) for assistance preparing the material on England and Wales. For more information about the *Garner* case, please see http://www.richardbuxton.co.uk and enter search term "Garner."

[iii] Thank you to the Ministerie van Infrastructuur en Milieu for assistance preparing the material on the Netherlands.

[iv] Thank you to Clemens Konrad (Ökobüro) for assistance preparing the material on Austria.

[v] Thank you to Jan Darpö (Uppsala Universitet) for assistance preparing the material on Sweden.

[vi] *See* Černý, Pavel, *Czech Republic*, *in* Justice and Environment, *Price of Justice*, 2009.

[vii] Kiss, Csaba, *Hungary*, *in* Justice and Environment, *Price of Justice*, 2009.

[viii] Thank you to Gustavs Gailis (Ministry of Environmental Protection and Regional Development of the Republic of Latvia) for assistance preparing the material on Latvia.

[ix] Madner, Verena, *The Austrian Environmental Senate*, 3 J. Ct. Innovation 23 (2010).

[x] Hollo, Erki J. et al., *Environmental Law and Administrative Courts in Finland*, 3 J. Ct. Innovation 52 (2010).

[xi] *See* Vaarmari, Kärt, *Selected issues of application of the Aarhus Convention in Estonia*, *in* Justice and Environment, *Report on Access to Justice in Environmental Matters*, 2010.

[xii] Thank you to Luc Lavrysen (Ghent University, Center for Environmental & Energy Law) for assistance preparing the material on Belgium.