

LEGAL PROVISIONS IN FAVOR OF ACCESS TO JUSTICE FOR ROMANIAN NGOS IN ENVIRONMENTAL AND CULTURAL PATRIMONY PROTECTION LITIGATIONS

- **Legal instruments used by Alburnus Maior in promoting and standing in courts on environmental litigation**

Law no 265/2006 for the approval of Emergency Governmental Ordinance no 195/2005 on environmental protection with Article 20, point 6, institutes a legal presumption for organizations that promote environmental protection to have the adequate procedural capacity to stand before courts on environmental litigation.

Article 5 – *The State recognizes to each individual the right to a clean and ecologically balanced environment, and in order to reach this aim guarantees:*

- a) access to environmental information, with no prejudice to confidentiality conditions imposed by the relevant legislation;*
- b) the right to associate in environmental organizations;*
- c) consultation in the decision-making process regarding the development of environmental policies and legislation and in drawing up plans and programs;*
- d) the right to complain, directly or via environmental NGOs to administrative and/or judicial bodies on environmental matters*
- e) the right to receive compensation for the inflicted damage*

Article 20. - (1) *The competent authority for environmental protection, together with other authorities of the local and central administration, if the case is so, ensures information and public participation in decision-making on specific activities and access to justice in accordance with the provisions of the Convention on access to information, public participation and access to justice on environmental issues, signed at Aarhus on 25 June 1998, ratified with Law [no. 86/2000](#).*

(6) *Environmental protection organizations have the right to initiate court actions on environmental matters*

According to Law 86/2000 for ratifying the Aarhus Convention, Article 2, point 4, non-governmental organizations *that promote environmental protection and fulfill the national norms are considered to have sufficient interest* in decisions on environmental matters. This interest can only be fully met by the full enjoyment of procedural rights stipulated by the Convention, including the one to have access to justice on environmental matters.

- **Cultural heritage – integral part of the environment – the defense of cultural heritage and patrimony through tools specific to environmental law**

According to annex 1 of Law 137/1995 on environmental protection, environment means *the sum of constituents and elements of the Earth: air, water, soil, subsoil, landscape, all atmospheric strata, all organic and non-organic materials as well as human beings,*

natural systems in interactions including all elements previously listed, including material and spiritual values, quality of life and the conditions that can influence the human well being and health”.

The definition of *the environment* is repeated in article 2, point 41 of Emergency Governmental Ordinance no. 195/2005 on environmental protection that repealed Law 137/1995

Article 1, paragraph 1 of Law 554/2004 – *Every person who considers to have had a right or a legitimate interest affected by a public authority, via an administrative act or by the non-resolution within the legal deadline of a request can complain to the administrative litigation court, requesting the annulment of the act, the recognition of the right or legitimate interest and restitution of the damage that was caused. The legitimate interest can be both private and public.*

as well as the provisions of

Article 8, paragraph 11 of Law 554/2004, with the subsequent modifications, covers the right to court action for non-governmental organizations whose constitutive acts promote the protection of the right to health, life and clean nature – an individual right belonging to everybody and a private interest at the same time.

The normative acts mentioned recognize the right of NGOs to sue, thus admitting the right to legal actions on matters such as environmental protection and cultural patrimony.

CIRCUMSTANTIAL OBSTACLES TO FREE ACCESS TO JUSTICE

Besides the existing norms, that are clearly in favor to the public, it has to be said that there are also circumstantial obstacles that must be taken into consideration. The practice has proven that this obstacles can be surmounted. Here are some examples:

- **Lawyers fees.** This problem is somehow theoretical because NGOs, as well as individuals, can represent themselves in a court of law. Also they can ask for assistance from the NGOs that already work with legal counselors. Another option is to address the Bar to nominate a free of charge lawyer. Most of the times the lawyer fees are not very high when working on environmental and social issues, but it is still difficult to say whether lawyers are interested in such cases.

- All **legal expenditures** incurred by the other side, in case the plaintiff was unsuccessful. Most of the time, the defendants are public authorities for which you don't have to pay the solicitors fees; although other expenses may occur.

- Lack of **competent experts** to address environmental issues, certified by the Ministry of Justice as well as the Ministry of the Environment.

- **Experts fees** established by the court. These fees are around 500-1000 lei for a single expertise and can go higher depending on the proposed objectives. These kind of fees are usually covered by the plaintiff.

MAJOR OBSTACLES THAT AFFECT THE ACCESS TO JUSTICE IN PRACTICE

- The lack of **social activism** concerning environmental issues both for individuals and NGOs. Therefore these cases are very rare, compared to other countries;

- The lack of proper **training for judges**, including principles, concepts and content regarding environmental protection.

At the moment is very important to work on a “culture” of environmental cases and to create precedents. The judges need to acquire experience, as well as the public and the public authorities so that the access to justice may become an efficient one.

Nevertheless, the possibility to submit complains to EPAs concerning the environmental violations is available to anyone. In some cases, one can notice the Police or even the Prosecutor's Office when the complaint refers to action under Criminal Law.

CARNIC, THE STORY OF A PRECEDENT

The Rosia Montana archaeological patrimony, especially the one discovered in the Carnic Massif, represents a cultural patrimony of national interest. The responsibility to protect and put to good use the Carnic Massif belongs to the Romanian state, to the Ministry of Culture and Cults, in particular.

The archaeological research in the Carnic Massif is part of the Alburnus Maior National Program which was listed as **CULTURAL PROJECT OF MAJOR NATIONAL INTEREST**.

Simultaneously with the archaeological research, an intensive mining activity was conducted in 2003 in the Carnic Massif. These mining activities were stopped as they were violating the environmental norms.

In August 13, 2003 Mr. Petru Lificiu, secretary of state for the Ministry of Agriculture, Forestry and Environment replied to an official letter: “The public authorities for environmental protection have not released any regulatory documents concerning the mineral resources exploitation activities in the Carnic Napoleon quarry.”

“Anyway these mining galleries were discovered many years ago and nobody cared about them. They don't belong to anyone and no one claims their property.” Valentin Rus, manager of the Rosia Min, September 4, 2003, Cotidianul newspaper.

As far as it concerns the importance of these archaeological discoveries, ICOMOS, an UNESCO consultative organism responsible for the preservation of historical monuments, listed them as an unique European and international patrimony and asked the national authorities for in situ conservation. (two resolutions: December 5, 2002 and October 29-31, 2003).

- **Alburnus Maior's requests to administrative bodies**

- August 11, 2003 – The first request formulated based on the Law 544/2001 regarding the access to public information addressed to the Authority of Culture, Cults and Cultural Patrimony. The request asked for information regarding the procedure initiated to classify the monuments owned by the Romanian state: The Orlea and Carnic Massifs, the Mausoleum discovered in the Hop-Gauri area in 2002;

- September 22, 2003 – The access to information request to the Environmental Guard concerning the official report on the person responsible of the mining activity in the Carnic Massif in Rosia Montana;

- October 1, 2003 – Court Action to produce proofs in support for the Campeni Court against Minvest Deva, the Rosia Montana brunch (Rosia Min). Alburnus Maior intended to prove that Carnic was intensively exploited on a daily basis, brutally intervening through explosion and blasting;

- November 21, 2003 – Petition to the National Control Authority asking for immediate cease of the mining activities, as defined in the Mining law 85/2003. The mining activities were taking place illegally at the time, as the exploitation had no environmental permits. The concerned areas were the Carnic Napoleon perimeter and the entire Carnic Massif perimeter;

- November 18, 2003 – Petition to the Environmental Guard to cease all mining activities taking place in the Carnic Napoleon perimeter, Rosia Montana;

- November 26, 2003 – petition addressed to the Ministry for Culture, requesting it to take measures to put an immediate halt to any kind of mining activity that takes place in the Carnic Massif; to adequately and effectively conserve this site and to independently and objectively evaluate the significance of the unearthed archaeological vestiges;

- December 9, 2003 – forming a coalition with other NGOs such as the Center for Legal Resources, Mare Nostrum, the Romanian Association for Environmental Law to sign a petition whereby to request the listing of the Carnic Massif as an archaeological site of national importance, given the Roman and pre-Roman mining galleries it hosts. This measure would be in accordance with the precautionary principle in decision-making and with the principle of sustainable use of natural resources, both stipulated by Law 137/1995 on environmental protection;

- December 19, 2003 – FOI request to the National Agency for Mineral Resources (NAMR);

- December 22, 2003 – court action against NAMR in order to obtain from this institution a copy of the exploitation license **approved with Governmental Ordinance** 458/1999 and a copy of the Protocol to the License that approved its transferal from Minvest Deva to Rosia Montana Gold Corporation, approved with Order 310/9.10.00;

- January 8, 2004 – FOI request to the Ministry for Culture, requesting it communicate a copy of the avis issued by the National Commission for Archeology on the archaeological discoveries in the Carnic Massif;

- January 2004 – court action against the Ministry for culture and the Cults for the annulment of the archaeological discharge certificate issued for the Carnic Massif.

- **Access to justice – effective protection**

The object of the administrative litigation initiated over the discharge certificate for Carnic: the illegality of the act and its inappropriateness judging from the point of view of the public interest protected by the law.

Relevant laws:

- Law 5/2000 for the approval of the National territorial management plan, Section III – protected areas;

- Law 451 /2002 for the ratification of the European Landscape Convention (Florence, October 20, 2000);

- Law 422/2001 on the protection of historical monuments;

- Decree No. 187/1990 for the ratification of the Convention on the Universal Cultural and Natural Patrimony (adopted by UNESCO, November 16, 1972);

- Law 150/24 July 1997 on the ratification of the European Convention for the protection of archaeological patrimony (revised) (La Valetta, January 16, 1992);

- **Strategies used in court by Alburnus Maior**

- Initiating administrative litigation for the annulment of illegal administrative acts, with a focus on arguments that prove the inappropriateness of the act;

- Discussing the problem as to why the act is inappropriate, discussion on the competence of the courts to censor an act based on arguments about its inappropriateness, bearing in

mind the principle of separation of state powers and the limits imposed to the discretionary power given to administrative authorities to judge the appropriateness of an act;

- The parallel introductions of suspension requests in order to suspend the contested administrative act created a separate file and was judged urgently and without calling the parties. After the modifications of the administrative litigation law, the framework for suspension requests was replaced with art 14 din Legea 554 din 2004 which now allows to formulate suspension requests and the submission of an administrative complaint at one and the same time;

- Calling into justice only of the administrative authority that issued the act and not also of its beneficiary. According to Alburnus Maior, the archaeological discharge certificate is an act that produces effects – both prejudices on an undetermined number of persons and gains and economic benefits for certain categories of persons - ERGA OMNES.

- **Proofs**

- Documents;

- Evidence given by experts – recognized local experts who brought arguments as to why the archaeological discharge certificate is inappropriate;

- Topographical expertize of the entire surface that was discharge and an expert assessment of how it corresponds to the archaeological studies carried out in the area.

- **Strategies used by the opponents – the project owner**

- The intervention formulated by Rosia Montana Gold Corporation in all cases initiated by Alburnus Maior;

- Formulating several requests to contest the impartiality of each and every judge and of all judges together from the Alba-Iulia Court of Appeal as a way to both intimidate the court as well as to preconstitute grounds for an appeal;

- Raising all possible exceptions on the procedure and the merits of the case: from that entitled 'the lack of the plaintiff's procedural capacity', to that entitled 'the lack of the plaintiff's interest', the inadmissibility of the court action, unconstitutionality *exceptions* raised for several laws cited by the plaintiff as the grounds for its action;

- Attempting to intimidate members of Alburnus Maior by formulating criminal complaints against them, accusing them of having violated intellectual property rights in using and publishing the archaeological reports by the French archaeologists;

- Mobilizing other entities to intervene in the case, namely two non-governmental organizations founded by Rosia Montana Gold Corporation as opposition to the opposition.

- **Consequences of access to justice**

Apart from the immediate success the court actions promoted by Alburnus Maior had, whereby all discharge certificates for Rosia Montana were challenged in court, these court cases:

- Were strategic litigation cases;
- Gained a special kind of value thought the arguments for and against debated in front of the courts;
- By setting up legal precedents, had the merit to mobilize other non-governmental NGOs to participate in the juridical debate and as such assuming an active role in Alburnus Maior's court cases;
- Had a long term impact on the decisions taken by the Ministry for Culture for Rosia Montana, both administrative and normative decisions (The Ministry for Culture publicly announced that it halts any procedure for archaeological discharge for Rosia Montana until an environmental decision has been reach on the request for an environmental accord by Rosia Montana Gold Corporation).

Access to justice is as such an essential guarantee and maybe the most important one, as it's a last resort why, in reaching one's fundamental right to a clean environment as well as one's procedural rights such as access to information and public participation in decision-making.

The right to have access to justice and the concrete procedure to exercise it are rather well defined in the Romanian legislation. Nonetheless there is a great deficiency in its enforcement at the level of the Romanian courts. In order to overcome this situation, there is a need for an increased social activism, public awareness and the adequate training of Romanian judges in the field of environmental law.

“The Court ascertains that the proposal was based more on the opinion of the claimed (n.r. Paul Damian) as there is no concordance between his opinions and those of the French archaeologists[...].He (n.r. Paul Damian) has the right to an opinion, even if this is formulated in bad faith and even if with this opinion he supports in a direct or indirect manner the economic interests of a multinational corporation[...].This person's bad faith or eventually it's lack of professionalism should have been analyzed by the National Commission for Archeology” (Criminal verdict no.1661 of 12 July 2006 taken by the Bucharest's Sector 1 Court)

“One can not accept the exception raised by the claimed concerning the plaintiff's lack of procedural capacity or it's lack of interest, it's conducts and court action having as grounds the normative acts invoked and which allow any person, including an association, to prove the invalidity of measures that are not meant to protect values of universal importance[...].”