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**Assessment and Analysis of Training Needs of Ukrainian
Administrative Court Judges**

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Introduction

This assessment is based on my trip to Kyiv, Ukraine in September 2007, and the materials and comments I collected associated with that visit. Where helpful I have used footnotes to indicate the source of the information I received.

Summary Conclusions

1. Current training plans for new administrative court judges on the Administrative Adjudication Code are probably sufficient to keep pace with the slow appointment process.
2. As more lawyers are appointed without judicial experience, efforts should be made to provide them with basic training in the role and techniques of being a judge as well as instruction in the AAC procedures.
3. Improvements could be made in the current training process on the AAC through the standardization of training materials, expanded use of non-judge trainers, and consideration of actual judicial decisions by the High Administrative Court and Supreme Court.
4. Ongoing training for sitting judges should focus on specific problem areas with the AAC, including jurisdictional questions and procedural differences between the general, commercial, and administrative courts.
5. Specialized training for judges of the general courts who hear administrative cases should be provided, focusing on issues and problems unique to those courts.
6. Training courses on substantive areas of law should be created for the courts at all levels, involving government, private and academic legal experts. Delivery of this training should be narrowly targeted and regionally delivered where possible.
7. Current training on the European Court of Human Rights administrative jurisprudence is effective and should be continued.

Current Court Appointment Projections and Training Plans

Staffing of the new administrative courts is proceeding relatively slowly. However, this has enabled the specialized administrative justice training process to reach almost all of the judges appointed to the three levels of the administrative courts. Given that the staffing process is unlikely to accelerate, it appears that new appointments will receive the specialized training being provided by OSCE and the other MCC-UROL partners.

There are currently 50 sitting judges on the High Administrative Court, with 47 additional positions to fill. In the seven administrative appeals courts there are 57 judges in place, with 295 positions to fill. At the 27 circuit administrative courts (of which only eight are currently operational) there are 121 sitting judges, with 551 vacancies.¹ The OSCE training programs² have covered over 400 judges and judge applicants during the past three years. They held 3 week-long training sessions in 2005, 8 in 2006 and 5 so far in 2007³. Each session included 25 to 30 participants, and current plans are to hold 8 each year. This would reach a minimum of 200 judges per year with administrative justice training. OSCE and other training partners are current revising the curriculum for the introductory training, and developing a new advanced course for sitting judges who have been through the initial course. The balance of the offerings between introductory and advanced will depend on the pace of appointments to the courts.

The basic introductory course covers essential elements of the new administrative adjudication system. Feedback from the questionnaires being distributed throughout the administrative court system will provide some insights in to how effective or useful the trainings are regarded by the judges.

Training Needs

New Judges

The large number of vacancies in the administrative court system indicates that the great majority of new appointees will be serving as judges for the first time. This argues for two stages of training for them, initial training in their new role as judges, and specialized training in the system of administrative justice. The Academy of Judges of Ukraine provides training courses on how to be a judge, and this will have to be incorporated into the training regimen for the new administrative court judges. Because the Administrative Adjudication Code is so new, it is doubtful that private lawyers or government attorneys appointed to the court will have significant experience with the code. Therefore, virtually all of the new judges will also need the introductory administrative justice training.

Sitting Judges

During our meetings with current judges, there was no clear consensus on training needs. Indeed, some judges indicated that continued training was unnecessary, especially as compared to the need for additional resources such as computers and internet access, and written materials, including copies of opinions from the High Administrative Court and Supreme Court. Questionnaire results may shed additional light on these attitudes, but it is clear that many judges feel additional training on the operation of the Administrative Adjudication Code is not needed since they have been working under the code for months.⁴ This suggests that the challenge for developing training for sitting judges is to make it relevant and non-threatening. Meetings with officials from the Tax Administration, private attorneys and others pointed towards training designed to focus

¹ Figures current as of September 11, 2007 provided by the High Administrative Court.

² Information from Oksana Serovid of OSCE, September 26, 2007 interview.

³ These do not include the specialized training on ECHR administrative jurisprudence.

⁴ It is worth noting that one appellate court judge indicated that all first instance court judges needed additional training in deciding cases under the new code.

on questions of substantive law that come before the courts, regional issues (i.e. customs, Chernobyl compensation, etc.), or difficult and unclear applications of the Administrative Adjudication Code that have been identified through conflicting court practice and decisions.⁵ The draft OSCE curriculum for advanced training addresses some of these issues in the context of their week-long training program. Shorter, more focused, and regional trainings may be more effective in addressing some of these concerns.

General Court Judges

A significant number of administrative cases will continue to be decided by judges of the first instance general courts even after the circuit administrative courts become fully operational. These cases are decided pursuant to the AAC, and appeals from these general courts will go to the administrative courts of appeals. Therefore it is important that these judges receive training in the application of the code and continued training on new developments and procedures.

Trainers

Current training approaches rely heavily on the judges themselves to provide instruction for other judges.⁶ The desire by the Administrative Chamber of the Supreme Court to provide training to all of the courts of appeal reflects this sense that other, higher court judges are best suited to instructing their colleagues. Use of the members of the High Administrative Court to train lower court judges on basics of the AAC may be effective for the introductory training programs, given the wide range of cases they review under the current procedures, although it is not clear that this is the best allocation of judicial resources given the overwhelming case load of the HAC. Use of members of the Administrative Chamber of the Supreme Court for basic instruction seems less justified however since the cases these judges review offer a relatively narrow view of the many issues arising under the AAC. Judges from either court might be somewhat better suited for advanced training on contentious issues, using fewer resources of the courts on more focused questions.

Reliance on judges for training, to the virtual exclusion of other competent legal professionals, seems somewhat short-sighted, although consistent with Ukrainian legal training traditions. Lawyers from NGOs are being included in some of the training programs, but this is an exception. There seems to be real resistance to involving private practitioners and government lawyers and officials with knowledge and experience in administrative justice in the training process. One person involved in planning training suggested that including representatives of potential parties before the courts presented a conflict of interest. There are also few academics involved in the training programs. At one time this might have been because of an absence of post-soviet legal scholars with an understanding of the reformed, more western legal systems, but this seems misplaced at this stage in Ukraine's legal development.

⁵ This latter category depends, of course, on their being some ordered resolution of these conflicts by higher courts or other authority.

⁶ The ECHR administrative jurisprudence trainings are the exception to this, probably because administrative court judges lack knowledge or experience in this area.

Non-judicial legal professionals are included in meetings styled as “roundtables” where issues of application of the AAC and substantive laws are discussed. The OSCE draft curriculum for advanced training includes once such roundtable to discuss questions of jurisdiction of the administrative courts. Lawyers from the Tax Administration apparently have periodic roundtable meetings with members of the administrative courts to discuss issues relating to tax cases.⁷ These meetings are usually held with more senior judges and appear to be directed more at policy-making than education and training.

Training Materials

I have not been able to review the details of the training materials because of the language barrier, although I have looked at the course summaries, outlines and schedules as well as directions to instructors. In addition I have reviewed the contents of the recently published “Bench Book” on the AAC and a portion of the trial handbook published by Judge Bachun of the Kyiv Circuit Administrative Court. I believe there may be other material addressing some issues before the courts as well, such as the now slightly out of date CPLR volume on the AAC, and believe that every effort should be made in developing training materials to include existing resources. The “Methodological Recommendations for the Preparation of Teachers” for the OSCE sponsored AAC training courses provides guidelines for each instructor to develop their own materials. Given that the training is utilizing sitting judges for the most part, this seems likely to result in less than ideal course materials. While there is something to be said for instructors developing their own materials, given the repetitive and generalizable nature of the training for the administrative court judges, as well as the ongoing development of writings about the AAC and its application, a common, professionally developed instructional program utilizing existing materials with specially developed practical applications seems advisable.

One readily apparent omission that this approach could address is the absence of decided cases as a central part of the training instruction.⁸ This is a function of the civil law orientation of the legal system of course, where decided cases only address the issues as they affect the litigants and have no precedential value. However, the AAC anticipates both the identification and resolution of conflicting decisions of panels of the High Administrative Court by the Administrative Chamber of the Supreme Court, and the lower courts judges we met with uniformly asked for guidance and clarification through higher administrative court decisions. Thus, notwithstanding its civil law origins, the administrative justice system in Ukraine is moving towards a case-law sensitive regime where decisions of higher courts take on growing significance.⁹ While a good argument

⁷ It would appear that this type of meeting raises greater issues of potential conflicts than the more general, and more transparent, participation in training sessions.

⁸ Again, the ECHR training is an exception, where decisions of that body are included as part of the instruction.

⁹ For example, during my visit in October of 2006 we learned of the practice of the Central Election Commission of collecting and publishing court decisions on election laws for the benefit of the various elections commissions, practitioners, and the courts.

can be made for devoting resources to collecting and publishing court decisions as part of the broader MCC-UROL project, there are compelling reasons to see important cases becoming an integral part of the training process for both new and sitting administrative court judges. The OSCE “Recommendations” for teachers suggests “case studies from court practices” as part of the material, which may be useful for practical issues with hearing procedures. But it is the case decisions themselves that need to be brought in to the training process as a key ingredient.

Subject Matter of Training

The training topics for the administrative courts fall roughly in to three categories: (1) Instruction on the Administrative Adjudication Code and its application; (2) the administrative jurisprudence of the European Court of Human Rights; and (3) Instruction on substantive areas of law that are implicated in cases before the administrative courts¹⁰. Up to now the focus of training has been almost exclusively on the first one, training new judges in the new Code. Training on ECHR matters has only recently begun, and there has been virtually no training focused on substantive areas of law. Below are several suggestions for training topics with regard to the first and third categories. I believe that current training on ECHR administrative jurisprudence is effective and should be continued. Thus my comments are focused on continued training in application of the Administrative Adjudication Code and on the new area of substantive law training.

Instruction on the Administrative Adjudication Code

Below are three topics that my discussions suggest should be emphasized in training programs focusing on the application of the Code. They are not exclusive by any means, but emerged as significant areas for special instruction:

- ***Concept of administrative justice – the burden of proof on the state***
The AAC made a fundamental change in judicial procedures protecting the rights of Ukrainian persons. The objective was to create a major paradigm shift from the heavy hand of the state during the Soviet period to a system that places the highest priority on the rights of citizens over government bodies. The Code intentionally shifted the burden of proof at all stages of judicial review to the government body making the decision. Add to this the *de novo* nature of the proceedings, the inquisitorial powers of the judges and the elements are present to allow the courts to make the government demonstrate the legitimacy of its position.

However, there is some evidence that the judges of the new courts do not fully appreciate this shift in priorities and continue to defer to the power of the state. The reasons for this include the presence of the prosecutor in court on the side of the government, the budgetary limitations of government bodies to satisfy monetary judgments, and the ingrained deference towards state power that many

¹⁰ It is not apparent that a fourth area, training on comparative systems of administrative justice in other countries, would justify the use of the limited training resources and time of the judges.

judges feel. This makes it imperative that training, both at the introductory stage and for advanced instruction, focus some attention on this fundamental concept of administrative justice and how it contrasts with the prior regime.

- ***Procedural differences from general and commercial courts***
An effective way of teaching judges about the new procedures under the Administrative Adjudication Code is to contrast them with procedures of other courts that the new judges will be familiar with. Whether the new administrative courts judges are coming from other courts or just practiced in front of them, it is likely that all new judges will be familiar with the procedures of the general courts or the commercial courts. The key differences in procedure are essential elements of the philosophy behind the new system and are critical to its success (see the discussion on burden of proof above). Thus for the initial training sessions it would be effective to highlight these differences as a means of emphasizing the perspective that the Administrative Adjudication Code requires.
- ***Conducting a hearing in the administrative courts***
In a similar vein, the nature of the hearing in the administrative courts, especially in the first instance, is a critical part of the new administrative justice process. There should be special instruction focused on conducting these hearings (especially for general court judges when they have to consider cases under the AAC). It would also be useful to conduct training for appeals court judges on the conduct of hearings to emphasize the special elements designed to protect the rights of citizens against the state.

Instruction in substantive areas of the law

The new courts must address the full range of government activity in their cases. Almost every action of the state that adversely impacts a person can be brought to the administrative courts for redress. This means that the courts must make decisions about a huge range of substantive legal topics while using the procedures of the Administrative Adjudication Code. Up to this point the training of judges has focused on how to use the AAC. As the system matures, the importance of training judges on the substantive area of the law they must apply will become more important. Set forth below are several important considerations for developing this kind of training.

- ***Areas of law to address***
Selection of legal topics for training should be based on the number of cases involving those areas of the law. Nationally this will probably be *tax cases*, since nearly every court I met with listed tax cases as among the most common. While there are multiple tax laws and many different types of tax issues, they are likely to be recurring throughout Ukraine and lend themselves to broad, general training. *Social welfare programs* such as *pensions* and *unemployment benefits* are national programs that could be treated similarly. *Government employment* cases are also common across the country and suitable for this kind of focus. Regional topics, foremost among them *customs law* cases in regions with borders should have a high priority for training as well. An analysis of case subject matter on a court-by-court basis should be conducted in the near term to identify topics and regional

patterns for planning purposes. In many courts there will be sufficient numbers of cases to warrant the creation of special chambers to handle only tax, customs, etc. cases. This will make targeting the training easier. In those courts where there are no specialized chambers, and for other topics that will be heard by all of the judges, targeting the training will be a challenge.

- **Nature of training**

There are limited resources for judicial training in Ukraine and limited time for judges to participate. The present system allows judges to select the topics, timing and location of the training sessions they wish to attend from among those offered through the Academy of Judges. Thus there will be competing claims on the training time of the judges between training on the process of administrative adjudication and the substantive laws.

This argues for a variety of ways to deliver the training, especially as the courts start up with new judges. While broad national training programs on tax and benefits topics could be offered similarly to those planned courses on the procedures under the Administrative Adjudication Code, shorter, more focused courses might be offered on these and other substantive topics. The courses could be offered regionally, or done on a court by court basis where a training team spends one or two days with most or all of the judges of a particular court. Bringing a team of trainers to a particular court to instruct 20 to 50 judges is far more cost-effective than paying for travel and lodging for all the judges.

- **Trainers**

It is critical that trainers on substantive legal topics be subject-matter experts. This means that government officials working with these areas of the law, private practitioners, and academics be involved in planning, preparing materials, and presenting the training. Use of judges with *great* familiarity with particular areas of the law could be encouraged, but over-reliance on judges without the depth of understanding of active administrators and practitioners in the area will be significantly less valuable.

Care will need to be taken, however, to balance the presentations with experts from outside the government given the apparent disposition of administrative judges to be overly deferential to the state. Training consisting exclusively or predominantly of government officials and lawyers might serve to reinforce the pro-state bias and work against the overall objective of the new court system to protect the rights of people against the government.