

TRIAL MONITORING REPORT
ADMINISTRATIVE JUSTICE
AZERBAIJAN
2012

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I. Acknowledgements

The OSCE Office in Baku (the Office) expresses its gratitude to those who contributed to the preparation of the 2012 Administrative Justice Trial Monitoring Report (the Report), including the Ministry of Justice, Judicial Legal Council, judges and personnel of the Administrative-Economic Courts and representatives from the Bar Association.

This Report is the first report that the Office has prepared to assess the work of the Administrative-Economic Courts which became operational in the Republic of Azerbaijan as of 01 January 2011.

Ms. Natasa Rasic, in charge of the Trial Monitoring Team within the Office's Rule of Law and Human Rights Unit (the Unit), Ms. Nigar Huseynova and Mr. Cabir Aliyev, members of the Trial Monitoring Team, developed this Report.

The Trial Monitoring Team (TM Team) further included six Trial Observers and two Trial Co-ordinators, including Mr. Cabir Aliyev and Mr. Bahruz Guliyev. The TM team collected factual data and analysed it in line with the applicable legislation and international norms and standards. Ms. Monica Martinez, former Head of the Unit and currently Deputy Head of Office and Mr. Giovanni Galzignato, the Head of Unit as of April 2013, supervised the overall preparation of the Report.

The Office carried out all Programme activities in accordance with the guidance provided by local experts in the field of administrative justice and the trial monitoring methodology developed by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).¹

The Office developed the Report in close co-operation with the Ministry of Justice and a specialised Working Group, which included representatives from that Ministry, the Judicial Legal Council, the Bar Association and members of the judiciary. The Working Group discussed the findings gathered by the Office's Trial Monitoring Team and contributed to enhance the accurateness of the Report.

Finally, the Office would like to extend its gratitude to the Governments of Finland and Norway for their generous extra-budgetary contributions that facilitated the development of

¹ ODIHR *Trial Monitoring: A Reference Manual for Practitioners*, 2008, revised in 2012, available at: http://www.osce.org/odihr/item_11_30849.html and the *Handbook for Monitoring Administrative Justice*, joint initiative of the ODIHR and the *Folke Bernadotte Academy*.

the Report and their consistent support to the implementation of the Office's Trial Monitoring Programme.

II. List of Abbreviations

CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
JLC	Judicial Legal Council
APC	Administrative Procedural Code
LRC	Legal Resource Centre
MOJ	Ministry of Justice
ODIHR	the OSCE Office for Democratic Institutions and Human Rights
The Office	the OSCE Office in Baku
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UDHR	Universal Declaration of Human Rights

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1. Introduction

Reasons for developing a thematic report on Administrative Justice. The Office's Rule of Law and Human Rights Unit prepared this Report to assist the Ministry of Justice in assessing the work of the newly established Administrative-Economic Courts in line with domestic legislation, OSCE commitments and other international standards.

The Report is therefore in line with the priorities established by the host Government in connection with strengthening the administration of justice in the country under the State Programme on the Development of the Justice Sector and the National Action Plan for Human Rights.²

The Office further developed the Report in accordance with its mandate³ in order to assist the host Government in further improving the justice sector and ultimately increase compliance with OSCE principles, commitments and other international standards.

Administrative justice system in Azerbaijan.⁴ In January 2011, newly established Administrative-Economic Courts became operational in Baku (two courts), Ganja, Sumqayit, Sheki, Shirvan and Nakhchivan Autonomous Republic.⁵

According to the statistical information provided by the Ministry of Justice, the Administrative-Economic Courts received 6.818 complaints in total, out of which, 4.665 complaints were resolved by the end of 2011, including 2.084 complaints which were examined on the merits. Out of the complaints which were examined on the merits, the Courts granted 1.752 complaints and rejected 332. In 2012, the number of complaints increased by 1,6 times, reaching 11.205 complaints in total, out of which 8.734 complaints

² *State Programme on the Development of the Justice Sector and National Program for Action to Raise Effectiveness of the Protection of Human Rights and Freedoms in the Republic of Azerbaijan*, approved by Presidential Decrees on 6 February 2009 and 27 December 2011, respectively.

³ The Office's mandate is set out by the OSCE Permanent Council's Decision No.318, dated 16 November 1999, and the Memorandum of Understanding between the Organization for Security and Co-operation in Europe and the Government of the Republic of Azerbaijan, dated 19 June 2000

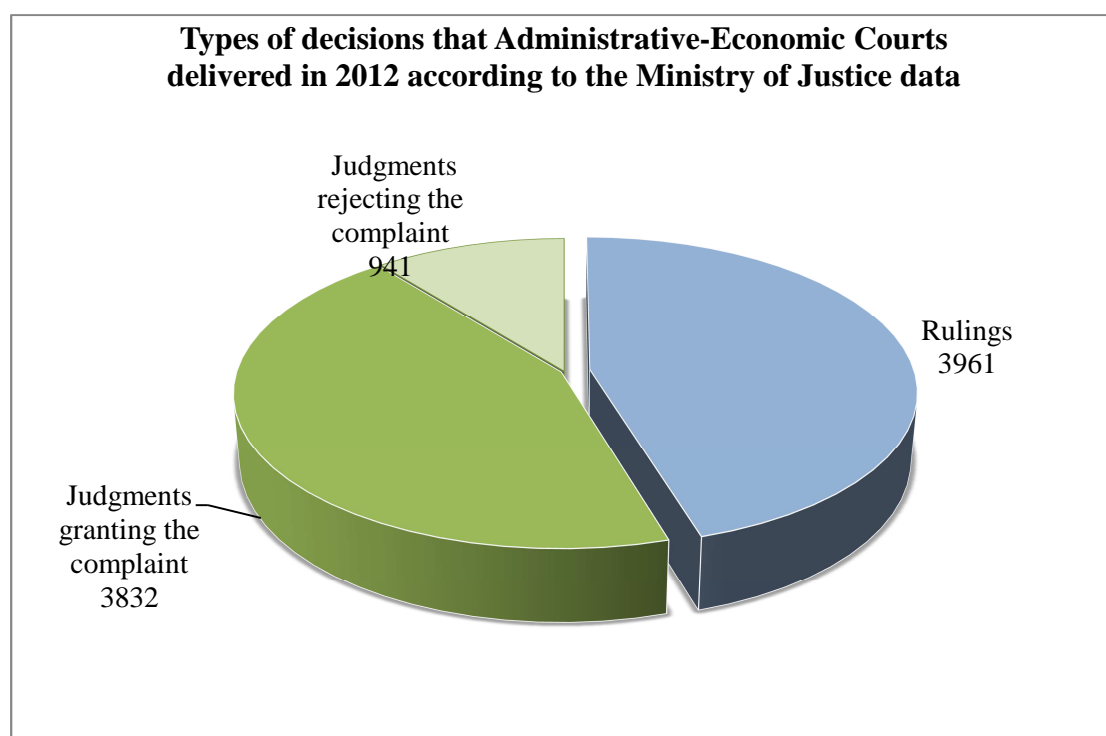
⁴ For more information see: Fərhad Mehdiyev, *İnzibati Hüquq [Administrative Law]*, Qafqaz University Press, Baku, 2010, pp. 317-344

⁵ Amendments to the Law on Courts and Judges on 22 June 2010. See also Presidential Decrees dated 15 July 2010 and 9 August 2010, including guidelines on the development of secondary legislation to facilitate the implementation of the these amendments.

were resolved by the end of 2012, including 4.773 complaints which were examined on the merits. Out of the latter, the Courts granted 3.832 complaints and rejected 941.

The statistical information above shows that although the Courts granted the majority of the complaints in the cases adjudicated on the merits in 2011 and 2012⁶, only in 44% of the overall number of cases adjudicated and completed in 2011, and 54 % of the ones adjudicated in 2012, the judges adopted a final decision on the merits. In the remaining cases, the judges did not examine the merits of the case and adopted a ruling that, under Azerbaijan's Administrative Procedural Code (APC), is to be issued in case of friendly settlement⁷, inadmissibility of a claim,⁸ rejection based on jurisdiction⁹ and withdrawal of a claim by the claimant.¹⁰

Table 1



Legislative Framework. The Courts adjudicate administrative proceedings under the APC, as latest amended on 12 May 2012. Courts may also apply some provisions of the Civil

⁶ 84.1% in 2011 and 80.3% in 2012

⁷ APC, Article 66

⁸ APC, Article 35

⁹ APC, Article 8.2

¹⁰ APC, Article 55.5

Procedure Code (CPC),¹¹ which latest amendments entered into force on 6 July 2011, provided that they are not in contradiction with the provisions of the APC.

The APC sets up a three-level judicial system for reviewing administrative acts:

- 1) First Instance Courts: six Administrative-Economic Courts¹² and the Administrative-Economic Collegiums of the Courts of Appeal. The latter act as courts of first instance in cases provided for in Chapters XV: “Proceeding on claims regarding legitimacy of normative acts”, XVI: “Proceeding on cases of dispute involving political parties”, XVII: “Proceeding on cases of dispute involving mass media” and XVIII: “Proceeding on claims regarding protection of suffrage, of the APC.”¹³
- 2) Appellate Instance Courts: namely the Administrative-Economic collegiums of five Courts of Appeal located in Baku, Sumgayit, Sheki, Ganja, Shirvan and the Administrative-Economic Collegium of the Supreme Court of Nakhchivan Autonomous Republic.
- 3) Cassation Instance Court is the Supreme Court of Azerbaijan Republic, namely its Administrative-Economic Collegium.

2. Scope and Methodology

Co-operation with the Government of the Republic of Azerbaijan. The Office prepared a first thematic Trial Monitoring Report, as a pilot one, focusing on administrative justice to assist the Ministry of Justice (MoJ) in assessing the work of the newly established administrative courts across the country.

The Office further discussed the scope of the Project with the MoJ and approached the Chairmen of Administrative-Economic Courts to inform them about the pilot project and request Trial Observers’ access to court proceedings and court cases’ related information, as required.

¹¹ The CPC entered into force on 1 September 2000.

¹² According to Article 3.1 of the APC, these courts act as first instance court in all cases, except cases adjudicated by administrative-economic collegiums of the appellate courts as courts of first instance

¹³ APC, Article 3.2

Trial Observers. In April 2012, the Office allocated four Trial Observers to monitor court proceedings at two Administrative-Economic Courts in Baku. As of July 2012, additional four observers were assigned to monitor the functioning of the Courts in the regions of Ganja, Sumqayit, Sheki and Shirvan.

All selected Trial Observers and Trial Co-ordinators proved to have gained extensive trial monitoring experience in the context of the Office's Trial Monitoring Programme. In addition, in October 2011, they joined a specialised training on administrative justice that the Office organised to further build their knowledge and skills on the specific requirements for monitoring administrative court cases¹⁴. To enhance further the Trial Observers' monitoring skills, in July 2012, the Office, in co-operation with the ODIHR and the *Folke Bernadotte Academy*, organised additional training on administrative justice monitoring for the benefit of the Office's Trial Monitoring Team.

Selection of cases and court proceedings The Trial Monitoring Team randomly selected the court cases to be monitored from the lists of cases placed on the information boards in court buildings. The Trial Observers monitored court cases from the preliminary stage to the judge's delivery of the final decision.

Format of monitoring and reporting. The Office provided the Trial Observers with a comprehensive trial monitoring questionnaire developed on the basis of domestic legislation, OSCE commitments and other international standards and good practices included in the Handbook for Monitoring of Administrative Justice. Following OSCE trial monitoring standards, they collected the factual data in an objective and impartial manner, refraining from conducting any assessment in connection with the substance of the case. The Trial Monitoring Team subsequently analysed collected data in line with domestic legislation and applicable international standards.

Scope of the Report. The findings of this Report include court cases monitored from 2 April 2012 to 30 November 2012. They cover six Administrative-Economic Courts throughout Azerbaijan: two in Baku and the Administrative-Economic Courts in Ganja, Sumqayit, Sheki and Shirvan.

¹⁴ The Office involved as international trainer a German Judge specialised in adjudicating administrative cases and with extensive experience working in Azerbaijan as former Head of the German International Development Agency's (GIZ) project on administrative justice.

During the monitoring period, the Trial Observers monitored 68 cases and 179 hearings in total, including 35 cases (104 hearings) monitored in Baku Administrative -Economic Courts and 33 cases (75 hearings) monitored in regional Administrative-Economic Courts. Observation also covered two cases (9 hearings) adjudicated by the Administrative-Economic Collegium of Baku Court of Appeal.

Regarding geographical coverage, the Office focused on cases in Baku capital area due to the highest workload of these Courts. As to the specific cases selected, the Office aimed at identifying a broad range that would reflect diversity in the nature of the proceedings before Administrative-Economic Courts.

In addition to monitoring administrative proceedings, the Trial Monitoring Team also met with the Chairmen and judges of Administrative-Economic Courts to receive their feedback on the problems faced by the newly established courts and the progress made in the field of administrative justice during 2012. The Office also included into this Report statistical data on the number of cases adjudicated by the administrative justice system in 2012 that the MoJ submitted to the Office.

Table 2

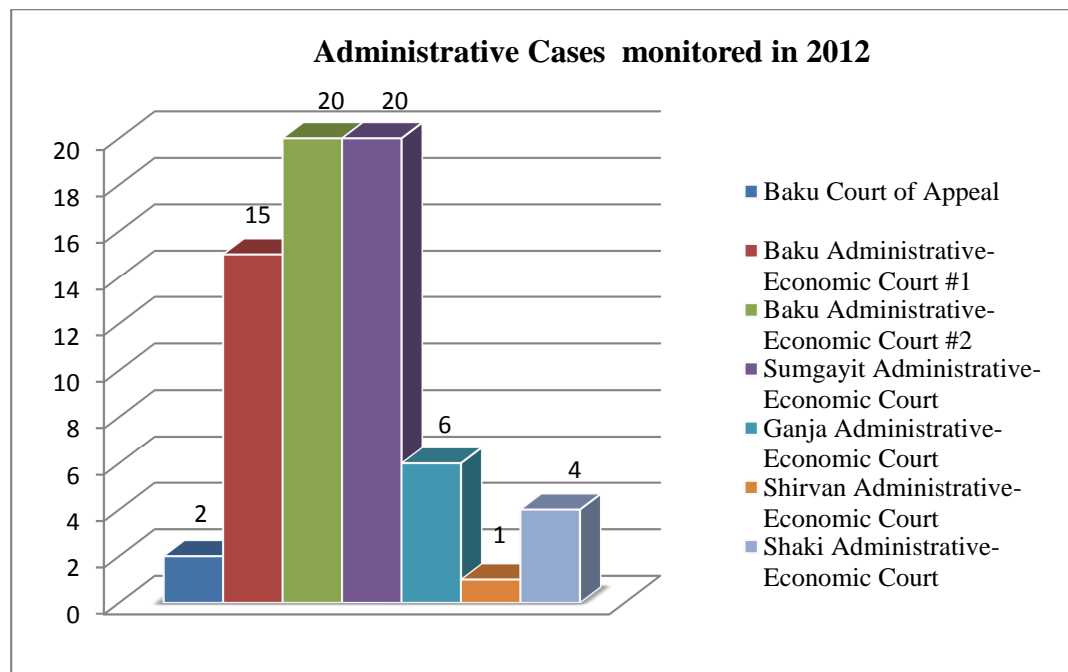
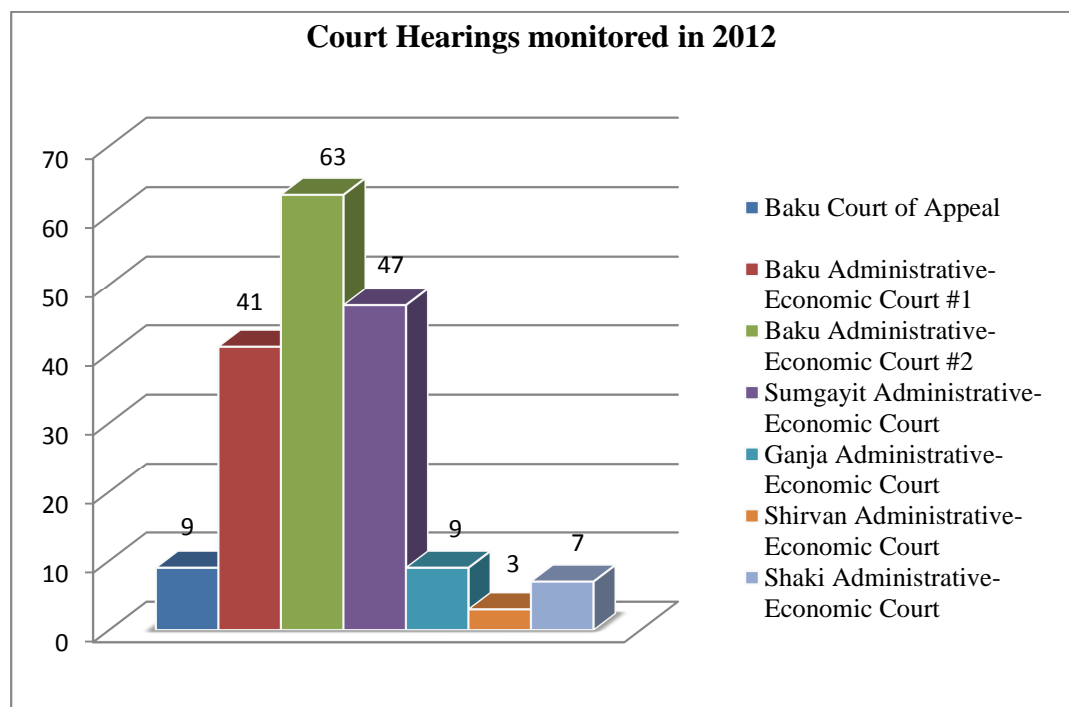
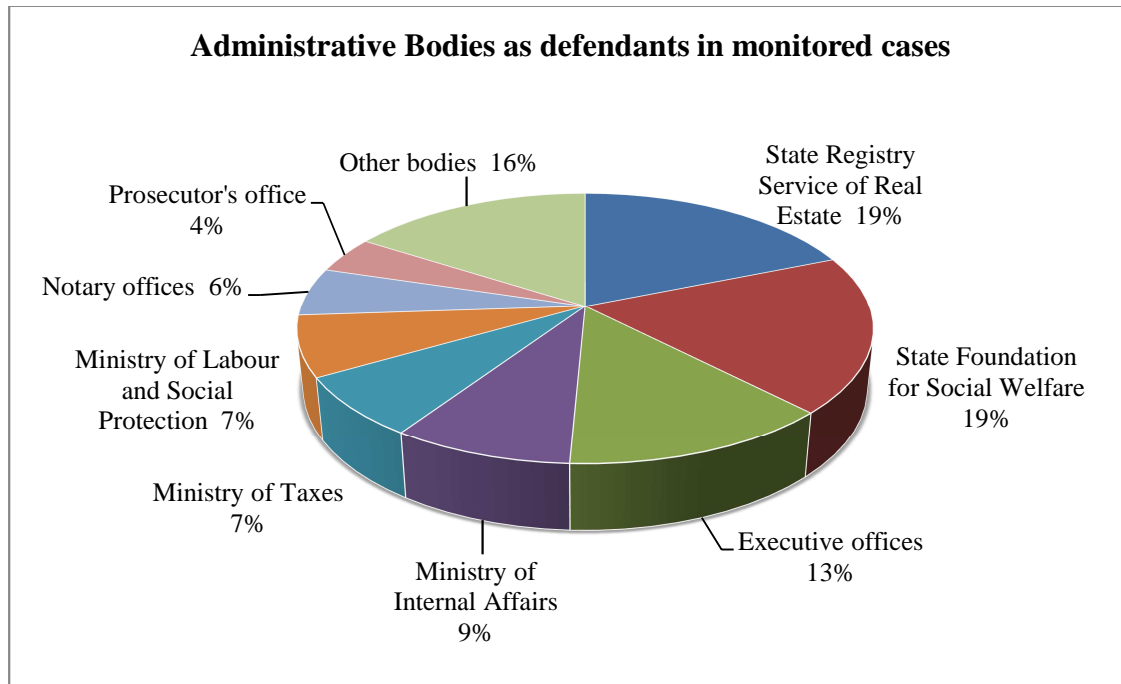


Table 3**Table 4****Cases and hearings per court**

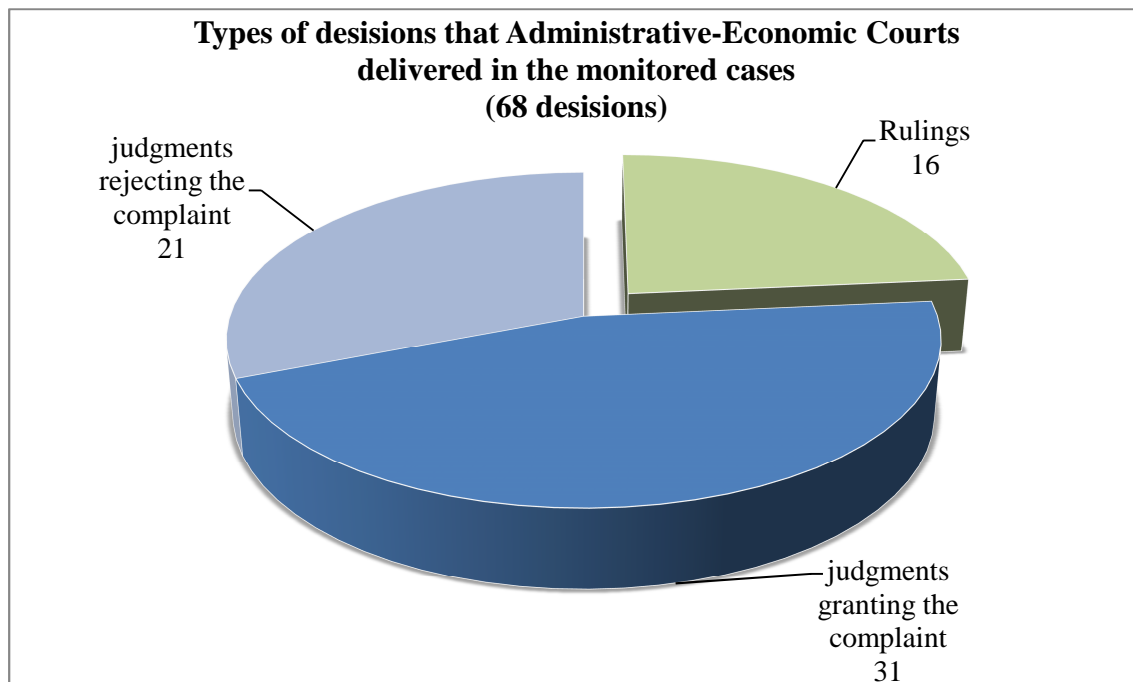
Name of the court		Cases	Hearings
1	Baku Court of Appeal	2	9
2	Baku Administrative-Economic Court #1	15	41
3	Baku Administrative-Economic Court #2	20	63
4	Sumgayit Administrative-Economic Court #1	20	47
5	Ganja Administrative-Economic Court #1	6	9
6	Sheki Administrative-Economic Court #1	4	7
7	Shirvan Administrative-Economic Court #1	1	3
Total		68	179

Table 5



*Other bodies include the Ministry of Finance, the Collegium of Advocates, State Committee for Land and Topography, State Committee for Work with Religious Organizations, the Ministry of Emergency Situations, State Oil Academy and the Ministry of Health

Table 6



*Rulings are divided as follows: friendly settlement (1 case), inadmissibility decision (6 cases), rejection based on jurisdiction (2 cases) and withdrawal of claim (7 cases)

3. Findings

- *The right to a public hearing*

The right to a public hearing is guaranteed by the Constitution of Azerbaijan, Article 127 (V), Article 17 of the APC and internal rules on court operations. Administrative proceedings are open for public, unless there are sound reasons justifying to hold closed hearings in order to safeguard the privacy of parties or protect specific information or interest of particular actors.

The European Court on Human Rights (ECtHR) has held that unjustified restrictions on individuals' access to court premises, including courtrooms, violates the fair trial requirements under Article 6 (1) ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The lack of hearings' publicity, inaccessible venues, insufficient courtroom space, and/or the application of unreasonable conditions to access courtrooms may entail a violation of the publicity requirements under the ECHR and ICCPR. Thus, in order to be able to attend the hearings, the general public should have an access to information on the date and the time of pending hearings in advance and the schedules of Court hearings should contain those pieces of information.

Practice observed in the cases monitored

Public access to information on Court cases.

The Trial Monitoring Team established that all Administrative-Economic Courts display information on court hearings either in a board, or through electronic screens¹⁵ installed in the respective Court buildings. In addition, the Ministry of Justice launched a new web portal¹⁶ in November 2011 to facilitate the public access to Courts. The portal includes a special section on the cases pending before any court in Azerbaijan but that Section was not yet activated at the time of drafting this Report.

The Trial Monitoring Team noticed that in practice the publication of information on pending cases varies from Court to Court. For instance, Sumqayit Administrative- Economic Court and Baku Administrative-Economic Court # 1 publish a daily schedule of pending trials, while Ganja, Shirvan and Sheki and Baku Administrative-Economic Court #2 publish the schedule of pending cases every Monday on a weekly basis.

¹⁵ Baku Administrative and Economic Court # 1

¹⁶ www.courts.gov.az

Moreover, the Monitoring Team observed inaccuracies in some lists of pending cases displayed either on the Courts' boards, or electronic screens.¹⁷ For instance, the Baku Administrative-Economical Court #1 did not publish information about preliminary hearings on the electronic screen. While Court clerks provided information to the Monitoring Team, in a number of cases, there was no information available on coming hearings, including trials on the merits.

At both Courts in Baku the Monitoring Team could not find in the information boards information about cases pending before the Chairmen of Administrative-Economic Courts.

On a positive note, all Administrative-Economic Courts, with the exception of Administrative Economic Court #1 in Baku, displayed information on the subject matter of the case in their Court schedules.

Besides the information on pending cases, the Courts also have the obligation to provide information on closed cases, by publishing electronic versions of first instance judgements no later than ten days upon rendering them. Pursuant to the *Rules on the Pronouncement of Act of State and Local Authorities through e-information systems*,¹⁸ Courts should have started that practice as of 1 January 2012, when the Rules came into effect. Nevertheless, the Monitoring Team did not find any judgements available at the First Instance Courts' websites at the time of drafting the Report.

Physical access.

The Trial Monitoring Team observed that physical access to Court proceedings is generally observed by Administrative-Economic Courts. Only in a limited number of instances the Monitoring Team faced restrictions in accessing one of the two buildings of the Sumgayit Administrative-Economic Court. The Court security personnel allowed only parties to a hearing to enter the Court building.

The Trial Monitoring Team also noted that on an exceptional basis, several Court hearings were held outside of the Court-rooms, in the judges' offices.

¹⁷ During the reporting period, the electronic screen in Administrative-Economic Court #1 in Baku was not operational during one month, i.e. from 15 September to 15 October 2012.

¹⁸ Adopted by Presidential Decree on 16 February 2011.

- *Inquisitional principle*

The APC includes both inquisitional and adversarial principles of adjudication in the administrative justice system. According to the inquisitional principle, a Court shall investigate all factual merits of a case that are relevant for a particular dispute and shall not limit judicial investigation to motions and evidence produced by the parties.

A Court shall gather other necessary evidence on its own initiative or on the initiative of the parties.¹⁹ Administrative Courts may involve at their own initiative persons whose legally protected interests may have been infringed, as third parties to the administrative proceeding.²⁰ Moreover, judges may, at any time, review or cancel a ruling on provisional remedies, provided that there are sufficient grounds for such a decision.²¹

Practice observed in the cases monitored

The Trial Monitoring Team observed that judges were not exercising enough their inquisitional powers. In many observed cases, judges failed to require from the parties to the Court proceedings to provide additional information or evidence related to certain claims and/or submit evidence at their disposal. Only in 18 out of 57 preliminary Court proceedings monitored,²² judges asked the parties to submit information or evidence related to the substance of a complaint. Furthermore, only in 16 out of 52 Court hearings on the merits observed,²³ judges asked the parties to submit information and/or evidence related to the claim. That was particularly relevant in relation to administrative bodies that did not make available to Courts documents or other information critical for the fair adjudication of the case.

The Trial Monitoring Team also observed that often times the judges were not requesting additional information and evidence on their own initiative from third parties. This applies to 41 out of 52 cases monitored²⁴ The Trial Monitoring Team further noted that judges were

¹⁹ APC, Article 12

²⁰ APC, Article 28

²¹ APC, Article 44

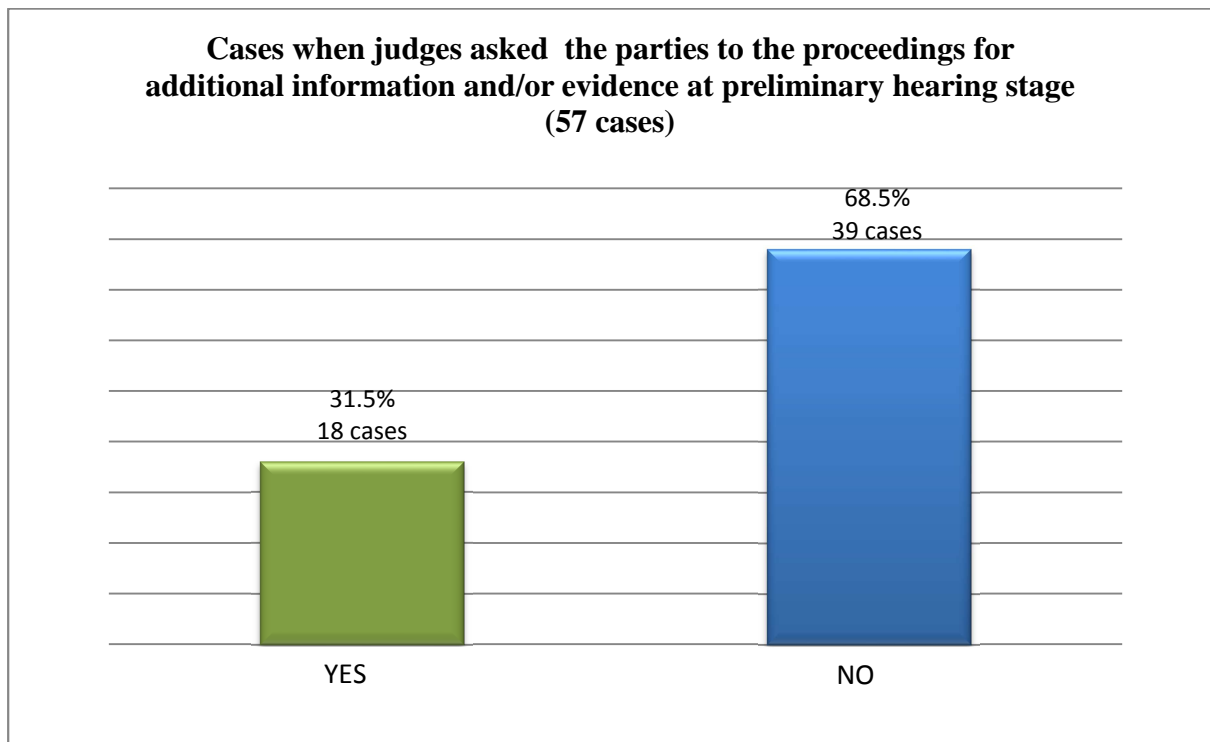
²² In 31.5% of monitored court proceedings

²³ In 30% of monitored court proceedings

²⁴ In 78, 8 % of monitored court proceedings

reluctant to invite third parties to appear at trials. Only in two out of 57 cases monitored,²⁵ judges invited a third party to join trial proceedings. On a positive note, in most of the cases monitored, judges explained the merits of the case to the parties and offered a friendly settlement. According to the observations, at the preliminary hearing stage the judges discussed the merits²⁶ of the case in 45 out of 57 monitored cases.²⁷

Table 7



²⁵ In 3.5% of monitored court proceedings,

²⁶ According to the Article 13 of the APC the “Court shall be bound to support the participants of procedure in eliminating formal offences committed with regards to claims filed, specifying unclear claims, replacing improper claims with acceptable ones, supplementing incomplete factual information, as well as providing explanations, which are significant in determining and evaluating the merits of the case.”

²⁷ In 78.9% of the court proceedings monitored.

Table 8

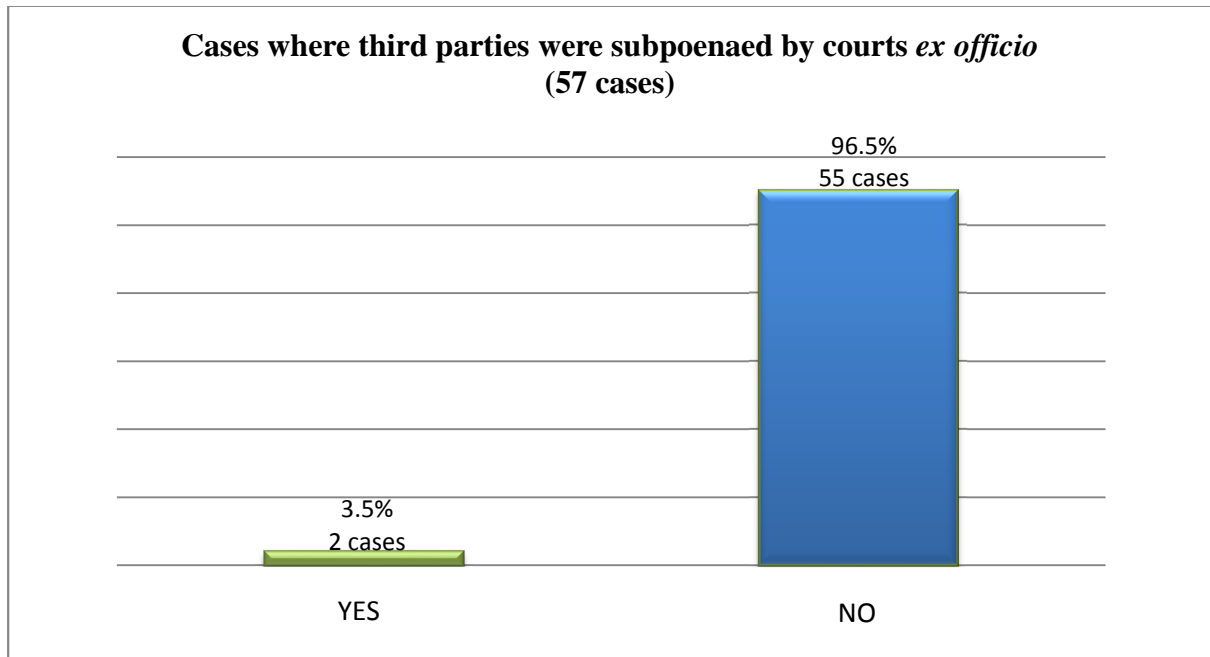


Table 9

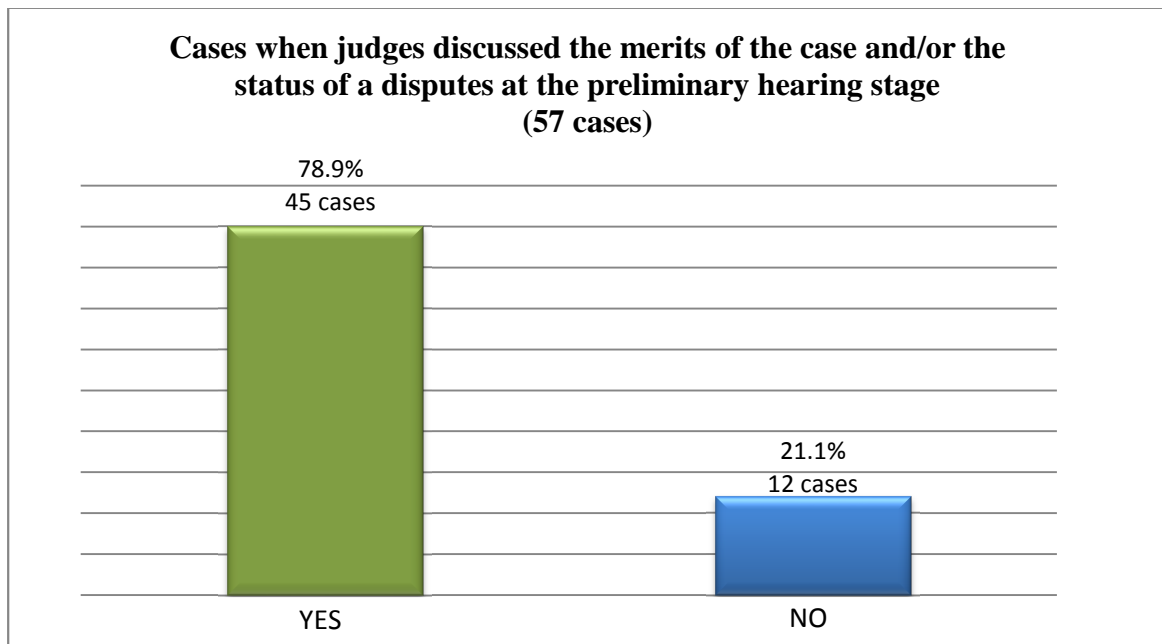


Table 10

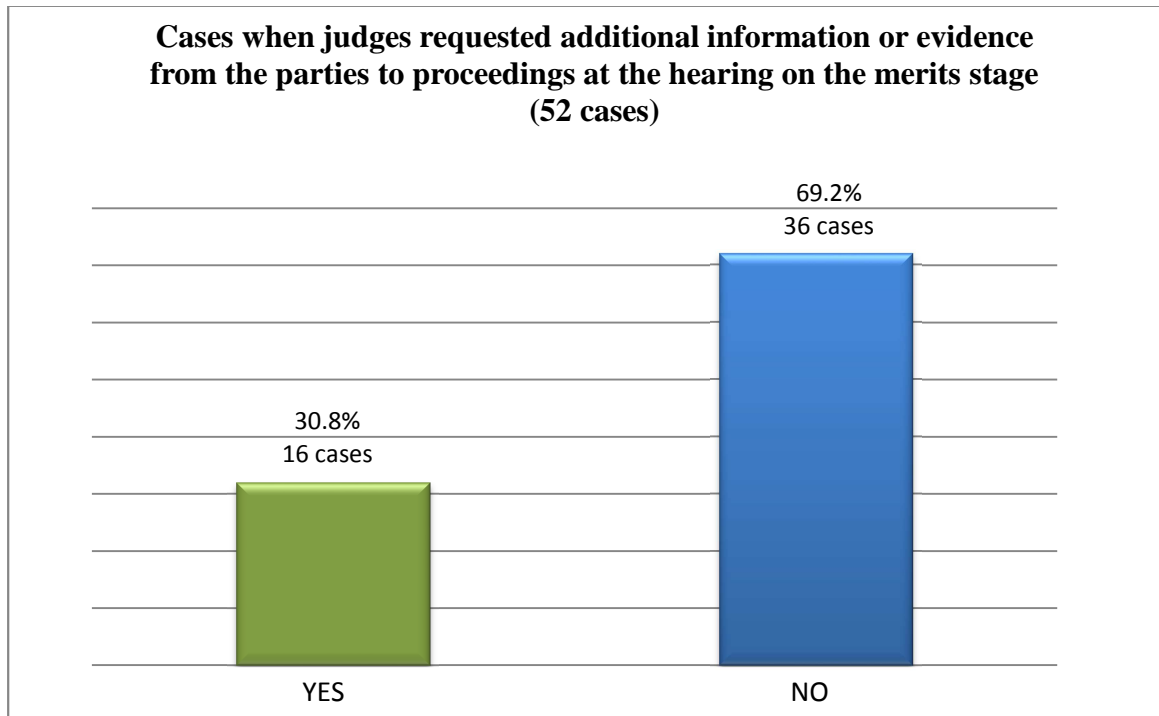
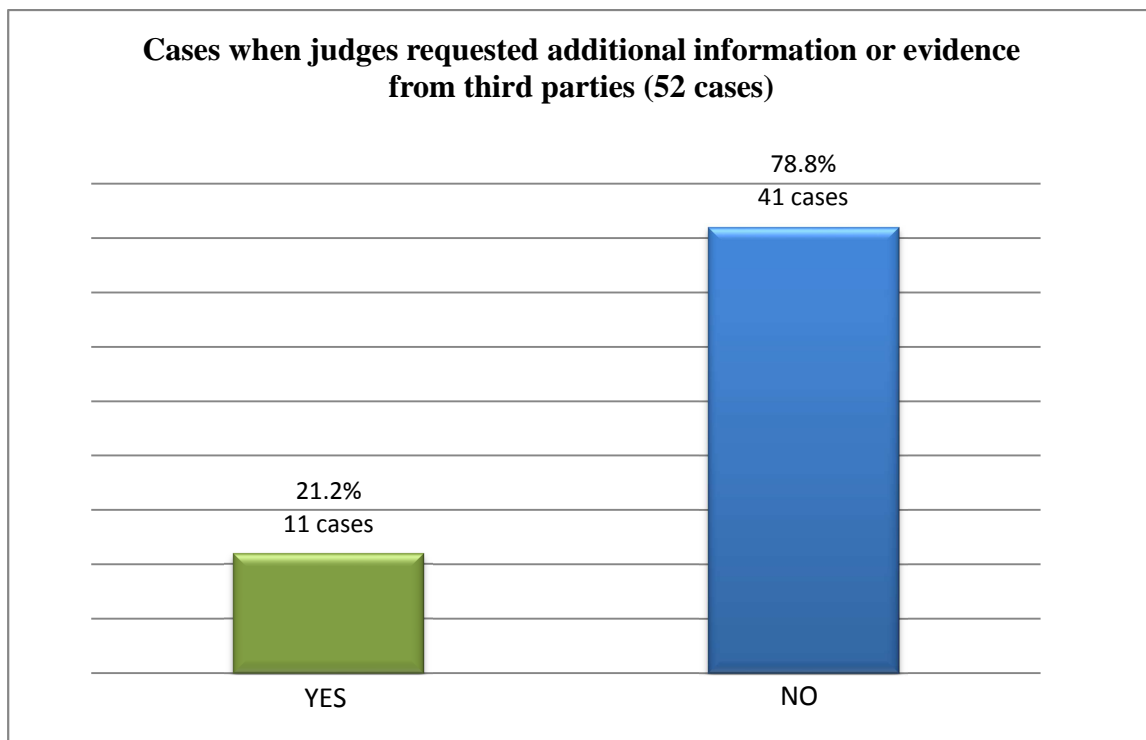


Table 11



- *Equality of arms and the adversarial principle*

The principle of equality of arms requires that each party is afforded a reasonable opportunity to present his/her case, including the evidence, under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* his/her opponent.²⁸

Thus, the Courts need to ensure procedural equality between the parties. Under international standards: “The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument.”²⁹ In Azerbaijan’s domestic legislation, the principle of equality of arms and the adversarial principle are regulated by Articles 127 (II) and 127 (VII) of the Constitution, and Articles 11 and 15.1 of the APC.

In administrative cases, there is a particular risk of infringement of this principle due to the privileged position of the party representing the State administration *vis-a-vis* ordinary citizens.

The ECtHR ruled that the principle of equality of arms may be breached when a) a litigant is faced with opponents who have advantages in respect of access to relevant information;³⁰ b) when the person holding relevant information prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would assisted them in legal proceeding;³¹ c) when the applicant could read the documents, but was refused copies of those documents, taking notes and using the documents in the Court proceedings;³² d) when one party’s right to call witnesses is restricted in comparison to the right afforded to other party³³ and e) when a law is passed in order to influence the judicial determination of an on-going legal dispute.³⁴

²⁸ *Werner v Austria* [1997] ECHR 92, para 63; *Coëme and Others v Belgium* [2000] ECHR 250, para 102; *G. B. v France* [2001] ECHR 564, para 58. cited in Legal Digest of International Fair Trial Rights, OSCE/ODIHR, 2012, p.110

²⁹ Council of Europe recommendation on judicial review of administrative acts, adopted by the Committee of Ministers on 15 December 2004, para. 4 (d).

³⁰ *Yvon v. France* (2003)

³¹ *McGinley and Egan v. United Kingdom* (1998)

³² *Matyjek v. Poland* (2006)

³³ Article 6 of the Convention does not explicitly guarantee the right to have witnesses called or other evidence admitted by a court in civil proceedings. Nevertheless, any restriction imposed on the right of a party to civil proceedings to call witnesses and to adduce other evidence in support of his case must be consistent with the

Practice observed in the cases monitored

The Trial Monitoring Team in general observed that the Courts complied with the principle of equality of arms by having granted or denied nearly the same percentage of motions filed by plaintiffs and defendants, respectively.

In general, it was observed that parties were reluctant to raise motions at the preliminary stage. The Monitoring Team noted that at 46 out of the 61 preliminary hearings observed,³⁵ the parties remained passive and did not raise any motion while at remaining 15 hearings they raised only 19 motions in total. On a positive note, judges ensured equality of arms by granting 10 out of 14 motions raised by plaintiffs and 3 out of 5 motions raised by defendants.

The findings were similar at hearings on the merits. The parties were also reluctant to raise motions at those hearings,³⁶ raising only 17 motions at 52 hearings on the merits the Office monitored. The judges granted 9 of 14 motions raised by the plaintiffs and 2 of 3 motions filed by defendants, thus complying with the principle of equality of arms.

Another important aspect of the adversarial principle is participation of the parties at Court proceedings. According to Article 15.1 of the APC, the parties may examine witnesses, experts and representatives of administrative bodies during Court proceedings. Therefore, in order to ensure respect for the principle and to allow a party to ask questions, judges should secure participation of the opponent party in the Court proceedings. In this context, the Monitoring Team observed that due to the absence of the defendant in 21 out of 52 observed hearings,³⁷ the plaintiffs could not examine the defendants.

In 71,1% of the cases observed,³⁸ the judges discussed both factual and legal aspects of the dispute with the parties.³⁹ In 75% of the cases observed,⁴⁰ judges gave the floor to the

requirements of a fair trial within the meaning of paragraph 1 of that Article, including the principle of equality of arms. *Gryaznov v. Russia* (2012) para. 57

³⁴ *Arnolin and Others v. France* (2007)

³⁵ In 75.4 % of monitored court proceedings

³⁶ In 72,5 % of monitored court proceedings

³⁷ In 40.3% of monitored court proceedings

³⁸ In 37 out of 52 monitored court proceedings

participants in order to present motions and/or substantiate their motions or claims.⁴¹ In 96,1% of the cases observed,⁴² judges provided full and equal opportunities to the participants in order to exercise their procedural rights.⁴³

4. Recommendations

To the Judiciary

- The Office advises the Courts that are not ensuring a full enjoyment of the right to public hearing, by announcing date and time of hearings in advance, to do it either on a board, or through electronic screens installed in the respective Court-buildings.
- The Office encourages judges to continue and increase the exercise of their inquisitional powers under the APC, by requiring from participants to Court proceedings and/or third parties to provide relevant information or evidence related to claims.
- In order to increase compliance with the adversarial principle, the Office advises the judges to secure the participation of administrative bodies` representatives in Court hearings.

³⁹ According to Article 64 of the APC, judges have a duty to discuss with the parties both factual and legal aspects of a case.

⁴⁰ In 39 out of 52 monitored court proceedings

⁴¹ According to Article 63.3. of the APC, after explaining the substance of the dispute to the parties, judges should give the floor to the parties to make motions and to substantiate these motions and/or any other claims.

⁴² In 50 out of 52 monitored court proceedings

⁴³ According to Article 11.2 of the APC, judges should create equal opportunities to the participants so that they may fully exercise their procedural rights .

To the Administrative Bodies

- The Office encourages the competent administrative bodies to timely make available to Courts documents and information relevant to the efficient resolution of Court cases.