which provide a release from land use taxes for farmers and other land-users who invest in land improvement, do not work because of high inflation and other economic barriers that make soil improvements unprofitable.

There are also doubts about the feasibility of some legal approaches. For example, the strict rule about the removal and storage of the soil’s fertile layer in cases of mineral extractions seems to be economically and environmentally questionable in many instances. If it is favourable for highly productive soils, it appears to be unfavourable for others. In cases of mineral extractions in regions where the land is not appropriate for agricultural uses, soil rehabilitation, which is relatively expensive, is not necessary and of little practical use. It has been proved that land rehabilitation makes the industrial process and the end product more expensive, while rehabilitated land is never quite the same again.

The civil mechanism of compensation for losses in cases of land takings in most cases does not encourage soil protection, despite the legal declaration. When agricultural or forested land is taken for industrial purposes with compensation, the money the land-users receive is rarely spent on development and improvement of new land areas. If land is taken from such land-users, they often abandon the land and move to cities, switching to other businesses. The land taken is used as a territorial basis for the location of roads, settlements and industries, and consequently the value of soil is lessened or even lost. However, there is no clear answer as to whether one should preserve all available soil as it is, in all cases.

Governmental regulations that are vital for the implementation of legislative requirements are often lacking, thus leaving many legal provisions inefficient and unworkable.

In addition, since the beginning of privatisation, some 60 per cent of agricultural land has been privatised, and the State has released itself from the responsibility of taking care of such land. All the above legal land improvement measures are expensive and cannot be carried out by farmers alone.

In environmental terms, laws frequently demonstrate economic rather than environmental concerns about the state of soil, especially those used for agriculture. It is interesting to note that the non-use of agricultural land that leads to the spread of bushes and trees is recognised as land degradation, qualifying as misconduct and being subject to punishment. However environmentally speaking in terms of, for example, wildlife and habitat protection, such processes seem to be favourable.

**Prospects for the development of soil protection legislation**

The legislation regulating soil protection is tending towards consolidation. A draft law on soil protection is now under consideration in the State Duma of the Russian Federation. However, it is currently being criticised by the government for repeating many of the rules already established in current legislation and for lacking well-grounded financial accounting of the implementation of certain soil protection measures, such as the creation of a soil database, monitoring the state of soil, development and dissemination of knowledge in the field of soil protection.

The State Duma of the Russian Federation is also going to consider another draft of the Land Code, which is supposed to provide for soil protection. In this way, the legislators face a serious challenge – to establish a well-balanced set of legal mechanisms that can overcome the current legal problems and ensure the efficient protection of soil. To what extent the legislators are ready to solve this task is not clear. Improvement in the current situation will also depend much on the political will of the government, the economic conditions, and the availability of the financial resources necessary for the implementation of legislative requirements.

**Notes**

1. Land designated for agricultural purposes totals some 39 per cent with arable land making up 12 per cent of this (State of the Environment in the Russian Federation, 1998).
3. The Federal Service of the Land Register was established on 13 May 2000 according to the Presidential Decree “On the Federal System of the Executive Power”.

**USA**

**Habitat Protection Ruling**

by Donald K. Anton*

A New York Appellate Court ruled in October that the habitat of endangered species as well as the species itself is protected under New York’s Endangered Species Act. It thus ruled that a fence might be illegal if it curtailed the creatures’ habitat.

In a *per curiam* opinion, the Court unanimously affirmed a County Supreme Court justice who had refused to issue a preliminary injunction to stop the State Department of Environmental Conservation from requiring a landowner to tear down a 3,500 foot long, four foot high “snake-proof” fence that keeps timber rattlesnakes off his 213-acre property, where he intends to create a mine. The

*Policy Coordinator, Environmental Defender’s Office; Member of IUCN Commission on Environmental Law.*
The decision is the first to interpret the state Endangered Species Act, which has been on the books for 28 years. Lawyers for the property owner said their client had not decided whether to appeal the preliminary injunction denial to the Court of Appeals. The landowner may also choose to go to trial on its request for a permanent injunction.

The statutory term “taking” applies to habitat as well as the animals, and a limitation of habitat that may harm the species provides enough justification for the State Department of Environmental Conservation to prohibit the fence, the court said.

The fence was erected when the landowner – Sour Mountain Realty Inc. – found a rattlesnake den 260 feet from its property line. But the Department of Environmental Conservation said that the fence would endanger the normal migratory patterns of the rattlesnakes, and cut them off from much of the area where they seek food. The normal territory radius of the snakes is two-and-a-half to three miles, and the fence would keep them from much of their habitat.

State officials ordered the property owner to dismantle the fence. The Department of Environmental Conservation issued the order under the Endangered Species Act, codified at §11-0535 of the Environmental Conservation Law. State environmental officials took the position that the fence would endanger the normal migratory patterns of the rattlesnakes, and cut them off from much of the area where they seek food.

The real estate company then went to court to obtain an injunction against the removal order. Justice Judith Hillery agreed in March 1999 with State environmental officials and refused to issue an order allowing Sour Mountain to maintain the fence.

The lawyer representing the property owner said that the ruling sets up two criteria which the State must meet in order to justify its action. “At trial, the State of New York must prove two things: first, that the fence modifies the snakes’ habitat; and second, that [the habitat curtailment] can cause harm to the species,” he said. He would ask the trial judge to instruct a jury on such a test and said, “I think we can win with that clarity.”

The appeals court rejected Sour Mountain’s argument that the New York law prohibited only the intentional harming or killing of an endangered species. It said that the statute contains broad language including a prohibition against disturbing endangered species in New York. “We agree with the Supreme Court that the proscribed ‘lesser acts’ logically include habitat modification,” the justices said.

**Denmark/Estonia**

**Compliance with the Aarhus Convention**

by Gitte Tuesen and Jacob Hartvig Simonsen*

**Introduction**

In this article we will describe the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in relation to the question of compliance.† The Convention was signed at the city of Aarhus, Denmark on 25 June 1998. It is expected to enter into force in 2001.‡ (See Environmental Policy and Law, Vol. 28, No. 2 (1998) at page 69; Vol. 28, Nos. 3 & 4 at page 171; and Vol. 28, No. 5 at page 220). We will describe compliance with the Aarhus Convention in two countries – Denmark and Estonia. The barriers to effective compliance with the Convention for the two countries are very different. These barriers will be described and discussed.

The background for this article is our interest in the subject of compliance with international environmental accords. Compliance problems are increasingly overshadowing successes in the adoption of new instruments.# Although a theory of compliance has been developed in literature and practice in recent years there is still a need to focus on specific barriers of compliance both nationally

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* Legal specialists at COWI Consulting Engineers and Planners, Denmark.

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