

Article: Liability for Environmental Damage

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Liability for Environmental Damage

Everyone remembers oil disasters like the Exxon Valdez oil spill near the Alaska coastline and the Deep Horizon oil spill in the Gulf of Mexico. These cases caused billions of dollars in damages to aquatic and marine life. Another example is a 14-billion Euro lawsuit against Chevron in Ecuador for oil pollution of the Amazon River by Texaco in the 1970s and 1980s. Surprisingly, a lawsuit was filed and won by local Amazon tribes. No one expected that Amazon tribes could win a large scale case against a petroleum giant.

In Kazakhstan, residents of Berezovka village had a ~~XXXXXXXXXX~~ with Karachaganak Oil Field for toxic air pollution it caused through gas flaring in 2006-2008. According to mass media, Kazakhstan ~~XXXX~~ government fined Karachaganak US \$27 million for this air pollution. A large part of this fine was due to the pollution of Berezovka village. It is necessary to note that in Kazakhstan the use of natural resources and waste disposal activities are regulated through the ~~XXXXXXXXXXXXXXXXXX~~ system. Any emissions or waste disposal above the limit or without a permit is considered to be a breach of environmental legislation and will result in penalties. The tariffs, rates, and amounts of these penalties are established in Kazakhstan's Tax Code. They can even be regarded as "environmental taxes".

The oil & gas companies may have double or triple liability for environmental damages due to the lack of legal experts in environmental law. Without specific knowledge and legal practice, lawyers cannot separate and understand ~~XXXXXX~~ ~~XXXX~~ of environmental and civil liability laws. As can be seen, the cases considered above are not connected with penalties for emissions or waste disposal. Most of these epic cases are based on tort. Tort in common law is a civil wrongdoing that caused damage to a person, a loss suffered by a person that resulted in legal liability and obligation of a tortfeasor to recover the damages and losses to the injured person.

Kazakhstan is a civil law country and has a similar concept of tort. Kazakhstan civil law imposes a legal liability to compensate the damage caused or to recover the losses. This legal liability is imposed on the person who caused unjustified damage or losses to the injured person. The problem arises that this liability may also be imposed on a person who did not engage in wrongdoing. For example, a car owner is fully liable for an accident his car was engaged in, even if his car was driven by somebody else at the time. Kazakhstan ~~XXXX~~ legislation imposes additional liability on the owner of dangerous property that poses a significant threat to welfare or life.

The same pattern may be used to understand how an oil consortium may be liable for an operator ~~XXXX~~ wrongdoing. Kazakhstan corporate

legislation sometimes imposes a liability (or recourse) on shareholders of a limited liability company for the company's wrongdoing. We do not know of any case in Kazakhstan when a corporate limited liability tested to share or recourse liability to the shareholders of a limited liability company or joint stock company, for wrongdoing engaged in by such a company. However, it is necessary to pay attention to this matter.

Another problem arises when we attempt to stipulate who actually owns the environment. It could be the government as a representative and sovereign institution, on behalf of the Kazakh nation. It could local people and their properties and rights to a good and healthy habitat, as in the Berezovka case in Kazakhstan. In a potential pollution case, both of these may be considered to be injured parties. Therefore, both public and private plaintiffs have a right to request compensation for the pollution.

Kazakhstan environmental regulations contain rules for pollution damage calculation and assessment, based on certain formulae. These rules are not clearly linked to a fair market value for the recovery and actual compensation costs in the event of pollution caused by a vast oil spill. Only Article 109 of the Environmental Code refers to market costs for liquidation of pollution. It does not necessarily assess all other losses and damages from the market value perspective, like fair compensation.

Article 109 and 110 of the Environmental Code show that state bodies have the power and authority to conduct a financial assessment of damages caused by pollution. Kazakhstan's government may file a lawsuit under Article 109 of the Environmental Code to compensate losses and damages for a natural habitat, public properties, and national interests, while private companies and individuals may seek legal protection based on Civil Code provisions and challenge another financial assessment for their damages and losses.

Kazakhstan's Civil Code provisions are sometimes in conflict with environmental legislation, in particular with a judicial system. The Civil Code allows pre-action and the procurement of an injunction to stop dangerous activities and eliminate a genuine threat; this could include the closure of an entire enterprise.

These Civil Code provisions may be in contradiction with the environmental impact assessment. The report on environmental impact assessment (EIA) should disclose all environmental and pollution risks and possible damages. The EIA report also suggests a remedy, protection, an action plan, and mitigation measures to reduce pollution and environmental risks, in agreement with the Ministry of Environmental Protection. It is generally believed that activities which could lead to irrevocable damage should be prohibited. Environmental expertise on the EIA report which grants permission for the planned activities prevent the Ministry of Environmental Protection from halting permitted activities. Unlike the public sector, private companies and individuals may request that operations be halted if there is a real threat.

Another important player is the Ministry of Oil and Gas which has powers to stop and even unilaterally terminate a hydrocarbon extraction contract with an oil & gas company. Will this be treated as a security measure, as a remedy, or as a liability? Oil & gas companies have many obligations to protect the environment from pollution, according to Articles 6 and 76.1.7, and Chapter 11 of the Subsoil Use Act. Therefore, the breach of subsoil use obligations may be considered as a liability and as a remedy.

It is well known that the oil and gas industry exposes Caspian marine life to significant risks. The Subsoil Use Act protects national security in terms of the safety of the natural environment. It prohibits all activities that create a risk of irrevocable damage to the natural environment. Therefore, the understanding of risk and damage are interrelated, and help to separate the remedy from the liability.

As shown in this article, liability and legal outcomes for environmental damage, even in risks, many vary and depend on various circumstances that have to be duly assessed from a legal perspective in order to avoid double liability.