Concerning Some Issues Regarding the Administrative and Civil Law Liability of Subsoil Users for Violations of Legislation on Environmental Protection and Ecology

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It is a well-known fact that imperfect legislation tends to significantly affect the way the courts review cases and deliver correct juridical decisions. In this connection, given the growing demands on the judiciary authorities concerning the quality of the administration of justice, in my view, similar demands also should be addressed to the lawmaking bodies in respect to the quality of the regulatory legal enactments they make.

In view of the difficulties in the application of laws due to the conflict of regulatory legal acts that arise because of the absence of clear definitions, something that allows for varying interpretations of legislative provisions, quite often court decisions give rise to criticisms or discontent and tend to contribute to the shaping of negative views on courts and judges.

In this report, I address some of the legislative discrepancies concerning the legal and regulatory management of subsoil users liability in terms of suspension of activity and compensation for damage resulting from breaches of subsoil use legislation, including breaches of legislative provisions concerning environmental protection and conservation, which create considerable difficulties for the judiciary in resolving such disputes.

The ROK Civil Procedure Code[1] (hereinafter the "CPC") offers a complete list of grounds on which to dismiss an action in court, that list being an exhaustive one, not allowing for loose construction. Given that under the Kazakh civil procedure legislation conflict of laws is not considered sufficient grounds on which to dismiss an action, the courts are required to accept all statements of a claim, including those which would be problematic to resolve due to certain irregularities in current legislation, in particular, the irregularities concerning the requirement for the suspension or prohibition of activities performed by individual entrepreneurs or legal entities.

Experience shows that in resolving such disputes, judges find themselves in a difficult situation, searching for solutions in a maze of legislative discrepancies.

I. Legislative and Regulatory Management of the Suspension or Prohibition of Activity or Specific Types of Activity Performed by Business Entities

Regulation of Procedures and Limitation Periods Concerning Administrative Liability: Under Article 45 of the ROK Code on Administrative Offenses[2] (hereinafter the "Code" or the "CAO"), the suspension or prohibition of activity, or of specific types of activity performed by a legal entity, is a type of sanction included in the list of administrative sanctions.

Pursuant to the provisions of Article 53 of the Code, suspension is affected through court proceedings on a petition submitted by a government agency (official) authorized to review administrative offense matters, with such petitions to be addressed by the courts within 10 days of submission. Under the Code, in exceptional circumstances only, suspension or prohibition of activity without a court decision is allowed for a maximum period of three days with an obligatory submission to the court of a petition by the established date.

Concerning the Civil Procedure Code, there are no provisions in the CPC stipulating which partic-

[1] The ROK Civil Procedure Code dated 1 July 1999 as subsequently amended.

[2] The ROK Code on Administrative Offenses dated 30 January 2001 as subsequently amended.

ular civil proceedings should apply to the review of such petitions. I would suggest that such petitions could be reviewed in special court proceedings similar to the actions in court challenging the decisions made by agencies (officials) authorized to review matters concerning administrative offenses. At the same time, given that Kazakh law classifies suspension as a form of administrative sanction, in the imposition of such a sanction it is necessary to follow the general procedure governing the imposition of administrative sanctions.

However, administrative agencies often fail to observe statutory provisions governing the institution of administrative proceedings. For instance, under the provisions of Article 36.1, ROK Administrative Offenses Code, a "legal entity shall be subject to administrative liability for an administrative offense in cases directly provided for in the Special Part of this Section". Article 60.1 of the CAO, further, stipulates that an administrative sanction for "an administrative offense shall be applied within the frame provided for a given administrative offense in the language of the Special Part of this Section in exact conformity with the provisions of this Code.

Administrative offenses and sanctions for the commitment thereof shall only be determined by this Code. No one may be subjected to an administrative sanction, or to the administrative offense proceedings measures, other than on the basis of and under the procedures stipulated by this Code" (Article 9.1, the CAO).

Administrative liability shall be based on the commitment of an act containing all constituent elements of offense as provided for in the Special Part of this Code" (Article 2, the CAO).

According to the tenor of the quoted provisions of the Code, to impute administrative liability on a person, there should be evidence of an offense for which administrative liability is provided in the Special Part of the Code.

"The administrative offense shall be a wrongful and guilty act (intentional or negligent) or failure to act by a physical person, or a wrongful act or failure to act by a legal person, which is subject to administrative liability under the provisions of this Code" (Article 28.1, the CAO).

For instance, when a demand is made to suspend activity of an organization violating environmental legislation, in the Special Part of the Administrative Offenses Code, there should be a clause stipulating specific liability for that precise offense against that legislation.

However, in the Special Part of the Administrative Offenses Code, including the language of Chapter 19 dealing with "Administrative Offenses in the Field of Environmental Protection and Use of Natural Resources", there are no provisions stipulating administrative sanctions in the form of suspension or prohibition of activity for any given offense.

It follows from the above that, in respect to offenses against environmental protection laws, suspension or prohibition of activity may not be applied for the simple reason that no such sanction is provided for in the Special Part of the Administrative Offenses Code.

Application of Laws Concerning the Suspension of Activity: In spite of the absence of a sanction in the form of suspension in the case of breach of environmental protection legislation in the Special Part of the Administrative Offenses Code, the courts make their decisions to suspend or prohibit activity referencing the language of Article 53 of the Administrative Offenses Code, and Article 77.2 of the ROK Law "On Environmental Protection".[3]

I believe that such references are mistaken, given that the first of the above mentioned clauses defines the concept of that type of administrative liability and the procedure governing its application, while the second clause only lays down the right of the competent authorized officials to petition the court for a suspension or prohibition of commercial or other activities performed in breach of ecological requirements or environmental legislation provisions. However, the above referenced legislative provisions *define neither the constituent elements of the offence nor the liability* for a specific offense.

It should be noted that, while the rights of authorized government agencies and their officials to impose a partial or full suspension of activity are established in the ROK Law "On Fire Safety", ROK Law "On Labor Safety and Protection", and in other regulatory legal acts, the Special Part of the Administrative Offenses Code does not stipulate sanctions in the form of suspension of activity in respect to breaches in those areas as well.[4]

Given that in the Special Part of the Administrative Offenses Code, the sanction in the form of suspension or prohibition of activity is not

[3] ROK Law No. 160-1 "On Environmental Protection" dated 15 July 1997 as subsequently amended.

[4] ROK Law No. 48-1 "On Fire Safety" dated 22 November 1996, and the ROK Law No. 528-P "On Labor Safety and Protection" dated 28 February 2004 as subsequently amended.

stipulated, it follows that, in view of the above-mentioned provisions of the General Part of the Administrative Offenses Code, sanction should not be applied.

In actual practice, however, there is a pressing necessity to suspend the activities of offenders against the law, including offenders against the provisions of respective legislations concerning subsoil use, nature conservation, and environmental protection. That explains why government agencies have to go to court with such petitions.

Guided by considerations of practicality and reasonableness of the requests to suspend activity, on the merits of the case, the courts make their decisions to sustain such requests even in the absence of a proper legal basis for doing so.

In its Regulatory Resolution "On Some Issues Concerning the Application by the Courts of Legislation on Administrative Offenses", the Republic of Kazakhstan Supreme Court attempted to iron out the existing legal discrepancies and, to some extent lessen the current gap in the legislation by stating that, in petitioning the court for suspension of activity, respective government agencies (officials), together with the petition, should submit an administrative offense protocol.[5] However, in disregard of that Resolution, the courts repeatedly fail to demand the submission of administrative offense protocols and find it difficult to decide what particular rules to follow in reviewing the case, whether the general rules of ordinary action proceedings of the civil process or the rules of administrative procedure.

Justifiably, some judges have noted that while establishing adversary proceedings for the review of such petitions, a process that requires the parties to be summoned to the court and, in the case of default in appearance, an adjournment of hearings, etc. (in other words, a procedure requiring considerable time), the Code stipulates a shorter 10-day period, making it virtually impossible to review a case in conformity with the above requirements given the short time allowed.[6]

Furthermore, the way the procedural regulation of the process of administrative offense actions review, including the review of petitions to suspend activity, is currently formulated in the Administrative Offenses Code appears to be clearly insufficient. Today, both theoreticians and practitioners in the field recognize the need to develop special procedural rules to govern administrative proceedings.

Under the current administrative procedure rules, with the exception of specific cases, upon identification of an administrative offense an administrative offense protocol should be executed first, and only after the examination of the case material an administrative offense order shall be issued.

For instance, pursuant to Article 634.3 of the Administrative Offenses Code, "administrative offense proceedings shall be considered instituted from the time of execution of a protocol concerning the commitment of an administrative offense, or of the prosecutor's making an order to institute administrative offense proceedings."

Under the provisions of Article 635, the CAO, "a protocol concerning the commitment of an administrative offense shall be executed by an authorized official, with the exception of cases provided for under Article 639 of this Code".

By the implications of Article 639, the Administrative Offenses Code, an administrative offense protocol shall not be executed, while a warning notice shall be issued or penalty imposed and collected by an authorized official at the site of commitment of an administrative offense, in the case of a commitment of administrative offense that requires the imposition of an administrative sanction in the form of a warning notice, or a penalty not exceeding a single monthly minimum calculation index.

Similarly, without the execution of an administrative offense protocol, the courts review matters involving administrative offenses as defined in Articles 80-113 of the Administrative Offenses Code (concerning administrative offenses infringing on the rights of individuals), where individuals file petitions seeking restoration of violated rights.

Neither shall an administrative offense protocol be executed where an administrative offense procedure is established by order of the prosecutor.

In all other cases, where a person commits an administrative offense, it is obligatory that a protocol should be executed by an authorized person. Without a protocol, an administrative offense action shall not be instituted and shall not be addressed by the courts.

[5] The ROK Supreme Court's Regulatory Resolution No. 18 "On Some Issues Concerning the Application by the Courts of Legislation on Administrative Offenses" dated 26 November 2004 as subsequently amended.

[6] See concerning the same an article by E. Kozhabayev in The Juridical Gazette *(Juridicheskaya Gazeta),* vol. 129, p.2, July 19, 2005.

Pursuant to the provisions of Subclause 4, Article 646.1 of the CAO, in the process of preparation for the review of an administrative offense petition, the judge or the concerned agency (official) shall make a "decision to return the administrative offense protocol and other case materials to the agency (official) executing the protocol in the cases of execution of the protocol, or the preparation of other case materials by unauthorized persons, or incorrect execution of the protocol or other case materials, or incompleteness of the presented materials, which cannot be corrected during the review of the case."

By the implications of the above language, the claim documents shall be returned to the petitioner in cases where the attached administrative offense protocol is either improperly executed or is executed by an authorized person and, all the more so, in the case where no protocol is attached thereto.

In disregard of that specific requirement of the law, government agencies and officials with powers to review administrative offense matters tend to petition the courts for suspension of activity. In other words, they seek to invoke administrative liability (sanction) without submitting administrative offense protocols. While the courts, however, in their review of the submitted petitions, fail to require that such protocols be submitted, and fail further to return the improperly executed documents to the petitioners.

What we see here is a situation where, while the provisions of the General Part of the Administrative Offenses Code do provide for the suspension of activity as a form of sanction for administrative offenses, the language of the Special Part of the Code lays down no specific grounds (elements) on which that sanction can be applied. Consequently, given the earlier quoted provisions of the Administrative Offenses Code, such an administrative sanction should not be applied.

According to the civil legislation standards, there should be some specific legal language providing for possible suspension of activity and laying down specific conditions under which such liability could be imposed.

As has been previously mentioned, however, the legislation mostly lays down provisions concerning the rights and powers of government authorities and officials without describing the offenses subject to such liability.

Moreover, if suspension of activity is to be seen as a civil law sanction, then it should be necessary to strike down from the Administrative Offenses Code the provision under which suspension is regarded as an administrative sanction.

Issues Regarding the Powers of Agencies Authorized to Review Matters Concerning the Suspension of Activity: There are some unresolved issues regarding the powers to review matters concerning suspension or prohibition of the activities of business entities.

The provisions of Chapters 31-32, Section 3 of the Administrative Offenses Code establish a list of government agencies authorized to review administrative offense matters, and also establish a list of matters within the respective jurisdictions thereof.

The ROK Subsoil Law[7] gives the right to the competent authority[8] for operations for a period of up to six months in the following cases:

1) Breach by the subsoil user of provisions of the contract and to suspend subsoil use;

2) Systematic failure by the subsoil user to comply with requirements of the Republic of Kazakhstan laws concerning the Kazakh content, or the protection of subsurface and the environment, or the safe conduct of work.

The law provides that, before a decision is made on the suspension of subsoil use operations, the competent authority must notify the subsoil user in writing of the identified noncompliance and must request from them written explanations regarding the causes of such noncompliance. The competent authority shall have the right to suspend subsoil operations in the case where it is impossible to eliminate the causes of the violations without the suspension of subsoil use operations, and also in the case of the subsoil user's failure to give explanations regarding the causes of violations within ten days of the time of notification of the identified violations (Article 45-1).

That particular article of the Law grants the competent authority the right to suspend the conduct of exploration, or production, or of the combined exploration and production, or the construction and/or operation of subsurface structures not connected with exploration and/or production; whereby the competent authority or the authorized government

[7] The Republic of Kazakhstan Law No. 2828 "On Subsoil and Subsoil Use" dated 27 January 1996 as subsequently amended.

[8] Under Subclause 17 of Article of the above Law, the competent authority is the government agency determined by the Government of the Republic of Kazakhstan and acting on behalf of the Republic of Kazakhstan in the exercise of rights involved in the execution and performance of contracts.

agency responsible for subsoil exploration and use shall be required to notify the subsoil user in writing of the reasons for suspension and shall set a reasonable deadline to address any such noncompliance.

The competent authority and/or the authorized government agency responsible for subsoil exploration and use are given the right to suspend the conduct of exploration, or production, or the combined exploration and production also in the case where, due to specific circumstances beyond the subsoil user's control, continued subsoil operations in accordance with the contract constitute a hazard or threat to human life or the environment. In such a case, the authorized government agency responsible for subsoil exploration and use has the right to give the subsoil user instructions of obligatory compliance to implement measures preventing or reducing the risk of adverse consequences resulting from such circumstances.

From the intent of the above Article, it follows that the competent authority independently may suspend the above named operations without going to court.

At the same time and in spite of the fact that the above mentioned Law stipulates the competent authority's powers and rights to suspend subsoil use operations (exploration and/or production), in the Special Part of the Administrative Offenses Code, no sanction is established in the form of suspension of the above operations. For instance, from the language of Article 275.1 of the CAO, it follows that breach of the rules governing the conduct of subsoil use operations, or breach of the subsoil contract provisions shall only be punished by imposition of penalties.

Furthermore, the above provisions of the Law giving the competent authority the right to independently suspend subsoil use operations for a period of up to six months are in violation of the provisions of Article 53.4 of the Administrative Offenses Code, which allow the "suspension or prohibition of activity, or of specific types of activities of individual entrepreneurs or legal entities without a court decision in exceptional circumstances for a maximum period of three days with an obligatory submission to the court of a petition by the established date. In such a case, the act ordering the suspension or prohibition of activity, or of specific activities shall remain in effect until the pronouncement of a court decision".

Without any doubt, the above mentioned legislative discrepancies need to be eliminated, and there is a pressing need to bring the provisions of the General Part of the Administrative Offenses Code into conformity with the language of the Special Part, and to bring the civil law and civil procedure law provisions into conformity with the rules laid down in the administrative legislation.

It should be noted that such legislative discrepancies are also found in the draft ROK Environmental Code.[9]

For instance, under the provisions of Article 57.1 governing the rights of officials exercising state environmental supervision,[10] government officials are given the powers to petition the courts for restriction or suspension of economic and other activities performed in breach of ecological requirements or environmental protection legislation provisions. From the sense of the language, it follows that the above actions are to be pursued in the courts of law.

Article 57.2, however, specifies that "prohibition or suspension of the activity of a small business entity performed in breach of ecological requirements shall be effected on the basis of a court decision. Prohibition or suspension of activity of a small business entity without a court decision shall be allowed, provided an obligatory notice in writing is given to the prosecutor within 24 hours, in exceptional circumstances, for a maximum period of three days, with an obligatory submission to the court of a petition by the established date. In this case, the act ordering the prohibition or suspension of activity shall remain in effect until a court decision is made." In other words, from the sense of the above language, it follows that judiciary proceedings governing the suspension or restriction of activity are obligatory specifically in respect to small business entities. With regard to other legal entities, the matter of suspension can be dealt with in other ways.

The above language is in violation of the provisions of the Administrative Offenses Code, which establishes a similar rule of judiciary proceedings governing the prohibition or suspension of activity, or specific activities for any legal entity or entrepreneur whether small or big.

Furthermore, pursuant to the provisions of Article 57.4, upon receiving notification of such a case, the prosecutor shall verify the lawfulness

[9] See the Draft Environmental Code received by KPLA in February 2006.

[10] Chapter 8 "State Environmental Control and State Control over the Use of Natural Resources", Section III "Environmental Control and Supervision", the Special Part.

of the actions conducted and, where they are found to be in breach of the law, the prosecutor shall issue an order canceling or removing such prohibition or suspension measures.

However, the Administrative Offenses Code makes no provisions for the prosecutor to be notified of the government supervisory authority's suspension or prohibitive actions as giving the prosecutor the right to cancel such orders to suspend or prohibit activity before a court decision is made.

In my view, the existing language of the Administrative Offenses Code regarding that matter is a more suitable language.

II. Determination of the Damage (Harm) Caused by Breach of Subsoil Legislation

Article 49 of the ROK Law "On Subsoil and Subsoil Use" provides for subsoil users' liability for the damage caused by noncompliance in the field of subsoil protection, such noncompliance often concerning nature conservation and environmental protection requirements.

Under the above referenced Article of the Subsoil Law, the size of the damage caused as a result of noncompliance with requirements in the field of subsoil use and protection should be determined by the respective authorized government agencies responsible for subsoil exploration and use, and environmental protection, jointly with the subsoil users. The procedures governing the calculation of damage should have been established by the Government of the Republic of Kazakhstan. The Subsoil Law, however, contains no corresponding explanation as to what exactly are the constituent elements of such damage.

To this day, the Government of the Republic of Kazakhstan has failed to establish specific procedures governing the determination of damage.

Regardless, and before the ROK central government could take any action in that direction, the Committee for Geology and Subsoil Protection under the Ministry of Energy and Mineral Resources rushed to approve the Instructions Governing the Issuance of Permits to Flare Associated and Natural Gas, with the language of Item 15 thereof stipulating that "the volume of gas flared by permission of the government subsoil use and protection agency, and the gas volumes flared in excess of the permitted gas volumes shall be considered as unauthorized losses and shall be compensated to the state in the established manner" (Item 15).[11]

In that way, the above named government agency defined what to consider as damage (harm) and how to determine its size.

Made in violation of the above referenced Article of the Subsoil Law and in excess of the Geology Committee's powers, that determination by the Committee confused some government authorities responsible for the supervision of subsoil use and protection, something that in its own turn generated unjustified claims for compensation of damage to the state, the size of which was calculated according to the said Instructions.

In 2005, for instance, territorial directorates of the ROK Committee for Geology and Subsoil Protection issued to several subsoil users a number of claims for compensation of damage to the state caused as a result of the flaring of associated and natural gas generated in the oil production process. The presumed damage to the state was declared in the amounts equal to the value of the flared gas. In acceptance of that position, some courts ruled in favor of the claimants in those actions.

The flaring of associated and natural gas without an appropriate permit is indeed in breach of the provisions of the ROK Law "On Petroleum".[12] Without any doubt, atmospheric emissions of noxious substances as a result of gas flaring are harmful to the environment.

At the same time, however, even if the gas is flared without the permission of the government subsoil use and protection agency, or if the flared gas volume exceeds the permitted gas volumes, the damage calculation in the amount of the price of the flared gas appears to be fundamentally incorrect for the following reasons.

According to the tenor of Subclauses 2 and 3 of Article 5, ROK Law "On Subsoil and Subsoil Use", mineral raw materials, technogenic mineral formations and technogenic waters shall belong to the subsoil user on proprietary rights unless otherwise provided for under the contract.

Mineral raw materials, of which hydrocarbon materials are part, are defined by Article 1 of the Subsoil Law as the extracted-to-the-surface part of the subsoil (geological material, ore minerals, and other) containing mineral resource (mineral resources).

[11] Instruction on licensing of the flaring of associated and natural gas dated 27 June 2004ã. ¹ 115-ï.

[12] ROK Law "On Petroleum" No. 2350 dated 28 June 1995 as subsequently amended.

As a rule, contracts to conduct exploration and production of hydrocarbons at oil and gas fields stipulate that the owner of hydrocarbon materials, including natural and associated gas, shall be the "contractor" (subsoil user) and may use these hydrocarbons at its own discretion without any restrictions.

Pursuant to the provisions of Article 188 of the ROK Civil Code,[13] the "right to own shall be a recognized and protected by legislative acts the right of a person at his discretion to own, use and dispose of the property which belongs to him". In this connection, whether the gas produced by the subsoil user is flared or used in some other manner, such actions should be regarded as the exercise by the owner of its own rights as guaranteed by the Law.

Consequently, in the case reviewed above, the question regarding the subsoil user's liability for the said actions (unless otherwise provided for under the legislation) may be raised only in the context of harm to the environment caused by atmospheric emissions resulting from the flaring of dry gas.

Concerning the determination of the size of such damage, its calculation procedures and methods were established by the Provisional Regulations Governing the Determination of the Size of the Damage Inflicted on the Environment by Violation of Environmental Protection Legislation as approved by the ROK Ministry of Ecology and Bioresources on June 21, 1995.

In this connection, in the exercise of control over the observance of the respective legislative provisions governing subsoil, nature conservancy, and environmental protection, the government agencies concerned and the courts in reviewing matters regarding the damage caused by legal entities or other persons, should first correctly establish who and what exactly has been damaged and only then address questions concerning the compensation size and calculation procedures.

It would impossible to overestimate the importance to human life and health of conserving nature and preserving our clean environment. At the same time, matters concerning the liability of those found in breach of the law should be addressed strictly within the confines of the law. It is unjustifiable to institute proceedings in contravention of the law, just as it is inexcusable not to bring to justice someone who is liable under the law.

However, given the inadequate legislative regulation of the civil and administrative liabilities for breach of the law, in the course of performance of their functional duties, the respective government agencies in some cases are forced to take certain steps in the field of environmental protection without due regard for the legislative requirements.

It is felt that the mechanisms and procedures governing the lawmaking process need some considerable improvement so as to eliminate discrepancies of the laws, and make the laws clear and understandable to any judge, government official, lawyer, or lay person. However, most importantly, legislation should be practical, especially in regard to what concerns the administration of justice. □

[13] The General Part of the ROK Civil Code dated 27 December 1994 as subsequently amended.