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Upstream Developments - Russia

Russia: Environmental Liability for Off-Shore Oil and Gas Operations

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Russian off-shore subsoil use operations: status and perspectives

After Rosneft's recent discovery of substantial light oil and gas reserves at the Universitetskaya-1 well in the Kara Sea, regular development of subsoil on the Arctic shelf will become just a matter of time. According to Rosneft's estimates, the resource portfolio for the first discovered trap contains approximately 340 bcm of gas and over 100 million tons of oil, which is just one of the structures in this field.

The importance of developing the Arctic region, and in particular the development of its mineral resources, is stated in a number of policy documents adopted by Russia. [1] The Russian Government's interest in the development of subsoil on shelf is not only documented on paper, it is also portrayed in practical terms by its readiness to stimulate development and provide necessary support. This has been confirmed by recently introduced legal amendments. In particular, these amendments concern the development of oil and gas production at "new offshore fields," which directly target the development of subsoil in the Arctic region.

Along with the described trends, there are increasingly vocal protests from environmental activists, specifically Greenpeace, who are campaigning against the development of shelf resources due to the risk of inflicting environmental damage. Protests, such as those carried out by the Arctic Sunrise Icebreaker team against Gazpromneft's Prirazlomnaya platform in September 2013, are not unique for Russia. Norway put an end to similar initiatives by Greenpeace at the Statoil oil producing platform located in the waters of Norway's exclusive economic zone in the Barents Sea.

The justification of Greenpeace's concerns and the adequacy of steps taken by its supporters are outside the scope of this article. At the same time, matters of liability regarding environmental pollution resulting from the subsoil use of shelf must be taken into account from a legal point of view.

Legal status of continental shelf

The continental shelf, which includes the sea floor and submarine mineral resources, [2] has a special legal status. It is not considered territorially part of the Russian Federation, but is under jurisdiction of the Russian Federation. Additionally, operations carried out on the continental shelf are covered by the legal regulations of the Russian Federation.

For this reason, environmental liability for damage caused by operations on continental shelf is regulated effectively by the same laws as environmental liability for the damage caused by operations conducted on the territory of Russia (save for certain specifics described in this article). The described rule may be applied not
only to the ocean floor and submarine resources, which are directly included in the definition of continental shelf, but also to the waters covering continental shelf that are generally included in the exclusive economic zone of the state.

However, it is necessary to keep in mind that this rule applies only if damage inflicted on the environment does not extend beyond the borders of Russia and/or continental shelf of Russia. When oil and gas operations are carried out on the continental shelf there is a possibility that damage could extend beyond the borders of Russia, *i.e.*, there could be "transborder" damage to the environment.

The legislative regulation of liability for inflicting transborder damage on the environment has its own features: Any determination of liability will not be based not on legislation of Russia (except for certain aspects as explained in detail below), but on international treaties and/or national legislation of the state where the damage was inflicted. We review matters of transborder liability for damage inflicted on the environment in the second part of this article.

**Grounds for imposing liability for environmental damage caused on Russian continental shelf**

As a general rule, the mere existence of environmental damage serves as grounds for imposing liability. For example, liability would be imposed for damage inflicted on the environment as a result of an accident involving an oil platform operating within the Arctic shelf of Russia. The concept of environmental damage does not have a clear legal definition, but may include various negative consequences for the environment, such as damage inflicted as a result of (i) contamination, exhaustion, deterioration, destruction or irrational use of natural resources; (ii) degradation and destruction of natural environmental systems, ecosystems and natural landscapes; or (iii) other violations of environmental legislation. [3]

Nonetheless, infliction of environmental damage as such does not always result in liability. Indeed, almost any industrial activity has a potential to negatively impact the environment (in the form of air pollution, disposal of pollutants in bodies of water, and production of industrial waste). Such impacts do not typically lead to liability for damaging the environment as long as relevant legal regulations are upheld. "Legitimate" impacts of the environment, *i.e.*, impacts according to and within the limits established by relevant permits, are carried out on a fee-paid basis. The amount of fee is determined by the size of the impacts and fixed tariffs for waste disposal.

**The notion of "fault" in respect to environmental damage**

As a general rule, infliction of damage can be either a result of environmental violation (for example, illegal discharge of oil containing disposals) or a consequence of legitimate acts. For example, environmental liability would be imposed for damage caused by an accident on a floating oil platform that lead to an oil spill, even if that platform operated in compliance with all applicable environmental and safety requirements. Such an accident could occur as a result of force-majeure circumstances, *i.e.*, anomalous natural phenomena or terrorist acts.

It should be noted that liability for environmental damage caused as a result of oil and gas operations is imposed in most cases irrespectively of fault. This is because subsoil use involves the operation of hazardous industrial facilities that are treated by law as "sources of increased danger" and as a result, subject to strict liability. Damages inflicted on the environment as a result of the use of hazardous industrial facilities (irrespective of the class of hazard) shall be compensated irrespectively of fault. [4]

Thus, given that energy companies in the course of their operations use hazardous industrial facilities and given that it is up to the court to decide whether particular facilities are environmentally hazardous at its own discretion, the majority of environmental damage cases inflicted by energy companies should be compensated irrespective of fault. [5]

**Types of liability**
In the event that environmental damage is caused as a result of the violation of environmental law, civil law liability for damage inflicted on the environment can be imposed along with relevant administrative or criminal liability.

Imposition of administrative and/or criminal liability for violating environmental law does not result in relief from civil liability to compensate damage inflicted on the environment.

Court practice features cases when a party, having inflicted environmental damage and having incurred administrative penalty, tried to appeal its civil law liability on the account of general prohibition of the application of dual penalty for the same deed (which is applicable in Russian legislation). [6] However, courts have rejected such arguments. With respect to violations of environmental law this principle applies in such a way that one and the same party that violated the law can be held either administratively or criminally liable with respect to individuals (in most cases depending on the amount of inflicted damage), or only administratively with respect to legal entities. Yet civil law liability can be applied at the same time.

Environmental law establishes an obligation to compensate damage inflicted on the environment in full. [7] Imposition of administrative liability on a legal entity does not exempt it from the obligation to compensate damage inflicted on the environment, which has been confirmed by court practice. [8] On the other hand, it is important to remember that the absence of environmental damage as such (e.g., violation of environmental legislation that does not result in actual damage to the environment such as a violation of the terms for prolonging a permit for polluting emissions) will not serve as grounds for exemption from administrative liability for a relevant violation.

Types of liability for environmental damages

The "amount" of the environmental liability can potentially consist of the following:

1. The amount of administrative fine for violating environmental law (when applicable given the above discussion).

2. The cost of eliminating the environmental violation (e.g., the elimination of the pollution, with may require the cleaning of the effected Continental Shelf water area).

3. The cost of works aimed at restoring the environment to its initial state (also called "compensation of damages inflicted on the environment in kind"); and/or

4. Compensating the amount of damage inflicted on the environment (usually calculated on the basis of fixed tariffs and formulae for such compensation established by law).

Administrative liability

The amount of an administrative fine may vary depending on the nature of the violation that led to or contributed to an incident. Although the average amount of an administrative fine for violating environmental law varies from 30,000 to 50,000 rubles, stricter penalties are imposed for some specific administrative offences. For instance, violating requirements for the rational use of subsoil leads to the imposition of a fine in the amount of up to 1 million rubles. It should be noted that lately the amount of both administrative fines for environmental pollution and civil law liability have increased, as discussed in more detail below.

In many cases, however, the amount of administrative liability often does not play a key role in determining the amount of expenses a wrong-doer incurs. An exception is an injunctive order for the temporary suspension of the operations, i.e., suspending the operations of a facility or certain type of activity that poses an environmental threat that is set for a period of time pending judicial or official review of the case.
Administrative liability expressed in administrative suspension of the operations could exceed the amount of other expenses, [9] as described below.

Cost of eliminating violation of environmental law

Eliminating contamination is an obligation imposed on a wrong-doer. This allegedly stops the violation, which otherwise would be continuous and could lead to an increased amount of damages. Contamination can be eliminated either by removing pollutants from the landscape (for example, gathering spilled oil from the water surface and glaciers of the Arctic shelf) or by performing works aimed at restoring the initial state of the environment.

Cost of restoring the initial state of the environment

Restoration of the initial state of the environment (by analogy with civil law it is often called "remuneration of damages inflicted on the environment") is in fact a reversal of the adverse effects of the damage inflicted on the environment. The initial state of the environment can be restored either voluntarily (along with, or in addition to the works aimed at eliminating damage as described above) or under court order. The number and nature of works required for restoring the initial state of the environment will depend on specific circumstances with consideration given to both the initiative of the wrong-doer itself and obligatory instructions issued by authorities.

Voluntarily restoration of the initial state of the environment would not always exempt the wrong-doer from civil law liability in the form of compensation for the damage inflicted on the environment. [10] As explained by the courts, payment for environmental damage (in the amount calculated on the basis of fixed rates and formulae established by law, as discussed in detail below) can be a measure of enhanced civil law liability, which is supposed to compensate not only actual damage, but also environmental losses that are difficult to restore or that are irreplaceable.

When establishing the amount of liability, courts can take into account costs voluntarily incurred by a wrong-doer for restoring the initial state of the environment (i.e., correspondingly decrease the amount of compensation to be paid for inflicted environmental damage), but such a decision is always made at the discretion of the court. As general court practice demonstrates, courts do not often apply this option.

Compensation of environmental damage

Compensation for damages inflicted on the environment is considered to be "enhanced civil law liability that is established with due consideration for actual damage as well as environmental losses." [11]

The amount of damage inflicted on the environment can be determined on the basis of (i) fixed tariffs and approved formulae (i.e., the established method of calculation) specifically established by law for this purpose in respect to damage caused to particular elements of the environment, or (ii) based on the estimation of the actual cost for restoring the initial state of the environment.

As court practice illustrates, courts prefer to determine the amount of damage on the basis of fixed tariffs and formulae (i.e., special norms). Only when these are absent do courts address methods of determining the amount of damage based on the estimation of the actual cost of restoring the initial state of the environment.

In order to determine the amount of compensation for environmental damage inflicted as a result of subsoil usage on the shelf, we believe that fixed tariffs and formulae will be used for calculating damages inflicted to the following parts of the environment: (i) bodies of water; [12] (ii) aquatic biological resources; [13] (iii) and species of animal life (those rated for hunting, [14] not rated as eligible for hunting or included in the Red Book of Endangered Species of the Russian Federation). [15]

The evaluation of environmental damage by courts on the basis of estimating the actual cost of restoring the
initial state of the environment is carried out less frequently due to the complexity of this method. In the process of estimating damage inflicted on the environment one should consider the environmental losses that are nonrenewable or difficult to replace. In the absence of fixed tariffs and formulae this will inevitably be challenging. In some cases, when there are no fixed tariffs and formulae available, instead of using methods to evaluate actual costs courts prefer to use fixed tariffs and formulae previously used by the legislation of the USSR (the applicability of which at present is rather questionable).

**Terms for imposing liability**

A legal entity can be held administratively liable within one year from the date of the committed violation, and for continuing violations (for instance, continuous pollution of a water basin by sewage wastes) within one year from the date that such violations were revealed. [16]

Compensation claims for damage inflicted on the environment can be submitted within 20 years, [17] *i.e.*, the party that committed a violation of environmental law can be subjected to civil law liability during a significant period of time after the expiry period of the statute of limitations for imposing administrative liability.

**Court practice**

The recent court practice confirms the above-described conclusions. For instance, at the Eighth Arbitrazh Appeal Court on June 2014, the court reviewed the appeal of LLC RN-Yuganskneftegaz in the matter of imposing liability on the company for the damage inflicted on the environment as a result of an oil spill at a forest plot, and ruled as follows: [18]

i. *Regarding compensation of damage inflicted on the environment*: the amount of compensation of 5,245,033 rubles has been determined by the court on the basis of relevant formulae.

ii. *Regarding the cost of restoring the initial state of the environment*: in its appeal, LLC RN-Yuganskneftegaz stated that it has in fact been restoring the initial state of the environment. For instance, it has been compensating damages in kind and since the law does not cover dual compensation of damages, the company should be exempted from monetary compensation beyond the actual compensation of damages. The court did not support such reasoning and emphasized that compensation of damage on the basis of fixed tariffs and formulae is "enhanced civil law liability stipulated by civil law, which is imposed on the account of actual losses and inflicted environmental damage". While establishing the amount of compensation the court did not take into consideration costs incurred by the company for restoring the initial state of the environment.

iii. *Regarding administrative liability*: the court ruling refers to the fact that the company has been held administratively liable for polluting forests, which in accordance with article 8.31 of AOC is penalized by a fine up to 300,000 rubles (the ruling itself does not contain reference to the amount of the fine because the imposition of administrative penalty and its amount were not appealed by the company).

**Transborder environmental damage**

As noted, the nature of oil and gas operations on continental shelf raises a possibility of inflicting environmental damage beyond the borders of Russia, onto territory and/or continental shelf and exclusive economic zones of another state or states, *i.e.*, "transborder harm to the environment". [19]

With respect to damage inflicted as a result of operations performed on the Arctic shelf, it is important to remember that neither geography nor law can give a generally recognized definition of the Arctic. [20] The legal status of the Arctic revolves around a prevailing sector concept which was formed during an extended period of time and the process is still ongoing. The concept refers to the distribution of Arctic territories into...
sectors according to their fixation to the coastlines of the polar states. The United States and Norway challenged this position as they believe that freedom of the high seas should be in effect, beyond the limits of the territorial waters of the Arctic. This vague definition of whether or not environmental damage is of a transborder nature and the question of what legal regulation should be applied to the relevant measures of liability presents additional difficulties.

In the event of transborder environmental damage, liability can be imposed on both the wrong-doer and the state in which the deed leading to the damages occurred (i.e., if subsoil operations on the continental shelf of Russia led to the infliction of transborder environmental damage then the Russian state can be held liable in accordance with the order outlined below).

**Liability of the state**

The state can be held liable for transborder damage on account of both the violation of the state's obligations stipulated by international treaties (of regional or universal application), and in the absence of the violations of provisions of the international treaties by the state for damage inflicted in the course of legitimate actions. Despite the fact that the majority of international law regulations are declarative (i.e., they do not expressly establish obligations of the state, violation of which can result in the imposition of liability), a state can be held liable on the grounds of international legal custom. At present, there is a principle of liability for the state under customary international law for transborder damages inflicted on the environment. [21] The state can claim a relevant amount of compensation from a wrong-doer. Such levying by the Russian state of a shelf subsoil user, whose actions resulted in the infliction of damages, will be effected in compliance with Russian legislation.

**Liability of legal entities according to international treaties**

Unlike states, legal entities can be deemed subjects of international environmental law only in cases expressly stipulated by relevant international treaties. Today there are a number of international treaties in force that contain provisions that envisage environmental liability of legal entities. However, only one of them is potentially applicable to the Arctic – the International Convention on Civil Liability for Oil Pollution Damage of 1969 (as revised by the 1992 Protocol).

The Convention covers damages from polluting the territory of a country-participant of the Convention, including its territorial sea and also territory of its exclusive economic zone (or, if a state did not establish an exclusive economic zone, within 200 nautical miles from the baselines).

The Convention is applied to pollution resulting from the transportation of oil in bulk (oil and oil products). Even though the term "ship" used in the Convention is quite broad it does not cover oil platforms (floating or fixed). Thus, provisions of the Convention cannot be applied to pollution as a result of an accident involving an oil platform at the Arctic shelf.

The Convention establishes the right of the owner of a ship to limit his liability with respect to any accident by a total amount, determined in accordance with the procedure, on the basis of the ship's capacity and units of account established by the Convention. For the purpose of availing himself of the benefit of limitation provided by the Convention, the owner shall constitute a fund for the total sum representing the limit of his liability with the court or other competent authority of any one of the states-participants of the Convention in which a claim can be filed. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the state where the fund is constituted, and considered adequate by the court or other competent authority.

**Liability under the legislation of a foreign state**

Inflicting transborder damage to the environment can result in the imposition of liability on a legal entity in compliance with the legislation of a foreign party whose environment was damaged.
Possible grounds for imposing liability and details of imposing liability (including a procedure for estimating the amount of compensation for damages inflicted on the environment) will be determined by the legislation of the relevant foreign state.

For instance, the legislation of Norway expressly provides for liability for damages inflicted as a result of oil and gas operations outside of Norway's territory if such operations adversely affected the territory of Norway or territory under the jurisdiction of Norway (i.e., the exclusive economic zone of Norway and/or continental shelf of Norway). Thus, legislation of Norway can be applied even if the source of pollution itself (for example, an oil leaking platform) is located beyond the jurisdiction of Norway. In such cases, liability for environmental damage will be imposed irrespectively of the wrong-doer's fault.

Also, the legislation of Norway generally imposes liability in the form of severe fines for contamination of the environment by oil containing materials. It is worth mentioning that the amount of fines has significantly increased in the last several years in order to make fines a preventative measure, i.e., so that they serve as a motivation to take the necessary steps to prevent pollution. For instance, in 2009 Statoil was held liable for damages inflicted on the environment of Norway as a result of an oil spill and the company had to pay a fine of approximately 4.2 million dollars.

Finally, besides liability for environmental damage in the form of a fine, the legislation of Norway stipulates that the wrong-doer shall compensate costs associated with eliminating the pollution, and with restitution and preventive measures incurred by the state and/or third parties in relation to such environmental pollution.

With respect to damages inflicted on the environment of any Arctic state, it is also important to note that article 234 of the 1982 United Nations Convention on the Law of the Sea granted coastal states the right to adopt laws and regulations for preventing pollution and protecting the environment in ice-covered areas within limits not exceeding 200 miles. In accordance with this provision, an Arctic state can adopt laws for the purpose of protecting and preserving the environment in the Arctic region, in relation to the area extending 200 miles beyond the territory of the Arctic state. Effectively the national environmental legislation of an Arctic state can be applicable even beyond its territory, on the territory of its excluding economic zone, under condition that such territory is covered by article 234 of the 1982 United Nations Convention on the Law of the Sea.

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[2] In accordance with the Article 1 of the Federal Law 187-FZ dated November 30, 1995 "On continental shelf of the Russian Federation", outer edge of the continental shelf extends to a distance of 200 nautical miles from the baselines, determining width of the territorial sea, if the outer edge of the continental margin does not extend up to that distance.


[4] See, for example, Ruling of FAC of West-Siberian district dated November 5, 2013, case No A75-4538/2012.


[6] See, for example, Ruling of Federal Arbitrazh Court of the Moscow District dated November 17, 2010 # KG-A40/13697-10 case # A40-31537/10-61-247.


[8] See, for example, Ruling of Federal Arbitrazh Court of the Moscow District dated November 17, 2010 # KG-A40/13697-10 case # A40-31537/10-61-247, according to which "...argument of a claimant that recovery of damage inflicted on the environment in this particular case contradicts effective legislation of the Russian Federation which does not provide for application of dual liability for the same offence, is declared ungrounded. Collection of fine in the amount of 300,000 rubles for administrative violation is an
administrative penalty, collection of the amount of inflicted damage, being a subject matter of this case [note – 1,500,000 rubles] is a civil law liability."

[9] According to clause 38 Decree of the Plenum of the Supreme Court of the Russian Federation No 21 On application by the courts of law of liability for offences of environmental and natural resources law" dated October 18, 2012, "if inflicted damage is a result of operations of a company, facility or other production activity which inflicted damage or threatened to inflict new damage, then court can enforce a defendant, along with recompensing, to suspend or cease relevant activity..."

[10] See, for example, Ruling of SAC No SAC-8493/13 dated July 16, 2013


[16] Article 4.5 of AOC.

[17] Cl 3 Article 78 of Law on protection of environment.


[19] According to the Resolution of the General Assembly of the UN No. 61/36 "Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities" "transboundary harm" includes damages inflicted within the territory (or other location under the jurisdiction) of the state other than the state which inflicted damages.


[21] In accordance with the article 38 of the Statute of the International Court of Justice of the UN, international custom means "proof of general practice, recognized as a legal rule". Briefly, concept of an international legal custom, formulated in the doctrine of international law, can be characterized as silent or implied agreement of the subjects of international law with respect to the establishment, amendment or termination of their mutual rights and obligations (cf. International Law. General Part: textbook by G.Ya. Bakirova, P.N. Biryukov, R.M. Valeev et alia.; editor-in-chief R.M. Valeev, G.I. Kurdyukov, M.: Statute, 2011). Doctrinal concept of international legal custom has been developed and described at its best in the works of Ian Brownlie (Brownlie I. Principles of Public International Law. 5th ed. Oxford, 1998), Antonio Cassese (Cassese A. International law. Second edition, 2004), Malcolm Shaw (M. Shaw, International Law, Cambridge, 6th edition, 2008). In Russia concept of international legal custom has been described in the works of G.I. Tounkin (Tounkin G.I., Theory of International Law, M. 1970), Yu.M. Kolosov (International law: Textbook / under the editorship of Yu.M. Kolosov and E.S. Krivchekovoy, M., 2007). As noted by all mentioned representatives of the doctrine, in a dispute presence of international legal custom requires proof of existence of two elements: (i) opinio juris (i.e. demonstration of legal understanding, recognition that such rule shall be legally binding) and (ii) practice of application of the principle. Principles of liability of the state for the trans-border damages inflicted on the environment described in this Memorandum, are recognized principles of the customary international law.


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