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SOME TRANSNATIONAL ASPECTS OF ENVIRONMENTAL DISPUTES IN KAZAKHSTAN AND ITS NEW ENVIRONMENTAL CODE

Environmental tort litigation is widely seen as an appropriate mechanism to redress wrongs caused by pollution, oil spills and other kinds of environmental degradation. Victims and NGOs try to find ways to sue parent companies in their country of incorporation, which is usually different from the country where the harmful event occurred. Central Asia is a region where part of the population suffers from similar situations. Kazakhstan, for instance, is very rich in minerals and foreign and domestic extractive companies often damage the soil and the air quality of towns and communities in the vicinity of their operations. The practical disappearance of the Aral Sea, partly due to the inappropriate use of water by Uzbekistan, is another example. Environmental regulation and administrative fines imposed by the countries concerned leaves the prosecution of reckless industrial practices in the hands of the Government, in countries were collusion between Governmental cliques and extractive industries is well known and where courts are often poorly trained or far from independent. Cases of transnational environmental damage are also possible due to the large border that Central Asian countries share with each other, as well as with other industrial giants like Russia and China. In such a scenario, what are the chances of using tort law and civil litigation for victims and other stakeholders, especially in view of the new Environmental Code of 2021? Central Asian countries basically belong to the civil law tradition and are greatly influenced by Russian legislation. This means that tort law and conflict of laws are usually codified in civil codes and in codes of civil procedure. Heads of jurisdiction and applicable law rules are not that different from those of other civil law countries. However, those rules often display certain "nationalist" features in that nationals or residents of the country of the forum usually have easier access to court against foreign defendants, at least on paper.

Key words: Environment, Code, Litigation, Kazakhstan.

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Қазақстандағы экологиялық даулардың кейбір трансұлттық аспектілері және жаңа Экологиялық Кодекс

Қоршаған ортаны қорғау бойынша сот ісін жүргізу қоршаған ортаның ластануынан, мұнайдың төгілуінен және қоршаған ортаның бұзылуының басқа түрлерінен келтірілген зиянды өтеудің қолайлы механизмі ретінде кеңінен қарастырылады. Жәбірленушілер мен үкіметтік емес ұйымдар өздерінің тіркелген еліндегі құқық бұзушы компаниялардың бас компанияларын сотқа беру жолдарын табуға тырысуда, бұл әдетте зиянды оқиға болған елден өзгеше. Орталық Азия – халықтың бір бөлігі осындай жағдайлардан зардап шегетін аймақ. Мысалы, Қазақстан пайдалы қазбаларға өте бай, сондықтан шетелдік және жергілікті тау-кен компаниялары өз жұмыстарына жақын қалалар мен елді мекендерде топырақ пен ауаның сапасын жиі бұзады. Тағы бір мысал ретінде Арал теңізінің іс жүзінде жойылып кетуі Өзбекстанның суды мақсатсыз пайдалануы салдарынан екендігін атап өткен жөн. Экологиялық ережелер және тиісті елдердегі салынатын әкімшілік айыппұлдар, жауапсыз өндірістік тәжірибелерге қатысты сот құдалаулары мемлекеттік топтар мен кен өндіруші өнеркәсіптер арасындағы сөз байласулары бар елдердің үкіметтеріне қалдырылады және сол елдерде әдетте соттар нашар дайындалған немесе еріктіліктен алшақтау болады. Трансұлттық экологиялық зиян келтіру жағдайлары Орталық Азия елдерінің бір-бірімен, сондай-ақ Ресей мен Қытай сияқты басқа да өнеркәсіп алпауыттарымен ортақ шекараларының үлкендігіне байланысты болуы мүмкін. Мұндай жағдайда, әсіресе жаңа 2021 Экологиялық кодексті ескере отырып, жәбірленушілер мен басқа мүдделі тараптар үшін деликттік құқықты және азаматтық сот ісін қолдану мүмкіндігі қандай? деген сұрақ туындайды.

Орталық Азия елдері негізінен азаматтық құқық дәстүрін ұстанады және Ресей құқығының ықпалында. Бұл деликттік құқық пен коллизиялық нормалар әдетте азаматтық және

азаматтық іс жүргізу кодекстерінде кодификацияланғанын білдіреді. Юрисдикция ережелері мен қолданылатын құқық басқа азаматтық-құқықтық елдердің ережелерінен айтарлықтай ерекшеленбейді. Дегенмен, бұл ережелердің көбіне белгілі бір «ұлтшылдық» ерекшеліктері бар, өйткені сот елінің азаматтары немесе резиденттері кем дегенде қағаз жүзінде болса да, әдетте, сотқа шетелдік айыпталушыларға қарағанда оңай жүгіне алады. Форум елінің азаматтары немесе тұрғындары әдетте, кем дегенде қағаз жүзінде шетелдік айыпталушыларға қарағанда, сотқа оңай қол жеткізе алады.

Түйін сөздер: қоршаған орта, кодекс, сот тәжірибесі, Қазақстан.

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Некоторые транснациональные аспекты экологических споров в Казахстане и новый Экологический Кодекс

Судебные разбирательства по экологическим правонарушениям широко рассматриваются как подходящий механизм для возмещения ущерба, причиненного загрязнением, разливами нефти и другими видами ухудшения состояния окружающей среды. Пострадавшие и НПО пытаются найти способы подать в суд на материнские компании компаний-нарушителей в стране их регистрации, которая обычно отличается от страны, где произошло вредоносное событие. Центральная Азия – это регион, где часть населения страдает от подобных ситуаций. Казахстан, например, очень богат полезными ископаемыми, а иностранные и местные добывающие компании часто наносят ущерб почве и качеству воздуха в городах и населенных пунктах, расположенных вблизи их деятельности. Другим примером является практически исчезновение Аральского моря отчасти из-за нецелевого использования вод Узбекистаном. Экологическое регулирование и административные штрафы, налагаемые соответствующими странами, оставляют судебное преследование безответственной промышленной практики в руках правительства в странах, где сговор между правительственными группировками и добывающей промышленностью хорошо известен и где суды часто плохо подготовлены или далеки от независимости. Случаи транснационального экологического ущерба также возможны из-за больших границ, которые разделяют страны Центральной Азии друг с другом, а также с другими промышленными гигантами, такими как Россия и Китай. Каковы при таком сценарии шансы использования деликтного права и гражданского судопроизводства для потерпевших и других заинтересованных сторон, особенно с учетом нового Экологического кодекса 2021 года?

Страны Центральной Азии в основном придерживаются традиции гражданского права и находятся под сильным влиянием российского законодательства. Это означает, что деликтное право и коллизионные нормы обычно кодифицируются в гражданских кодексах и гражданско-процессуальных кодексах. Правила юрисдикции и применимого права не сильно отличаются от правил других стран гражданского права. Однако эти правила часто имеют определенные «националистические» черты в том смысле, что граждане или резиденты страны суда обычно имеют более легкий доступ к суду в отличие от иностранных ответчиков, по крайней мере, на бумаге.

Ключевые слова: окружающая среда, кодекс, судебная практика, Казахстан.

Introduction. Materials and methods

Central Asia is a region whose environmental problems are well known and Kazakhstan is a good example of those problems. They are in part the legacy of the Soviet Union period. Because of the need for cotton, large areas of its territory were devoted to cotton crops and huge irrigation systems were put in place. Water diversion from the rivers Amu Darya and Syr Darya, as well as mismanagement, contributed to degradation of the Aral Sea. Here, the layer of chemical pesticides and salt, as well as the poor air quality, have become dangerous for health and have terribly affected the economy and the population. Similar problems can be noticed in some parts of the much larger Caspian Sea. Kazakhstan was also a Soviet nuclear testing ground since the 1940s. The population of the region of Semipalatinsk (Semei) were exposed to high levels of radiation and to chemical substances used for the demolition of laboratories. The effects are still suffered by its population nowadays. Air pollution is a significant problem in several other major cities, too.

In the economy of Kazakhstan, extractive industries have a very important weight, whereas agriculture is not very relevant due to poor arable land. This problem is accentuated by the process

of desertification caused by global climate change. Despite its mineral resources, wealth is very unequally distributed among the population, partly due to the traumatic transition to a capitalist economy after the collapse of the Soviet Union, which gave rise to a political and economic oligarchy. The Caspian Sea area, as well as other areas of West Kazakhstan, is where the largest oil and gas extraction and industry operations are located, which further endangers flora and fauna. They have also been the cause of various cases of accidental contamination. Improper mining and industrial waste disposal and storage – including uranium – since independence have also been very problematic and have led to transboundary pollution and tension between states, including areas of special seismic activity. Centralised governments in the region obviously play a very significant role in decision making and efficient international cooperation in environmental matters is missing [Asian Development Bank, 2016, p. 1].

The present article provides an overview of the existing legislative framework for environmental protection in Kazakhstan in order to highlight the positive effects that the new Environmental Code may bring, as well as some of the issues that may arise in its application, especially in an international context. For this purpose, the existing academic literature in English is reviewed in the following section, relying especially on reports made by NGOs and international organizations, as well as legal opinions by law firms and practitioners in the field of environmental law.

Problems of the existing legislative framework before the Environmental Code of 2021: literature review

In the course of the years, the government of Kazakhstan has tried to introduce more strict ecological requirements in all legal acts and economic sectors. Examples of this are several national and sectoral environmental programmes, the introduction of environmental impact evaluation, environmental audits and environmental insurance.

Kazakhstan is also a party to a number of treaties and international agreements on environmental protection. In this regard, the Law on international treaties of the Republic of Kazakhstan of 2005 provides that duly ratified international treaties are part of the domestic legal system (art. 15.2). Examples of these treaties and agreements are the UNECE Convention on Long-Range Transboundary Pollution of 1979; the Vienna Convention for the Protection of the Ozone Layer of 1985; the Montreal Protocol on Ozone Depleting Substances of 1987; the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their disposal of 1989; the Espoo UNECE Convention on Environmental Impact Assessment in a Transboundary Context of 1991; the three Rio Conventions: the United Nations Framework Convention on Climate Change of 1992, the Convention on Biological Diversity of 1992 and the Convention on Combating Desertification of 1994; the UNECE Convention on the Transboundary Effects of Industrial Accidents of 1992; the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998; the Stockholm Convention on Persistent Organic Pollutants of 2001; the Kyoto Protocol of 2009; the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 2016; the Paris Agreement of 2016; and the Convention on the Legal Status of the Caspian Sea of 2018 [Angelini, 2010, p. 5-17].

The country has also entered into several cooperation agreements and programs with neighbouring countries for the joint use of transboundary rivers. Among these it is worth mentioning the Syr Darya Control and Northern Aral Sea Phase I Project, sponsored by the World Bank and which started in 2001, or the Central Asian Cooperation Organization, created in 1994, and whose members are now Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and, since 2004, also Russia.

The Republic of Kazakhstan is also a member of several international commissions to address sustainable development and environmental issues like the United Nations Commission on Sustainable Development; the Interstate Commission on Sustainable Development of the Central Asian Countries; the Regional Eurasian Network of the World Business Council for Sustainable Development; the Interstate Council on Hydrometeorology of the Community of Independent States (i.e. former Soviet republics); or the International Renewable Energy Agency.

However, Kazakhstan still has to make significant efforts to adapt its legislation to the abovementioned treaties and agreements and, more generally, to comply with its international obligations.

Kazakshtan has, despite its wide range of environmental problems, made progress on some of the targets it set for itself in the 2030 Agenda for Sustainable Development or the Concept on Transition to Green Economy [Decree No. 577 of 2013]. However, continuous regional differences

persist [UNECE 2019, p. p. xxxi-xlii]. For instance, in 2014, the Ministry of Environment and Water Resources disappeared. Five departments of the Ministry of Energy assumed some of its competences but in a very limited way. However, the subordination of key regulatory and enforcement competences concerning the environment to the ministry in charge of the biggest polluting sector had a significant impact.

On the bright side, the Environmental Code enacted in 2007 is sometimes considered the only example of accomplished codification in post-Soviet area. Environmental legislation as a whole has introduced extended producer-importer responsibility, better access to information and public participation procedures. However, certain tools applied in jurisdictions with more advanced environmental legislation do not work properly in Kazakhstan, yet. For instance, integrated environmental permits did not exist and were only introduced with the new code, in 2021. Effective environmental audit procedures and the duty to obtain environmental insurance were also failures in the system. Although the 2007 code timidly introduced the "polluter pays" principle, environmental damage already caused is not remedied, even where the polluter is identified and pays heavy fines. Moreover, only around 30% of environmental taxes and penalties collected at the local level are used on environmental protection and remediation. Moreover, under the 2007 code, Kazakhstan still subscribed to fault-based principles of liability for monetary compensation that link liability to exceeding a predetermined limits in emission permits [Environmental Code 2007]. It can be said that many environmental norms had unrealistic assumptions, were overly complex and overlapped. This was so despite the fact that the Environmental Code of 2007 was hierarchically superior to other statutes and regulations.

Some of the most urgent legislative reforms to be made, in the eyes of external observers, before the new Environmental Code of 2021 was enacted, were the reform of the system for greenhouse gas emissions quoting and trade; prioritizing the remediation of environmental damage over fines based on emissions and pollution; the introduction of the five-step waste management prevention system (refuse, reduce, reuse, repurpose and recycle); the creation of a uniform national system of environmental monitoring; and the improvement of the obligation and process of environmental audits [Kalaganov et al., 2019, p. 1534].

On the side of potential polluters, corporations, law firms and legal consultants used to complain about the high fines to which even unintentional violations of the complex regulatory could lead and which could amount to 1,000% of the standard emissions charge. Criminal charges were not uncommon, either. For instance, in the year 2019, state authorities conducted 904 corporate audits, identified 1,773 violations and imposed 614 administrative fines for a total of KZT 2,589,066,140. In the first half of 2019, 480 orders for compensation for environmental harm were issued, for an amount of KZT 33, 375, 799, 970 [Deloitte, 2021]. It is also common, when discussing this topic with Kazakhstani legal consultants, to hear the complaint that environmental audits and fines were sometimes actually used by state authorities to put pressure on oil and gas companies, when renegotiating concessions and other deals with the Government.

There has been some progress with ensuring public participation in environmental matters, as well as in access to justice, although the differences between regions are substantial and very few judges specialize in environmental cases. There is an increasing number of NGOs and civil society organizations working on environmental issues and taking part in litigation and environmental dispute resolution proceedings. Examples include Eco-Forum (a coalition of around sixty NGOs), Eco-image, Eco-school, Eco-education and Green Woman and Nature (Tabigat).

Among the ten environmental achievements of Kazakhstan that UNECE has identified in the period 2008-2018 are: the commencement of the shift from carbon and oil to gas and the development of the country's gas infrastructure; the stabilization of the populations of many globally-threatened fauna species; intensive afforestation works, in particular those to mitigate the adverse effects of the Aral Sea disaster; the implementation of river basin management; the conclusion of new transboundary water agreements; high attention given to radioactive waste; nearly universal access to energy services; green economy having been made a policy priority; and an institutional framework set up for implementation and monitoring of the 2015 UNAG Sustainable Development Goals.

The ten environmental priorities for Kazakhstan that UNECE has identified until 2030 are: ensuring independence and strengthen inspections in the environmental area; raising the effectiveness of environmental permitting and reforming the environmental payments system to stimulate behavioural changes; raising emission limit

standards for large combustion plants and ensure their modernization; supporting the growth of renewable energy and implement energy efficiency measures; significantly extending the protected area network; improving water use efficiency in agriculture; expanding water supply and sanitation with stronger efforts in rural areas; developing modern waste disposal sites and introducing sound chemicals management; addressing the growing burden of non-communicable diseases; and ensuring effective public participation in decision-making on the environment.

Some of the OECD's "Recommendations to foster green growth" of 2017 include shifting the focus of environmental requirements from penalising non-compliance to re-incentivising and encouraging pollution prevention and control; cooperation with a wider array of government stakeholders; and continuous engagement in international co-operation projects and platforms for policy dialogue in support of both national and international green economy targets [OECD, 2017, p. 117].

The New Environmental Code of the Republic of Kazakhstan

On 2 January 2021 a new Environmental Code was enacted, after several years of consultations and congressional work [Environmental Code 2021]. It entered into force on 1 July 2021, with a transition period for certain provisions, in order to enable business to assess the impact of this new piece of legislation and adapt to it. For some, the original draft may have suffered some watering down in parliament before the final approval, due to lobbying by corporations [Abankov, 2020]. Subsequent and related changes have been made to other norms like the Code of Administrative Offences, with stricter rules on liability for administrative offences, the Entrepreneurial Code, the Tax Code, Criminal Code, Forestry Code, Water Code, Land Code, Law on Permits and Notifications, Law of Civil Protection, Law on Public Administration, Law on Development of Agro-Industrial Complex and Rural Areas and Law on Mandatory Environmental Insurance.

The new Code is a qualitative improvement with respect to the 2007 code. The legislation of the European Union and of OECD countries has served as model for this reform. It contains many novelties and has been saluted as a step forward. As mentioned above, this paper only tries to highlight some of the most significant reforms, focusing on those which relate to transnational environmental disputes, which may facilitate the apparent increase of public interest litigation that is now the tendency in various Western jurisdictions.

Article 5 of the Code lists the new principles which should inform all the environmental legislation of Kazakhstan. 1) Prevention: activities which are harmful to the environment or to human health will only be allowed, within the limits of the Code, if all necessary measures have been taken at the very source of the environmental impact, to prevent those harmful effects; 2) remediation: environmental damage must be fully remedied or, where this is impossible, it must be minimised; 3) precaution: economically acceptable measures must be taken to prevent any significant and irreversible effects of activities which pose a risk of damage for the environment or to human health, even if the present state of scientific knowledge does not allow to accurately assess the probability of such damage; 4) proportionality: environmental protection measures must be taken to the extent that they are required to achieve the objectives of the environmental legislation of Kazakhstan, giving preference to the least burdensome measures; 5) the "polluter pays": those individuals or entities whose activities cause environmental damage or damage to human health shall bear the costs of compliance with the environmental legislation of the Republic of Kazakhstan to prevent and control negative implications of their activities, including the elimination of any environmental damage already caused; 6) sustainable development: the state shall ensure the rational and well balanced use of natural resources for the benefit of present and future generations, prioritising an ecological and sustainable economic development, water conservation and energy efficiency and reducing non-renewable sources of energy and raw materials; 7) integration: policies related to all areas of the economy and society will be made and implemented to ensure an appropriate balance between socio-economic development, environmental protection and sustainable development; 8) access to information: the state shall guarantee the right of access to environmental information within of the law and in accordance with its treaty obligations; 9) public participation: the public shall have the right to participate in decision making concerning environmental protection and sustainable development; 10) ecosystem approach: the interconnection of all natural ecosystems shall inform all planning and decision-making by state bodies and officials which may affect such ecosystems negatively.

One of the most relevant changes in the new Code are the new criteria for the classification of polluters, on the basis of the risk of negative environmental impact of their activities (art. 12). The most hazardous activities are Category I. Entities in this category must transition to obtaining an Integrated Environmental Permit, whose grant shall be subject to the introduction of best available technologies by the polluter. State authorities envision that in the first stage of implementation of the new Code, the fifty largest mining, oil and gas, chemical and electrical companies, which account for 80% of pollution in the country, shall make this transition. The improvement, with respect to the 2007 code is that the classification is made on the basis of the type of business activity – energy industries, chemical industries, food industries, waste management businesses and other activities – and not on the specific features of each business to be classified [Decree No. 187, 2022].

Business in Category II will have to obtain an Environmental Impact Permit, those in Category III shall have to submit an environmental impact declaration by the operator and for those in Category IV no permit or declaration shall be required. Operators themselves will have to determine the category into which their business activity falls and will have to apply for the relevant permit.

The Environmental impact permit is similar to the previously obligatory emissions permit but includes waste accumulation limits, even if the operator does not have its own waste landfill. Category III businesses will submit to the local authorities an environmental impact declaration after obtaining an expert opinion from the relevant authorities. The declaration shall indicate the amount of emissions and the amount and type of waste. Exceeding the declared amounts of emissions or waste may lead to administrative liability.

Related changes to the Tax Code mean that, in relation to emission charges, the taxable base is limited by the threshold established in the Integrated Environmental Permit (Category I) or in the Environmental permit (Category II). For Category III businesses, the tax base is limited to the amount of emissions indicated in the declaration [KMPG, 2021].

The Code also provides that operators which have received the Integrated Environmental Permit and which have implemented the best available technologies in the process will be exempted from payment of the kind of emission charges that were the rule so far. Other businesses which have not received such permit may also have access to the same exemptions if they implement an environmental efficiency program. However, emission charges for all other businesses will increase exponentially two, four or eight times every three years, beginning in 2025. Contrary to what happened before the 2021 code, it is envisaged that the entire amount received by the state from emission charges shall be used for environmental remediation at the local level.

The process of Environmental Impact Assessment is also improved in the new Code and, most importantly, all state and local authorities affected, as well as the "public concerned" – e.g. environmental as well as business associations – shall have the right to participate in the relevant public hearings, as part of the assessment, in accordance with the new concept of the "Listening state", announced by President Tokayev [Makhmetova, 2021].

The new Code also introduces a new classification of waste which corresponds to the best practices in Europe, replacing the concept of "waste handling" with "waste management". The goal is to achieve circular waste management: minimization of waste production, reuse of generated waste, recycling, disposal and landfill disposal. Additionally, a new licensing procedure is introduced for businesses in charge of processing, disposal and destruction of hazardous waste. For business dealing with transportation of waste, a notification procedure is introduced [PWC, 2021a]. Moreover, the new Code introduces the concept of "waste accumulation", which is applied not only to the business generating waste but to those collecting, recovering and disposing of waste. A new licensing and notification procedure for certain waste management operations is also introduced.

At the same time, certain additional norms were introduced in July 2021 for operators of businesses and facilities in Categories I and II. Under these norms, the operator must carry out an approved control program of the facilities, monitoring emissions of pollutants and environmental impact, as well as submitting information about such control and monitoring to state authorities [PWC 2021b].

Most importantly for the purposes of environmental dispute resolution, under the new 2021 Code environmental harm caused shall always lead to the imposition of measures for the restauration of the environment by the polluter, independently from any fines for administrative violations. The upside of this for businesses is that it may avoid cases of monetary compensation without any evidence of the harm caused.

Environmental dispute resolution and transboundary issues in the new code

Although the 2007 code already contained certain provisions on environmental dispute resolution, the new code introduces interesting possibilities in this regard, along with certain unanswered questions.

As previously said, the new Code attempts to increase the right of public participation of legal entities in decision making, as well as in dispute resolution (art. 13). To this end, non-profit organisations are given a certain role for the protection of the environment and of the rights of those affected by environmental damage. Article 14 of the 2007 code already provided that non-profit organisations could initiate processes of consultation with state authorities, represent in court the interests of specific affected individuals, as well as the interests of an indefinite number of persons, concerning environmental issues or the use of natural resources and, seemingly, participate as *amicus curiae* in environmental civil litigation.

It must be added that, in 2007, the new code of 2020 on Administrative Procedure was not yet in force, so the Code of Civil Procedure provided the procedural framework for both civil litigation and to appeal rules and decisions made by state authorities. In this regard, articles 47.3, 55.1 and 55.1.4 of the new Civil Procedural Code of 2015 clarified the possibility that third parties such as non-profits could be claimants in civil litigation, if a specific law – e.g. the environmental code – so authorised. Therefore, under article 14 of the 2007 environmental code, non-profit organisations already had the possibility of being a party in environmental civil litigation against polluters, as well as the possibility of filing administrative appeals against norms or decisions of state authorities which were environmentally harmful to specific individuals or to an indefinite number of persons.

The wording of the new article 14 of the 2021 environmental code is a bit different and raises some questions. On the one hand, this provision seems to differentiate between civil litigation against polluters and administrative appeals against norms and decisions of state authorities. However, in the first case – civil litigation –, non-profits are given the right to represent in court the interests of individuals and legal entities whereas, in the second case – administrative appeals –, non-profits seem to be given a broader role, with the possibility of contesting the legality of any actions or inactions of state authorities, in the interest of an indefinite number of persons, i.e. the general public. Coincidentally, the new environmental code and the new administrative procedural code both entered into force on the same day, 1 July 2021. Participation of non-profits in environmental civil litigation may in the future allow Kazakhstan to join the group of countries where transnational environmental dispute resolution and climate change litigation have become so common in recent years.

In this regard, the new environmental code of 2021 distinguishes between environmental damage and environmental harm to human life or health (arts. 131-141). The first is damage caused to the environment, where the environment must be restored and the damage remedied in accordance with the "polluter pays" principle. Environmental harm to life or health must be compensated to the victims in accordance with civil law.

Further to this, it is appropriate to make reference to the relevant jurisdiction rules and applicable law rules of the Republic of Kazakhstan. These rules are actually quite favourable to potential victims of transboundary environmental damage, who wish to bring to the courts of Kazakhstan polluters located abroad or polluted located in Kazakhstan, where activities located in its territory have harmful effects abroad (arts. 466 and the following of the Code of Civil Procedure of 2015).

For instance, a legal entity incorporated outside of Kazakhstan but which has a governing body – or even just assets, which may be considered an exorbitant exercise of jurisdiction – in the territory of Kazakhstan, may be sued in Kazakhstan. The same occurs if a foreign legal entity has a branch in Kazakhstan, but probably only in matters arising from the operations of the branch. In tort cases such as environmental harm to health, foreign legal entities may be sued in Kazakhstan if the place of the causal event is in Kazakhstan or, simply, if the claimant – i.e. the victim of environmental damage – has a place of residence in Kazakhstan, a jurisdiction rule which clearly aims at the protection of national victims. In case of environmental harm to property, a lawsuit against a foreign national or foreign legal entity can also be filed in Kazakhstan if the causal event can be located in the forum.

The applicable law in cases of transboundary environmental damage will be the law of the place of the wrongful action (art. 1116 Civil Code), which is a different approach to that taken by the European Union Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), where the law applicable is the law of the country in which the damage occurs (art. 4.1).

It can be added that foreign nationals and legal entities also have legal standing in court and the same procedural rights as nationals from Kazakhstan (arts. 46 and 472 Code of Civil Procedure).

Concerning international cooperation and transboundary impacts of environmental damage, the 2007 code (arts. 43) basically referred to international treaties to which Kazakhstan was a party. The new code also highlights international cooperation and the international obligations of Kazakhstan in this area (art. 412 and 413) but introduces a much more detailed regulation of transboundary impact assessment (arts. 80-84), including activities carried out in the territory of Kazakhstan which may have an impact on the environment of a foreign country, as well as activities planned or carried out in the territory of other countries and which may have an impact on the territory of Kazakhstan. In the first case, the initiator of the potentially harmful activity or a state authority of Kazakhstan have the obligation to commence a transboundary impact assessment process where the foreign affected parties must be duly informed and consulted. In the second case, if the state authorities of Kazakhstan are informed by a foreign state that potentially harmful activities for Kazakhstan are being planned, the state authorities of Kazakhstan have the obligation to request the state of origin to participate in a transboundary impact assessment organized by the latter. In this second case, no participation of the public is envisaged.

Conclusions

The new environmental code of Kazakhstan of 2021 is based on the best internationally accepted standards and is a leap forward for a country ravaged with environmental problems. Its provisions on dispute resolution, coupled with the rights of participation granted to the public and to environmental NGOs may pave the way for environmental litigation and other forms of dispute resolution, similarly to other Western countries. However, the application of the code by the courts of Kazakhstan, as well as the success of any kind public interest litigation initiated by victims of environmental degradation or by NGOs will depend upon the expertise and respect for the rule of law of judges and other state authorities. Otherwise said, the new code will only be as good as the individuals and state bodies which have to apply it.

In this regard, Kazakshtan still ranks low in the most common corruption indexes. For instance, Kazakhstan ranked 102, with a score of 32, in the 2021 Corruption Perception Index made by Transparency International. It ranked 79 / 137 in the 2017-2018 Judicial Independence Index of the Global Competitiveness Report (i.e. World Economic Forum). It ranked 65 / 126 in the Rule of Law Index of 2019 of the World Justice Project. Finally, in the 2017 Judicial Independence (WEF) Index of the World Bank, Kazakhstan received a grade of 3.64, where 1 is “heavily influenced” and 7 is “entirely independent”.

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