ON THE DEVELOPMENT VECTOR OF "GREEN" FINANCE LEGAL REGULATION IN "GREEN" ENERGY

DOI 10.18572/2410-4396-2020-1-72-77

Mikhail I. Kleandrov,
Chief Research Scientist of the Institute of State and Law of the Russian Academy of Sciences
Chief Research Scientist
of the Energy Law Center
Saint Petersburg State University of Economics
Corresponding Member
of the Russian Academy of Science
energylaw211@unecon.ru

Abstract. As is well known, the climate situation has aggravated globally over the last few years. Hence closer attention to technologies dramatically decreasing the environmental impact on a scale reasonably established in the term "green economy". The power industry is a key sector of any economy, including a "green" one, and our country focuses on its "green" course. This article describes problems of "green" energy legal regulation and concludes that "green" financing which is essentially a "soft power" driving environmental impact reduction economically plays a key part among legal measures ensuring its efficiency, primarily within the Russian oil and gas complex. The author believes the lack of legal clarity in the question "Who is the true owner of yet unextracted natural resources buried in our country's soil, first of all, hydrocarbon reserves?" to be a serious challenge when increasing the effectiveness of legal regulation of "green" energy and "green" finance.

Keywords: *energy law; legal status of energy companies, "green" economy, "green" energy, "green" finance.*

Legal science has been dealing with challenges of legal regulation of the "green" economy, an important sector of which is "green" energy, for a long time. [1]

Main features of the "green" economy include: implementation of energy-efficient technologies to minimize environmental impact; effective use of power resources (energy saving); material encouragement of waste-free business activities of enterprise structures; improving the system of financial and other support of environment protection activities.

As is well known, a separate field of legal study currently named "Environmental Law" is now at the heart of scientific support of environment protection activity legal regulation (previously, this field was called "Nature Conservation Law", before that, "Mining Law"..., etc.).

According to the description of scientific discipline 12.00.06 "Land Law; Natural Resources Law; Environmental Law; Agricultural Law" of the nomenclature of legal science disciplines approved by Order of the Ministry of Education and Science of the

Photo: www.ssrf.rupage9147detail-Council of Judges of the Russian Federation

Russian Federation No. 1027 dated October 23, 2017, (as amended by Order of the Ministry of Education and Science of the Russian Federation No. 209 dated March 23, 2018) [2], fields of environmental law that obviously contain segments of "green" economy legal regulation include "environmental Protection Principles and Objects"; "types and scope of environmental rights and obligations of citizens and legal entities"; "enforcement and legal defense measures"; "organizational and legal regulation of environment protection and environmental safety..."; "legal responsibility for environmental offenses. Environmental law and order", and, to a lesser degree, other ones.

In addition, "green" economy legal regulation also includes some fields of a scientific discipline with code 12.00.14 "Administrative Law"; "Administrative Process", such as: "administrative violation"; "industry-specific administrative and legal regulation in economic and business complexes". The legal science branch named "Business Law" also contains certain segments of the legal regulation in question (within the scientific discipline with code 12.00.03).

More serious and extensive fields of study in the area of "green" economy legal regulation are established in the description of legal science disciplines under code 12.00.07 "Corporate Law; Competition Law; Energy Law", in the discipline named "Energy Law". These include such subsectors of energy law studies as: "Russia's energy strategy"; "energy efficiency and saving"; "state regulation of the use of primary energy sources"; "legal regime of renewable energy sources"; "reenergy"; "environmental safety law in the energy industry (energy ecology)", etc.

Therefore, it is safe to say that, since the energy industry is an important part (branch) of economy (national economy complex), "green" energy is an important part of the "green" economy, it is a correlation between type and variety.

Meanwhile the "green" energy industry is primarily the one focused on renewable energy: wind hydropower, marine energy (energy carried by high and low tides); solar energy; geothermal energy; ocean thermal energy conversion energy; bioenergetics. The problems of legal regulation in the field of "renewable" (or "alternative") energy are explored by our scientists [3], in particular, in the form of thesis research. [4]

However, a reasonable question arises: is it really impossible for non-renewable energy generated using oil, gas (other coal hydrocarbons) to be included in the "green" energy sector, first of all, in terms of its legal regulation? Its contribution to our country's energy complex as a whole is enormous, much more than that of alternative (renewable) energy. Accordingly, the effectiveness of improving legal regulation of relations in the field is much higher than that of improvement of legal regulation of relations in the field of purely "green" energy, in all vectors. If this improvement is focused on decreasing the environmental impact of using gas, oil, etc., promoting environmental safety and economic law and order in the oil and gas energy sector by legal means, there is every reason to believe this to be an improvement of legal regulation in the field of "green" energy.

However, it creates a dilemma in terms of research and strategy: which legal means should be used to achieve the improvement: by strict administrative enforcement or "soft power", primarily, with financial incentives, which essentially means "green" financing in the "green" energy sector.

Russian science in this field is, figuratively speaking, breaking new ground, but the expert council on the long-term investment market of the Bank of Russia developed a rather extensive and well-structured concept for organizing a Russian methodology system for development of green financing tools and domestic investment projects in 2019. To a certain extent, this was driven by industry-specific scientific literature on challenges of the "green" economy in general [5] and challenges of "green" financing in particular. [6]

Naturally, next in line are relevant scientific publications on challenges of "green" finance development legal regulation resulting from in-depth R&D.

However, it is not the law as such that determines the economy development strategy, especially that of the "green" economy. The society is evolving regardless of juridical laws, often contrary to the social development logic defined by science. Meanwhile, the situation with

determination of the economy's energy sector development strategy can become critical.

First of all, this refers to "green energy" which is an important segment of the "green" economy. Fundamentally, doctrinal interpretation rather than improvement of the development vector of legal regulation of the "green" economy, and of the "green" energy sector within its structure, depends on the answer to the crucial question: does global warming on our planet depend on industry-related activities of the human civilization and, if so, to what extent?

Unfortunately, it is still mostly unclear which option and, inherently, which reason is responsible for the warming of Earth's climate, leading to various natural anomalies plaguing the humanity.

The first possibility is that the humanity is at fault (to a certain extent, specific countries the technogenic activities of which do not contribute to reduction of greenhouse gas emissions, carbon dioxide concentration in the atmosphere, etc., i.e., do not ensure the required level of environmental safety). As a result, glaciers are melting, including the Arctic ice sheet and the Antarctic dome; sea level is rising which will soon lead to flooding of a number of low-lying coastal areas of several countries; fires, droughts, and floods are becoming more frequent, hazardous, and consequential, marine flora and fauna are extinguishing; melting of vast permafrost territories results in an increased number and more severe consequences of accidents at production and social infrastructure facilities located there, etc.

The second possibility is that the humanity and its technology-related activities did not directly cause global climate warming on Earth, at any rate, their contribution to this problem is very small. There is significant and generally recognized evidence that global warming on Earth itself is yet another stage of its existence: even throughout the well-known human history, global climate, first of all, the average air temperature, has changed dramatically, many territories (Greenland, for instance) froze over and thawed, there have been severe floods caused by melting glaciers, including the Arctic ice sheet, the Antarctic dome, etc. Carbon dioxide content in the atmosphere changed even when the level of industrial production development in the most developed countries (and the pre-state formations currently known to us) was so low that it simply could not have a negative environmental impact on our planet's climate. We need hardly mention more ancient times, before human beings appeared.

Surely, the truth is likely to lie somewhere between these extreme positions, leaning toward one of them. It is also indisputable that the global climate change on Earth can (and has been, both recently and very long ago) caused by factors external to our planet: falling of large meteorites, the origin of Earth (along with the entire Solar System) as it orbits the center of the Milky Way galaxy in spaces the physical fields of which affect the climate on Earth (and other planets of the Solar System), as well as other factors completely unknown to the modern geoscience... However, these are force majeure circumstances beyond the control of people.

Nevertheless, it is indisputable that Earth's climate is definitely warming at the current stage of human civilization development. The warming is most strongly manifesting in our country: in the Arctic Region, Northern Siberia, and Northern Far East.

On the one hand, this can be good for our economy: enormous thawed permafrost territories can be involved in agriculture, with all the positive consequences that come with it.

On the other hand, in some countries, droughts, shallowing rivers, and other manifestations of natural anomalies caused by climate warming can result in a large number of "climate migrants", which will obviously lead to growing political tension and, possibly, armed conflicts.

Finally, it should be noted that vast former permafrost regions are not guaranteed to become giant gardens after thawing. As is known, many permafrost regions in the Northern Russia have frozen methane which, when thawed, will be released into the atmosphere, making the climate on Earth even worse, and this process will not be instantaneous, but long (hundreds of years?), which could hamper or even exclude the possibility to include these territories in agriculture and may make it impossible for people to even live (and, therefore, conduct business) there.

So which path (from the above-mentioned) should we follow in the development of the society, economy, energy industry? It will not be determined and confirmed by the law. The legislator's task is to ensure laws and regulations are in place for the selected economy development vector, which, in its turn, depends on the country government's decision on the reason of the global climate change.

Has the government chosen the vector? It's unlikely. It is also far from a given that warming of Earth's climate, mostly in the northern regions of our country, is inevitable. How else can we explain the following paradox?

If the climate is actually warming significantly, including in the north of Russia, it is natural to expect a severe rise in the Arctic Ocean water temperature. It means that the Northeast Passage will become deiced rather quickly, although not momentarily, and this is a major change in navigation and cargo carriage volumes for the benefit of our economy.

At the same time, we have planned and started construction of a large icebreaking fleet to accompany cargo vessels when navigating the Northeast Passage! Now, there are 4 nuclear-powered and 4 diesel-electric icebreakers in the Northeast Passage waters; three nuclear-powered vessels are under construction at the Baltic plant in Saint Petersburg at the request of Rosatomflot; 12 more icebreakers are expected to be built in the years to come. In May 2018, at the St. Petersburg International Economic Forum, Rosatom State Corporation Director General A. Lihachev estimated the cost of building new icebreakers at RUB 500 billion. Construction of powerful icebreakers (as enthusiastically reported by various media from time to time) along with their typical design and operation, all this places a significant strain on the federal budget and the budget of major businesses. But if all the ice along the Northeast Passage were to melt, what are these powerful icebreakers for? They can hardly be used for transportation of cargo, least of passengers. Hence, we can assume that, in this case, a practical strategy to stop global warming prevailed (it can hardly be presumed that climate warming was to be prevented only in the Northeast Passage region). Another possibility is that there is no global warming at all, but only episodic climate changes, and the ice in the Arctic Ocean along with the permafrost in Northern Russia will not melt.

There is undeniable evidence supporting this. For instance, the head of the Department of Oceanography, Atmospheric Physics and Geography of the Russian Academy of Sciences, member of the Russian Academy of Sciences G. Matishov (who is indisputably well-versed in this subject) had a rather bold opinion in this issue: "I've been in the Arctic since 1965, studying ocean zones surrounding glaciers for decades. When asked on global warming, I say that it doesn't exist. There are only charlatans, no warming..." [7]

This brings us to an even more fundamental, mostly scientific (but, what is really important, scientific and legal) problem. Academic science, unlike research and, even more so, applied science, is meant, if not destined to explore the most fundamental problems, including those of the society and state's life. This is the main objective of academic legal science.

First of all, the basic question in terms of the problem in question has to be formulated and answered in this paradigm. And the question is as follows: who owns natural resources, first of all, hydrocarbon resources, in our country?

Who, as their owner, can and should determine the development strategy of the economy energy sector considering (or disregarding) some environmental tasks, often costly ones?

The current Constitution of the Russian Federation does not elaborate on this issue; Article 9 Part 2 only says "Soil and other natural resources can be owned by individuals, the state, municipalities, etc." This means that natural resources bestowed on our country's citizens by God can be in ownership in different forms. To whom do they belong initially, by nature, at least in theory?

Indeed, as Article 36 Part 2 of the Constitution of the Russian Federation states, land and other natural resources are used and allocated by their owners freely, as long as it does not harm the environment or violate the rights and legal interests of third parties. But who is the initial owner of specific natural resources, who is in possession, who has the right to use and allocate them?

Is it the state? The current Russian Constitution does not specify it. At the same time, Article 11 of the 1978 Constitution of the Russian Soviet Federative Socialist Republic states: "The land, its subsoil resources, waters, forests are solely owned by the state..." Academic literature and other sources have also referred to natural resources (etc.) as public assets, sometimes as socialistic assets, which terms are often treated as synonymous.

However, assets (and natural resources are exactly that) cannot exist without an owner, so who's been the owner of natural resources in Russia since December 12, 1993? If we analyze the preamble of the Russian Constitution, it is conceivable that the owner is the entity that adopted this Constitution: "We, the multinational people of the Russian Federation...", but not only the people of 1993, but future generations as well: "... proceeding from the responsibility for our Fatherland before the present and future generations...".

Can we assume that the owner of Russia's natural resources is a constitutional entity represented by present and future generations of the multinational people of the Russian Federation? The entity has not been legitimized formally, but it exists, at any rate, it should exist in the spirit of the Constitution.

However, one may wonder: why only future generations? Why not those of the past as well? According to the same preamble of the Russian Constitution of 1993, "...revering the memory of ancestors who have conveyed to us the love for the Fatherland, belief in the good and justice..."

This is no scholastic theorizing. Assuming that we, the people currently living in the Russian Federation, are the society existing between the past and future generations, rooted in the past and moving towards the future at the same time, and acting on their behalf from this temporal point of view, this paradigm imposes an enormous responsibility on us now, mostly in the "green" energy sector. We must take heed of our past mistakes and deficiencies using an important tool, the law, and secure the future by legal means...

In this respect, we have got a lot more work to do yet: not only in the field of "green" finance, not even in the "green" energy sector, but, first and utmost, in the field of "green economy". "We" means the society, the state, the multinational people of the Russian Federation who adopted the Constitution in 1993. And even each Russian citizen: today, the citizens of the Russian Federation lack the right to a guaranteed share of income derived from mineral extraction (the so-called "unconditional" income) while a number of foreign countries in possession of significant hydrocarbon reserves, just like our country, have implemented this right.

Here is an example. As is known, the following business-to-government contracts are currently used in the oil and gas industry worldwide: concession, production license, production sharing agreements, and service contracts, each with several subtypes. In Saudi Arabia, one of the country's largest companies has entered into a service contract with the government (this type of contracts is very common abroad) and conducted oil exploration and production under the contract receiving 6 cents per barrel discovered and 15 cents per barrel produced. The government sold extracted oil itself. This means that this company (just like any other oil and gas company operating under service contracts with the government worldwide) is only a contractor performing the scope of work stipulated by the contract for a fixed fee. However, the state reserves the legal title to the oil it extracts. The government sells the extracted oil, and the resulting profit goes into the state budget rather than that of the company that produced the oil, agents, traders, etc.

In our country, production licenses are used predominately for production of oil (and many other minerals), meaning that the extracted oil belongs to the producer, along with any profits it brings. The government only receives taxes and some mandatory non-tax payments from the oil producer.

Even the negative impact of natural resource extracting on the environment has long been covered from sources other than producers. This changed after March 5, 2013, when the Constitutional Court of the Russian Federation issued Ruling No. 5-П determined whether designated companies that collect, transport and bury municipal solid waste received from other companies and

sole proprietors on a leased land plot (landfill) or the producers of such waste entering into civil law contracts with such designated companies are to pay for environmental impact (the so-called environmental fee). The Constitutional Court of the Russian Federation ruled: The constitutional obligation to protect the nature and environment, to use natural resources sparingly is general in nature and, as a part of the mechanism of enforcing everyone's constitutional right to a favorable environment and other environmental rights, applies to both citizens and legal entities, which implies that they are responsible for the state of the environment. Since exploitation of natural resources, their involvement in the stream of commerce harm the environment, costs of its restoration by the government under market-based economy conditions should be primarily covered by the business entities and other institutions that cause the negative environmental impact. In its turn, the public government, also responsible for preserving nature and environment under the Constitution, is obliged to take measures to reduce environmental pollution, prevent and mitigate environmental risks (see Ruling No. 5-П of the Constitutional Court of the Russian Federation dated March 5, 2013 [8]).

In principle, this, in many respects significant, legal stance of the Constitutional Court of the Russian Federation can be deemed a postulate: business structures should cover the cost of liability for damage to the natural environment caused by their extracting natural resources, whereas such "defective" business is conducted when extracting natural resources that do not belong to these structures (they are owned by our society), and damage to the natural environment is damage to the society. ■

References

1. M.S. Yegorova. "Green" Economy: Challenges and Prospects of Legal Regulation / M.S. Yegorova, P.A. Glik // Advances in Modern Natural Sciences. 2014. No. 11-2. P. 73–76.
2. N.A. Vlasenko. Nomenclature and Description of Scientific Disciplines of Legal Studies: A Collection of Documents and Other Materials / N.A. Vlasenko, I.M. Mackiewicz. Moscow : Prospekt, 2019. P. 184.
3. A.E. Kopylov. Further Development of Legal Support of Renewable Energy Sources in Russia / A.E. // Kopylov Energy Law. 2010. No. 1. P. 39–44.; K.V. Papanov Government Support of Alternative Energy industry Development / K.V. Papanov, A.P. Kazantseva // Business Law. 2016. No. 2. P. 44–52.
4. S.L. Xiropoulos. Legal Regulation of Energy Supply Using Renewable Energy Sources (Civil Law Aspect): abstract of thesis of PhD (Law) / S.L. Xiropoulos. Krasnodar, 2013. P. 24.
5. D.N. Chugurov. Green Economy: Content, Problems, and Priority Areas / D.N. Chugurov // Challenges of Economic Growth and Sustainable Development: Materials of the II International Academic and Research Web Conference (Vologda, May 16 to 18, 2017): Collection of Scientific Articles. Vologda : Vologda Scientific Center of the Russian Academy of Sciences, 2017. P. 179–183; L.G. Shobey "Green" Economy as an Alternative to Sustainable Development / L.G. Shobey, V.V. Kubinets // Economy Vector. 2018. No. 4 (22). P. 31.; D.V. Shigayev. Global Experience in "Green" Economy Growth / D.V. Shigayev // Challenges of Economic Growth and Sustainable Development: Materials of the III International Academic and Research Web Conference (Vologda, May 16 to 18, 2018). In 2 parts. Part 2: Collection of Scientific Articles. Vologda: Federal Publicly Funded Institution of Science Vologda Scientific Center of the Russian Academy of Sciences, 2019. P. 140–144.
6. L.Yu. Andreyeva. Institutes and Instruments of "Green Financing": Risks and Opportunities of Russian Economy Sustainable Development / L.Yu. Andreyeva // Forestry Engineering Journal. 2017. No. 2. P. 205–209.; I.D. Rakov. Support Mechanisms for Financing "Green Projects": Countries' Experience / I.D. Rakov // Topical Issues of Economics and Law. 2018. No. 2 (42). P. 67–82; O.V. Bogacheva. Government Measures for Establishment and Development of a "Green" Bonds Market / O.V. Bogacheva // Financial Magazine. 2018. No. 3 (31). P. 55–65.; A.I. Nikittsova. Modern State and Development of the Green Finance Market in the Russian Federation / A.I. Nikittsova // Alley of Science. 2018. Vol. 7. No. 11 (27). P. 97–102.
7. M. Brovkina. A Heated Subject... There is no Global Warming. Arguments of Academy Fellow Gennadiy Matishov / M. Brovkina // Rossiyskaya Gazeta - Week February 12, 2020.
8. Ruling of the Constitutional Court of the Russian Federation No. 5-П dated March 5, 2013 // Corpus of Laws of the Russian Federation. 2013. No. 11. Article 1164.