

Legal regulation of cross-border energy transportation

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Abstract. In transportation business, special attention is paid to cross-border transportation of energy resources by various means of transport. Therefore, to evaluate legal regulation of transportation business, it is possible to dwell on the concept, international legal and national (Russian) legal regulation of cross-border energy transportation. There is no legal concept of cross-border transportation. Therefore, it should be defined based on some other sources. However, there is a concept of transboundary carriage defined as any carriage of hazardous wastes or other wastes from or through a jurisdictional territory of another state, to or through non-jurisdictional territory of any state, provided that such carriage involves at least two states. Legal regulation of cross-border energy transportation is an urgent issue in modern legislation. It will be useful to come up with a legal solution to regulate law enforcement activities. The author, exploring problematic issues, proposes to clarify and supplement laws in this area.

1 Introduction

The main historical milestones in energy transportation evolution, in particular, is the first oilfield pipeline in the world, launched in 1887 and connected the Balakhani fields with the Ludwig Nobel plant in Gara Shahar (Black City) in Baku, which triggered pipeline transportation. The second stage started with the collapse of the Russian Empire and the formation of the USSR. The beginning of World War II is considered the third stage in the development of pipeline transportation, resulting in pipeline infrastructure to be rebuilt for military purposes. The last fourth is the modern stage, when pipelines have become crucial for transporting mineral resources over virtually any distance.

Within a historical perspective, such international legal documents as the Barcelona Convention on Freedom of Transit of 1921, the General Agreement on Tariffs and Trade (GATT) of 1947, the UN Convention on the Law of the Sea of 1982 and a number of other documents should also be considered [1].

Today, the following international agreements are kept with including Report of the Inland Transport Committee of the Economic Commission for Europe of 2004, Concept of the Fundamentals of Transport Legislation of the EurAsEC Member States of the Interparliamentary Assembly of the Eurasian Economic Community (EurAEC), Agreement between the Government of the Russian Federation, the Government of the Republic of Bulgaria and the Government of the Hellenic Republic on cooperation in the construction and operation of the Burgas-Alexandroupolis oil pipeline, Agreement between

Azerbaijan, Georgia and the Republic of Turkey on laying the pipeline.

A large segment of international legal framework on pipeline transportation tend to go by international economic laws, which does not mean that the latter holds a 'privilege' of regulating the relations between states and other subjects in this domain. Based on a target of legal regulation, these relations can be regulated by international maritime norms (as long as pipelines are laid on the seafloor), environmental law (environmental safety), investment and other branches and institutions of international law. Moreover, the legal literature speaks of international energy law being developed as a sub-branch of international economic law, although there is currently no legal evidence.

It is crucial to pin down international and national legal regulation of cross-border energy transportation, to specify challenges and propose solutions.

2 Materials and Methods

An indisputable target of international legal regulation in pipeline transportation are states, being key agents of international law, and international intergovernmental organizations. As for individuals and legal entities – pipeline operators who maintain pipelines, provide transportation services and ensure technologically sound conditions, they are active agents in respective international legal relations (trade, investment and others), whose status is mainly set out by domestic laws and partially (within limits) – by international.

Based on the sources of international legal regulation of relations in pipeline transportation, special attention should be paid to the European

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Energy Charter of 1991 and the Energy Charter Treaty (hereinafter referred to as the ECT) of 1994[2]. Bearing in mind significant RF and EU contradictions on the ratification of the ECT and the Transit Protocol, fundamental terms are highlighted relating to, firstly, equal access to pipelines, the right of first refusal of gas producers who have entered long-term arrangements with European consumers, from extended-term gas-transit agreements, thirdly, the provisions on the Regional Economic Integration Organization (REIO).

Meanwhile, European energy and oil and gas companies claim for unimpeded access to natural resources, as well as to transportation systems and energy capacities of participating countries, though, limiting investment in their own oil and gas sector. Regarding ECT ratification, the Russian Federation has a totally grounded position, from an international legal point of view, meeting modern economic and political situations and national interests. Free access to pipelines and other capacities may further lead to unlawful seizure of industries and the energy sector of the economy, which are the property of Russian citizens. In addition, the EU plans for access to energy capacities, including Russia's pipelines, do not expect adequate response steps, which is clearly inconsistent with the principle of sovereign equality.

When it comes to international legal norms stipulating the relations in pipeline transportation, it is important to bring up general, basic and special principles of international law for the construction and operation of pipelines. Relations in the field of pipeline transportation feature such elements as normativity, ideological and "some social charge that, firstly, determines the entire system and, secondly, forms a framework of legal orders herewithin, each component of which cannot be perceived, act, applied and interpreted in isolation from others", as well as an "economic component" of the basic principles of international law.

The principle of state sovereignty considered in two dimensions, sovereign equality and total constant sovereignty of states over all their wealth, natural resources and economic activities, is of paramount interest and significance to keep with in pipeline transportation.

Considering the principle of equality, it is necessary to recall the directives of the European Commission on the EU energy market reform, referred to as the Kroes-Piebalgs Amendments of September 19, 2007. The amendments prohibit to simultaneously run companies involved in electricity generation, gas production and transportation over pipelines. In addition to the above provisions, the directives adopt a reciprocity clause restricting major oil and gas exporters (Russia or Saudi Arabia) to invest in transportation systems. As far as the global after-effects of "closing" the European energy market are concerned, this measure could provoke a new surge of interest in the "gas OPEC". Countries that supply gas to Europe and are unable to influence the energy market within the EU will try to influence it from outside.

Of a great deal of elements constituting

international legal regulation of pipeline transportation, Gas Exporting Countries Forum (GECF) activities are worthy to note. It is an organization uniting the world leading gas exporting countries founded in 2001 in Tehran, similarly to the Organization of the Petroleum Exporting Countries, often referred to as the "gas OPEC".

Subject to a type of pipeline transportation through different territories, some of them may be under sovereignty of a respective state (pipelines over land, internal waterways, the territorial sea), others have a different international legal regime, being covered by the sovereign rights of coastal states, others are under neither sovereignty nor sovereign rights of states (high seas, international seafloor, etc.). The above aspects result in two legal frameworks for pipelines to be laid across the territory of two or more states:

- 1) a differentiated legal framework by which the jurisdiction of each state extends to a part of a transboundary trunk pipeline passing across its territory,
- 2) a unified legal framework by which states provide special (identical) conditions enabling international legal regulation of a transboundary trunk pipeline, persisting along its entire length.

The legal framework for pipeline transportation outside the state territory in maritime spaces is clearly regulated by the UN Convention on the Law of the Sea of 1982[3]. Thus, the rights of a coastal state in the territorial sea result from its sovereignty over this space (Article 24, paragraphs 1a and 1b). In the exclusive economic zone, states have sovereign rights to lay submarine cables and pipelines, in line with the rights and obligations of the coastal state (Article 58). On the continental shelf, all states are granted the right to lay submarine cables and pipelines, with the consent of the coastal state being required to map out pipeline routes (Article 79). The right of each state to lay communications on the high seafloor outside the continental shelf conforms to the legal obligation not to interfere with other states in enjoying the freedom of the seas. All states are entitled to lay submarine cables and pipelines on the high seafloor outside the continental shelf (Articles 112–115).

When it comes to transporting mineral resources by pipelines, it is necessary to investigate whether there are international legal obligations to grant the right to transport through jurisdictional territories or through state territories. "Transit" and "freedom of transit" are the key concepts within the meaning of this paper [4]. Reference should be made to the Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 1993 [5], the EEC Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Pipelines dated October 10, 1989 [6], Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of 10 December 1999 [7].

The sources of international legal regulation should also include the Barcelona Convention and Statute on

Freedom of Transit of 1921. The Preamble affirms that Contracting States intend to “declare their right of free transit and regulate it as one of the best ways to promote cooperation.” This provision, however, should not be seen as a general international rule applicable also to Non-Contracting States. Transit is not free, but tariffs or charges must be, according to Article 4, “reasonable”. The only question that remains open is whether the rules set forth in the 1921 Convention can be regarded as customary norms of contemporary international law, whereby not only state borders, but also offshore delimitation lines are crossed – when it is about the transit of goods of one state through a pipeline laid on continental shelf of another state.

The next international legal instrument laying down the norms and principles of the transit of energy resources is the 1965 Convention on Transit Trade of Land-locked States [8]. First, this convention generally does not apply to pipelines, as clearly expressed by the definition of “means of transport” provided for in Article 1. However, the parties may specifically agree to include oil and gas pipelines in the concept “means of transport”. In the light of the object and purpose of this Convention, onshore pipelines to mineral deposits, rather than offshore, may be considered. Secondly, Article 2 of the Convention sets out the rule on “freedom of transit”. The rule is supplemented by the principles of “non-discrimination” and “uninterrupted and continuous traffic”. Exceptions are cases when “essential security interests” of a Party to this Convention are protected (Article 11), as well as “force majeure” cases. These key elements of the transit regime, including the principles of freedom on agreed terms, non-discrimination, and uninterrupted and continuous traffic, are also integrated into other international treaties.

The General Agreement on Tariffs and Trade of 1947 (GATT 1947) and the General Agreement on Tariffs and Trade of 1994 (GATT 1994) also underlay the issue addressed herein. This document is thought to be the first multilateral interstate agreement to provide rules on energy transit. Under the agreement, “transit” means the carriage through the area of a Contracting Party, for loading and unloading, of energy materials and products originating in the area of another state and destined for the area of a third state, so long as either the other state or the third state is a Contracting Party (Part 1 Article 7). In the Treaty, “area” means not only “state territory”, but also, for example, the continental shelf (Paragraph 10 Article 1). However, a Contracting Party “through whose Area energy materials and products may transit shall not be obliged to permit the construction or modification of energy transport facilities” or “permit new or additional transit through existing energy transport facilities”. There is no clear answer to this question in the Treaty. It is likely to receive a positive answer in two ways. Firstly, a Contracting Party should not prevent the construction and operation of pipelines if transit cannot be commercialized using existing energy transport facilities. Secondly, preventing repairs can increase accident rate and, among other negative impacts,

increase environmental risk.

There are also bilateral and multilateral agreements that provide for provisions on the transit of mineral resources through pipelines like the Agreement between the Republic of Azerbaijan, Georgia and the Republic of Turkey on the transportation of Crude Oil through the Territories of the Republic of Azerbaijan, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Pipeline.

These international legal documents ascertain the availability of certain general legal regulations, a treaty prohibition for member states to impose any charges on pipeline operators, solely at a pretext of transboundary nature of a pipeline or a field, certain rules of non-discrimination – regarding both types of legal subjects resulting from the development of a transboundary field and from the construction or operation of transboundary pipelines, and, finally, on the treaty confirmation of the priority rights of the state on whose territory a transboundary field is operated or from whose territory hydrocarbons are transported through a transboundary pipeline.

The above agreements suggest that international agreements concluded in this area are elaborate regulatory documents that rest on the norms and principles of contemporary international law.

3 Results and Discussion

Transportation of gas, oil, and oil products through main pipelines is a natural monopoly activity and is regulated by federal legislation on natural monopolies. A natural monopoly is a state of the commodity market, in which the satisfaction of demand in this market is more efficient in the absence of competition due to the technological features of production (due to a significant decrease in production costs per unit of goods as the volume of production increases), and the goods produced by subjects of natural monopoly cannot be replaced in consumption by other goods, in connection with which the demand in this commodity market for goods produced by subjects of natural monopolies depends to a lesser extent on changes in the price of this product than the demand for other types of goods. The owner of the unified system of main oil pipelines is the state company Transneft. It was established in 1993 on the basis of the Main Production Directorate for the Transportation and Supply of Oil (Glavtransneft) of the USSR Ministry of the Oil Industry. Transneft is a natural monopoly. The state regulates the tariffs for its services in accordance with the established procedure and also controls 100% of the company's voting shares (ordinary shares of Transneft, which make up 75% of the authorized capital, are fixed in federal ownership, preferred shares (25% of the authorized capital) are placed free of charge among members of the labor team). Within the constituent entities of the Russian Federation, oil and gas transportation is usually carried out by legal entities in the form of state unitary enterprises or business entities, individually included by the Federal

Energy Commission of the Russian Federation in the register of natural monopolies of the fuel and energy complex. Between Gazprom, its subsidiaries, on the one hand, and regional companies transporting gas, on the other hand, there is fierce competition, during which the “Gazprom system” often uses its dominant position in the market.

The reason for this is that the legislation on natural monopolies regulates only general aspects of oil transportation activities, and does not define the legal, economic, and organizational features of relations that arise during the creation, operation, and development of trunk pipeline transport systems. Therefore, many aspects of relations entered into by the organizations of the main pipeline transport in the performance of their functions are still regulated not by law, but on the basis of decisions of ministries and departments.

Transportation of oil and oil products are services for the fulfillment of the order and dispatching, ensuring the reception, pumping, transshipment, draining, loading, and delivery of the shipper's oil. Transportation of oil and oil products through main oil pipelines and oil product pipelines is carried out on the basis of agreements, annual and quarterly calculations of the balances of oil production and supply, approved by the authorities of the constituent entities of the Russian Federation on the territory of which oil pipelines are located, on which agreements are concluded with them. The government bodies of the constituent entities of the Russian Federation, in agreement with the government bodies of the Russian Federation, determine the production and supply volumes of oil and petrochemical products. Transportation of oil and oil products is carried out according to schedules determined by the Ministry of Fuel and Energy of Russia in agreement with the governments of the constituent entities of the Russian Federation. Transportation of oil and oil products on the territory of the Russian Federation is carried out at uniform tariffs, regardless of the form of ownership of enterprises in the oil and oil refining industry.

Enterprises-producers of oil and oil products exporting oil and oil products outside the Russian Federation conclude contracts for the transportation of oil and oil products through main oil pipelines and oil product pipelines with the corresponding oil product supply enterprises. Enterprises-producers of oil and oil products provide customs clearance of oil and oil products supplied outside the Russian Federation following the customs legislation of the Russian Federation and the agreement on customs regulation (this distinguishes a contract for the transportation of hydrocarbons by pipeline transport from a contract for a transport expedition).

Routes for the transportation of petroleum products in domestic and export directions are agreed upon by consignors with organizations of oil product pipeline transport when concluding contracts for transportation. Organizations of oil product pipeline transport, based on the principle of equal accessibility, carry out the transportation of oil products in accordance with the approved schedules. Responsibility for the correctness

of shipping documents is always assigned to the producer of oil products, even if other commercial structures are engaged in the sale of oil produced by him.

Payment for the services of oil product pipeline transport organizations for the transportation of oil products and gas is made at tariffs approved by the Federal Energy Commission of the Russian Federation and duly registered.

It was established that when supplying petroleum products to the domestic market of the Russian Federation to solve the problem of arrears in payment for Transneft services, shippers who are not part of one oil company, commercial and other non-governmental organizations must pay for transportation of petroleum products on a prepaid basis. Consignors that are part of one oil company, when paying for these services, make a partial prepayment (during the first two weeks of the month in which services for the transportation of petroleum products are provided).

On the basis of such acts, Transneft developed a form of a connection agreement that provides for full prepayment for its services, the right to refuse services to oilmen, and a wide system of penalties for violations of payment for oil transportation. The peculiarity of transportation by pipeline transport also lies in the fact that after entering the network, oil cannot be individualized, therefore, the producer loses ownership of the oil, retaining only the right to claim against the transporter.

The contract for the carriage of goods by pipeline transport practically does not have special legislative regulation, in contrast to the contracts for the carriage of goods by rail, the carriage of goods by water, etc. sphere. Currently, the only act at the level of federal law that regulates property relations in this area is the Civil Code of the Russian Federation. At the same time, since the contract for transportation by pipeline transport is not specifically prescribed in the Civil Code, only the norms of the general part of the Civil Code on the contract apply to it, and the norms of the special part of the Code - by analogy. The subject of the contract for the transportation of oil through the pipeline. The subject of the contracts concluded by Transneft with customers are: "services for the transportation of the shipper's oil through the system of main oil pipelines." At the same time, the term "transportation" here means: "services for fulfilling the order and dispatching, ensuring the reception, pumping, transshipment, discharge, loading, and delivery of the shipper's oil." The main purpose of such an agreement is the delivery and delivery of oil to the shipper at the destination. In this form, the purpose and subject of the contract fully coincide with the contract for the carriage of goods. The conclusion is based on the assumption that “shipper's oil” is a cargo, that is, an individually defined thing.

The oil delivered to the system of main oil pipelines is considered as a “cargo” by the Oil Accounting Instruction, which establishes that: oil is a cargo for transportation through the system of main oil pipelines, and also that “OJSC Transneft enterprises”: transport

oil (as cargo) via main oil pipelines based on agreements concluded with producers (consignors) of oil.

However, other provisions of the contracts concluded between Transneft and its clients and the practice of their execution do not give grounds to consider oil as ordinary cargo. The main responsibilities of Transneft are as follows: coordination of oil transportation; ensuring the acceptance of the shipper's oil at the point of departure for its subsequent transportation following route instructions; ensuring the transportation of the corresponding consignment of oil of the consignor from the point of departure to the point of destination within the period specified in the itinerary order; ensuring the delivery of oil at the destination in the amount specified in the itinerary order. The main obligations of the consignor are the obligations to hand over to Transneft at the point of departure the oil declared for transportation; pay for the services of Transneft; to ensure the reception of oil at the destination.

An analysis of the text of the contracts shows that in some provisions they operate with the concept of "shipper's oil", in others – "shipper's oil batch", and in others – "oil." Only one of these terms "shipper's oil" implies the identification of oil as cargo, its separation from any other oil owned by other shippers. As shown above, this term is used only when describing Transneft's obligations to receive oil from the sender at the point of origin.

Within the national legal regulation of this type of activity, it is necessary to analyze the Civil Code of the Russian Federation (Part 2), as well as the current departmental regulations to determine the legal character of the oil transportation contract by pipelines (hereinafter referred to as the oil transportation contract).

First, the Civil Code does not contain rules on this type of contract, which, however, does not deprive it of its right to exist by virtue of Article 421 of the Civil Code of the Russian Federation, which provides an opportunity to conclude contracts, both provisioned and not provisioned by the Code [9].

Oil transportation by pipelines is specific. Once transported, oil from different fields having certain inalienable characteristics (specific gravity, viscosity, percentage of sulfur, etc.) is mixed and pumped through the pipelines to consumption areas in the form of mixtures. Therefore, the thing is that the supplier "delivers" one oil into the pipe, and at the output receives oil with other quality characteristics. In this regard, we can come to the following conclusion. Given that the oil company cannot accurately determine whether the oil of a particular shipper has reached its destination or not, the carriage of the oil becomes an assumption, a fiction. Theoretically, it is possible not to carry the oil at all and still meet obligations to deliver the oil at the destination. Thus, the purpose of the transportation agreement is to ensure the availability of a given amount of oil at the destination, which brings this agreement closer to the

group of agreements on the transfer of property.

4 Conclusion

Based on international and national legal regulation available on the target issues, the author defines cross-border transportation as the process of moving a cargo/object to its destination by certain means of transport when crossing the borders of various states.

In view of the above, the oil transportation contract is not a mixed contract, because it does not "unconditionally" fit the model of any of the existing types of civil-law contracts. It seems that this contract is a special kind of contract (*sui generis*), which requires independent legislative regulation by a separate legislative act. "Freedom" under monopoly conditions pave the way for violating non-discriminatory access to the "pipeline". It is long overdue to address this problem in a cardinal way, not to drive the oil transportation agreement into "Procrustean bed" agreements contained in the Civil Code of the Russian Federation, but to develop and integrate special section on contracts for the transportation of oil and gas into Civil Code of the Russian Federation.

We believe that the definition and general provisions of this contract should be included in the Civil Code of the Russian Federation, and since, by its legal nature, it is closest to the contract of carriage and to the contract of paid services, it seems most logical to put the chapter on this contract after Chapter 40 on Transportation of the Civil Code and to renumber the remaining chapters of the Code accordingly.

The contract for oil transportation by pipelines can be defined as follows. Under the contract of oil transportation by pipelines, the company maintaining pipelines shall accept a certain amount of oil of the established quality from the sender at an oil pipeline assembly (departure point) and give the person authorized to receive oil the oil of the established quality in the quantity accepted from the sender, reduced by the amount of technological (operational) losses, at another oil pipeline assembly within the period specified in the contract, and the oil sender shall timely deliver the appropriate amount of oil of the established quality to the company maintaining pipelines at the point of departure, ensure acceptance of oil at the point of destination and pay the charges established for the transportation of oil. The identified legal problems and ways to solve them should help the subjects of legal relations in law enforcement practice.

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