

COLIBRI^{IAW}

**KEY THINGS TO
KNOW ABOUT
MINING IN
GEORGIA,
KAZAKHSTAN,
KYRGYZSTAN,
TAJIKISTAN,
UZBEKISTAN AND
MONGOLIA**



Below is a brief overview of the key aspects of mining industry law in such jurisdictions as Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan and Mongolia. This paper is not intended as the basis for any investment decision. Due to the constantly evolving laws and regulations in these jurisdictions, investors are advised to undertake appropriate due diligence to determine any changes to the law prior to considering any specific transaction.

Legal framework and regulatory authority

Exploration and development of minerals in these countries is regulated by a number of laws and regulations. In most of these jurisdictions the primary law regulating the mining sector is the subsoil use law /in Mongolia, the primary law regulating the subsoil use for exploration and mining is the Minerals Law/ which sets out the basic legal framework governing exploration and development of the subsoil resources, provides for the state control and granting, using and assigning or terminating rights and obligations of subsoil users, and other general matters. Along with the relevant subsoil use laws, the laws on concessions (Tajikistan, Kyrgyzstan and Mongolia), the laws on production sharing agreements (Kyrgyzstan, Tajikistan, Uzbekistan and Mongolia), and the law on oil and gas (Georgia) regulate the investors' operations in the mining sector.

The mining industry in these jurisdictions is also regulated by a number of other laws and regulations of general nature, including the laws on licensing, investment protection, taxes, environmental laws, etc.

In general in all these jurisdictions duties of the state in regard to management of the subsoil are allocated to the central government, competent body and local executive bodies. The responsibility of the government is vested with organizing and managing the state subsoil stock, outlining subsoil allotments, establishing the procedures for the conclusion of the subsoil use contracts, and appointing the "competent body" for execution and implementation of contracts. The competent body prepares and organizes tenders, conducts negotiations with subsoil users, signs and registers contracts, monitors compliance with contracts, and issues permits for the assignment of subsoil rights. Local executive bodies grant land plots to subsoil users, supervise the protection of the land, and participate in negotiations with subsoil users for environmental and social protection, among other functions.

Ownership of subsoil, subsoil use rights, transfer

In all these jurisdictions, notwithstanding who owns or leases the land, the subsoil remains in the state ownership. Title to minerals passes from the state to the subsoil user on extraction from the ground pursuant to the terms of the subsoil use license or contract.

In such jurisdictions as Georgia, Tajikistan and Uzbekistan the subsoil use rights are granted pursuant to the terms of a license and a license agreement as an integral part of a license.

In Mongolia, the subsoil use rights for exploration and mining of all types of mineral resources other than water, petroleum and natural gas are granted through exploration and mining licenses.

In Kazakhstan prior to August 1999, the State established subsoil use rights by granting a license and executing subsoil use contract. In August 1999, the State abolished the two-tier process. Subsoil use rights are now established only by a subsoil use contract and no license is required. Licenses previously issued, however, remain valid.

In Georgia, Uzbekistan and Tajikistan rights granted under licenses are generally not transferable.

In Kyrgyzstan, a licensee may transfer its license subject to prior approval of such transfer by the competent body (i.e. the State Agency on Geology and Mineral Resources under the Government of the Kyrgyz Republic). Such transfer is possible only one year after the date on which the relevant project commenced. **With respect to the strategic assets, such transfer is subject to the government's pre-emptive right.**

In Kazakhstan, the state has the pre-emptive right to acquire the transferred subsoil use rights and/or the objects connected with the subsoil use rights (or a part thereof). Additionally, any acquisition of the subsoil use rights and/or objects connected to subsoil use rights is subject to the competent authority's prior consent (e.g. the Ministry of Oil and Gas or the Ministry of Industry and New Technologies). As in Kyrgyzstan, the transfer is subject to expiration of the so-called "moratorium" period which is in Kazakhstan it is 2 year from the date of the execution of the relevant subsoil use contract.

Forms of subsoil use projects

The laws of all such jurisdictions allow any individual or legal entity whether local or foreign to become the subsoil user.

The legal entities may be established in any form of enterprises as allowed under the relevant laws of these countries. Most popular legal forms used in these jurisdictions are the companies/partnerships with limited liability and operating on the basis of joint ventures projects.

Granting of subsoil use rights and surface land rights

Subsoil use rights in all these jurisdictions are granted by the relevant government authorities for a specific period, but may be extended before the expiration of the contract and/or license generally depending on the type of carried activity.

In Georgia the validity of the license varies from 5 years to 45 years and in the some exceptional cases the license for subsoil use rights may be issued for indefinite period of time.

Exploration contracts in Kazakhstan may be executed for up to 6 years. Term of production contracts is determined based on a production plan.

In Kyrgyzstan the geological exploration license may be extended up to 10 years and the production license may be extended until the complete depletion of mineral reserves.

In Uzbekistan the validity of the license for geological study operations is up to 5 years, excluding extensions. Production license depend on the production term as determined in the feasibility study.

In Mongolia both exploration and mining licenses are granted to legal persons duly formed and operating under the laws of Mongolia and Mongolian taxpayers. Exploration licenses are valid for three years, with an option to extend for two additional terms of three years each. The initial term of a mining license is 30 years and may be extended two times for a period of twenty years each depending up on the reserve of the mineral.

In Tajikistan the term of the license is subject to negotiations. In general the term of a concession agreement on which basis the subsoil use rights are formalized should not exceed 49 years; however, for the deposits which may require significant capital investments the term of the contract may be up to 99 years.

Subsoil use licenses and contracts may be granted on the basis of competitive tenders and in some exceptional cases - direct negotiations with the competent body.

Entering into any of the above contracts includes a right to use the surface land thereof while exploring, mining and reclaiming the land. However, such right must be set forth in a surface lease agreement with the applicable local administrative authorities. A surface lease agreement may be entered for the same period of time as the relevant underlying subsoil use contract including any extensions.

Progression from exploration to mining

In every such jurisdiction if a subsoil user under an exploration license/contract has discovered and appraised a deposit, then it has an exclusive right for obtaining/execution of a production license/contract on the basis of direct negotiations. If a production license/contract is not granted / executed, then the relevant subsoil area shall be put up for tender or auction.

Access to geological data

As a general rule in all these jurisdictions the geological data is provided to an investor by a relevant competent authority subject to a confidentiality agreement. Depending on the level of the disclosure and/or the level of involvement of an investor into the project (i.e. being a potential or the licensed investor), the data may be provided either on free of charge basis or for a fee. In particular, in Georgia, Kazakhstan and Uzbekistan on free of charge basis the potential investors may obtain certain preliminary information comprising the names of the given deposits, their location and general geological, geophysical and geochemical data. In other cases, access to the geological data is possible for compensation, which is usually determined on the basis of the historical costs.

During the term of a subsoil use contract and upon its termination, all geological data obtained at the expense of the subsoil user during the course of the operations as well as the documents and material carriers of such data shall be provided by the subsoil user to the competent authority free of charge.

With some exceptions, the investors cannot disclose the provided geological data to any third party. Such exceptions include, inter alia, disclosure to a subcontractor operating under the subsoil use contract. In other cases, the disclosure is possible on the basis of the consent of the competent authority and/or usually a subject to a tripartite agreement executed between the subsoil user, the competent authority and the third party.

Unauthorized disclosure of the geological information may lead to certain penalties which may vary from the established fines to the suspension or termination of the relevant license and/or subsoil use contract (Kazakhstan is an example).

Taxation and stabilization

The taxation system in the region is still developing. The tax risks with respect to subsoil user's operations and investment into these jurisdictions varies from medium (Georgia) to significant (Kazakhstan and Kyrgyzstan). Tax legislation here is subject to different and changing interpretations as well as inconsistent enforcement at both local and state levels.

Subsoil users in these jurisdictions are required to pay all, the so-called, general taxes, duties and fees applicable to all tax payers. Such taxes include an income tax, value-added tax, an excise tax, a social tax, a land tax, a property tax, a transport tax, as well as required contributions to various funds, duties and fees for licenses.

In addition to the general taxes, there are specific taxes, payable by subsoil users. These in particular, include, mineral extraction tax (Kazakhstan), excess profits taxes (Kazakhstan and Uzbekistan), royalties (Georgia, Kyrgyzstan, and Tajikistan), bonuses (subscription bonus in Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan, commercial discovery bonuses in Kazakhstan, bonuses on commercial exploration and production in Tajikistan), and payments for compensation of historical costs (Kazakhstan). The Minerals law of Mongolia imposes exploration and mining fees per hectare and plus the royalty payment, which varies depending on the type of the mineral resources, and their use.

In some exceptional cases the rates of the specific taxes and mandatory payments are determined in the respective subsoil use contracts. However, in general, in all these jurisdictions, a subsoil user undertakes to pay taxes and other mandatory payments to the budget pursuant to the laws as applicable at the time obligations of payment thereof arise.

With some exceptions, the laws in these jurisdictions do not provide for tax stability. Specifically, the legislative exceptions may include the tax stability regime under production sharing agreements (Kazakhstan, Kyrgyzstan and Uzbekistan), the subsoil use contracts signed by the head of the State (Kazakhstan) or granted by special resolution of the Cabinet of Ministers (Uzbekistan).

Under the Minerals Law of Mongolia, an investment agreement may be concluded between the Government and a license holder. Projects involving an investment of US \$50 to 100 million will have 10-year terms; US \$100 to 300 million projects will have 15-year terms; and projects involving more than US \$300 million will have 30-year terms. For investments of greater than \$100 million such agreement will be concluded at the Parliament level.

Perhaps with the exception of Georgia and Tajikistan, analysis of the changes of tax legislation amendments in these jurisdictions evidences the tightening of the subsoil user taxation. In practice too, in such jurisdictions as Kazakhstan and Kyrgyzstan there is a tendency of reconsidering the tax regimes, established in the subsoil use contracts which were concluded in the early nineties.

Investment protection

A fundamental principle of the investor protection in the region is the constitutional provisions that ratified international agreements take precedent over domestic legislation. If there is no applicable ratified international agreement addressing a specific issue, the terms and conditions of the investment or other agreement must be in strict compliance with national laws.

Basically, the investment laws provide various investor protections such as the stability of contract terms, international dispute resolution and guarantees against nationalization and other protections.

In every such jurisdiction the State guarantees stability of contracts concluded between investors and authorizes state bodies. However, in Uzbekistan, Kyrgyzstan and Kazakhstan subsoil users are only stabilized against the legislative amendments adversely affecting the results of a commercial activity of a subsoil user. As such the contractual stability may not cover changes in the law for defense, national security, environmental protection, health, taxes and customs duties and social contributions.

Another important protection available under the investment laws of these countries is the right to resolve disputes by way of international arbitration. All these jurisdictions are the contracting states to 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. As such the disputes may be settled through the foreign arbitration, including International Centre for the Settlement of Investment Disputes (ICSID), and an arbitration forum using the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

It is worth noting that the general policy of this jurisdiction is based on the principle that special (discriminative) treatment should not be given to foreign investors and that all investors should be treated on an equal basis. Despite this, currently, the legislations in these countries contain some provisions that can be considered as directly or indirectly discriminative with regard to foreign investors.

Naturally, one of the main principles and objectives of any state policy is to protect the internal labor market, domestic manufacturers and suppliers of goods. Such protection is provided specifically in the subsoil use law of Kazakhstan and as the recent developments demonstrate is a hot topic in Kyrgyzstan as well. Pursuant to the local content requirement the subsoil users are required to employ local personnel and enterprises to perform work and services for subsoil. Specifically to Kazakhstan, the requirement also spreads to the use materials and products produced in Kazakhstan if they comply with the standards and other requirements.

Other policy which may be considered as discriminative for the foreign investors is the that the requirements for the protection of national security shall be mandatorily taken into consideration upon execution of contracts on use of strategic resources of these jurisdictions, fulfillment of such contracts and control of their execution; and upon adopting decisions by the competent authority to issue or deny issuance of a permit for partial or full assignment by the subsoil user of the subsoil use right to another entity. This especially is the concern for the subsoil users operating in Kazakhstan, Kyrgyzstan and Uzbekistan. Following the recent trends in FDI, the Mongolian Government has introduced a new foreign investment law that has given the government the power to intervene in sectors of the strategic importance. Three sectors, namely minerals, banking and finance, and media and communication are listed as sectors of strategic importance.

Restrictions in foreign currency transactions and repatriation of foreign currency/capital are other measures which may have negative impact on the activities of the foreign investors in the region.

Safety and environmental protection

Subsoil users' activities are subject to certain state and local laws and regulations governing environmental protection and employee health and safety. In addition to compliance with the general environmental requirements as prescribed by the laws and contained in, or incorporated into, the subsoil use contracts, subsoil users must obtain specific environmental licenses and permits before carrying out subsoil operations. There are several types of permits, applicable for example to the emissions into the environment, as well as water use and waste disposal.

Failure to comply with applicable environmental and health and safety laws may result in injunctions, damages, suspension or revocation of licenses or permits, the imposition of penalties and even termination of the subsoil use contract (the last penalty is applicable to the subsoil users operating in Kazakhstan).

It is worth mentioning that the environmental and employee health and safety laws and regulations within the region have tended to become more stringent over time which may have a material adverse effect on subsoil user's financial condition, cash flow or results of operations.

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