NORTON ROSE FULBRIGHT

Mining in Kazakhstan

Ten things to know

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Mining in Kazakhstan

01 | State Ownership of Minerals and Metals

The subsoil is owned by the Republic of Kazakhstan (the **ROK**). The state grants a licence to legal entities for the exploration and mining in specified subsoil areas. Minerals mined by subsoil users become their private property.

The Code on Subsoil Use 2017 categorises mineral resources into solid minerals, hydrocarbons and uranium. The Ministry of Industry and Infrastructural Development (**MIID**) is responsible for state policy in the mining sector other than mining uranium, and MIID is responsible for the grant of licences, imposition of conditions on licensing and overseeing compliance with licences. The Ministry of Energy (**MOE**) is responsible for granting licences for uranium and hydrocarbon mining, and these materials are governed by a separate regime due to their particular importance to energy security. This publication will focus on the regulation of solid minerals.

There are no restrictions on foreign private companies holding subsoil use rights or being granted licences so long as they comply with the requirements of the SSU Code. Foreign entities can establish a ROK SPV as the licence holder in the form of a limited liability partnership.

02 | Mining Legalisation

The main legislation governing mining in the ROK is the Code on Subsoil and Subsoil Use 2017 (the **SSU Code**), which is based on Australian and Canadian models of subsoil use. It covers specific issues relating to categories of metals and governs the granting of licences, transfer of subsoil use rights and acquisition of equity interests of subsoil users or controlling entities.

In addition to the SSU Code, the other legislative acts applicable to exploration and mining include:

(a) the Environmental Code of 2 January 2021 (the **Environmental Code**);

(b) the Tax Code of 25 December 2017 (the **Tax Code**);

(c) the Land Code of 20 June 2003;

(d) the Business Code of 29 October 2015 (the **Business Code**);

(e) the Law on Precious Metals and Precious Stones of 14 January 2016 (the **Precious Metals Law**); and

(f) the Law on Civil Protection (safety law) of 11 April 2014.

The SSU Code provides the following types of licences for various subsoil rights:

(a) unexclusive licences for geological survey and prospection, granted by the Committee of Geology;

(b) exclusive exploration licences for solid minerals, granted by MIID;

(c) exclusive mining licences for solid minerals, granted by MIID;

(d) exclusive subsoil use licences, granted by the Committee of Geology; and

(e) exclusive artisanal mining licences and rights to land, granted by local authorities (akimats).

The Code entitles subsoil users to estimate their reserves under the KAZRC standard, which is aligned with the international Committee for Mineral Reserves International Reporting Standards (**CRIRSCO**) standards. This is to encourage investment by sharing data in an internationally-recognised format.

The ROK also has publicly available registries of natural resource indicators, which include information about land plots (e.g. location, legal status and boundaries) and the environment (e.g. soil, subsoil, flora and fauna).

03 | Mining Licences

An online register of mining licences was introduced to avoid potential overlaps of mining licences in the same area. Applications for licences can be submitted online. Subsoil rights are obtained from the state generally on a first-come, first-served basis, or in some instances by auction or competitive tender. For the purposes of this publication, references to mining licences refer only to the production of solid minerals and not artisanal mining licences.

There are different licences for various stages of mining and for different purposes; for example, exclusive exploration licences and mining licences for solid minerals. These licences are granted by different state bodies. To avoid an overlap in licensing in the same subsoil site, the licensing process has been digitised. This publication will focus on exclusive exploration licences and exclusive mining licences for solid minerals.

Exploration Licence

The exploration licence for solid minerals is granted by MIID and is designed for legal entities or individuals who wish to conduct exploration in a specific area. The licence area is exclusive to the licence holder and is formed by subsoil blocks (each block being approximately 2km²). There is no limit on the number of licences per entity, and exploration licences are transferable subject to MIID consent upon review of national security considerations. In the event of a change of control over a licence (i.e. a transfer of shares in the licence-holder resulting in a direct or indirect change in the licence-holder's interest), licence-holders will need to notify MIID so that MIID can review the transaction for national security risks. Failure to obtain MIID consent makes the transaction void under the ROK law and entitles MIID to unilaterally revoke the relevant subsoil use right if the transaction poses a threat to national security.

Holders of an exploration licence are entitled to explore all materials in their given area. The term of the licence is six years with the potential to extend it for an additional five years, subject to the fulfilment of existing licence obligations (such as the payment of fees) and mandatory surrender of 40% of blocks if the licence area included 10 or more blocks when the licence was originally issued.

Before an exploration licence can be granted, the operator must obtain a reclamation/rehabilitation security instrument to cover the cost of reclaiming a site in the event a subsoil user fails to reinstate the land in accordance with the terms of the licence. For example, the SSU Code states that subsoil users must prepare and submit mining reclamation plans and provide financial security for reclamation as part of the plan. Please see below for further details on rehabilitation bond requirements.

The SSU Code prohibits the issuance of an exploration licence to an area already licenced to another operator.

An exploration licence is crucial to obtaining a mining licence. Exploration licence holders have an exclusive right to apply for a mining licence on a priority basis within the term of the licence and in respect of the same licence area, subject to the discovery of a deposit of solid minerals with a report containing supporting evidence and details of resources and reserves.

Mining Licence

The mining licence for solid minerals is also granted by MIID. To obtain a mining licence, the applicant must submit supporting documents to MIID for approval, such as a draft mining plan.

The term of the licence is 25 years, with unlimited potential extensions not exceeding the original term of the licence. There is no limit on the number of mining licences per entity. Mining licences are transferable to other entities subject to MIID consent.

Before mining activities can begin, the mining operator is required to obtain reclamation security instruments and mine closure security instruments to ensure the mining operator complies with reclamation and mine closure requirements under mining licences. Mine closure security ensures a mine is closed responsibly and includes aspects such as monitoring the site post-closure and preventing illegal mining. Forms of security may include an account pledge or insurance agreement.

The licence area is exclusive to the mining licence holder. There is no minimum or maximum size of the licence area. Licence holders are authorised to mine any materials except for uranium, which is covered under a separate energy regime.

After a subsoil use licence is issued, if the ROK legislation introduces additional conditions for such licences, such conditions are not applicable to the licenses issued prior to the introduction of the additional conditions.

Transfer of licences

Subsoil use rights, including exploration and mining licences, can be transferred to other legal entities through transactions except in certain circumstances such as during the first year of operation for exploring solid minerals, geological surveys and prospecting precious minerals. These rights are transferred by transferring the shares in the subsoil user to another party. The previous subsoil user and the acquirer of the right would then file a joint application to the relevant authority which originally issued the licence.

The competent authority may reject the renewal of the licence or amendment of a subsoil use contract if the parties failed to obtain MIID consent when it was required or meet the requirements under the subsoil use permit, such as obtaining relevant security instruments or meeting other conditions specific to the licence when it was originally granted. Applicants have the opportunity to appeal this decision. A refusal does not disqualify the right holder from reapplying, thereby allowing for repeated applications for transfer.

Permission from the authority is not, however, required for transfer of rights within an organisation where at least 99% of equity instruments belong directly or indirectly to the subsoil user. If permission is required, subsoil users must apply to the relevant body.

Rehabilitation bond requirements

There are no requirements for the issuing bank of the rehabilitation bond to be local or for the bond to be issued under local law. However, there are requirements as to the amount of security given for exploration of the licence area for exploration and for mining.

The amount of security required for rehabilitation bonds for exploration activities is based on the number of blocks in the licence area. For mining activities, the security required is based on the cost of works for rehabilitation for the abandonment/liquidation plan of the mine. This would have formed part of the additional supporting documentation prior to obtaining the mining licence.

Security for rehabilitation for mining activities can be in the form of an account pledge, guarantee, or insurance agreement in favour of the ROK.

Displacement requirements

There is no need to acquire surface rights specifically for exploration or surface activities. Easements can be established for these activities. Public easements relating to public land are based on decisions made by the akimat. Private easements relating to private land are based on agreements between the landowner and the land user. For mining activities, displacement and compensation or leases are required. Land plot owners are entitled to ask for compensation; however, there is no specific legislation to determine the amount of compensation. In these cases, the amount of compensation may be decided by the court based on reasonableness, the financial positions of the parties and the costs of maintaining the land plot.

Change of Control provisions

With regards to requirements for change of control, MIID consent is required where there is:

(a) a transfer of subsoil use rights; or

(b) a transfer or issue of shares in the subsoil user entity enabling an organisation to directly or indirectly control the subsoil user. However, no consent for change of control is required if:

  (i) the transfer is of shares listed on a relevant stock exchange;

  (ii) the transfer of shares will result in the transferee holding less than 1% of the shares (i.e. a participation interest); or

  (iii) transactions are within a corporate structure where more than 99% of the shares of the group are owned by the same entity, provided the transferee is not registered in a tax haven.

Obtaining subsoil use rights via auction vs. tender

While subsoil use rights are generally granted on a first-come first-served basis, exploration or mining licences may be acquired via auction if:

(a) there is more than one applicant applying for the licence; or

(b) for a contract for mining of solid minerals (except for commonly occurring minerals and uranium) concluded before 29 June 2018. Contracts concluded before 29 June 2018 were terminated by the MIID and these licence areas were re-opened to applicants to facilitate the transition to the new subsoil use regime.

04 | Rights of Foreign Investors

There are no restrictions on foreign investors holding mining rights. Such individuals or legal entities can hold mining rights provided that they comply with the requirements of the SSU Code. Foreign investors can apply for licences in the same way as national entities (via the online portal). However, MIID retains the discretion to refuse applications for licences. Tax legislation in the ROK does not distinguish between foreign and national investors. There is no requirement for a minimum government stake in mining projects.

05 | Government's Pre-emptive Rights

The ROK has pre-emptive rights over the acquisition of subsoil use rights to strategic subsoil plots and objects relating to subsoil use which are available for sale on an organised securities market, such as rights in shares.

The official list of strategic subsoil sites approved by the ROK includes sites in the ROK sector of the Caspian sea containing a uranium deposit or geological oil reserves of over 50 million tonnes or natural gas reserves of over 15 billion cubic metres. Importantly, the classification of a site as "strategic" does not seem to be restricted by the type of mineral.

We note, however, that the Precious Metals Law provides for certain specific requirements in relation to the refining and export of precious metals and ores. In particular, the Precious Metals Law provides that precious metals and ores containing precious metals must be processed at a ROK refinery unless the refinery declines to take on the work. If the refinery declines to process the metals/ores, the subsoil user is permitted to export the unrefined metals/ores. Further, the National Bank has a pre-emption right over the purchase of refined gold and refined gold may only be exported from ROK if the National Bank has declined to purchase such gold.

06 | Foreign Lending into Kazakhstan

There are generally no restrictions on foreign lending into the country, although lenders should note the restrictions on taking security over subsoil rights.

Onshore mining companies can hold foreign currency in offshore accounts. Under the Currency Control Law, they must notify or register the transaction with the National Bank of the ROK (the **National Bank**) depending on the type of transaction.

Entities must notify the National Bank if:

(a) they enter into foreign currency transactions greater than USD 50,000; or

(b) they open bank accounts with a foreign bank. Entities must register the transaction with the National Bank:

  (i) if they are in receipt or transfer USD 500,000 between residents and non-residents of the ROK; and

  (ii) if the entity is a non-resident with a ROK branch, they receive or transfer foreign currency between their offshore branches and the ROK branches.

It is possible to obtain a pledge over subsoil rights for a loan so long as the purpose of the loan is linked to the subsoil use right. As part of registering the loan, the pledge agreement should be registered with the National Bank.

07 | Foreign Exchange Controls

The ROK has general export and marketing restrictions, including the requirement for the exporter to obtain customs clearance, a customs fee, export customs duties with regards to non-precious metals, a VAT tax report in respect of the export turnover, obtaining permission from the MIID to export solid minerals and providing additional documents (e.g. documents confirming the lawfulness of extraction).

Transactions for the repatriation of the proceeds of sale from minerals must be registered with the National Bank, along with relevant applications, loan agreements, amendments and translations into Kazakh or Russian where necessary.

08 | Fees, Taxes, Duties and Royalties and Tax Incentives

A key issue for investors looking to invest in the ROK's mining sector is the frequent amendment to the tax legislation. Mining companies are required to pay corporate income tax, VAT on minerals, property tax, land tax at varying rates and subsoil use taxes and duties. Additionally, right holders need to pay the relevant fees for their subsoil use rights:

(a) **Signing bonus:** A signature bonus must be paid by the mining company upon obtaining a subsoil use right.

(b) **Mineral extraction tax** (**MET**): MET is a volume-based tax applicable to extracted metals at specified rates. Pricing is determined based on the value of taxable volume of the extracted reserved, calculated on the basis of:

  (i) the average exchange price of the minerals that have official price quotations on the London Metal Exchange or the London Bullion Market Association;

  (ii) the weighted average sale price in respect of the other minerals to be sold; and

  (iii) the costs of actual mining and primary processing in respect of the minerals which will either be taken to further processing or used as part of the mining operations.

(c) **Rental fees**: Rental fees are also payable as a licence obligation under exploration and mining licences based on the surface area of the subsoil site and type of licence.

(d) **Payment on compensation for historical costs:** Payment for "historical costs" to the government for conducting a geological survey before the execution of a subsoil use contract is also required – this is a fixed payment in instalments.

(e) **Commercial discovery bonus:** Additionally, payment of a commercial discovery bonus applies to licences issued prior to 31 December 2017. This entails the payment of a fee to the state by the licence holder when a discovery of minerals is made in the licenced area.

(f) A direct or indirect change of control in the mining entity may trigger tax on capital gains (which is collected from the buyer).

Tax incentives for mining investors

While subsoil users are generally not entitled to tax incentives there are certain investment preferences (including tax benefits from which subsoil users may be able to benefit.)

If a subsoil user enters into agreements or investment projects with the ROK to invest in developing and upgrading manufacturing facilities, their mining activities may be subject to tax exemptions such as exemptions from import VAT for specified products for up to five consecutive years. To enjoy these tax incentives, the subsoil user must meet several criteria, such as the requirement for a minimum government stake in the investment projects or a minimum amount to be invested in the construction of new production facilities or modernisation of existing production facilities.

There is also potential for subsoil users to negotiate an intergovernmental agreement for tax preferences directly with the ROK.

Tax regulations, tax incentives and royalties are subject to change and the applicable regulations and rates should be considered and evaluated by investors and other stakeholders in mining projects in the ROK at the relevant time to ensure that the financial evaluation of the project is based on the applicable tax and royalty rates at the relevant time.

09 | Protection of the Environment

The primary legal framework for environmental protection is the Environmental Code (effective as of 2 January 2021), which stipulates that activities with potential environmental impact require a permit. Such activities are categorised based on level of potential negative environmental impact. Relevant to mining are Category I and II which require permits due to significant or moderate negative impacts. There are two types of permits:

(a) integrated environmental permits that could have a significant impact on the environment, usually reserved for Category I activities such as the extraction and enrichment of solid minerals; and
(b) environmental impact permits reserved for Category II activities that could have a moderate negative impact on the environment, such as exploration activities involving the extraction of rock mass.

For Category I facilities, permits must be obtained from the Committee for Environmental Regulation and Control. For Category II, the permit must be obtained from the akimat. Applications to the relevant permitting authority must include documentation for construction facilities, draft emission limits, a draft waste management program, environmental control documentation, and other necessary documents.

Prior to applying for a permit for mining or exploration, the right holder must conduct an environmental impact assessment (EIA) and produce an EIA report. Public hearings must be conducted in the affected area to inform the community about the proposed subsoil activities. The public must also be granted access to materials to properly consider the proposed activities. Community remarks from public hearings are publicised on local authority websites, but there is no obligation under the SSU Code to consider consultation results when operating the mine, except when formulating liquidation plans.

The SSU Code prohibits subsoil activity in environmentally protected areas, with exceptions for exploration activities in state-protected areas subject to state body approval and mining activities subject to governmental approval. The Code lists areas where mining and exploration are prohibited, namely areas with clean or potable water, towns and cities, and lands for defence and national security.

10 | Enforcement Regime

The ROK is party to treaties with approximately 50 countries establishing guarantees for the protection of investment activities. All treaties stipulate the right of an investor to resolve any disputes via international arbitration. For example, the ROK signed a bilateral investment treaty (BIT) with the UK which came into force in the ROK on 9 January 1999. The ROK is also a member of the Hague Convention which simplifies cross-border enforcement of judgments.

Furthermore, the ROK is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

As to governing law, the parties have the flexibility to choose the applicable law governing their contract.



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