

Legal Regulation of Subsoil Usage in Russia, Kazakhstan and Kyrgyzstan: a Comparative Analysis.

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This article will provide readers with a comparative analysis of certain key aspects of the legal regulation of subsoil use in three countries – Russia, Kazakhstan and Kyrgyzstan. The choice of these countries for the comparative analysis was intentional. Many investors view these countries as being of strategic interest, and the common legal and cultural heritage of these markets is of economic interest whether market entry is phased or parallel.

Subsoil law in Russia, Kazakhstan and Kyrgyzstan has many similarities, reflecting the common sources of the legislation. However, the development level of legal regulation of subsoil use, and in some cases the conceptual approach to a number of key issues, differs considerably in each country.

The main legal act governing subsoil use in these countries is the law on subsoil. The present law in Russia is the RF Law on Subsoil, adopted February 21, 1992, in Kazakhstan the RK Law on Subsoil and Subsoil Use, adopted January 27, 1996, and in Kyrgyzstan the KR Law on Subsoil of June 2, 1997.

Below we provide a comparative analysis of certain institutional issues in subsoil use in each country.

ALLOCATION OF SUBSOIL USE RIGHTS

Kyrgyzstan

Kyrgyzstan uses a license system to grant subsoil use rights, which is based on administrative law and provides for subsoil use in accordance with a license issued by a state authority, with the terms of subsoil use established in the license itself. A license agreement is also concluded in addition to the license, which is a document reflecting a subsoil use permit issued by the state subsoil use authority. The license agreement between the subsoil owner and the licensee sets forth the terms of subsoil use, including production sharing, payments, safety and environmental requirements, etc. The license agreement is an integral part of the license.

A new draft Subsoil Law has been submitted to the Kyrgyzstan parliament¹, which retains the licensing system for granting subsoil use rights. We agree with comments by

¹ The draft Law on Subsoil was submitted to parliament by Kyrgyzstan Government resolution No. 201 of May 8, 2008

Murat Madykov, who said that: “the new Law should ensure the rights of the subsoil user to the licensed subsoil, as the validity and inviolability of the license are, as a rule, the entire meaning of the company’s existence and activities. The current subsoil law provides grounds for suspension or revocation of licenses, and allows the licensor, i.e. the State Agency for Geology and Mineral Resources of the Kyrgyzstan Government to make such decisions. Decisions on the suspension or revocation of licenses must be taken on a transparent legal basis, with consideration for the arguments of interested parties.”²

Kazakhstan

The contract system is considered a more progressive means of granting subsoil use rights than licensing. This system moves the relationship between the state and the subsoil user from administrative law to the field of civil law. Most importantly, this allows the subsoil user to set terms and fix them in the subsoil use contract, rather than simply accepting the state’s license conditions. We see the development of effective means of cooperation in various circumstances, which will minimize the scope for arbitrary action by officials, as the principal advantage of the contract system of granting subsoil use rights.

Today, Kazakhstan has a contract system of granting subsoil use rights. Tenders are used as the basic framework for granting rights, with the contract system operating as follows. The winner of a tender for works at a subsoil plot concludes a contract with the competent authority for the performance of subsoil use operations. The subsoil use right is deemed granted and acquired only upon registration of the contract³. In the event the tender winner does not submit a draft contract for the performance of subsoil use operations within seven months of the decision declaring the winner of the tender, the tender commission will cancel the decision declaring the winner of the tender. Upon the tender winner submitting the draft contract on time, the draft undergoes expert assessment and approval by state authorities. On the basis of positive opinions of the state authorities and the outcome of discussion of the terms, the competent authority concludes a contract with the winner of the tender. If the contract is not concluded within eighteen months of the date the tender winner was determined, the tender commission must cancel the decision declaring the winner⁴.

Russia

Russia’s applicable subsoil law is closer to administrative than to civil (i.e. private) law. As in Kyrgyzstan, Russia has a licensing system for subsoil use. This means that the state, as subsoil owner, unilaterally sets the rules of subsoil use and grants subsoil users their use rights. In certain cases provided by the Subsoil Law, state authorities are entitled to unilaterally cancel, suspend or restrict subsoil use rights⁵.

² The New Law on Subsoil: Some Recommendations for Improvement, Murat Madykov (www.ibc.kg)

³ P. 8, art. 41-7 Kazakhstan Law on Subsoil and Subsoil Usage, of January 27, 1996

⁴ P. 9 art. 41-7 of the Law on Subsoil and Subsoil Usage, of January 27, 1996

⁵ For example, upon the subsoil user systematically violating subsoil usage rules, failing submit reports required by RF subsoil law, and in other cases.

The rights to use a subsoil plot within specified boundaries for a specific purpose within an established term, subject to compliance with the agreed conditions, are set out in the license. Although RF law does not require the additional conclusion of any agreement to give rise to subsoil rights, the state authorities and the subsoil user may enter into an agreement establishing the conditions of subsoil use, and likewise obligations of the parties with regard to performance of the agreement.

MEANS OF GRANTING RIGHTS

Another important institution is the means of granting subsoil use rights. While in Kyrgyzstan and Kazakhstan tenders and direct negotiations are used to grant subsoil use rights, in Russia auctions are also used.

The new draft Subsoil Law currently before the Kyrgyzstan parliament also provides for auctions as a means of granting subsoil usage rights. Expert Valentin Bogdetsky believes this is “the most acceptable” form of licensing. He gave an example of when licenses in Kyrgyzstan were issued “to anyone”. “Right now practically anyone can buy a license to develop a deposit, and then sell it on to a mining company,” he said⁶.

In terms of the relationship between direct negotiations and tenders/auctions, the law of all three countries prefers the more transparent tender/auction procedure as a matter of course.

Kyrgyzstan

The Kyrgyzstan Subsoil Law determines that tenders shall be held for gold, oil, gas, and other subsoil resources of national significance by decision of the Government of the Republic of Kyrgyzstan.

The state authority for subsoil use, determined by the Government of the Republic of Kyrgyzstan, grants subsoil rights through direct negotiations upon applications by natural persons and legal entities⁷. The Regulations on Subsoil Use Licensing Procedure state that direct negotiations may be used for licenses to develop deposits of common resources, or locally significant deposits, exploration of sites with uncertain prospects, and geological studies performed to state orders⁸.

The new draft Subsoil Law provides that direct negotiations may be held to grant rights to use of subsoil that does not involve geological studies or development of a deposit.

⁶ If the new Law on Subsoil is passed, licenses will be issued by means of auctions (IA AKI-Press report of 12.11.08)

⁷ Art. 16 of the Kyrgyzstan Law on Subsoil of July 2, 1997.

⁸ Clause 4 of the Regulations on the Procedure for Licensing Subsoil Users (approved by PP KR of June 14, 2002)

As noted above, it is likely that auctions will be introduced as a means of granting subsoil use rights in Kyrgyzstan. The auction winner will be the bidder that offers the highest price for the subsoil use rights.

The new Subsoil Law also provides for subsoil use rights to be granted “by right of first application”. Subsoil use rights will be granted by right of first application for: (1) deposits, mineral prospects and promising sites not in the List of Deposits, Prospects, and Promising Sites offered at auction; (2) deposits, mineral prospects and promising sites for which two auctions or tenders have failed.

Kazakhstan

Tenders are the main means of allocating subsoil use rights in Kazakhstan. A contract for exploration, extraction, or combined exploration and extraction is concluded on the basis of the results of the tender.

The Kazakhstan Subsoil Law provides a clear and exhaustive list of the cases in which subsoil use rights may be granted by direct negotiations⁹. Direct negotiations without a tender may be used to conclude contracts:

- For extraction operations with a party that already holds an exclusive right to obtain subsoil use rights in connection with a commercial discovery made on the basis of an exploration contract;
- For construction and/or operation of underground structures not related to exploration and/or extraction;
- For exploration and/or extraction of common resources when building/reconstructing/repairing railways or roads and public bridges;
- For exploration and/or extraction operations with a national company¹⁰.

Russia

By virtue of its federative nature, subsoil use rights are granted in Russia at the federal and at regional levels. The granting of subsoil use rights without a tender or auction would be more of an exception than the general rule. In addition to the standard cases where subsoil use rights may be granted without a tender, such as the granting of use rights for locally significant subsoil for construction and operation of underground structures of local significance not related to the extraction of resources, there is one

⁹ Art. 13.1-1 of the Kazakhstan Law on Subsoil and Subsoil Usage of January 27, 1996

¹⁰ A “national company” is a joint stock company created by decision of the Government in which the state or a national holding is the sole shareholder, that performs activities in various areas of subsoil usage on terms established by law of the Republic of Kazakhstan

other interesting ground for granting subsoil use rights without a tender/auction – a decision of a regional state authority to grant short-term (up to one year) use rights for common resources, to enable a legal entity to conduct activities at a subsoil plot containing common resources for which the use rights have been revoked¹¹.

The main criterion for determining the winner in an auction of subsoil use rights is the size of the one-time payment for the subsoil use rights. Tenders are judged on the scientific and technical level of the geological study program and subsoil use, high extraction rates, national defense and state security, and other criteria.¹²

TERM OF SUBSOIL USE RIGHTS

Kyrgyzstan

The Kyrgyzstan Subsoil Law provides that a license for geological studies of subsoil grants the holder exclusive rights to conduct surveys within the bounds of the licensed area **for two years**, with subsequent **prolongation to 10 years**, if all license conditions are met.

The Kyrgyzstan Subsoil Law provides that a license to develop a mineral resource deposit grants the holder exclusive rights for the term established in the technical plans, **but not for more than 20 years, with subsequent extensions until the mineral reserves are exhausted.**

Kazakhstan

The Kazakhstan Subsoil Law provides that an exploration contract may be concluded for **a term of up to six years**. The contractor is entitled to prolong the contract, subject to compliance with the working program and the annual programs of work specified in the contract. The contract can be prolonged twice, for up to two years each time.

Extraction contracts are concluded for **up to 25 years**, and for **up to 45 years** for deposits with large or unique mineral reserves. Extraction contracts may be prolonged upon the subsoil user applying for prolongation at least 12 months before the contract expires.

Combined exploration and extraction contracts are concluded for a period including the time required for exploration and extraction, allowing for prolongation.

Russia

According to the Subsoil Law, subsoil plots can be allocated to users for a specified period or for an indefinite term. For the purposes of geological studies, subsoil plots are granted for a **term of up to five years, or for a term of up to 10 years** for geological

¹¹ Art. 10.1. of the Law on Subsoil of February 21, 1992

¹² Art. 13.1. of the Law on Subsoil of February 21, 1992

studies of subsoil plots in RF internal waters, territorial seas, or the continental shelf. Subsoil plots for mineral extraction are allocated for the **period in which the mineral deposit will be worked**, calculated on the basis of the deposit feasibility study, and ensuring rational use and protection of the subsoil.

Subsoil plots may be allocated **for an unlimited term** for the construction and operation of underground structures not related to mineral extraction, construction and operation of underground structures used in waste disposal, construction and operation of oil and gas storage facilities, and also to form specially protected geological sites and other purposes.

Provided the subsoil user does not breach the license terms, the term for use of the subsoil plot may be extended, if necessary, to complete exploration and assessment, develop a deposit, or for mitigation works.

TRANSFER OF SUBSOIL USAGE RIGHTS

The law of all three countries provides for the transfer of subsoil use rights to differing degrees.

Kyrgyzstan

In Kyrgyzstan the only possible means of transfer is a pledge of the license. According to the Kyrgyzstan Subsoil Law, a licensee may, **with the consent of the state subsoil authority**, pledge the license to a third party to secure financing for a project at the licensed area. If as a result of enforcement of the pledge the license is transferred to the third party, the third party must accept all the obligations of the previous licensee established in the license agreement¹³.

The draft new Subsoil Law provides that licensees may transfer subsoil use rights to third parties at their discretion, subject to the written consent of the state subsoil authority, including to secure financing for a mining and/or geological exploration project (at the licensed plot), upon expiration of the first year of development of the licensed area in compliance with the license conditions.

In practice, as a rule, subsoil use licenses are transferred by selling the legal entity that holds the license, by means of the sale of 100% of shares/participatory interest in the company. In that regard neither existing Kyrgyzstan law nor the new draft Subsoil Law provide any due legal regulation.

Kazakhstan

The transfer of subsoil use rights is regulated in greater detail in Kazakhstan. The law considers the transfer of shares/participatory interests in the subsoil user, denial of permission to transfer subsoil use rights, and other matters.

¹³ Article 13 of the Kyrgyzstan Law on Subsoil of July 2, 1997

The Kazakhstan Subsoil Law provides that the full or partial transfer of subsoil use rights to another party on paid or gratuitous basis, including by means of the alienation of shares/participatory interest in the legal entity that is the subsoil user, including as a contribution to the charter capital of a new legal entity, transfer of subsoil use rights as part of the sale of a property complex (alienation of shares/participatory interest in a legal entity that is a subsoil user) as part of receivership in the course of bankruptcy of the subsoil user, or during privatization of a subsoil user, and likewise the pledge of subsoil use rights, requires the **permission of the competent authority**. The competent authority issues permission or a substantiated denial of permission within 45 days of an application¹⁴.

A transaction to transfer subsoil use rights concluded without permission is considered void ab initio.

The competent authority makes its decision on whether to issue permission for the transfer of subsoil use rights on the basis of the subsoil user's application and the enclosed information on the natural person or legal entity to which the subsoil user wishes to make the transfer.

Subsoil use rights cannot be transferred for two years after the contract enters into force, except in the case of transfer upon liquidation of the legal entity, enforcement of a pledge against a pledged subsoil usage right, or transfer of the subsoil use right by inheritance or upon reorganization of the legal entity. This restriction does not apply in the event of a transfer or acquisition of subsoil use rights by a national company or its subsidiary.

Russia

RF subsoil law establishes the principle of limited circulation of subsoil use rights – in accordance with the Subsoil Law, subsoil use rights may be alienated or pass from one person to another to the extent federal law permits such circulation. According to the general rule, a legal entity **cannot transfer subsoil usage rights to third parties**, including by way of assignment of rights established by civil law, except in the cases provided in the Subsoil Law or other federal laws.

Among the exemptions from the above rule in the Subsoil Law are reorganization of or cessation of activities by the subsoil user, transfer of subsoil usage rights to a subsidiary or parent company, acquisition of the property (property complex) of a bankrupt enterprise by another enterprise in accordance with the procedure provided in the Federal Law on Insolvency (Bankruptcy). Upon transfer of the subsoil use rights the subsoil use license must also be reissued.

The transfer of use rights for federally significant subsoil plots to legal entities with foreign investment, or a group of persons including a foreign investor capable of

¹⁴ Article 14 of the Kazakhstan Law on Subsoil and Subsoil Usage of January 27, 1996

disposing directly or indirectly of more than 10% of voting shares in such legal entity, determining the decisions taken by the legal entity, or appointing the CEO and/or more than 10% of the collegial executive body, is permitted only in exceptional cases by decision of the RF Government.

PREFERENTIAL RIGHT OF THE STATE TO PURCHASE SUBSOIL USE RIGHTS

Kazakhstan

In Kazakhstan, the state has a preferential right to purchase subsoil use rights, and shares in a subsoil user or the parent company of a subsoil user upon their alienation.

The Kazakhstan Subsoil Law provides that: “For the preservation and strengthening of the resource and energy foundations of the national economy, the state, represented by the Government of the Republic of Kazakhstan, or by decision of the Government of the Republic of Kazakhstan the national management holding or national company for subsoil use, shall have priority over the other party to a contract or the participants of a legal entity holding subsoil rights, and other parties in new or existing contracts to acquire subsoil use rights or a portion thereof that are being alienated, or a participatory interest/shares in a legal entity that is a subsoil user, or in a legal entity that is able directly and/or indirectly to determine the decisions, or influence the decisions taken by a subsoil user, if the principal activity of the said legal entity is related to subsoil use in the Republic of Kazakhstan, on terms no worse than those offered to other buyers.”¹⁵

Kyrgyzstan

Kyrgyzstan Subsoil Law does not contain similar provisions on the preferential right of the state to purchase subsoil rights alienated by any subsoil user.

However, the Kyrgyzstan Law on Strategic Objects of the Kyrgyz Republic, of May 23, 2008 includes subsoil deposits among the strategic objects. In accordance with the law, the list of strategic objects is determined by the Government of Kyrgyzstan on the basis of recommendations by the Kyrgyzstan Security Council. The Government of Kyrgyzstan approved the List on August 14, 2009. The list includes, in particular, subsoil users such as ZAO Kumtor Gold Company, ZAO Jeruyaltyn, and OsOO Andash Mining Company.

In accordance with the Law on Strategic Objects, in the event the owner intends to sell a strategic object in municipal, private or other ownership, the Kyrgyzstan Government has a preferential right to purchase the strategic object in accordance with the procedure established by Kyrgyzstan law¹⁶.

¹⁵ Art. 71 para. 2 of the Kazakhstan Law on Subsoil and Subsoil Usage of January 27, 1996

¹⁶ Para. 1 art. 4 of the Kyrgyzstan Law on Strategic Objects of the Kyrgyz Republic

Russia

Russian subsoil law does not grant the state preferential rights to purchase subsoil use rights.

SPECIAL STATE RIGHTS CONCERNING STRATEGICALLY SIGNIFICANT DEPOSITS

Kazakhstan

The Kazakhstan Subsoil Law provides for the concept of “subsoil plots (deposits) of strategic significance”. The term applies to major deposits. A list of subsoil plots (deposits) of strategic significance was approved by Kazakhstan Government Resolution of August 13, 2009, No. 1213.

For these deposits, special legal rules govern the key issues of the state’s relationship with the subsoil user – repudiation of the contract at the Government’s initiative, amendment at the initiative of a competent authority, and unilateral termination of the contract if the subsoil user refuses to make the required amendments.

The Kazakhstan Subsoil Law provides that in the event that the actions of a subsoil user using a subsoil plot (deposit) of strategic significance result in a material change in the economic interests of the Republic of Kazakhstan that creates a threat to national security, the competent authority has the right to demand amendment of the contract conditions to restore the economic interests of the Republic of Kazakhstan¹⁷. Formally, the law provides the subsoil user with the opportunity to hold negotiations with the competent authority concerning the proposed amendments. However, the law effectively obligates the subsoil user to agree the amendments to the contract within a designated period. In the event the subsoil user refuses to hold negotiations or to make the required amendments to the contract, the competent authority has the right to unilaterally terminate the contract.

The Kazakhstan Subsoil Law also provides that at the initiative of the Government the competent authority has the right to unilaterally repudiate a contract in the event the subsoil user’s actions in use of a subsoil plot (deposit) of national significance result in a material change in the economic interests of the Republic of Kazakhstan that creates a threat to national security¹⁸.

It should be noted that applicable Kazakhstan law does not define “material change in the economic interests of Kazakhstan that creates a threat to national security”.

Kyrgyzstan

¹⁷ P.1. art. 45-2 of the Kazakhstan Law on Subsoil and Subsoil Usage of January 27, 1996

¹⁸ P.1 art. 45-3 of the Kazakhstan Law on Subsoil and Subsoil Usage of January 27, 1996

Unlike Kazakhstan, Kyrgyzstan law does not contain provisions allowing competent authorities to repudiate or demand the amendment of contracts relating to strategic deposits, as described above. At the same time, art. 3.1 of the Kyrgyzstan Law on Strategic Objects of the Kyrgyz Republic, establishes that the Government of Kyrgyzstan may set special requirements for the functioning and operation of strategic objects for national security considerations. What is meant by “special requirements for functioning and operation” in this provision is unclear. The Kyrgyzstan government has yet to adopt any act to implement this provision of the Law.

Russia

The Russian Subsoil Law contains the notion of “federally significant subsoil plots”, a classification that can be applied to individual subsoil plots¹⁹. Geological studies of subsoil and/or exploration and extraction of mineral resources at federally significant subsoil plots are classed as activities of strategic significance for national defense and state security²⁰.

In accordance with the Subsoil Law, only Russian legal entities can be subsoil users of federally significant subsoil plots. In certain cases, the RF Government may establish additional restrictions on participation in tenders and actions for the right to use federally significant subsoil plots for Russian legal entities with foreign investors. Stricter rules apply to federally significant subsoil plots on the RF continental shelf – subsoil users of these sections must be Russian legal entities with at least five years experience in subsoil use, and in which the Russian Federation owns at least 50%²¹.

The Subsoil Law provides that if in the process of geological studies of subsoil performed by a foreign legal entity or a legal entity with foreign investment, including under a combined license, a mineral deposit is found that meets the criteria for a federally significant subsoil plot, the RF Government may decide:

- To refuse to grant the rights to use of the subsoil plot for exploration and extraction of mineral resources for the said federally significant subsoil plot to the said entity, or
- In the case of geological studies under a combined license – to cancel the right to use the subsoil plot for exploration and extraction at the said federally significant subsoil plot.

¹⁹ A list of federally-significant subsoil plots is officially published by the federal authority for management of the state subsoil fund in accordance with the procedure established by the RF Government. Federally significant subsoil plots include subsoil plots (i) containing deposits of rare or especially valuable resources (uranium, diamonds, especially pure quartz, yttrium group rare earth metals, nickel, platinum group and other resources), (ii) containing extractable oil reserves of over 70 million tons, gas of more than 50 billion tons, vein gold of 50 tons, copper of 500,000 tons, (iii) in internal waters, territorial waters, on the RF continental shelf, (iv) use of which requires use of defense, security land.

²⁰ Art. 6 of Federal Law No. 57-FZ on Procedure for Foreign Investment in Economic Undertakings of Strategic Significance for National Defense and State Security

²¹ Art. 9 of the Law on Subsoil of February 21, 1992.

Such decision may be taken in the event of a threat to national defense and state security arising. Under the Federal Law on the Procedure for Foreign Investment in Economic Undertakings of Strategic Significance for National Defense and State Security, a threat to national defense and state security is deemed to be a combination of conditions and factors creating a threat to vital interests of identity, society, and/or the state.

The procedure for adoption of such decisions was established by RF Government Resolution of 16.09.2008 No. 697. The procedure for payment of the related compensation was established by RF Government Resolution of 10.03.2009 No. 206, which approved the Regulations on the Compensation of Expenses on Exploration and Assessment of a Discovered Mineral Deposit, and the One-time Payment Paid in accordance with the Conditions of a Combined License to Use a Subsoil plot to Persons Denied the Right to Use a Subsoil plot for Exploration or Extraction of Minerals in a Federally Significant Subsoil plot in accordance with Article 2.1.5 of the RF Subsoil Law, and on the Payment of their Remuneration.

PROSPECTS FOR THE DEVELOPMENT OF SUBSOIL LEGISLATION

Russia

Several years ago, there were discussions in Russia on the adoption of a new Subsoil Law that would change many aspects of the existing legal regulation of subsoil use. Among the proposals were the following significant amendments: moving from a license system of granting rights to a contractual system, establishing sole federal ownership of subsoil and mineral deposits therein, significant restrictions on subsoil use by foreign entities, and the introduction of registration of subsoil use rights as rights to real estate.

However, the draft law, which has been returned several times for further work, is still under consideration by the RF State Duma²². In the end, the current Subsoil Law was amended, rather than a new one passed. A significant portion of the amendments were adopted as part of a package of laws restricting foreign investment in economic undertakings of strategic significance to national defense and state security²³. Restrictions were imposed on foreign investors acquiring shares in economic undertakings engaged, in particular, in geological studies of subsoil and/or exploration and extraction of mineral resources at federally significant subsoil plots. Thus, the expected move to a civil law system of allocating rights to subsoil use did not occur, and the amendments were primarily concerned with restricting subsoil use by foreign entities.

²² According to information on the RF State Duma's official "Legislative Activity" website [<http://asozd.duma.gov.ru/>], the last event for the draft Law on Subsoil – appointment of the responsible committee (State Duma Committee for Natural Resources, Natural Resource Use and the Environment) – took place February 5, 2008.

²³ Federal Law of 29.04.2008 No. 58-FZ on Amendment of Certain Legislative Acts of the RF and Declaration of Certain Provisions of RF Legislative Acts Lapsed upon the Adoption of the Federal Law on the Procedure for Foreign Investment in Economic Undertakings of Strategic Significance for National Defense and State Security, Federal Law No. 57-FZ on Procedure for Foreign Investment in Economic Undertakings of Strategic Significance for National Defense and State Security.

At present, there are several draft laws on subsoil use in the RF State Duma. The proposed assignments concern, inter alia, the following matters: abolition of the payment for providing geological information; enabling adjustment of the boundaries of a subsoil plot at the request of a subsoil user, if it appears that a deposit extends beyond the boundaries of a mining or geological allocation.

The RF Ministry of Energy is also working on a law on oil, which will govern the legal relations concerning specific issues in the oil sector.

Kazakhstan

The Kazakhstan Government submitted a draft new Subsoil Law to the Kazakhstan Parliament by resolution No. 993 of October 31, 2008.

The main innovations in the law are a simplified procedure for granting subsoil use rights on the basis of tenders and direct negotiations, regardless of the resource for which the rights are granted.

The criteria for selecting tender winners have been reduced to three parameters: the proposed signing bonus, spending on social and economic development in the region, development of infrastructure, and the proposed level of Kazakhstan content of goods, works, services and staff in the bid.

The law also provides for regulation of (i) the procedure for issuing permits for the transfer of subsoil use rights and participatory interests/shares in legal entities with subsoil usage rights, and (ii) the procedure for the state to exercise its priority right to purchase an alienated subsoil use right, including participatory interests/shares in legal entities that hold subsoil use rights and legal entities that are capable of directly or indirectly determining the decisions or affecting decision making by the subsoil user.

The draft law provides procedures for compulsory termination of subsoil use contracts, grounds and procedure for reinstating contracts, including out-of-court procedures for reinstating contracts.

Another new provision is that project documentation must now be approved before concluding the contract and approving the working program. This will ensure that the design documentation, of which an exhaustive list is included, meets all requirements.

Furthermore, for the purposes of securing state interests, the draft law establishes a phased procedure for raising Kazakhstan content in the goods, works, and services procured by subsoil users. A specific level of content is to be established in each contract, with penalties for subsoil users that do not meet the requirements.

The draft law also abolishes combined exploration and extraction contracts and resolves issues relating to moving from the exploration phase to extraction. A person that

discovers and assesses a deposit under an exploration contract will have the exclusive right to conclude an extraction contract, without a tender²⁴.

Finally, the draft law makes significant changes to the provisions on contract stabilization. While at present subsoil users are guaranteed that no amendments adversely affecting their position will apply, the draft law provides that amendments will not apply if they have a direct adverse impact on the results of the subsoil user's commercial activities. However, the draft law does not specify how an adverse impact on the results of commercial activities would be defined.

Kyrgyzstan

On June 12, 2009 the President of Kyrgyzstan adopted a Decree on Urgent Action to Reform the Administration of the Mining Sector of the Republic of Kyrgyzstan. This document acknowledges that ensuring real development of the sector will require fast and thorough reform of the mining sector, and offers a program of action to improve work in the sector, including the adoption of a new subsoil law and a set of regulatory acts governing various aspects of subsoil use.

According to a statement on the official website of the State Geology and Mineral Resource Agency of the Government of Kyrgyzstan: "The reforms will be systemic, thorough and wide-ranging, but all actions taken will work together towards the primary objective – achieving immediate strong growth in the country's macroeconomic indicators through the development of mineral resources. Favorable and transparent conditions will be created to attract investment."

We mentioned above that a new draft Subsoil Law intended to improve legal regulation of subsoil use issues has been submitted to the Kyrgyzstan parliament. We discussed certain innovations in the draft law above.

MISCELLANEOUS

As we have seen above, over the last two years these countries have taken action to systematically improve their subsoil use law. This work has been conducted on the basis of experience gained in applying subsoil use law over the years since the previous laws were passed in 1997-1998. At the same time, legislative reform is progressing gradually, as can be seen in the Russian Federation, for example.

It is particularly noteworthy that the changes in subsoil use laws in the three countries are not identical, and they reflect the actual level of development of the country and its laws, and are based on the actual situation on the market in each country.

²⁴ Mineral Resources – National Interests, an interview with Kazakhstan Parliament Mazhilis Committee Chairman R. Nigmatulin (Laura Tusupbekova).

