



# ICLG

The International Comparative Legal Guide to:

## **Mining Law 2018**

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A practical cross-border insight into mining law

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**General Chapter:**

1	<b>New Policies, New Priorities: A Review of Mining and Minerals Policy and Legislative Changes by Governments</b> – Tom Eldridge, Mayer Brown International LLP	1
---	--	---

**Country Question and Answer Chapters:**

2	<b>Angola</b>	VdA Vieira de Almeida: João Afonso Fialho & Marília Frias	5
3	<b>Armenia</b>	Concern Dialog law firm: Aram Orbelyan & Roustam Badasyan	11
4	<b>Australia</b>	Allens: Gerard Woods & Daniel Knight	16
5	<b>Brazil</b>	TozziniFreire Advogados: Luiz Fernando Visconti & Caio Mimessi Fransani	24
6	<b>Canada</b>	Lawson Lundell LLP: Khaled Abdel-Barr & Karen MacMillan	31
7	<b>Chile</b>	Claro & Cia.: Nicolás Eyzaguirre	42
8	<b>Colombia</b>	Martínez Córdoba & Abogados Asociados: Adriana Martínez-Villegas	49
9	<b>Congo – D.R.</b>	VdA Vieira de Almeida: Matthieu Le Roux & Olivier Bustin	56
10	<b>Ethiopia</b>	Latournerie Wolfrom Avocats: Christopher Dempsey & Johanna Cuvex-Micholin	62
11	<b>Gabon</b>	Project Lawyers: Jean-Pierre Bozec	68
12	<b>Ghana</b>	Reindorf Chambers: Fui S. Tsikata & Dominic Dziejornu Quashigah	75
13	<b>Greenland</b>	Windahl Sandroos & Co.: Bo Sandroos	81
14	<b>Indonesia</b>	Ali Budiardjo, Nugroho, Reksodiputro: Woody Pananto & Freddy Karyadi	87
15	<b>Ivory Coast</b>	Bilé-Aka, Brizoua-Bi et Associés: Joachim Bilé-Aka & Moussa Traoré	99
16	<b>Kazakhstan</b>	GRATA International: Yerbolat Yerkebulanov & Mikhail Abdulov	105
17	<b>Kenya</b>	Kieti Advocates LLP: Clarice Wambua & Sammy Ndolo	113
18	<b>Macedonia</b>	Georgi Dimitrov Attorneys: Katarina Ginoska & Marija Jankuloska	118
19	<b>Mauritania</b>	Latournerie Wolfrom Avocats: Christopher Dempsey & Johanna Cuvex-Micholin	124
20	<b>Mexico</b>	RB Abogados: Enrique Rodríguez del Bosque	132
21	<b>Mongolia</b>	GTs Advocates LLP: Zoljargal Dashnyam & Mend-Amar Narantsetseg	140
22	<b>Mozambique</b>	TPLA – Taciana Peão Lopes & Advogados Associados: Taciana Peão Lopes & André Cristiano José	148
23	<b>Namibia</b>	Engling, Stritter & Partners: Axel Stritter	156
24	<b>Poland</b>	Wolf Theiss: Ronald B. Given	167
25	<b>Portugal</b>	VdA Vieira de Almeida: Manuel Protásio & Marília Frias	174
26	<b>Russia</b>	Melnitsky & Zakharov, Attorneys-at-Law: Grigory Zakharov & Vadim Borodkin	180
27	<b>Senegal</b>	Latournerie Wolfrom Avocats: Christopher Dempsey & Johanna Cuvex-Micholin	189
28	<b>South Africa</b>	Fasken Martineau: Godfrey Malesa & Nicola Jackson	196
29	<b>Ukraine</b>	Redcliffe Partners: Dmytro Fedoruk & Zoryana Sozanska-Matviychuk	204
30	<b>United Kingdom</b>	Mayer Brown International LLP: Tom Eldridge	211
31	<b>USA</b>	Mayer Brown LLP: Kevin L. Shaw & Daniel P. Whitmore	219
32	<b>Vietnam</b>	Mayer Brown JSM: Nguyen Hai Thao & David Harrison	227
33	<b>Zambia</b>	Eric Silwamba, Jalasi and Linyama Legal Practitioners: Joseph Alexander Jalasi, Jr. & Eric Suwlanji Silwamba, S.C.	233

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# Kazakhstan



Yerbolat Yerkebulanov



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## Note

In mid-2015, the concept of a new *Code on Subsoil and Subsoil Use* (the “**Code**”) was approved in the Republic of Kazakhstan (“**RoK**” or the “**State**”). The Code shall enter into force and replace the currently acting *Law on Subsoil and Subsoil Use* dated 24 June 2010 No. 291-IV (the “**Subsoil Law**”) six months after the official publication of the Code. It is planned that the RoK Parliament will finalise the Code by 31 December 2017, however, it may last longer. If the Code enters into force in 2018, this chapter will be updated accordingly; the updated version will be available online at [www.iclg.com](http://www.iclg.com).

## 1 Relevant Authorities and Legislation

### 1.1 What regulates mining law?

The principal legislative act governing mining activities in Kazakhstan is the Subsoil Law.

There are also numerous Decrees of the RoK Government and orders of the RoK Minister of Investment and Development (the “**MID**”) which regulate specific issues in the mining sphere.

Mining activities are regulated through the award of mining contracts (until August 1999 this was through the award of a licence with the further conclusion of a mining contract), which are obtained either through competitive procedures or through direct negotiations for:

- (i) certain RoK national companies (depending on the type of mineral according to established allocation of responsibilities);
- (ii) holders of the exploration right that made the commercial discovery and assessed it as confirmed by state expertise; or
- (iii) exploration right obtained under the simplified order with regard to understudied subsoil plots. (Under such order, any individual or company may choose a certain area from the approved list of subsoil plots (on an electronic map) and file an application with the MID. The MID registers the application and discloses information about such individual or company on its website. If within five business days there is no other application for the subsoil plots under the first application, the applicant is entitled to direct negotiations. If another application has been submitted, the exploration right is obtained through an auction.)

Broadly, regulation for mining can be categorised by reference to specific minerals as follows:

- (i) solid minerals (gold, silver, coal, etc.); and
- (ii) commonly occurring minerals (sand, clay, etc.).

Please note that the Subsoil Law, in addition to above minerals, also regulates relations related to oil and gas. Unless otherwise stated, we have not addressed issues of oil and gas and commonly occurring minerals in this chapter.

### 1.2 Which Government body/ies administer the mining industry?

Depending on the category of minerals, there are three so-called competent authorities (the “**Competent Authority**”), specifically:

- 1) the MID regulates solid minerals contracts (f/k/a the Ministry of Industry and New Technologies from 12 March 2010 to 6 August 2014; before 12 March 2010 known as the Ministry of Energy and Mineral Resources);
- 2) the Ministry of Energy regulates oil and gas, coal and uranium (f/k/a the Ministry of Oil and Gas from 12 March 2010 to 6 August 2014; before 12 March 2010 known as the Ministry of Energy and Mineral Resources); and
- 3) the local executive bodies (*i.e.* akimats of regions/Astana/Almaty (“**Akimat**”)) regulate commonly occurring minerals.

The MID also supervises the mining industry through its subordinate, the Committee on Geology and Subsoil Use (the “**Geology Committee**”). The Geology Committee has regional departments called *TsentrKazNedra* (for central territories), *ZapKazNedra* (for western territories), *SevKazNedra* (for northern territories), *VostKazNedra* (for eastern territories) and *YuzhKazNedra* (for southern territories).

The issues of (i) local content in goods, works, services and staff, and (ii) procurement of solid minerals subsoil users are resolved by the MID taking into consideration the view of the National Agency on Development of Local Content JSC.

### 1.3 Describe any other sources of law affecting the mining industry.

Depending on the sphere of activities, the mining industry is affected by the following legislative acts:

- (1) the *RoK Tax Code* dated 10 December 2008 (the “**Tax Code**”);
- (2) the *RoK Land Code* dated 20 June 2003 (the “**Land Code**”);
- (3) the *RoK Environmental Code* dated 9 January 2007;
- (4) the *RoK Labour Code* dated 15 May 2007;
- (5) the *RoK Water Code* dated 9 July 2003;
- (6) the *RoK Law on Precious Metals and Precious Stones* dated 14 January 2016 (the “**Precious Metals Law**”);

- (7) the *RoK Law on Architecture, Town-Shipping and Construction Activities* dated 16 July 2001;
- (8) the *RoK Law on Permits and Notifications* dated 16 May 2014;
- (9) the *RoK Custom Code* dated 30 June 2010 and the *Customs Code of the Customs Union*; and
- (10) the *Rules of Procurement of Goods, Works and Services at Performance of Subsoil Use Operations* approved by the Order of the MID dated 30 January 2015 No. 96, and so on.

## 2 Mechanics of Acquisition of Rights

### 2.1 What rights are required to conduct reconnaissance?

There is no notion of “reconnaissance” in Kazakhstan law; instead the term “exploration” is used, which includes (i) prospecting works, and (ii) assessment of commercial discovery. See our response to question 2.2.

There is also a notion of state geological survey, which is undertaken by the authorities either by themselves or through contractors. Please note that even if a contractor performs a state geological survey at its own expenses and not at the expenses of the state budget, the Subsoil Law does not provide such contractor with any preferences to conclude a subsoil use contract for the territory surveyed.

### 2.2 What rights are required to conduct exploration?

#### (i) Subsoil use and land plot lease contracts

First of all, to conduct exploration, an individual or an entity must have a subsoil use right. Such rights are deemed to be granted upon the Competent Authority’s signing of a contract (“**Subsoil Use Contract**”) for the right of (i) exploration (either ordinary or simplified), (ii) production, or (iii) combined exploration and production.

During the preparation of the subsoil use contract, the Geology Committee issues a geological allotment for the territory to be explored.

Also, a relevant project on exploration works or on assessment of commercial discovery shall be elaborated by a relevant licensed organisation and be considered and approved by the ecological authority (if the project on assessment of commercial discovery includes pilot production, approvals of sanitary-epidemiological and industrial safety authorities are also required), as well as by the Geology Committee.

If the exploration right is granted under a simplified order, the subsoil user approves the exploration project by itself and sends it to the Geology Committee.

Further, execution of a subsoil use contract is an unconditional ground for granting the land use right by Akimats. Such land use right is confirmed by signing a land plot lease agreement with the land authorities.

#### (ii) Licences

To carry out exploration works, depending on the method, the following licences may be required:

- a licence on drilling works;
- a licence on handling explosives;
- a construction licence (for construction of a mine, a processing plant, infrastructure, etc.); or
- a licence on the application of chemicals and other agents, etc.

A holder of a subsoil use right can either obtain such licences on its own or hire contractors which have the relevant licences.

### 2.3 What rights are required to conduct mining?

Please note that there is no legal notion of “mining” in Kazakh law; instead, the terms “production” or “extraction” are used for determining the commercial development of the deposits and extraction of the minerals.

In general, the requirements are the same as mentioned in our response to question 2.2, except for the following:

- 1) the subsoil use contract for (i) production, or (ii) combined exploration and production with a relevant amendment thereto allows the holder of the subsoil use right to conduct production;
- 2) instead of the geological allotment, a mining allotment must be obtained;
- 3) instead of an exploration project, a production project must be elaborated and approved by the authorities (please note that there is no need to elaborate a production project for production of technogenic mineral formations (the “**TMF**”)); and
- 4) the holder of the subsoil use right must obtain a licence for the exploitation of mining activities.

Mining of solid minerals can also be performed under a test mining stage, which is part of the assessment of commercial discovery (*i.e.* at exploration stage).

### 2.4 Are different procedures applicable to different minerals and on different types of land?

No, generally the procedures are the same, save for a number of special licences required for carrying out activities with the production, storage or processing of radioactive ores.

### 2.5 Are different procedures applicable to natural oil and gas?

Generally, the same procedures are applicable to the exploration and production of natural gas and oil.

## 3 Foreign Ownership and Indigenous Ownership Requirements and Restrictions

### 3.1 What types of entity can own reconnaissance, exploration and mining rights?

Under the Subsoil Law, any individual or legal entity can own exploration, production (mining) or combined exploration and production rights.

### 3.2 Can the entity owning the rights be a foreign entity or owned (directly or indirectly) by a foreign entity and are there special rules for foreign applicants?

Yes, the entity owning the rights can be a foreign entity or owned (directly or indirectly) by a foreign entity. The order of filing an application is the same for national and foreign applicants.

Exception: if a contract for exploration or production in the Caspian Sea is concluded, at least 50 per cent of shares in charter capital of the subsoil user shall belong to the quasi-state national company (National Company KazMunaiGas JSC).

### 3.3 Are there any change of control restrictions applicable?

The Subsoil Law contains the definition of objects connected to the subsoil use right (the “**Objects**”), which are:

- (i) shares in subsoil users;
- (ii) shares in parent companies of the subsoil users, provided that the principal activity of such parent companies is connected to subsoil use in Kazakhstan; or
- (iii) securities confirming the ownership rights to the abovementioned shares or securities convertible into the above-stated shares (including when issuing for IPO for issues (i)–(iii)).

Under Article 12.2 of the Subsoil Law, with regard to deposits of strategic significance (the list of such deposits is approved by the RoK Government Decree dated 4 October 2011 No. 1137), the State has the priority right to acquire (i) subsoil use right (in full or in part), or (ii) the Objects.

Save for limited exceptions, any transaction that alienates the subsoil use right (in full or in part) or Objects is subject to the prior obtainment of (i) a waiver of the State’s priority right (the “**Waiver**”) with regard to deposits of strategic importance only, and/or (ii) consent of the Competent Authority (the “**Consent**”) as set out by Article 36 of the Subsoil Law.

Failure to obtain the Consent results in acknowledgment of the relevant transaction as being void *ab initio* from a Kazakh law perspective and entitles the Competent Authority to unilateral termination of the subsoil use contract under Article 72.3.2 of the Subsoil Law.

Under the Subsoil Law, the Consent is obtained during 20 business days and the Waiver, if applicable, is obtained during additional 50 business days. However, as the authorities are entitled to request additional information, in practice it can take a longer period of time.

Within five business days after execution of the transaction, the acquirer of the subsoil use right (or its part) or the Objects shall notify the Competent Authority.

If the subsoil use right or the Objects are planned to be pledged, a prior Consent shall be obtained; otherwise, a pledge transaction is treated as being void *ab initio*.

Furthermore, if, as a result of the transaction, the acquirer will hold more than 50 per cent of shares of a Kazakh entity, and the aggregate balance cost of assets of such Kazakh entity and the acquirer exceeds 10,000,000 monthly calculation indexes (about USD 70 million, rate KZT 330/USD 1), the transaction is subject to prior antimonopoly approval.

### 3.4 Are there requirements for ownership by indigenous persons or entities?

No, there are no requirements for ownership by indigenous persons or entities of subsoil use rights in Kazakhstan, except for oil and gas projects in the Caspian Sea, where the share of National Company KazMunaiGas JSC shall be not less than 50 per cent (Article 93.3 of the Subsoil Law).

### 3.5 Does the State have free carry rights or options to acquire shareholdings?

See our response to question 3.3 above regarding the State’s priority right.

If a mining asset is included in the *List of Deposits of Strategic Importance* approved by RoK Government Decree dated 4 October 2011 No. 1137, the State is entitled under Article 71.3 of the Subsoil Law to require the introduction of amendments into the subsoil use contract if actions of the subsoil user lead to a change of the State’s economic interests, and constitute a threat to national security. If the subsoil user does not agree to amend its contract, the State is entitled, under Article 72.4-5 of the Subsoil Law, to unilaterally terminate such contract.

## 4 Processing, Refining, Beneficiation and Export

### 4.1 Are there special regulatory provisions relating to processing, refining and further beneficiation of mined minerals?

The Subsoil Law differentiates between (i) primary processing (beneficiation) of raw minerals, and (ii) processing of raw minerals.

The primary processing (beneficiation) of raw minerals is acknowledged as a type of mining production activity, which comprises gathering on the site, breaking or crushing, separation (sorting), briquetting, agglomeration and enrichment by physical-chemical methods (without qualitative changes of the mineral forms of useful minerals, their aggregative-phase conditions or crystal-chemical structure). It may also comprise processing technologies which are special types of work related to the production of useful minerals (underground gasification and melting, chemical and bacterial leaching, dredging and hydraulic development of placers). The list of works related to the primary processing (beneficiation) of raw minerals shall be determined in each subsoil contract, except for subsoil use contracts concluded before the enactment of the Subsoil Law (i.e. before 7 July 2010), and for amendments to subsoil contracts.

On the other hand, the processing of raw minerals is acknowledged as works (i) related to the extraction of a useful mineral(s) from raw mineral materials, as well as (ii) following the primary processing of raw minerals.

### 4.2 Are there restrictions on the export of minerals and levies payable in respect thereof?

In general, there are no restrictions on the export of minerals, except for the below.

First, according to the Precious Metals Law, the owner of mineral raw material containing precious metals (e.g. gold) is obliged to propose to the RoK National Bank (which has the priority right to buy-out fine gold) fine gold refined at foreign gold refining plants. Moreover, a Kazakh subsoil user, before exporting gold from Kazakhstan to a foreign refinery, shall obtain the waiver of local refining plants.

Second, in some cases the authorities establish temporary limitations (e.g. bans with regard to the export of gold, etc.).

Last, in certain cases, exporters must preliminarily obtain export licences (e.g. for the export of natural crude stones, non-ferrous metals, precious metals and precious stones and diamonds).

## 5 Transfer and Encumbrance

### 5.1 Are there restrictions on the transfer of rights to conduct reconnaissance, exploration and mining?

Please see the requirements for the transfer of exploration and mining rights in our response to question 3.2 above.

Additionally, we note that the Subsoil Law envisages such a notion as the “concentration of rights on conducting subsoil use operations”, i.e. the owning of such amount of shares in subsoil use contracts in the territory of Kazakhstan or such amount of participatory interest in a charter capital (a number of shares) in Kazakhstani subsoil users by a person or group of persons from one country which can constitute or constitutes a threat to the RoK’s economic interests.

If the Competent Authority, when considering an application for the transfer of rights to exploration or mining, decides that the proposed transaction can cause a concentration of rights, it is entitled to reject to issue its Consent.

### 5.2 Are the rights to conduct reconnaissance, exploration and mining capable of being mortgaged or otherwise secured to raise finance?

Yes, the rights to conduct exploration and mining can serve as security (pledge), provided that a prior relevant Consent in the form of a pledge certificate is issued by the Competent Authority.

Please note that according to Article 36.4 of the Subsoil Law, funds received against a pledge of the subsoil use right must be used only for the purposes of subsoil use or organisation of subsequent processing on the Kazakhstan territory as set out by the subsoil use contract either (i) by the subsoil user itself, or (ii) by its wholly owned subsidiary organisation.

Pledge of shares in a subsoil user or its parent companies, provided that the principal activity of such parent companies is connected to subsoil use in Kazakhstan, also requires preliminary consent of the Competent Authority.

## 6 Dealing in Rights by Means of Transferring Subdivisions, Ceding Undivided Shares and Mining of Mixed Minerals

### 6.1 Are rights to conduct reconnaissance, exploration and mining capable of being subdivided?

As for the subsoil use right itself, it can belong not only to a single individual/entity, but also to several individuals/entities (jointly considered as a single subsoil user).

As for the contract territory, according to Article 70-1 of the Subsoil Law, solid minerals subsoil users carrying out exploration are entitled to transform their contract territory by allocation of a certain land plot. A new exploration contract is concluded for such territory. The term of such contract cannot exceed the term of its “mother” subsoil use contract.

A production contract can also be subdivided in the following two cases:

- (i) According to Article 70-1.8 of the Subsoil Law, a subsoil user that is carrying out production in several fields, which

part is entered in the list of high-viscosity, watered, marginal or exhausted fields approved by the relevant Government Decree, is entitled to make a request to the Competent Authority for the conclusion of a separate production contract in respect of such field(s). Such a contract may be concluded for a period lasting to the end of the initial contract.

- (ii) Subsoil users that have an exploration contract can apply for the conclusion of a production contract for a field(s) with a commercial discovery as confirmed by the relevant conclusion of the State Reserves Committee (the so-called GKZ). Such practice is followed by the Competent Authority in the oil and gas sphere.

### 6.2 Are rights to conduct reconnaissance, exploration and mining capable of being held in undivided shares?

According to Article 29.3 of the Subsoil Law, a subsoil use right under a subsoil use contract can be jointly held by several individuals/entities, which have joint and several liability for the obligations arising under the contract.

Rights and obligations of the joint holders of subsoil use rights and the procedure for managing the general affairs shall be defined in the contract, as well as in the agreement on joint activities. The participants can choose the operator who would represent them before the Competent Authority.

### 6.3 Is the holder of rights to explore for or mine a primary mineral entitled to explore or mine for secondary minerals?

Generally, the subsoil use contracts may directly allow subsoil users to mine not only primary minerals, but also “associated minerals” which may be economically recovered along with the primary mineral(s).

Furthermore, according to Article 10.7 of the Subsoil Law, production of “associated minerals” simultaneously with the production of minerals specified by the terms of a subsoil use contract is acknowledged as production within the framework of such contract.

Lastly, please note that, as mentioned above, the Subsoil Law divides the mineral resources into three categories: (i) hydrocarbons (oil and gas); (ii) solid minerals; and (iii) commonly occurring minerals. Accordingly, if the secondary minerals belong to another category, then the conclusion of a separate contract with another Competent Authority is required.

### 6.4 Is the holder of a right to conduct reconnaissance, exploration and mining entitled to exercise rights also over residue deposits on the land concerned?

The Subsoil Law provides for a notion of TMF, which are aggregations of mineral formations, rocks, liquids and mixtures bearing useful components that are rejects of mining and enrichment, metallurgical and other types of productions (i.e. tailings).

TMF that originated from mineral raw materials imported into Kazakhstan, as well as stored, after 30 May 1992, which contain minerals, and which a tax on the extraction of said minerals and (or) royalty has been paid, are considered as a subsoil user’s property. The subsoil user can own, use and dispose of its mineral raw material at its own discretion.

All other TMF are acknowledged as state property and a separate subsoil use contract shall be concluded with the Competent Authority for carrying out subsoil use operations.

## 6.5 Are there any special rules relating to offshore exploration and mining?

Offshore exploration and mining in Kazakhstan are understood only as oil and gas operations. There are specific provisions of the Subsoil Law, the Environmental Code and other legislative acts extensively regulating offshore operations. From a practical point of view, it is a rather complicated procedure, requiring numerous permits and authorisations.

## 7 Rights to Use Surface of Land

### 7.1 Does the holder of a right to conduct reconnaissance, exploration or mining automatically own the right to use the surface of land?

According to Article 42.1 of the Land Code, the right to the land plot, unless otherwise set out by legislative acts, also affects the surface soil layer, closed ponds and plantings within the boundaries of such land plot.

The subsoil use contract only evidences the subsoil user's rights to use the subsoil plot; however, they do not provide for any land use rights, and the latter should be procured separately (see our response to question 9.1 for further details).

### 7.2 What obligations does the holder of a reconnaissance right, exploration right or mining right have *vis-à-vis* the landowner or lawful occupier?

The holder of an exploration or mining right shall agree with the landowner or lawful occupier the terms of using the land plot for subsoil use purposes as discussed in our response to question 9.1.

### 7.3 What rights of expropriation exist?

According to Article 84 of the Land Code, a land plot can be expropriated for State needs (in exceptional cases when there is no other way of satisfying such needs) by an equivalent reimbursement of property either upon consent of the owner or land user or upon a court decision. The discovery and development of a mineral resources field is one of the grounds for expropriation.

Further, according to Article 90 of the Land Code, expropriation of agricultural land plots is permitted in exceptional cases connected to the discovery of a mineral field under the land plot.

However, in practice, the above provisions do not work due to Article 84.5 of the Land Code, whereby expropriation cannot be considered as being for State needs if such expropriation pursues the commercial targets of non-governmental legal entities and aims to satisfy non-governmental interests.

In view of the above-stated, currently there is no mechanism for the expropriation of land plots. Subsoil users directly depend on the will of owners or land users, and must come to an agreement with them in order to use the land plots, as discussed in our response to question 9.1.

## 8 Environmental

### 8.1 What environmental authorisations are required in order to conduct reconnaissance, exploration and mining operations?

According to Article 109 of the Subsoil Law, ecological grounds for carrying out subsoil use operations are: (1) positive conclusions by State ecological experts with regard to project documents; and (2) the environmental permit (setting out a scope of permitted environmental emissions).

Subsoil users are obliged to submit all (i) preliminary project documentation, and (ii) project documentation for State ecological examinations. The documents shall include an assessment of the impact of the proposed activity on the environment and contain an "Environmental Protection" section.

### 8.2 What provisions need to be made for storage of tailings and other waste products and for the closure of mines?

According to Article 111 of the Subsoil Law, after the termination of subsoil use operations or the depletion of mineral resources, a subsoil user shall immediately proceed to work on the liquidation or conservation of the subsoil use objects (e.g. mines). If an urgent decision on the termination of production is required, the subsoil user must carry out a set of measures for the conservation of production units before their liquidation or conservation.

The liquidation or conservation works are carried out based on a liquidation or conservation plan that has been (i) elaborated by a licensed project company, (ii) agreed to by authorities in the fields of environmental protection, study and use of subsoil, industrial safety, sanitary-epidemiological service, land resources management, and (iii) approved by the subsoil user.

The operation is financed by the liquidation (abandonment) fund of the subsoil user and, if it is not sufficient, at the expense of the subsoil user itself.

The liquidation or conservation of subsoil use objects is considered complete after the signing of the act of acceptance by the commission established by the Competent Authority, which consists of officials in the fields of environmental protection, study and use of subsoil, industrial safety, sanitary-epidemiological service and land resources management, and by the Akimat.

### 8.3 What are the closure obligations of the holder of a reconnaissance right, exploration right or mining right?

See our response to question 8.2 above.

### 8.4 Are there any zoning or planning requirements applicable to the exercise of a reconnaissance, exploration or mining right?

Yes, such requirements exist with regard to areas of outstanding natural beauty, where:

- (i) exploration is permitted upon permission of the environmental authorities in view of special ecological requirements; and

- (ii) production of minerals is permitted in exceptional instances upon a decision by the RoK Government made upon a presentation by the Geology Committee agreed with by the environmental authorities.

## 9 Native Title and Land Rights

### 9.1 Does the holding of native title or other statutory surface use rights have an impact upon reconnaissance, exploration or mining operations?

There is no concept of native title in Kazakh law.

Surface rights (known in Kazakhstan as land use rights) are separate from mining rights.

According to Article 68.5 of the Subsoil Law, execution of a subsoil contract is the ground for the provision of a relevant land plot by the relevant Akimat, except in cases of the expropriation of a land plot (land use right) for State needs under the Land Code. Provision of land plots under ownership or under the land use right of third parties is made according to the Land Code.

In other words, if the land plot where subsoil use operations are conducted is in the State's property, the relevant Akimat provides such land.

According to Article 71.1 of the Land Code, individuals and entities carrying out geological, geophysical and search works can perform such works without taking away such land plots from their owners or leaseholders. Such provision is normally used for exploration purposes.

In cases referred to in the previous paragraph or if land plots where mining is supposed to be undertaken is owned or leased by a third party (an individual or entity), the subsoil user shall conclude a relevant agreement with such owners/leaseholders. Normally, the subsoil user shall reimburse losses of agricultural activity (due to withdrawal of land plots used for agricultural activities). In certain cases, subsoil users are obliged to conclude servitude contracts.

Please see also our response to question 7.3.

We also note that the only constant and free right which individuals and entities have with regard to subsoil use at the land plots owned or leased by them is the mining of commonly occurring minerals for their own needs.

## 10 Health and Safety

### 10.1 What legislation governs health and safety in mining?

There are a number of legal acts directly or indirectly governing health and safety in mining, approved by the orders of the MID.

The regulations set out that each mining company shall have a special person responsible for health and industrial safety. All workers (including workers of contractors, subcontractors) who are directly involved in dangerous fields of work must regularly pass different certifications.

### 10.2 Are there obligations imposed upon owners, employers, managers and employees in relation to health and safety?

Major requirements for owners, employers, managers and employees in relation to health and safety are set out in Article 115 of the Subsoil Law and include, *inter alia*: prohibition or immediate

termination of works if they are or become dangerous to the life and health of people; admitting to work only those people that have special qualifications; procuring special clothes; having available means of individual and collective protection; using equipment and materials that meet safety and sanitary requirements; constantly monitoring the atmosphere for availability of oxygen and harmful gas and dust, etc.

See also our response to question 10.1 above.

## 11 Administrative Aspects

### 11.1 Is there a central titles registration office?

As stated in our response to question 1.2 above, the MID is the Competent Authority for the conclusion and registration of subsoil use contracts for solid minerals. The Competent Authority is responsible for the registration of a subsoil use right, as well as its transfer or pledge.

### 11.2 Is there a system of appeals against administrative decisions in terms of the relevant mining legislation?

Normally, subsoil users in Kazakhstan appeal against decisions of the State authorities only in cases related to environmental issues, customs and tax charges and termination of subsoil use contracts.

The appeal is made by filing a claim to a State court. There are three stages of court consideration, with the third being the RoK Supreme Court.

The order of appellation is set out in the Civil Procedural Code.

In some subsoil use contracts, there is a direct reference to the fact that any disputes are subject to resolution by foreign arbitration.

## 12 Constitutional Law

### 12.1 Is there a constitution which has an impact upon rights to conduct reconnaissance, exploration and mining?

According to the RoK Constitution, which is the main law in Kazakhstan, the land and its mineral resources, water, flora and fauna, and other natural resources are owned by the State.

Article 10 of the Subsoil Law states that, according to the RoK Constitution, the subsoil and the useful minerals that are in it are under State ownership. State ownership of the subsoil shall be recognised as one of the component bases of the state sovereignty of Kazakhstan. The State shall ensure access to the subsoil on the bases, conditions and within the limits provided for by the Subsoil Law.

### 12.2 Are there any State investment treaties which are applicable?

Kazakhstan is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to ICSID.

Kazakhstan is also a signatory to bilateral investment treaties with more than 50 countries establishing guarantees for the protection of investment activities (see the list at the website of the Ministry of Foreign Affairs – [www.mfa.kz](http://www.mfa.kz)). Texts of these treaties can differ

in terms of defining an investor, an object of investment, protected rights of an investor, and the procedure of investment protection. However, all of the treaties stipulate the right of an investor to apply for international investment arbitration to protect their rights and investment.

## 13 Taxes and Royalties

### 13.1 Are there any special rules applicable to taxation of exploration and mining entities?

In addition to obligations to pay ordinary taxes and fees (e.g., VAT, corporate and individual income taxes, property tax, land tax, fees for exploitation of radiofrequency band, etc.), all exploration and mining entities are subject to taxation under section 11 (*Taxation of Subsoil Users*) of the Tax Code, comprising Articles 307–354.

Subsoil users shall carry out separate accounting related (i) for subsoil use activities, and (ii) for all other non-subsoil use activities (if any).

Below is the list of specific taxes for subsoil users:

#### 1. Signature bonus

The signature bonus is a one-off payment for the right to carry out activities for subsoil use. The exact amount of the signature bonus is determined at the tendering stage for subsoil use rights or during direct negotiations on the provision of subsoil use rights.

#### 2. Commercial discovery bonus

The commercial discovery bonus is a one-off payment by the subsoil user for each commercial discovery on the contractual territory. The basis of its calculation is the cost of the volume of recoverable mineral reserves approved by the authorised state body. The cost of recoverable reserves is calculated on the exchange price determined at the International (London) Exchange, listed according to the source given by Platts Crude Oil Marketwire. The commercial discovery bonus is paid at the rate of 0.1 per cent of the tax base (i.e. the cost of the volume of recoverable reserves of minerals, approved by the Geology Committee).

#### 3. Payment to reimburse historical costs

Historical costs are an established payment intended to reimburse the State's expenses for exploration and settlement of the contractual territory, incurred before the contract on subsoil use was concluded.

Liability in respect of the payment to reimburse historical costs arises from the date of the signing of a confidentiality agreement between the subsoil user and the Geology Committee.

#### 4. Tax on extraction of minerals (the "TEMR")

TEMR is a type of tax royalty based on the volume of production, and applies to solid minerals, including gold, silver, platinum and other precious metals and gems. The list of rates is set out in Article 339 (*Rates of Tax on Extraction of Mineral Resources*) of the Tax Code, which consists of 10 categories and 29 subcategories.

#### 5. Excess profits tax (the "EPT")

EPT is calculated on an annual basis. The tax is paid on a sliding scale of rates applied to the part of the net income minus 25 per cent of the deductions (expenses incurred) in the order set out by Articles 350–351 of the Tax Code.

We note that Kazakhstan is elaborating a new Tax Code, which supposedly will enter into force in 2018, where it planned (i) to rescind the commercial discovery bonus, (ii) to eliminate tax borders between an exploration contract and a production contract

(this will allow to deduct exploration costs at the expenses of another production contract and reduce expenses connected to income tax and EPT), and (iii) for new exploration contracts to rescind obligations on financing tuition of Kazakhstani personnel, research and development works, payments on social development of the region and historical costs (such payments shall be made on a production stage).

### 13.2 Are there royalties payable to the State over and above any taxes?

Kazakhstan used to have royalties paid by subsoil users. But, as from 1 January 2009 when the Tax Code replaced the previous tax code, royalty payment was accordingly replaced by the TEMR. See more detail in our response to question 13.1 above.

## 14 Regional and Local Rules and Laws

### 14.1 Are there any local provincial or municipal laws that need to be taken account of by a mining company over and above National Legislation?

Kazakh legislation is centralised and consists mostly of codes, laws, Government Decrees and orders of the ministers. Local authorities do not have the right to adopt laws.

We shall, however, note the following specific case: according to Article 495.9 (Fee Rates) of the Tax Code, the local representation body (the so-called "*maslikhat*") is entitled to increase the rates set out by this Article for environmental emissions for no more than two times (except for the rates for pollutions from gas flaring).

### 14.2 Are there any regional rules, protocols, policies or laws relating to several countries in the particular region that need to be taken account of by an exploration or mining company?

No, there are no such rules for an exploration or mining companies (solid minerals subsoil users).

The rules referred to in this question apply to oil and gas exploration and production in the territory of the Caspian Sea, which is not the subject of this chapter.

As for customs issues, the customs legislation of the Customs Union (consisting of Russia, Kazakhstan, Belarus, Kyrgyzstan and Armenia) prevails over Kazakh customs legislation.

## 15 Cancellation, Abandonment and Relinquishment

### 15.1 Are there any provisions in mining laws entitling the holder of a right to abandon it either totally or partially?

Any subsoil user is entitled to (i) return part of its contracting territory, or (ii) demand pre-scheduled termination of the subsoil use contract through court proceedings or under the grounds set out by the subsoil use contract. In both cases, the subsoil user shall preliminarily carry out relevant liquidation or conservation works (see question 8.2 above).

### 15.2 Are there obligations upon the holder of an exploration right or a mining right to relinquish a part thereof after a certain period of time?

Yes, the majority of exploration contracts set out a subsoil user's obligation to relinquish a certain percentage of contract territory after a certain amount of years of exploration. The relinquishment is made after signing of the act on relinquishment with further re-issuance of the geological allotment with exclusion of relinquished areas.

### 15.3 Are there any entitlements in the law for the State to cancel an exploration or mining right on the basis of failure to comply with conditions?

Yes, Article 72 of the Subsoil Law contains a number of grounds entitling the Competent Authority to unilaterally cancel a subsoil

use right in case of violation by a subsoil user's of its obligations. Such grounds, among others, include: a subsoil user's failure to rectify more than two breaches of contractual obligations within the timeline set out by the Competent Authority (for physical obligations – six months, for financial obligations – three months, and one month for other obligations); transfer of the subsoil use right or the Objects without prior obtaining of the Consent; performance of financial obligations for less than 30 per cent during two consecutive years, etc.



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