

CHAPTER 9

KAZAKH LEGISLATION ON SUBSURFACE USE

Historical background and present status

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1. INTRODUCTION

At the time when Kazakhstan acquired sovereign status (at the end of 1990), followed soon thereafter by the break-up of the USSR (late 1991), the country—as one of the Soviet Republics—had a centralised planned economy in common with the whole of Soviet society and a fairly mature system of legislation typical of any Soviet republic (including the Subsurface Code of the Kazakh SSR dated 4 August 1976). The Republic had no particular outstanding features in terms of the legal regulation of subsurface use that set it apart from the other Soviet Republics, just as it had no rights to use the subsurface on its own behalf. This was the sole prerogative of the Union. However, despite the overwhelming orientation of Kazakh legislation towards the planned socialist system of social relations, there was one piece of legislation—the 1964 Civil Code of the Kazakh SSR—which in terms of its structure, legal institutions, terminology and concepts had much in common with similar codified laws in the capitalist countries (i.e. most European countries, Japan and others). Of course, the economic foundation of the legal institutions embodied in the Civil Code remained entirely rooted in the legal regime of Soviet society.

Several important stages can be recognised in the evolution of Kazakh legislation on subsurface use in the post-Soviet era, i.e. in the period spanning the nineties. These are: Stage I: 1990-1996; Stage II: 1996-1999; Stage III: from 1999 up to the present day. This chapter traces the development of the law in this field, assessing the progress that has been made in the first decade or so since independence and highlighting the obstacles that remain to be overcome if the Kazakh legal system is to reach full maturity.

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monitoring of the subsurface,⁴ and others.⁵ However, the statutory instruments promulgated by the President and the Government were rather sparsely worded, covering only some of the issues affecting subsurface use, and only the regulation on licensing of subsurface use was elaborated in sufficient detail.⁶

3. STAGE II: 1996-1999

This stage sees the extension of Kazakh legislation to all main areas of subsurface use. Its beginning of this stage is marked by the promulgation of the two most important laws hitherto enacted in the sphere of subsurface use, namely the Petroleum Law of 28 June 1995⁷ and the Subsurface and Subsurface Use Law of 27 January 1996.⁸

From a historical standpoint and considering their mutual influence, these two laws should be considered together insofar as the Petroleum Law was of fundamental importance in shaping the form and content of the Subsurface Law. All of the basic provisions of the Petroleum Law were carried over into the Subsurface Law, and thus the arrangements for subsurface use embodied in the Petroleum Law came to apply to subsurface activities relating to all types of minerals.⁹

At its introduction, the Subsurface Law was characterised by a fairly logical structure, the inclusion of a number of progressive provisions (for example, security of the rights of the subsurface user), and a depth of detail unusual for a law passed at this level (the Law comprises 10 Sections and 76 Articles, including transitional provisions).

³ RK Cabinet of Ministers Order no. 1034 dated 8 December 1992 on 'Approval of the Regulation on arrangements for the disposition (transfer, exchange, sale) of subsurface information in the Republic of Kazakhstan'.

⁴ RK Cabinet of Ministers Order no. 811 dated 29 September 1992 on 'Approval of the Regulation on State monitoring of protection and use of the subsurface';

⁵ RK Cabinet of Ministers Order no. 128 dated 2 February 1994 on 'Approval of the Regulation on arrangements for the attestation of subsurface users'.

⁶ Regulation on 'Arrangements for licensing of subsurface use in the Republic Kazakhstan' passed by RK Cabinet of Ministers Order no. 886 dated 8 August 1994 (later replaced by the similar 'Regulation on arrangements for licensing of subsurface use in the Republic of Kazakhstan' passed by RK Government Order No. 1017 dated 16 August 1996. RK Cabinet of Ministers Order no. 600 dated 7 June 1994 on 'Approval of interim license fees for the conduct of geological survey work and mineral extraction'.

⁷ Passed by RK Presidential Decree-Law no. 2350 dated 28 June 1995 with amendments and additions (hereinafter—the Petroleum Law). Prior to this, RK Presidential Decree on 'Petroleum Operations' was passed on 18 April 1994.

⁸ Passed by RK Presidential Decree-Law no. 2828 dated 27 January 1996 with amendments and additions (hereinafter—the Subsurface Law).

⁹ This degree of influence is clearly attributable to the quality of the law-making process involved. The Petroleum Law was more than three years in the drafting by a team of Kazakh legal experts with practical assistance from officials at the Ministry of Geology and Ministry of Energy & Fuel Resources (later the RK Ministry of Oil and Gas Industry). In 1993, by order of the Kazakh Vice-President, a working group was set up under the direction of Professor M.K. Suleimenov to finalise the draft law (over 30 drafts were produced during this exercise). Considerable assistance was provided by foreign experts in preparing the Petroleum Law, including experts from the World Bank.

legislation was amended in various ways shortly after its introduction. The same period saw the active development of legislation on the licensing of subsurface use and licensing of subsurface-related work.¹⁷

However, many of the Government Orders introduced (principally relating to the acquisition and formalisation of subsurface rights) were inadequately framed, others were technically at odds with the Subsurface Law and Petroleum Law or, even worse, their requirements effectively blocked certain provisions of the Laws. The regulation on organisational arrangements and conditions for mandatory insurance of petroleum operations¹⁸ proved so ineffectual, and its criticism by investors so damning, that Government was compelled to rescind it after three months, and the relevant ministries and departments were instructed to present proposals within a month for improvement of the machinery for mandatory insurance of petroleum operations, using the services of outside consultants.¹⁹

At the same time—from the early nineties onwards—a new system of economic legislation was actively evolving in Kazakhstan, embracing company law, banking and foreign exchange legislation, land laws, foreign investment legislation, etc., creating a common legal regime for subsurface use. All of these laws were drafted quickly and were amended after a short period of time. A new General Part of the Kazakh Civil Code drafted in light of the new European Civil Codes (particularly the Dutch Civil Code) and with the benefit of input from West European lawyers, was introduced on 27 December 1994. Kazakhstan signed up to a number of international economic conventions, including the Energy Charter Treaty.

4. STAGE III –1999 TO PRESENT

This stage, which covers the modern status of Kazakh subsurface legislation, is marked by the introduction of the Law of 11 August 1999,²⁰ substantially amending the two basic

¹⁶ RK Government Orders: no. 109 dated 27 January 1997 on 'Permitting procedures for construction development on sites containing minerals'; no. 110 dated 27 January 1997 on 'Reimbursable cost allocation procedures for subsurface operations'.

¹⁷ The first special statutory instrument in this area was the 'Regulation on licensing arrangements for subsurface use in the Republic of Kazakhstan' passed by RK Cabinet of Ministers Order No. 886 dated 8 August 1994. RK Presidential Decree-Law No. 2200 on 'Licensing' (hereinafter the 'Licensing Law'), containing provisions on the licensing of subsurface use, was passed on 17 April 1995. An RK Presidential Decree-Law dated 23 December 1995 subsequently introduced amendments to the Licensing Act whereby certain aspects of subsurface licensing and protection of nature are defined in special legislation. Since then, only the licensing of various classes of work relating to subsurface use (but not subsurface use per se) is covered by the Licensing Law.

¹⁸ Passed by RK Government Order No. 916 dated 18 July 1996.

¹⁹ RK Government Order no. 1198 dated 1 October 1996 (Articles 1, 2).

²⁰ RK Law on 'Amendments and additions to certain legislative acts of the Republic of Kazakhstan relating to subsurface use and the conduct of petroleum operations in the Republic of Kazakhstan', passed on 11 August 1999 and effective from the time of its official publication on 1 September 1999 (hereinafter the Amendments Law).

The amendments introduced are not necessarily all viewed in a positive light. On one hand, a number of conceptually important changes have been introduced which simplify and otherwise improve the legislative regime from the investor's standpoint (including the abolition of dual licensing and contracting procedures and the move to a contract-based system of subsurface use); certain aspects are now regulated more precisely (and therefore, it is to be hoped, more predictably); this precision is achieved partly by the introduction of several new or revised definitions of terms; and the Subsurface and Petroleum Laws have been brought into closer alignment. However, certain additions appear unduly rigid (for example, preference for local subcontractors and governing law) or insufficiently conceptually developed (for example, the respective functions of the National Company and Competent Body, and the regulations on environmental protection).

In addition, the somewhat hasty introduction of the legislation led to a number of existing inconsistencies and some new discrepancies and omissions being left in the text of both key laws. One notable instance occurs in Article 44 paragraph 3 of the Subsurface Law, which, in a literal match with the wording of the Amendments Law, states that the contract on subsurface use shall be registered and 'shall take effect both from the time of its signature and from the date of its registration'.

In the intervening period of over two years since the Amendments Law was passed, a considerable number of statutory instruments have been introduced and/or amended (essentially at the level of Government Orders), relating to specific aspects of the legislative regime governing subsurface use, the two most notable of which are discussed below.

By RK Government Order dated 31 July 2001, approval was given for a new Model Contract for the conduct of subsurface operations, superseding the previous version.²¹ The new Model Contract should have taken into account amendments to the legislation on subsurface use embodied in the Amendments Law of 11 August 1999. It was also assumed that, in the process of framing the new Model Contract, the experience gained since the 1997 Model Contract was introduced would be taken on board. Despite the fact that the new Model Contract took almost two years to produce, it is essentially a repetition of the general regulatory provisions contained in the legislation, and glosses over particular aspects of certain subsurface operations. As before, the new Model Contract is silent on provisions for petroleum operations, including production sharing contracts. Nor has the much-debated Special Model Contract on production sharing been introduced.²² Other deficiencies evident in the Model Contract include the fact that

²¹ RK Government Order no. 1015 dated 31 July 2001 on 'Approval of the Model Contract for the conduct of subsurface operations in the Republic of Kazakhstan' (hereinafter—Model Contract). The previous Model Contract was passed by RK Government Order no. 108 dated 27 January 1997.

²² We understand that the now defunct Kazakh Investment Agency (ARKI) did attempt to produce a Model Contract for Production Sharing, and that it was even formally approved by the Agency (under the Subsurface Law, the document should have been passed by RK Government Order), but this Model Contract failed to win general acceptance.

own right. For instance, a variety of legislation on precious metals has been enacted and repealed (gold being the main focus of regulatory attention in this area); petroleum legislation is far more diverse and detailed than is reflected in the paper. Aspects worthy of separate analysis in the field of subsurface use might include: tax and environmental protection legislation;²⁶ legislation governing the functions of state bodies and state commissions; legislation defining the status of Kazakh national companies engaged in subsurface use; and also sectoral instruments (including various ministerial and departmental instructions) regulating subsurface use. Instances are known where prepared legislation never reached the statute book—for example, the Coal Act was drafted but not enacted.

All of which is ample indication that at the present time Kazakh legislation on subsurface use is quite broadly based and has attained a measure of maturity. However, this legislation still requires serious economic and legal analysis with the aim of (i) harmonising certain provisions and defining others in greater detail, and (ii) eliminating existing technical errors and illogicalities. New draft bills and plans for legislative drafting work by the RK Government confirm that the lawmaking process is alive and well in this field.²⁷

²⁶ For a review of the status of environmental legislation, including that relevant to subsurface use, see O. Chentsova, 'Problems of Environmental Legislation', *Oil & Gas of Kazakhstan*, 2000, #5-6, 96-110.

²⁷ For further details, see O.I. Chentsova and N.V. Brainina. 'Recent amendments to Kazakh subsurface and petroleum legislation and prospects for future changes', paper for the KIOGE Conference held on 3-4 October 2001 in Almaty.