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Global Mining and Metals Industry Group

February 2015

Kazakhstan push for reform

First published in Mining Journal 24 February 2015

Maxim Telemtayev, Astana based White & Case partner, will be speaking on the Kazakhstan subsoil use legal and regulatory changes at MINEX Central Asia 2014 Mining and Exploration Forum in Astana 17 – 19 March 2015.

Kazakhstan's new legal and regulatory changes are part of a push for progress and are a step in the right direction in creating a simpler, more transparent and attractive environment for international investment in the mining sector

At the turn of the year, officials in the Republic of Kazakhstan continued their push for progress in the mining and metals sector. In December, Kazakhstan ministers announced plans to invest some US$7 billion in 30 or so large-scale mining projects.

In order to attract international involvement—including investment—with a particular focus on encouraging enterprises from around the globe to engage the domestic mining sector, they also adopted amendments to laws and regulations relating to ownership and use of subsoil resources.

On the one hand, business has boomed. The world's top producer of uranium, Kazakhstan accounts for more than 35% of global production and holds the world's second-largest known reserves of the resource. Kazakhstan is also the second-ranked producer of chromite, with more than 15% of output worldwide and the fourth-ranked producer of cadmium metal, magnesium metal and titanium sponge, respectively.

Other prominent products include bauxite, copper, gallium, rhenium, and zinc. The mining and metals market accounts for as much as a fifth of Kazakhstan's nominal gross domestic product and more than a fifth of its industrial employment.

So, why reform? Well, just as potential doesn't always result in performance, performance doesn't always reflect potential.

Over the past half-century, domestic difficulties, regulatory restrictions, and inadequate infrastructure have impeded international investment in Kazakhstan's mining and metals sector; in this sense, Kazakhstan's already-strong performance hasn't reflected its potential.

Moreover, Kazakhstan hasn't seen large-scale mining exploration since the 1950s, meaning Kazakhstan's true potential may be unknown or undiscovered. In addition, inadequate infrastructure continues to complicate domestic efforts to measure, mine, and move resources: ongoing and envisioned projects—in the mining and metals sector, yes, but also in other extractive industries—are often far away from the country's key cities such as Astana and Almaty.

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In such remote areas, roads, power, utilities, and labour may fall short of industrial or commercial needs. None of these problems are unique or unexpected in Kazakhstan, or elsewhere, but they've shackled potential nonetheless.

Legal reform in context

As part of their push for progress, Kazakhstan's authorities have attempted to attract international investment and other forms of participation by engaging in sustained and sensible legal reform. Without racing recklessly through reform, Kazakh officials, corporations, and entrepreneurs are looking to learn lessons embedded in the experiences of counterparts in relatively established mining and metals markets: Australia, Canada and various countries in Latin America.

Importantly, officials have already made moves thus far: they've effectively limited the state's pre-emptive rights; eased and clarified the state's ability to unilaterally terminate mining contracts; reduced review requirements for project-related contracts; liberalised rules relating to exploration and production rights; and overhauled the frameworks for ownership, contract areas and disposal of rights.

After these amendments, the state may only exercise a pre-emptive right to acquire mining interests with respect to "strategic" deposits, which are to be identified by the state subject to certain criteria. Potential participants in the mining sector will still require consent and other forms of participation from relevant authorities, such as the Ministry of Investments and Development (MID), which oversees the mining segment, to acquire, develop or transfer subsoil use interests.

However, Kazakh officials have reduced the time it takes to consider some applications: if the state does not have a pre-emptive right in the enterprise, authorities must consider applications within 20 business days of submission.

The MID may no longer terminate contracts solely for breaches of obligations under the relevant project documents; instead, the reforms have resulted in grace periods for certain breaches that were once the basis of unilateral terminations by the state. These grace periods vary from thirty days to six months, depending on the type of underlying contract and the circumstances requiring resolution.

Prior to these amendments, the MID could—within a time frame left to its absolute discretion—terminate a mining contract if the mining company failed to address more than two breaches of its obligations under that contract or the project documents.

While draft mining contracts will be subject to economic and legal review by experts, Kazakh officials have now reduced requirements and significantly streamlined the process for approvals. Mandatory expert reviews of draft subsoil-use contracts are out, feasibility studies are no longer subject to stringent review, and holders of exploration rights may do business without standard local content requirements. And developers will now enjoy longer timelines to negotiate, draft, and approve project documents.

In "understudied areas", which hold particular interest for exploratory efforts, the MID may now negotiate directly with applicants and grant rights via pro forma contracts. In turn, the MID may grant exploration and mining rights through its existing tender process or a new alternative approach: UK-style auctions based on signing bonus bids.

Overhauling ownership, Kazakh officials have reformed rules governing tailings, mineral wastes, metallurgical by-products and other technogenic mineral formations (TMF). The latter, for instance, may be owned by private players if it is formed by processing ore imported to Kazakhstan or has been dumped after May 30, 1992. Other TMF will remain under the state's ownership and control, although rights will be granted to others by the MID through negotiation.

The next steps

Kazakhstan will continue to roll out reforms at an ambitious pace. Several state authorities have already begun preliminary hearings to consider approvals for a draft code scheduled for the end of 2015 and a new framework to be implemented in early 2016. If the reforms pass as envisioned, they'll enable international arbitration as a mechanism for dispute resolution; adopt international standards for calculating—and, hence, reporting —reserves; introduce retention rights; bring in simplified state control procedures and modify the tendering process; increase access to information, including geological data; cut expert review requirements and approval times further; and implement a comprehensive field development plan.

Kazakhstan has a way to go. But it's taking steps to surmount—and remove—hurdles that have led it to lag behind peer producers in other parts of the world. In coming years, Kazakhstan may well dig itself out of the hole and into a position as a go-to destination for mining, metals, and more.

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