

Subsoil Code: What Oil Industry Investors Should Expect?

Кодекс «О недрах» – чего ожидать инвесторам нефтяной отрасли?

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In summer 2015, the Concept of the Code of the Republic of Kazakhstan «On Subsoil and Subsoil Use» (hereinafter, the Concept) was approved in Kazakhstan and it was resolved to draft and adopt the Code. According to the Legislative Drafting Plan for 2017, the Draft Code (hereinafter, the Code or Draft) is to be submitted to the Parliament in September 2017. The Subsoil Code is expected to enter into force from 1 July 2018.

In the beginning of March 2017, the Draft was circulated to various public organizations, including professional and investor associations, for extensive discussion by business community and provision of comments and proposals. Since that time, the Draft has changed a lot, and not to investors' benefit. When preparing this article, we have been analyzing the Draft version as of early April 2017.

Writing articles on draft legislative acts a lowly and somewhat useless job, as they are utterly apt to changing, which is corroborated by major modifications in the Draft made within the short period from March to April 2017. Also, draft laws at the stage of their preparation are often «uncleaned» and sometimes unstructured documents. The Draft Subsoil Code well embodies all these features. Still, realizing the importance of the drafted Code, its significance for the development of economy and investors' interest in subsoil, we found it possible to express our views on the yet-to-be-finalized Draft.

KEY NOVELTIES OF THE DRAFT

Draft Structure. Firstly, it should be mentioned that, once the Code is adopted, subsoil use will be gov-

erned by the regulatory legal act of a higher legal force than the currently effective Law of the Republic of Kazakhstan «On Subsoil and Subsoil Use» of 24 June 2010 (hereinafter, the Subsoil Law).

As befits the Code, the Draft includes a Special and General Parts. In turn, the General Part contains 6 large sections governing a broad range of fundamental issues, such as the concept of subsoil and its resources; minerals and their classification; the concept of subsoil use right and the grounds for its origination and termination; transfer of subsoil use right; legal regime of geological information; subsoil license and contract; safe use of subsoil; governmental regulation over industry; and other key provisions comprising the subsoil use regime at large.

The Special Part contains 5 sections governing the geological study of subsoil; exploration and production of hydrocarbons; exploration and extraction of solid minerals (hereinafter, the SM); the use of subsoil space and artisanal mining.

Notably, the Concept sets forth as the rationale justifying the Code appropriateness the need to establish in the Special Part of the Code a special regulation over a number of matters (for example, the use of technogenic mineral formations, common minerals, etc.), however, as revealed by the Draft analysis, in the course of its drafting this approach has been abandoned.

The Draft Missing Some Issues Currently Regulated by the Subsoil Law. The Draft lacks regulations to govern the construction and/or operation of underground facilities unrelated to exploration and production. Obviously, those operations will not actually disappear,

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but at the moment it is unclear how and by what they will be regulated.

Also, in all appearances, following the Code adoption, subsoil legislation will not be regulating the extraction and use of underground water and therapeutic muds. The Code expressly stipulates that the relationships involving the use of underground water resources are regulated by the RK water legislation, except for the cases provided for by the Code. However, the Code contains but sparse pertinent regulations, which are mostly of reference nature.

The drafters have left out the special rules relating to the exploration and extraction of common minerals contained in the current Subsoil Law. Moreover, this term has been altogether excluded from the Code. We understand that this is due to the transition to the international system of mineral reserves qualification, but the need for, and appropriateness of, complete demolition of the existing system remains questionable.

Technogenic mineral formations (TMF) are qualified as SM, and no special regime so much spoken of at the stage of the future Code Concept development has been established.

In all fairness, it has to be said that the drafters have no conceptual solutions and final common position in respect of a number of the above issues. Perhaps, in the course of further work some approaches will yet be modified and in the outcome we will have a legislative act very different from the existing Draft.

Some Conceptual Changes in the Subsoil Legal Regime

Replacement of the contract system by the licensing system. It should be primarily mentioned that the legal regulation of subsoil use in the oil industry is being amended to a much lesser extent than that in the mining area.

It is the mining industry that is intended to undergo large concep-

tual changes, the major one being replacement of the contract system by the licensing system.

The license will be issued for the geological study of subsoil and for SM exploration and extraction.

The use of subsoil space and artisanal mining will also be license-based.

Streamlining of the subsoil use right obtaining procedure. Licenses, including SM extraction licenses, are expected to be issued under a maximally simplified procedure on the basis of applications.

Reduction of subsoil user's obligations. The list of subsoil user's obligations in the mining area has been cut to the fullest extent possible. Specific obligations are defined by the Code, including expressly stipulated annual minimum expenditures, both at the SM extraction block, and SM exploration block.

Other novelties in the mining area. Mining is expected to undergo a number of other important innovations, for example, introducing the concept of SM extraction block retention. This implies a specific legal regime for subsoil blocks under SM extraction licenses, providing for the subsoil user's right not to start, or to suspend, the SM extraction at the block. The retention status is assigned under certain conditions, which include, for instance, extraction of discovered mineral resources being unprofitable for the subsoil user due to unfavorable market conditions, if there are reasonable grounds to believe that such extraction can become profitable in the future.

Liberalization of the Geological Information Usage Legal Regime. As suggested by the Draft, subsoil users will be able to freely dispose of their own geological information.

Flaws in the Draft Legal Writing. As of today, the Draft is obviously immature. It is poorly structured, many provisions non-finalized and unclearly worded.

Rejecting the well-considered, verified and already familiar terms and definitions and replacing them with other, sometimes (in our opinion) legally flawed or significantly more «cumbersome» ones, does not improve the quality of legislation as compared to the current, but rather has the contrary effect.

Some procedural matters are governed in excessive detail, which should not be the case with the legislative act of such high legal force as the Code. Some rules are duplicated in the General and Special Parts.

A number of issues are addressed in a large number of articles. For example, changing of the contract area (according to the usual terminology) is regulated in the Draft

by several quite extensive Articles: «Subsoil Block Reduction»; «Subsoil Block Allotment»; «Subsoil Block Adjoining».

One can only hope that in the process of further work the Draft text will be proofread, finalized and structured.

EXPECTED OIL INDUSTRY REGULATION

Since the magazine is dedicated to the oil industry, we are highlighting below the points of expected legal regulation over the exploration and production of hydrocarbons.

Realizing that the Draft will be actively improving and, consequently, modified at least until September 2017, we are dwelling only on its provisions that are most essential in our view and that form the legal regime in the area of hydrocarbons subsoil use, and consider them in general, without lingering on details and on the so-called «petty regulations» abounding in the Draft.

As mentioned above, no drastic changes in the oil industry subsoil regulation have occurred and the fairytale legal regime liberalization so awaited for by the miners will not come to bless the oilers. This can be explained by the considerably worse state of the mining industry, the special significance of oil as the source of energy, and by many other reasons.

Nonetheless, it is anticipated that, once adopted, the Subsoil Code will change subsoil use regime in the oil industry as well, although not so drastically.

SUBSOIL USE RIGHT CONCEPT AND CONTENT UNDER THE CODE

According to the Draft, subsoil use right is a person's ability, secured by the Code, to use subsoil within the allotted block for a certain period of time, on a paid or free-of-charge basis.

The Code expressly stipulates that the subsoil use right is an indivisible right in rem.

As before, subsoil users may be both legal entities and individuals. Foreigners, foreign legal entities and stateless persons enjoy the same rights and bear obligations in subsoil use relations on equal terms with individuals and legal entities of the Republic of Kazakhstan, unless otherwise expressly provided for by the Code and other legislative acts.

OBTAINING SUBSOIL USE RIGHTS TO CONDUCT HYDROCARBONS OPERATIONS

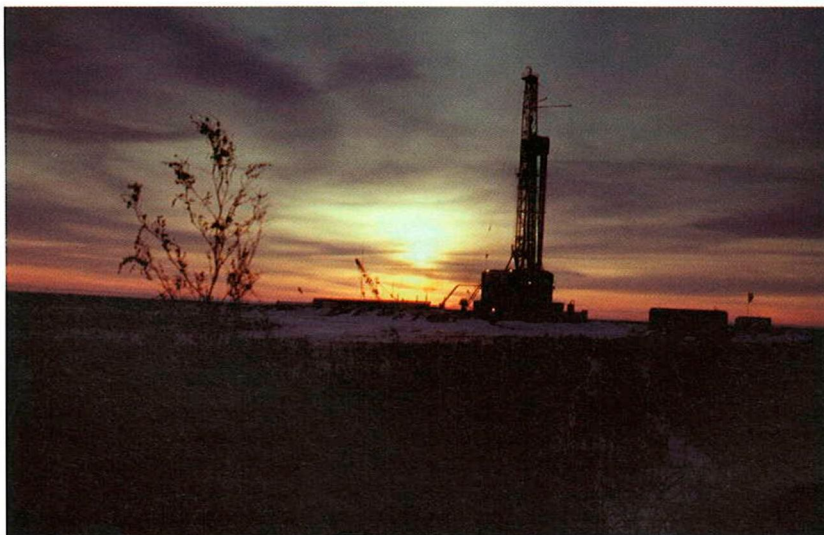
Types of Hydrocarbons Subsoil Use Operations. According to the Draft, hydrocarbons mean crude oil, gas condensate, gas (including crude natural and associated gas and gas from low permeability (shale or coal) reservoirs) and natural bitumen.

The General Part of the Code implies that, as regards hydrocarbons, subsoil use right is granted to conduct the following operations: 1) geological study of subsoil; 2) mineral exploration; 3) extraction of minerals; and 4) use of subsoil space for the purposes unrelated to exploration and/or production of minerals.

However, the systems analysis of the Code suggests that, as regards hydrocarbons, subsoil use right is only granted for the exploration and production (i.e., combined exploration and production) or for production.

Grounds for the Subsoil Use Right Origination. The right to the geological study of subsoil and to use subsoil space for the purposes unrelated to exploration and/or production arises on the basis of a license.

The right to the exploration and production of hydrocarbons arises on the basis of a contract (same as at present), while the same rights with



respect to SM are to arise on the basis of a license.

Procedure for Obtaining the Right to Exploration and Production. Since investors are traditionally mostly interested in obtaining the rights to the exploration and production of hydrocarbons, we will dwell on this in more details.

As a general rule, the contract for the exploration and production or for production of hydrocarbons will be concluded based on the results of the auction (currently, the tender). Contracts with the National Company, same as now, will be concluded based on the results of direct negotiations.

The auction procedure is spelled out in every detail, which we deem unreasonable for a legislative act of the code level. Such detailed procedural breakdown would be more appropriate to appear in a subordinate legislation. These would be the same legal writing flaws devaluating the Code's significance as such.

Requirements to Subsoil Users. In a nutshell, the requirements to persons willing to obtain the right to the exploration and production or for production of hydrocarbons and the right-granting procedure are as follows.

The potential subsoil user must meet the following requirements:

1) Not to be in the process of dissolution (for legal entities), or reorganization (for legal entities), or bankruptcy;

2) Not to have outstanding arrears on taxes and other mandatory payments to the state budget;

3) In case of obtaining subsoil use rights for the exploration and production of hydrocarbons – to possess financial resources sufficient to fulfill the minimum requirements as to the volumes and types of work at the subsoil block during the exploration period;

4) In case of obtaining the subsoil use right at an offshore subsoil block – to possess a positive experience of conducting subsoil use operations in the territory of Kazakhstan's continental shelf, in Kazakhstan's inland water bodies, or offshore outside the Kazakhstan territory.

Auction Procedure. A person seeking to obtain the hydrocarbons subsoil use right must submit to the competent authority a written application requesting to conduct an auction to grant the right.

Following review of the application, the competent authority accepts the application and publishes the auction announcement within 10 business days of the date of acceptance, or rejects the application acceptance on the grounds established by the Code.

The auction announcement contains an extensive list of terms and conditions accepted by the participants apriori. Among other things, the announcement contains such habitual terms as the amount of expenditures on local personnel training in the period of production; expenditures on research-and-development, research-and-engineering and pilot construction operations in the RK territory necessary to perform work under the contract in the period of production; expenditures on the socio-economic development of the region and development of its infrastructure in the period of production; minimum local content obligations regarding work, services and personnel, etc.

In addition, in certain cases the competent authority may establish additional conditions, for example, the national company's share in the contract, minimum requirements to the volumes and types of operations at the subsoil block during exploration period higher than those established by the State Subsoil Fund Management Program, and others.

In case the auction is held in respect of a subsoil block the subsoil contract for which was terminated during or after the production period, and a trust management contract with the national company was concluded, the auction announcement must contain a condition stating the amount of security to ensure cleanup after production operations, which must be provided by the auction winner when entering into the contract.

The auction is held in an open format via its participants declaring their signature bonus bids, beginning with the starting amount specified in the auction announcement and increasing it by the auction step. The auction step is from 5% to 50% of the starting signature bonus amount.

The winner of the auction submits to the competent authority a signature bonus payment confirmation and signs the contract for the exploration and production or for production, prepared in accordance with the model contract approved by the competent authority.

If granted the subsoil use right for the exploration and production, the auction winner additionally prepares a work program to contain the data provided for by the Code and attaches it as an integral part to the contract.

The competent authority, within 10 business days of the date of receiving from the auction winner the contract and the signature bonus payment confirmation, concludes with the winner the contract

for the exploration and production or for production of hydrocarbons.

If the only person registered as the auction participant is the person filing the application for the auction, the subsoil use contract is entered into with such person in the same manner as with the auction winner, on condition of payment of the starting amount of the signature bonus.

Essentially, the auction prescribed by the Code has little to do with the classic auction, in which the seller undertakes to sell the auctioned item to the highest bidder. Given all subsoil user's obligations pre-defined in the auction announcement, including conditions additionally imposed by the competent authority, such auction is rather similar to the universally-familiar tender, but held in the form of an auction based on the only position – the size of the signing bonus.

STRENGTHENING THE NATIONAL COMPANY'S ROLE

The national company retains all rights and privileges stipulated by the current legislation.

The Code additionally establishes that in case of appointment of an operator under a contract with mandatory share participation of the national hydrocarbons company, the share of the national company's participation in the operator's charter capital cannot be less than 50%. It is yet unclear whether this rule will apply to «old contracts.»

SUBSOIL USE CONTRACT ACCORDING TO THE DRAFT

The Concept and Types of Contracts. Under the contract, one party (the Republic of Kazakhstan in the person of the competent authority) is to grant for a certain period of time to the other party (subsoil user) the subsoil use right, and the subsoil user undertakes to perform, at his own risk and expense, the subsoil use in accordance with the terms and conditions of the contract and the Code.

The contract is made only for the exploration and production or for the production of hydrocarbons.

Thus, as of today, the Code does not clearly define which type of contracts the subsoil use contract refers to, and does not provide for the possibility to execute the globally-adopted contracts, such as PSAs.

Contract Terms and Conditions. The terms and conditions contained in the subsoil use contract include as follows:

- 1) Type of subsoil use operations;
- 2) Contract term;
- 3) Borders of the subsoil block (blocks);

- 4) Subsoil user's obligations by the volumes and types of work at subsoil blocks;
- 5) Subsoil user's obligations to finance local personnel training in the period of production;
- 6) Subsoil user's local content obligations regarding work, services and personnel;
- 7) Subsoil user's obligations regarding processing (disposal) of crude gas in the period of production;
- 8) Subsoil user's obligations regarding expenditures on research-and-development, research-and-engineering and pilot construction operations in the territory of the Republic of Kazakhstan necessary to perform work under the contract in the period of production;
- 9) Subsoil user's obligations regarding expenditures on the socio-economic development of the region and development of its infrastructure in the period of production;
- 10) Subsoil user's liability for breaching contract obligations; and
- 11) Other conditions on which the subsoil was granted for use.

Hence, in view of the possible inclusion of other terms and conditions into the contract (p. 11) and the content of the auction announcement, one may say that subsoil

user's contractual obligations defined by the Code are in essence largely identical to the obligations contained in the currently effective Law, and the list of commitments that have nothing to do with subsoil use (for example, social development of the region) has not been shortened.

Conformance with the Model Contract. Subsoil use contracts are prepared in accordance with the model contract for the exploration and production or for production of hydrocarbons, approved by the competent authority. Deviation from the model contract is allowed in cases, to the extent, and in accordance with the procedure, prescribed by the Code. The Code analysis shows that actually no such cases are provided for.

Moreover, Article 107 governing the issues of production period extension, stipulates, inter alia, that, if the contract conforms to the model contract, in case of extending the period of production, the subsoil user and the competent authority enter into a supplementary agreement to the contract for the exploration and production or for production of hydrocarbons, providing for the extension of the

production period and for the subsoil user's obligation to fulfill the work program.

If the contract does not conform to the model contract, when extending the period of production, the subsoil user and the competent authority enter into a revised hydrocarbons production contract, designed in accordance with the model contract for the production of hydrocarbons.

If the hydrocarbons production period under the contract is 20 years or more, then, in case of extending the production period, the contract terms are subject to adjustment in accordance with the legislation of the Republic of Kazakhstan in effect at the time of such extension.

Thus, the Code has a built-in mechanism to bring all oil contracts, including previously concluded, in line with the model contract, and for contracts with a 20+ year production period the extension may also entail variation of the entire regime in accordance with the legislation in effect at the time of such extension.

The existence of such regulations brings to the forefront the issue of a potential breach of stabilization guarantees granted to subsoil users by the current legislation.

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EXPLORATION AND PRODUCTION PERIODS

The effective term of a hydrocarbons exploration and production contract is determined by the subsoil block (blocks) usage periods.

Exploration Period. Pursuant to the Code, the period of exploration under an exploration and production contract is no more than 6 consecutive years, or no more than 8 years for an offshore block or for complex exploration projects. Within the said period, subsoil users may conduct any field prospecting and evaluation operations at the exploration block, including field pilot production.

The exploration period is calculated from the date of registration of the hydrocarbons exploration and production contract.

Subsoil users may terminate the exploration period early by relinquishing the entire exploration area in accordance with the procedure and on conditions established by the Code.

Complex hydrocarbons exploration projects mean projects under hydrocarbons exploration and production contracts, which involve drilling of 6,000+ meter deep wells.

The exploration period may be extended, accordingly reducing the production period. The current legislation contains no such rule.

A one-off extension is possible in order to evaluate a discovered field (deposit), including its pilot production for a period up to 3 years, or for up to 6 years for an offshore block or for complex hydrocarbons exploration projects.

The current legislation establishes no maximum allowable extension period for evaluation purposes, however, in practice this period is typically 3 years. The extension is only allowable for subsoil blocks determined by the subsoil user for the purposes of evaluating the fields (deposits) discovered by him.

The Code sets forth a number of grounds to reject the extension, including instances where the subsoil user fails to eliminate contract breaches.

The exploration period is suspended in cases of discovering a gas or a gas condensate field for a period required to build the gas transportation infrastructure; such period, however, not to exceed 5 years.

The exploration period is also suspended in case the subsoil user discovers a hydrocarbons field at a state border-adjacent subsoil block.

Production Period. The Code-amended regulations relating to production period do not favor subsoil users. According to the Code, the period of hydrocarbons pro-

duction cannot exceed 25 years, or 45 years for large or unique fields, extendable only within the said periods.

Currently, production contracts are concluded for the same periods, but are extendable until the term required for complete development of reserves.

Moreover, the Code establishes additional requirements providing for the possibility to extend contracts for large unique fields. In case a subsoil contract's term is extended by more than 10 years at such fields, the contract provisions must be supplemented by one of the following obligations set out by the Code:

1) Setting up processing plants independently through organizing a new legal entity, or jointly with other persons;

2) Modernization or reconstruction of the existing production plants;

3) Modernization or reconstruction of the existing processing plants;

4) Supplying the produced mineral for processing to the processing plants (productions) in the RK territory on contractual terms;

5) Implementation of another investment project or a project aimed at the socio-economic development of the region, independently through organizing a new legal entity, or jointly with other persons.

Field Facilities Construction. The Code explicitly sets forth that construction of facilities at a discovered field is to be carried out within the exploration period and/or within the first 3 years of the production period. The current Law does not regulate this issue.

TRANSFER OF SUBSOIL USE RIGHT AND ALIENATION OF STRATEGIC SUBSOIL BLOCK-RELATED OBJECTS; STATE'S PREEMPTIVE RIGHT

The transfer of subsoil use right (a part thereof) (according to the current terminology – assignment (transfer) of subsoil use right) will be performed, same as at present, on consent of the competent authority.

As to subsoil use right-related objects, the Code requires consent only in cases of transferring objects related to the strategic blocks of subsoil.

The Code defines such objects as participation interests, units, shares and other share participation instruments, as well as securities, confirming the right of ownership or convertible into shares, participation interests, units and other forms of share participation in a legal entity entitled to use a strategic block of subsoil, or in a legal entity or

other organization having the possibility to directly and/or indirectly determine the decisions made by the person using a strategic block of subsoil.

Not recognized as objects related to a strategic block of subsoil are shares, participation interests, units and other instruments of share participation in legal entities and organizations holding strategic subsoil block-related objects traded on an organized securities market.

Please note that the Code contains a regulation clearly defining which blocks qualify as strategic. Recognized as a transfer of strategic subsoil block-related objects is the following:

1) Alienation of strategic subsoil block-related objects based on paid or free-of-charge civil law transactions, including in case of a legal entity dissolution or where such objects are paid in as a contribution to the legal entity's or another organization's charter capital;

2) Foreclosure on such objects, including in case of a pledge;

3) Arising of the right to such an object as a result of admission of a new participant or unit holder, or placement of shares, except for changes in the ratio of interests, shares, units or other share participation instruments resulting from actions not covered by paragraph 1);

4) Transfer of the said objects by way of succession on the basis of a corresponding act of transfer or a spin-off balance sheet in case of a legal entity reorganization;

5) Transfer by way of inheritance;

6) Release of such objects for circulation on an organized securities market.

The Code establishes a broader range of exceptions from the general rule requiring the competent authority's consent to the transfer of subsoil use rights and strategic subsoil block-related objects, as compared to that currently in effect.

For instance, the consent is not required in cases of «*changes in the amount of charter capital, including placement of shares or sale of the previously purchased shares or other securities convertible into the legal entity's shares, if these do not change the percentage of participants' participation interests, unit holders' units or shareholders' shares or other securities that are the strategic subsoil block-related objects*» and in a number of other instances not provided for by the current legislation.

Transfer of subsoil use rights (an interest therein) under the license for geological study of subsoil is prohibited.

Alienation of objects related to subsoil use right for all subsoil



blocks other than strategic is subject to a notification procedure.

The state's preemptive right is envisaged for instances of alienation of subsoil use rights (an interest therein) arising under a subsoil contract for the use of a strategic subsoil block, and for securities of strategic subsoil block-related objects being alienated or released for circulation on an organized securities market.

The Code's Article defining strategic blocks suggests that these comprise not only the blocks containing hydrocarbons, but also those containing SM, however, the Article dealing with the state's preemptive right speaks only about the transfer of rights arising on the basis of a contract (applicable only to hydrocarbons). Hence, there is an internal controversy, probably due to the Code's immaturity.

EARLY TERMINATION OF CONTRACT ON COMPETENT AUTHORITY'S INITIATIVE

As compared to the current Law, the Code expands the list of grounds for contract early termination on competent authority's initiative. In addition to the currently existing grounds, the Code establishes the competent authority's right to early terminate the contract in case:

1) A court decision prohibiting subsoil use activities due to environmental and industrial safety violations comes into force;

2) A knowingly inaccurate reporting, as envisaged by the Code, is submitted;

3) A reporting envisaged by the Code is not submitted;

4) Hydrocarbons subsoil use operations are conducted without appropriate project documents approved by the subsoil user and having received positive opinions of the expert examinations envisaged by the Code;

5) Hydrocarbons subsoil operations involving damage to the earth surface integrity are conducted without provision of security for the performance of subsoil use cleanup obligations.

The competent authority notifies subsoil users in writing about their committed violations described in paragraphs 3), 4) and 5).

Subsoil users must rectify the violations within 3 months of the date of receiving such notification, and accordingly inform the competent authority in writing, attaching the documents supporting the rectification.

If the violation is not rectified within the said period, the competent authority early terminates the contract.

As to the termination of contracts for the fields of strategic importance, the regulation remains so far unchanged.

EXPLORATION AND PRODUCTION CLEANUP

The Code governs the issues of subsoil use cleanup in a new fashion. Pursuant to the Code, the consequences of exploration and production are still to be cleaned up in accordance with the abandonment plan, while the performance of subsoil user's obligations to perform the hydrocarbons exploration and production consequences cleanup will have to be secured exclusively by pledge of a bank deposit.

The amount to secure the hydrocarbons exploration consequences cleanup and the timeframes for its depositing are determined in the exploration operations project, based on the market cost of cleanup operations.

The amount to secure the production consequences cleanup and the timeframes for its depositing are determined in the field development plan for the first 3-year production period based on the market cost of cleanup operations, and are subject to adjustment depending on the consequences of production accumulating in aggregate by completion of each subsequent 3-year production period.

In the event the subsoil user fails to commence exploration or production cleanup operations within the Code-determined period after the contract termination date, the competent authority will ensure the cleanup using the cleanup obligations security provided by the subsoil user.

The subsoil use cleanup is deemed completed on the date the abandonment certificate is signed.

SUBSOIL USE STABILIZATION REGIME

The provisions governing subsoil use conditions stabilization have undergone significant changes.

The stabilization guarantees currently in effect ensure that only changes in legislation deteriorating

the results of subsoil user's entrepreneurial activities do not apply to subsoil contracts. However, even this guarantee does not cover legislative changes in the area of national security and defense capacity, and in the areas of environmental safety, healthcare, taxation and customs regulation.

The relevant Article of the Code suggests that it is expanding the effect and «coverage» of stabilization guarantees as compared to the Subsoil Law currently in effect, setting out that the subsoil use right does not fall under legislative changes establishing or toughening the subsoil use right holder's liabilities or imposing on him new obligations, including those determining different conditions of subsoil operations and deteriorating the results thereof.

Besides, the Code has narrowed the list of areas in which the guarantee does not apply, by excluding therefrom taxation and customs regulation.

Since the proposed revisions significantly expand the guarantee application area and imply, among other things, both taxation and customs charges stability, it is highly unlikely to be adopted as is.

DISPUTE RESOLUTION

As established by the Code, any disputes arising between the subsoil user and the competent authority in connection with subsoil use operations are to be settled in the Kazakh courts, unless otherwise provided for by the Code.

The «otherwise,» i. e., the possibility to settle disputes in commercial arbitration, is provided by the Code for subsoil users active in the mining industry and applies to a limited range of disputes.

Subsoil users conducting exploration for and/or production of hydrocarbons cannot enjoy such possibility. This is a principled position of the Ministry of Energy, which is substantiating it by the existence of the Energy Charter Treaty (ECT) and investment protection treaties ratified by Kazakhstan.

The possibility and extent of applying the ECT and investment protection treaties in order to go to arbitration, given the express rule defining Kazakh courts as the sole remedy for subsoil users, and the model contract to undoubtedly duplicate this rule, is a subject of further analysis. We would just say that the issue of remedies to protect own investment is very important for investors, and lack of the statutory opportunity to arbitrate an investment dispute adversely affects their decisions concerning project investment. ■