To:
The Ministry of Industry and Construction
of the Republic of Kazakhstan
010000, Astana, A. Mambetov street, 32

From:
Association of Legal Entities «Kazakhstan Chamber of Mines»
November 17, 2023

Comments on the draft Law «On amendments and additions to certain legislative acts of the Republic of Kazakhstan on subsoil use issues in order to improve the investment climate».

Association of Legal Entities «Kazakhstan Chamber of Mines» (hereinafter referred to as the "Chamber") expresses its greetings and deep respect to you.

The Chamber unites national and foreign companies in the mining sector of Kazakhstan, such as Rio Tinto Exploration Kazakhstan, IG Kazakhstan Ltd., Aurora Minerals Group, Scythian Mining Group, Arras Minerals, Sarytogan Graphite Ltd., GRATA International and other companies that have emerged, arrived, or expanded their investments in connection with the adoption of the Republic of Kazakhstan Code "On Subsoil and Subsoil Use" (hereinafter referred to as the "Subsoil Code").

On October 30, 2023, the draft Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Subsoil Use Issues to Improve the Investment Climate" was published on the Electronic Government website in the "Open Legal Acts" section (https://legalacts.egov.kz/npa/view?id=14769801). This draft proposes a number of amendments and changes to the Subsoil Code which are subject for discussions.

Regarding this draft law, the Chamber would like to provide the following comments and kindly ask the initiators of the draft to consider them with the participation of Chamber representatives:

1. **The draft law introduces a distinction between the concepts of "subsoil use for entrepreneurial purposes" and "subsoil use for state needs". However, any subsoil use, regardless of the status of the subsoil user (state or private), serves and corresponds to**

state needs since, according to the Constitution of Kazakhstan, subsoil and natural resources belong to the people, and subsoil users are essentially contractors that the state attracts for exploration and/or extraction under subsoil use contracts or subsoil use licenses.

Among other things, the draft law includes the following provisions:

4. Subsoil use for entrepreneurial purposes is carried out by conducting subsoil use operations within the allocated subsoil area and the granted subsoil use rights.
Subsoil use for state needs is carried out during state geological exploration of subsoil, the use of subsoil space for placing underground defense structures, construction and operation of tunnels, underground transport arteries for the movement of people and goods, communications, as well as in the extraction of common minerals for use in the construction (reconstruction) or repair of state public roads, railways, water supply systems, heat pipelines, other public utility facilities, elimination of the consequences of dangerous natural phenomena, disasters, dam breaches, emergencies in life support systems, treatment facilities, and in other socially significant cases.

Article 16-4. Subsoil use for state needs

1. Subsoil use for state needs pursues socially significant goals and is carried out by state legal entities or subordinate organizations within the implementation functions of state bodies.

2. Subsoil use for state needs during state geological exploration of subsoil is carried out in accordance with Article 74 of this Code.

3. The use of subsoil space for state needs is carried out on the basis of and within the framework of construction projects in accordance with the legislation on architectural, urban planning, and construction activities in the Republic of Kazakhstan.

4. Subsoil use in the extraction and use of common minerals for state needs is carried out on the basis of and within the scope of the permit issued by the local executive body of the region, city of republican significance, the capital.

We believe that the division of subsoil use for entrepreneurial purposes and for state needs will lead to a range of practical and conceptual problems for regulating the industry as a whole:

1) Conceptually, the separation of subsoil use into two groups will prioritize "subsoil use for state needs" over "subsoil use for entrepreneurial purposes" in the future. However, as noted above, any subsoil use, even if carried out by a private company, serves the needs of the state. This aligns with the provisions of Article 6 of the Constitution of Kazakhstan;

2) According to Article 84 of the Land Code of the RoK, the discovery and development of deposits of minerals (solid and common minerals, hydrocarbons) are recognized as state needs for the purposes of forced land alienation. The Land Code does not distinguish whether such development will be for state needs or for entrepreneurial purposes. The proposed new Articles 16-1 and 16-4 in the Subsoil Code will either contradict the provisions of Article 84 of the Land Code or significantly change the legal practice of applying Article 84 to the detriment of the interests of bona fide subsoil users (please see below next para);

3) Currently, local executive bodies leave subsoil users "alone" with land users regarding resolving issues of rights to land in the subsoil where subsoil users have explored and discovered deposits. While legislation in the Republic of Kazakhstan clearly regulates the procedure for establishing a private servitude by a subsoil user regarding another land

plot in terms of exploration operations, legislation regarding mining plots (mining allotments) does not establish the possibility and procedure for a subsoil user to independently (without involving the state) ensure the forced alienation of a land plot in which valuable minerals are discovered. Therefore, subsoil users transitioning to the mining stage make every effort to negotiate with land users for the purchase of the land plot or its part. However, there are often cases where such agreements are unattainable, for example, due to the land user overestimating their rights. In this case, the subsoil user has no other recourse but to appeal to the local executive state body for the forced alienation of the land plot for state needs under Article 84 of the Land Code. If we allow changes to the Subsoil Code (by dividing subsoil use for state needs and entrepreneurial purposes) and make it contradictory to Article 84 of the Land Code, the subsoil user will have no recourse in a situation where a land dispute cannot be resolved privately. We believe that this situation, in principle, creates a threat to the state-guaranteed exclusive right to the subsoil user (investor) to extract explored and discovered minerals;

4) The judicial practice that has developed in Kazakhstan over the past few years shows that even if local state bodies refuse a subsoil user in the forced alienation of a land plot for state needs (for example, citing that the subsoil user is not a state legal entity), the courts always defend the rights of subsoil users, pointing out that subsoil and natural resources belong to the people of Kazakhstan, and therefore, the development of a deposit is always a state need, as established by Article 84 of the Land Code. The proposed provisions in the Subsoil Code may change judicial practice, and in this case, competent authorities (the Ministry of Railways of the Republic of Kazakhstan and the Ministry of Energy of the Republic of Kazakhstan) will face a large number of cases where subsoil users simply cannot start mineral extraction due to the legal impossibility of resolving disputes with land users occupying the territory of the deposit;

5) The proposed amendments and the negative consequences they entail also need to be discussed with the Ministry of Energy of the Republic of Kazakhstan (hydrocarbons and uranium deposits). Judicial practice in the Mangystau, Atyrau, Aktobe, and West Kazakhstan regions shows that, for example, oil and gas companies also face the impossibility of reaching an agreement with land users and, accordingly, turn to local state bodies for the alienation of land plots for state needs.

We also would like to emphasize that the Chamber in no way diminishes the rights of land users and adheres to the need to negotiate with land users for the purchase of their rights in all possible cases without involving the state. However, if such possibilities are exhausted, the subsoil user must have a legally established opportunity to undergo a judicial process in order to determine the rights to a land plot for the purpose of mining discovered minerals. In this regard, the Land Code, in the case of forced alienation of a land plot for state needs, directly establishes the need to compensate the land user for the cost of the land use right, as well as the possibility of providing another land plot.

2. **Amendments proposed in the industrial policy section, introducing additional obligations for subsoil users related to the approval and implementation of a domestic value development program, as well as conducting procurement procedures for contracts aimed at industrial development.**

The Chamber is committed to the principles of supporting domestic suppliers and increasing the share of local content in the procurement activities of subsoil users. However, any measures aimed at supporting local content and implementing industrial policy should be taken with consideration of the principles of stability, clarity, and simplicity in the execution of subsoil use conditions. The current draft law contains fundamentally new terms and concepts, such as "domestic value development program" and "procurement procedures for contracts aimed at industrial development." Moreover, the responsibility for the development and implementation of these new concepts is entirely placed on subsoil users.
We believe that the draft law in this regard is not elaborated to the extent necessary to provide clarity for investors (subsoil users) regarding the legislator's introduced requirements. In this context, it is difficult to assess the justification for such requirements and their enforceability by subsoil users. In particular, we would like to draw your attention to the following:

1) **The proposed amendments to paragraph 7 of Article 31 of the Subsoil Code aim to not extend the principle of stability of subsoil use conditions to industrial policy issues. Such changes may undermine investors' confidence in the stability and consistency of the state's regulatory policy towards investors.**

   Currently, the Subsoil Code establishes that if, after the issuance of a subsoil use license, other conditions for subsoil use licenses are established by the legislation of the Republic of Kazakhstan regulating subsoil use, these conditions do not apply to the previously issued license. However, under the current legislation, this guarantee does not extend to issues of national security, defense capability, environmental safety, healthcare, taxation, customs regulation, and competition protection. The discussed draft law proposes to add industrial policy issues to this list.

   Industrial policy, as defined by the legislation of the Republic of Kazakhstan, determines a system of economic, organizational, and legal measures implemented by the state to stimulate and develop industry.

   Considering the very general definition of the concept of "industrial policy," we believe that if the proposed amendment to paragraph 7 of Article 31 of the Subsoil Code is adopted, the state will be able to change any conditions of subsoil use related to the procurement of goods, works, and services during exploration and mining, any issues related to the processing of discovered minerals by the investor, as well as any issues related to their realization in the external or internal market. Essentially, these are all matters related to conducting commercial activities and production stages.

   Thus, the proposed amendment will mean that the principle of stability of subsoil use conditions will cease to exist in practice in Kazakhstan.

Pages 5 and 25 of the World Bank's Report on the results of the Diagnostic of the mining sector in Kazakhstan note, among other things, that regulatory and institutional instability does not provide investors with guarantees regarding the future direction of development of the mining sector and its legal framework in Kazakhstan. It is evident that the "blurring" of the guarantee of stability of subsoil use conditions will make the regulatory policy of Kazakhstan in the mining sector even more unstable.

2) **The proposed amendments to several articles of the Subsoil Code regarding additional obligations of subsoil users related to the approval and implementation of the program for the development of domestic value and the conduct of procurement procedures through contracts aimed at industrial development introduce administrative and planning regulation into market relations, which can negatively impact the investment climate.**

The provisions of the draft law stipulate that all subsoil use contracts and licenses for the extraction of solid minerals must include additional obligations for subsoil users, namely:

- the approval and implementation of programs for the development of domestic value;
- the conduct of procurement procedures for the purchase of goods, works, and services through contracts aimed at industrial development.

The draft law provides for liability in the form of termination of subsoil use contract or revocation of a mining license for violating such obligations.

Firstly, it should be noted that according to the current provisions of the Subsoil Code (paragraph 3 of Article 208), licenses for the extraction of solid minerals already include, as one of the mandatory conditions, the requirement to specify the minimum share of domestic value in the works and services used during mining operations. This legal requirement is clear and should ensure support for domestic suppliers. Additional clarifications in the form of imposing on subsoil users obligations to approve and implement additional programs and conduct procurement procedures through pre-determined contracts will only restrict the freedom of entrepreneurial (investment) activity of investors.

Secondly, the draft law does not consider the fact that many foreign and local major investors adhere to higher standards of quality and safety for the goods, works, and services they acquire, for example, due to their global policies or listing on international stock exchanges. In this regard, administrative and planning regulation of the procurement of such investors may be fundamentally unacceptable, as any restriction on the investor's choice of a potential supplier (contractor) violates their rights and legitimate interests.

Thirdly, the draft law does not provide for cases of objective and justified impossibility of fulfilling the introduced additional obligations. For example, if, for reasons beyond the subsoil user's control, there is an objective impossibility to implement a program for the development of domestic value and/or conduct procurement through contracts aimed at industrial development, there is no exemption from liability. On the contrary, the draft law unequivocally establishes the consequences in the form of revocation of the mining license or termination of the subsoil use contract. This creates serious risks for the state-guaranteed exclusive right of the investor to mine explored minerals. The more complex the requirements imposed on the investor during mining, the less incentive there will be for them to invest in already high-risk exploration.

President Tokayev has repeatedly emphasized the need to stimulate foreign investment in the search and exploration of new deposits. However, these proposed initiatives cannot be considered aimed at improving the investment climate (despite being labeled as such by the draft law).

3. **Regarding the proposed amendment to Article 59-1, "Processing of Primary Metals," in the Republic of Kazakhstan's Law on Industrial Policy, the following observations are made:**

According to the proposed amendments, to ensure the priority processing of domestic raw materials within the country, it is suggested to impose obligations on producers of primary metals to approve and implement programs for processing these metals. We believe that it is essential to avoid introducing impractical requirements, such as mandating all mining companies (which may only produce raw materials or concentrates) to become metal producers. Such unrealistic restrictions could hinder the development of deposits where the concentrate does not meet the requirements of Kazakh metallurgical plants or where the production scale does not justify the creation of infrastructure for metal production, potentially impeding development under different conditions where the operation could be profitable. Additionally, mandatory processing requirements, where feasible, would significantly alter the commercial conditions for metal production by metallurgical plants, potentially eliminating the incentive for high-risk research and development in these deposits.

According to the amendments, **the export of primary metals from the territory of the Republic of Kazakhstan will be prohibited, except in certain cases specified in paragraph 6 of this article**. Presumably, this implies that mining companies must direct their production to local manufacturers and are not allowed to export it (e.g., copper sheets), except in situations currently unclear. While supporting local processing industry is an important goal shared by all mining companies, it should occur on mutually beneficial terms without introducing obstacles that may eliminate the possibility of exporting products. The Chamber proposes rejecting these provisions until further clarity is obtained on the following issues:

a) local-level compliance conditions (e.g., production percentage, taking market conditions into account), and
b) under what conditions products can still be exported (concentrates, copper sheets, etc.).

If the proposed conditions remain unacceptable, further discussion between the industry and the Ministry is required to achieve a common understanding.

In the initiated concept of the "Hearing State" by the President of Kazakhstan, the importance of building constructive dialogue between government agencies and investors is emphasized. However, the Kazakhstan Chamber of Mines has legitimate doubts that the proposed amendments above contribute to improving the investment climate in the country. On the contrary, such initiatives may pose a threat to the state's efforts to attract new investments in Kazakhstan's geological exploration. We believe that regulating the business operations of subsoil users through administrative methods will not achieve the expected effect; instead, it may indicate instability, inconsistency, and unpredictability in the state policy in this field.

4. **Amendments to Article 47 of the Subsoil Code and Reduction of the Control Threshold from 25% to 5%**

According to the proposed amendments, subsoil users are obligated to notify the competent authority of any changes in beneficial ownership exceeding the 5% threshold, as opposed to the current threshold set at 25%. This provision may pose difficulties for subsoil users who attract investments through public offerings of their securities on stock exchanges. Consequently, the most sought-after investments will be burdened with additional regulation and bureaucracy, contradicting the principles and provisions of paragraph 32 of the Action Plan for the Implementation of the Decree of the President of the Republic of Kazakhstan dated April 13, 2022, No. 872, " On measures to de-bureaucratize the Activities of the State Apparatus."

Moreover, the concept of control and the threshold of exactly 25% are conceptually established in other areas of the legislation of the Republic of Kazakhstan. For example, according to the provisions of the Tax Code of the Republic of Kazakhstan on controlled foreign companies, a threshold of 25% is also taken.

5. **Amendments to Article 187 of the Subsoil Code** – It is proposed to exclude four documents from the list required for obtaining a reconnaissance license, including documents confirming financial and professional capabilities, a written description of planned activities, absence of tax arrears, etc. Excluding these documents may attract entities seeking to accumulate licenses with the intention of selling them to professional participants in subsoil use relationships.

6. **As an alternative to the proposed addition to paragraph 11 of Article 192 of the Subsoil Code,** we suggest considering the following option: Calculate the Amount of Annual Minimum Expenses based on the remaining number of months until the end of the year. In addition, as grounds for exemption from obligations under the Annual Minimum Expenses, one should take into account cases when delays in obtaining an environmental impact assessment (EIA) and emission permits are not due to the fault of the subsoil user (e.g., delays due to weather conditions hindering field visits, as well as delays in holding public hearings by local executive bodies, etc.).

7. **Amendments to Article 197 of the Subsoil Code** – The Chamber suggests considering the possibility of introducing additions to the article regarding when a subsoil user's obligations for annual minimum exploration expenditures cease. Obtaining a signed liquidation certificate can take 6-8 months, during which subsoil users are still technically expected to fulfill expenditure obligations. An example of an addition to the article could be: "The subsoil user's obligations for annual minimum exploration expenditures cease upon written notification to the competent authority of the subsoil user's intention to return the license, except in cases where it is necessary to ensure the complete and legally compliant liquidation of the consequences of subsoil use. Proportional expenditure obligations must still be fulfilled until official notification."

8. **Regarding the addition of the content of licenses for exploration and production of solid minerals (clause 52 and clause 66 of the Article)**, we believe that the duplication and specification of the rights of subsoil users provided for by the Code in the License calls into question the possibility of exercising those rights that are not specified in it. This also raises the question of the applicability of such rights to currently existing subsoil users who received licenses earlier.

9. **Regarding the provision of an additional one year for obtaining a production license after the expiration of the exploration license (clause 91 of the Article)**, we believe that this provision will impede the transparency of the process of turnover of subsoil use rights.

10. **Regarding the initiative to de-bureaucratize the activities of the state apparatus,** it is proposed to exclude a number of government rules and regulations, transferring these powers to the Regulations of state authorities. At the same time, certain rules provide for their implementation by several state authorities (central and local). In particular, the procedure for accepting work on surveying and eliminating the consequences of the activities of subsoil users. In this regard, there is a risk of the emergence of the so-called "human factor" during their implementation and uncertainty in the actions of local state authorities

In light of the above, the "Kazakhstan Chamber of Mines" expresses readiness for constructive dialogue and the search for optimal solutions within the discussion of the proposed changes, with the aim of creating a more favorable and transparent regulatory framework for subsoil use in Kazakhstan.

Sincerely,

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About the Chamber:

The Kazakhstan Chamber of Mines was established in March 2023 to represent the interests of explorers, developers, and producers of minerals in Kazakhstan. The Chamber is committed to promoting responsible mining practices, advocating for a favorable investment climate, and fostering collaboration within the industry to contribute to the long-term prosperity of Kazakhstan. The founding members comprise both Kazakh and international exploration companies, including representation from entities listed on the London and Canadian Stock Exchanges.