Kazakhstan Subsoil Use Legislation: Current Status, Development Aspects and Problems of Lawmaking (a View of a Practicing Lawyer)

Dr. Olga I. Chentsova, Managing Partner, Aequitas (Kazakhstan)

1. Introduction

The history of Aequitas law firm practically coincides with the history of Kazakhstan, and we have had a wonderful opportunity over the past ten years to witness the development of the Republic's legislation as the lawyers practicing in civil (commercial) law. As the subsoil use projects constituted a significant part of the firm's practice from almost the first days of its creation, this area of Kazakhstan law, including its application, was in the focus of our attention.

Over the ten years, depending on the actual situation and commercial interests of our clients, we have studied the relevant aspects of the subsoil and related (e.g. environmental, investment) legislation. In addition, the specific projects and subsoil use issues necessarily required a detailed analysis of both the general legal provisions (including the theory of obligations and the contract, the principles of the civil law and other legal institutions) and the specific areas thereof (e.g. privatization, corporate, etc.).

We have been summarizing our practice on a regular basis, in the form, among others, of articles containing an overview of Kazakhstan subsoil use law, including the history of its development and investigation of its specific problems.

As a professional, I have been fortunate enough to work for a few years in the highly qualified working groups drafting a number of key laws (the RK Civil Code[1], the RK Law on Foreign Investment[2], the RK Laws on Petroleum[3] and on Subsoil[4]), and as an official expert of the RK Academy of Sciences for evaluation of the drafts, I believe I can appreciate to a certain extent the problems connected with the preparation of normative acts in this area.

This article attempts to characterize the current subsoil use legal regime in Kazakhstan (with a short excursus into the history of the matter, where appropriate), evaluate the prospects of its development, and express certain views on lawmaking in Kazakhstan.

2. A General Overview of the Subsoil Use Legal Regime in Kazakhstan can be provided

only on the basis of a complex analysis of various areas of Kazakhstan law with a natural focus on the special subsoil use legislation. A complex characteristic of the subsoil use legal regime should be primarily based on:

1) the special subsoil use legislation; and

2) other (related) legislation, including ecological, investment, corporate, and tax legislation and the laws determining the status and authorities of the government bodies in Kazakhstan, etc.

As a branch of law, the subsoil use legislation can be nothing but a complex branch of law, comprising the legal institutions of most other branches.

3. Current Special Subsoil Use Legislation includes 2 basic laws

– the Petroleum Law and the Subsoil Law, and a great number of normative acts mostly of the RK Government Decree level[5].

[*Note:* Unless the context requires otherwise, the capitalized

[1] The Civil Code of the Republic of Kazakhstan: General Part of December 27, 1994 and Special Part of July 1, 1999, hereinafter – the Civil Code.

[2] The Law of the Republic of Kazakhstan, On Foreign Investment, dated December 27, 1994, as amended, hereinafter – the Foreign Investment Law.

[3] The Law of the Republic of Kazakhstan, On Petroleum. Enacted by Edict No. 2350 of the President of the Republic of Kazakhstan having the force of a law, dated June 28, 1995, as amended, hereinafter - the Petroleum Law.

[4] The Law of the Republic of Kazakhstan, On Subsoil and Subsoil Use. Enacted by Edict No. 2828 of the President of the Republic of Kazakhstan having the force of a law, dated January 27, 1996, as amended, hereinafter – the Subsoil Law.

[5] In addition, it is worth noting that during the period from 1995 through 1998 the subject of the legislative and other related legal regulation in Kazakhstan was the precious metals and stones. However, the structure and approach of that legislation was absolutely different from those of the Petroleum and Subsoil Laws. As the "gold" laws were cancelled without having influenced in any serious way the formation of the subsoil use legislation in the Republic, the reference to them in this case is of a purely historic nature, while at the same time, it may serve as an illustration of a different (as compared to the Petroleum and Subsoil Laws) approach which had place in regulation of the legal regime of specific mineral resources.

terms used hereinafter correspond to the definitions given in the Petroleum and Subsoil Laws.]

The enactment of the Petroleum Law in 1995 and of the Subsoil Law in 1996 was received by the investors (at that time mostly foreigners) as an important legislative development, and it was expected that in future those Laws would be improved and further detailed by special normative acts (preparation of some of them was directly stipulated in Article 76 of the Subsoil Law).

Indeed, within quite a short period of time – during 1996, 1997, and 1998 – an impressive number of various Government Decrees was issued to further develop the Petroleum and Subsoil Laws, including the Decrees **(i)** clarifying the subsoil use license procedure, the Contract execution and registration procedure, and the status of the Competent Authority of the Government for execution of Contracts; approving the Model Contract and the subsoil use right pledge procedures; **(ii)** clarifying various technical aspects of the legal regime for minerals and the subsoil monitoring; **(iii)** dealing with other aspects of subsoil use. Many of them were amended soon after their adoption. That period also witnessed a dynamic development of the subsoil use licensing legislation, including the license regulations for the subsoil use-related works.

However, many of those Decrees were immature and interpretation of individual provisions thereof (including by the government authorities) created a lot of problems for the subsoil users; at times the Decrees had technical inconsistencies with the Petroleum and Subsoil Laws or, what is worse, their rules blocked certain positive provisions of the Laws. For example, the Regulations on Organization and Conditions of Mandatory Insurance of Petroleum Operations issued in 1996[6] were so poorly drafted and the investors' criticism thereof was so strong that less than three months after their adoption the Government had to suspend them and instruct the ministries and agencies concerned to submit, with the help of professional consultants, their proposals for improvement of the mechanism of mandatory insurance of petroleum operations[7].

It was at that time that Kazakhstan acceded to a number of international economic conventions, including the Energy Charter Treaty[8].

Further conceptual changes to the Subsoil Law and the Petroleum Law were made in August 1999[9] mainly to update them to reflect the changes introduced by the subsequent normative legal acts in the preceding years. Furthermore, as the practice showed, important subsoil use issues remained fully or largely unregulated (for example, environment protection and development of offshore resources). In addition, the Laws were inconsistent with each other and those contradictions and inaccuracies had to be eliminated.

For less than one year, beginning from 1998, a series of amending laws had been drafted, all with different concepts and contents. The key developers of the draft laws (the RK Investment Agency) sent the drafts to the other state agencies, major foreign companies, investment groups, law firms, other consulting companies and law scholars soliciting their input. As a result of the considerable work done, a Law on Introduction of Amendments was enacted in August 1999.

We have carried out a detailed analysis of the above-mentioned changes, of which the results were disappointing in many respects[10]. Certainly, the 1999 Law had considerably improved the legal regulation of subsoil use in general, and of Petroleum Operations, in particular. A number of important conceptual changes were made to streamline and otherwise improve the legal regime for investors (including canceling the double license-and-contract system and transfer to a contract-based subsoil use system); individual aspects were given a clearer (i.e. more predictable) regulation; the Subsoil Law and the Petroleum Law had been more or less reconciled.

But a huge number of ambiguous and hastily written rules (including the functions of the National Company and the Competent Authority, the environment protection provisions, and the legal regime for the earlier issued licenses[11]) combined with a poor legal technique created the impression of an abortive effort and impaired the general effect of the changes. A classic example of the poor legal technique is the rule of Article 44 (3) of the Subsoil Law about the coming of the Contract into force [quote: "The Contract ... shall come into force from the moment of its signing and shall come into force from the date of its registration..."].

In my opinion, there were different reasons for such results and omissions, including the methods of work

[6] Approved by Decree of the Government of the Republic of Kazakhstan No. 916 dated July 18, 1996.

[7] Decree of the Government of the Republic of Kazakhstan No. 1198, dated October 1, 1996 (paragraphs 1,2).

[8] Edict of the President of the Republic of Kazakhstan, On Ratification of the Energy Charter Treaty and the Energy Charter Protocol on the Issues of Energy Efficiency and the Related Ecological Issues, dated October 18, 1995.

[9] Law of the Republic of Kazakhstan, On Amending Certain Legislative Acts of the Republic of Kazakhstan Concerning Subsoil Use and Petroleum Operations in the Republic of Kazakhstan, passed on August 11, 1999 and enacted on the date of its official publication, September 1, 1999, hereinafter – the Amendment Law or the 1999 Law.

[10] Please see: Yu. G. Bassin, O.I. Chentsova, J. H. Hines, Kazakhstan's Amended Legal Regime for Natural Resource Development: a Critical Analysis of the Key Changes // The Parker School Journal of East European Law, Columbia University: 1998. – Vol. 5, No.4 - P. 421-454.

[11] Speaking of licenses here we mean the content (the wording) of Article 2 of the 1999 Law.

on the amendments (for example, the draft amendments distributed for discussion contained no provisions whatsoever on the National Companies which appeared in the adopted version of amendments). Another factor was the little involvement of the leading Kazakhstan lawyers earlier working on the Petroleum and Subsoil Laws in the work on the changes and the inability of the working group (mainly government officials – non-lawyers) to appreciate the problems connected with the inaccurate wording and poor legal technique of the Laws.

Quite a number of normative acts (mainly of the Government Decree level) dealing with the specific aspects of the subsoil use regime have been passed and/or amended since the enactment of the 1999 Law. Among the important acts of that period we note the endorsement of the 2001 Model Contract for Subsoil Use Operations[12] and the 2000 New Rules for Granting the Subsoil Use Rights in Kazakhstan. The most important novelties of 2002 concern the status of KazMunaiGas CJSC National Company and the regulations for the purchase of goods, works and services for Petroleum Operations. We have analyzed each of these acts in the framework of the firm's practice and presented our views in the Information Memoranda, presentations at various conferences, and articles. In this article I will briefly discuss their individual provisions.

It was expected that the new Model Contract would take into account the experience accumulated from the time of the 1997 Model Contract and the legislative changes of the 1999 Law. However, although the preparation of the new Model Contract took almost two years, the Model Contract mainly reproduced the general legal regulations and virtually ignored the peculiarities of specific subsoil use operations. It failed again to provide a special regulation for Petroleum Operations, including the Product Sharing Agreements. Among its other defects are the provisions reproducing the rules of the Subsoil Law directly contradicting the Petroleum Law. The Model Contract does not take into account the requirements of Kazakhstan's new procedural legislation, and its poor legal technique (especially in the liability, contract stability, and other clauses) makes its application extremely difficult.

Another problem connected with the Model Contract (both the old and new versions) is the interpretation thereof by the officials of the Competent Authority who base their judgment on a rather poorly drafted formulation of the relevant Decree prescribing "... *to follow the provisions of the Model Contract in drafting and executing the contracts"* and in many instances regard its provisions as the rules of law, which cannot be modified in negotiating individual contracts[13].

The 2002 Rules of Granting the Subsoil Use Right in Kazakhstan[14] superseded the earlier normative acts regulating this procedure. They provide a rather clear regulation of the relevant procedures. The Rules, however, are silent as to the specifics of granting this right to KazMunaiGas, which has become a very acute issue lately following the adoption of the new regulations with respect to the company. Among the positive changes we note liberalization of the procedure of amending the subsoil use contracts. At the same time, certain procedural aspects of receiving the subsoil use right still need a better regulation. For example, there is a lot of ambiguity around the closed tenders – it is not clear which particular cases call specifically for a closed tender, which criteria should be used to identify the qualifying bidders for such tenders, etc. (and again, a separate aspect of such problems concerns KazMunaiGas and is especially important in the light of the latter's special status).

In June 2002 Kazakhstan adopted and enacted the Regulations for Purchase of Goods, Works, and Services for Petroleum Operations[15] (hereinafter – the "Purchase Regulations") which received a strong negative response of the Contractors. Such a reaction can be explained by natural reasons. The major problems are connected with the increasing government control over Contractor's operations verging on the infringement of the right to a free entrepreneurial activity and with a general inconsistency of the key provisions of the Purchase Regulations with the effective legislation of the Republic of Kazakhstan. Other major problems are connected with the poor legal technique of the document's key concepts, including the absence of a clear definition of the qualifying goods, works and services ("the Goods"), the absence of a price threshold for the Goods acquired in accordance with the Regulations, lack of clarity in the relation between the Purchase Regulations and the slightly older RK Law on State Procurement[16].

[12] Decree of the Government of the Republic of Kazakhstan No.1015, on Endorsement of the Model Contract for Subsoil Use Operation in the Republic of Kazakhstan, dated July 31, 2001, hereinafter – the Model Contract or the MC. The earlier Model Contract was endorsed by the RK Government Decree No. 108, dated January 27, 1997.

[13] Of course, it is also a question of understanding the law in the aspect of system interpretation of legal rules, as the definition of the Model Contract given in the Subsoil Law (Article 1(13)) allows to determine with certainty its legal nature as a standard contract to be used as model.

[14] Approved by Decree of the Government of the Republic of Kazakhstan No. 108, dated January 21, 2002, hereinafter - "the Rules".

[15] Approved by Decree of the Government of the Republic of Kazakhstan No. 612 of June 7, 2002, hereinafter - "Decree No. 612".

[16] The Law of the Republic of Kazakhstan, On State Procurement, dated May 21, 2002. Please see our detailed analysis of this issue in: O. I. Chentsova, N. I. Brainina: New Regulations for Purchase of Goods, Works and Services for Petroleum Operations in Kazakhstan // Invest Kazakhstan. – 2002. – No. 3. – P.P.96-107.

The Regulations cover only the Petroleum Operations, however, Decree No. 612 instructed the RK Ministry of Energy and Mineral Resources (RK MEMR) to submit to the Government, within six months after the issue of the Regulations, the proposals on regulation of purchase of goods, works and services for other subsoil use operations. The same ministry was initially appointed the authorized government agency for regulation of the purchase of Goods for Petroleum Operations (which appeared logical given RK MEMR's current status of the RK Competent Authority for execution of subsoil use contracts). However, already on November 14, 2002, for no evident logical reason, that function was transferred to the RK Ministry of Industry and Trade (RK MIT)[17], which is now authorized *"...to monitor the fulfillment of the effective Subsoil Use and Petroleum Operations Contracts and Product Sharing Agreements for compliance with the legal requirements on mandatory purchase of goods, works, and services from domestic producers in conducting the above operations in the territory of the Republic...".* RK MEMR has been also instructed to provide the proposed Draft Contracts to RK MIT for approval from the point of view of their compliance with the above regulations.

The legal regime of the National Companies (NC)[18] is a separate and a very important issue. A definition of NC was first given in the 1999 Petroleum and Subsoil Laws but it was not before May 2002 that the RK Law on Joint Stock Companies was added with Article 46-1 to provide a general legal definition of a National Company.

In this article I would like to briefly describe the status of a National Company in the oil sector and the related problems, namely, the status and problems of KazMunaiGas National Company ("KMG NC" or "KazMunaiGas") established by the Presidential Edict of February 20, 2002[19].

The Edict largely reproduces the National Company provisions contained in the Petroleum Law. Apart from the very general provisions, the Edict does not specify the scope of the National Company's authority. It has also left unregulated the mechanism of KazMunaiGas' mandatory participation in the Petroleum Operations Contracts and the issue of separation of powers between KMG NC and the Competent Authority.

A few months later, On June 29, 2002, the Government passed two Decrees shedding some light on the above issues:

! Decree No. 707, On Separation of Powers in Petroleum Operations between the Government Agencies and KazMunaiGas[20],

! Decree No. 708, On Approval of Regulations for Representing the Government Interests by the National Company in Service Contracts....[21]

The Decrees introduced a number of important novelties providing a clearer regulation of individual provisions concerning the authorities and the scope of participation of the National Company in the oil and gas industry. However, the legal mechanism of application of the new regulation is not always clear. Many powers of KMG NC, including those relating to representation of the Republic in the Contracts, remain ambiguous. Furthermore, in many instances the new regulation rather adds to the confusion in determining these powers, because its individual provisions contradict each other.

The content of Decree No. 708 indicates that the Government has taken a rather tough position with respect to KazMunaiGas NC's participation in the Petroleum Contracts, which tends to be prevailing.

The Decree provides for two ways of obligatory share participation of the National Company in the Petroleum Contracts:

1. in the form of a joint venture established by the National Company with the winner of the tender;
2. in the form of a consortium under a joint activity contract between the National Company and the winner of the tender.

The legal mechanism of neither method is quite clear, as the current legislation, including the Petroleum and Subsoil Laws, require that a Petroleum Operations Contract be executed directly with the winner of the tender, and not with any other person, including the National Company.

The participation interest of the National Company in the Contracts, irrespective of the form of such participation, should not be less than 50%,

[17] Decree of the Government of the Republic of Kazakhstan No. 1204, On the Measures to Enhance the Government Support of Domestic Producers, dated November 14, 2002.

[18] The general problems of status of NCs in Kazakhstan have been lately actively investigated by Yu. G. Bassin. Please see, for example, his article: Concerning the Need of Conceptual Changes in the Civil Code of the Republic of Kazakhstan // Predprinimatel i Pravo (Entrepreneur and Law). – 2002. – No. 20. – P.P. 5-7.

[19] Edict of the President of the Republic of Kazakhstan No. 811, dated February 20, 2002, On the Measures to Further Secure the Government Interests in the Oil and Gas Sector of the Country's Economy".

[20] Decree of the Government of the Republic of Kazakhstan No. 707, On Separation of Power in Petroleum Operations between the government Agencies and KazMunaiGas National Company Closed Joint Stock Company, hereinafter – Decree No. 707.

[21] Decree of the Government of the Republic of Kazakhstan No. 708, On Approval of Regulations for Representing the Government Interests by the National Company in the Service Contracts for Petroleum Operations through a Mandatory Share Participation in the Contracts, hereinafter - Decree No. 708.

unless otherwise is provided for by an international treaty or an RK Government resolution. Thus, except for specific cases, KazMunaiGas would have enough authorities to determine the Contractor's decisions or, at least, to block such decisions. The dominating position of the National Company as to its share participation in the Contracts is further strengthened by its right to nominate the Contract Operator irrespective of the interest it holds. *"Contract (Agreement) Operator"* is another new and not very clear concept created by Decree 708.

Decree No. 707 distributes the powers among the government agencies and KasMunaiGas. Among the new authorities of KasMunaiGas we note the following:

Selection of Subsoil Lots (Blocks). The Decree establishes that the blocks and subsoil lots to be allocated to the National Company on the basis of direct negotiations, as well as the blocks and subsoil lots to be developed with the National Company's mandatory share participation, shall be determined on the basis of the proposals of KazMunaiGas NC itself. Furthermore, the National Company will participate in the setting up of the basic tender conditions for the lots so selected by it and in identifying the companies, with which it would like to develop such lots.

Participation in the Work of State Agencies. The National Company will participate, for example, in the investment program tender commissions, the Central Commission for Development of Oil and Gas Fields and in the specially authorized agency for state expertise of subsoil reserves; it will also participate in the drafting of Contracts for all major offshore projects with the Competent Authority to determine their mutual obligations under the future contract. [The legislation does not specify what should be defined as "major offshore projects ".]

Functioning as a Working Body of the Competent Authority. Decree No. 707 provides that the Competent Authority (currently RK MEMR) may engage the National Company as a working body for a number of actions, including the actions of technical nature [Kazakhstan law provides no definition whatsoever of a "working body" or the functions, authorities, and responsibilities thereof].

Among the functions of the National Company as a working body of the Competent Authority (i.e. RK MEMR) we note the following:

(i) Conservation of fields or individual wells. It is unclear why in performing these actions the National Company shall operate as a working body of the Competent Authority while the law refers such actions to Contractor's obligations.

(ii) Determining the tax treatment model for the Contracts and conducting an expert examination of the projects connected with the Petroleum Operations, that is, performing specific authoritative functions.

(iii) It was established that KazMunaiGas NC would protect the government's interests in settling the disputes arising out of the Contracts, including PSAs. An additional scrupulous legal work is required here to determine how KazMunaiGas NC should be able to protect (represent) the government's interests in the disputes arising out of a Contract to which it is a party and simultaneously act as the other party to such Contract – the Contractor or a member of the Contractor.

4. Other (related) Legislation Influencing the General Subsoil Use Legal Regime

includes ecological, investment, corporate, currency and tax legislation and the legislation establishing the status and authority of the government agencies. A dynamic formation of such a legislative system in Kazakhstan began in early 90-s, it was rapidly developed but also very often amended.

For example, ecological legislation makes an important part of any subsoil use project. Its wide scope is illustrative of a general tendency of "ecologization" of Kazakhstan law[22]. However, the basic ecological law of the Republic of Kazakhstan, On Protection of the Environment, dated July 15, 1997 (as amended by the Law of June 4, 2001) and specifically, individual important provisions of Chapter IV "Natural Resources and Nature Management" thereof, are little consistent with the Petroleum and Subsoil Laws. Obviously, these Laws should be reconciled.

The Foreign Investment Law[23] has always been the key document for the foreign investors. As it is known, in December 2002, the RK Parliament passed, and on January 8, 2003 the President signed, the RK Law on Investment superseding the above Foreign Investment Law and the RK Law on Governmental Support of Direct Investment of February 28, 1997.

The idea of the Law is to establish equal legal conditions for foreign and national investors. However, rather than to enhance the protection of national investors, this is done through impairing the protection of legitimate interests of foreign investors. Just a small example: the Law has

[22] For more details please see: O. I. Chentsova. Environmental Legislation Problems // Oil & Gas of Kazakhstan. – 2000. – No. 5-6. – P.P. 96-110.

[23] Please see a discussion on the development of the block of investment legislation in: Yu. G. Bassin, O. I. Chentsova. Legal Regime of Foreign Investment under Kazakhstan Law // Review of Central and East European Law. – 2000. – No. 2. – P.P. 197-208.

changed the earlier foreign investment legislation in the part of the concept of the investment dispute and the investment dispute settlement procedure, cancelled certain guarantees to foreign investors, et cetera. All this is likely to worsen the investment climate for foreign capital. The above-mentioned provisions of the Law and the other related issues, including the problem of legal technique, require a special analysis, which our firm intends to complete in the nearest future.

The status and authority of the government agencies are directly related to the general subsoil use regime. For example, the Subsoil Law contains special clause No. 70, Control over Observance by Subsoil Users of Contract Conditions. The Competent Authority (the authorized government agency) is specified there as the controlling authority.

A clause with such a title and content in a key law might initially create an illusion for the Contractor as to the controlling authorities and the scope of control over its contractual obligations. However, in reality, apart from the Competent Authority (currently – RK MEMR), the most important controlling authorities include the RK Ministry for Environmental Protection (responsible for the ecological control and preservation of mineral resources), the RK Ministry of Industry and Trade (purchase of Goods for Petroleum Operations), RK Agency for Emergency Situations (mining control), the other government bodies controlling the construction projects and the water and land resources; the governmental sanitary and epidemic control service; the governmental agency for standardization, metrology and certification; the local regulatory bodies, the prosecutor's officers, the tax authorities, and so on[24].

As it can be seen from the press, the RK Parliament and the Governmental Commission may also exercise control over the Subsoil Use Contracts[25]. In addition, various governmental commissions are set up to resolve subsoil use and petroleum issues, including: the Interdepartmental Commission for Export Oil and Gas Pipelines[26], The Central Commission for Development of Oil and Gas Fields[27], the National Commission for Response to Oil Spills[28], and the Interdepartmental Commission for Investigation of Specific Subsoil Use Issues[29].

Speaking of other areas of the related legislation, practically any one of them can be the subject of a separate analysis in the context of subsoil use; however, in this article I limit the discussion thereof to the above examples.

5. Concerning the Subsoil Use Legislation Concept. The lack on any official or at least accepted concept as to what the structure and system of the subsoil use legislation should be is the key problem in the development of such legislation. It is encouraging that the practicing lawyers and the legal scholars have recently begun to raise the question of conceptual approaches and initiated an academic discussion thereof. In my view, the following questions can be the subject matter of such discussions:

(i) Should there be a Subsoil and Subsoil Use Code or a similar law including a General Part regulating the relations currently primarily regulated by the Subsoil Law and a Special Part with the following sections: (a) petroleum; (b) solid mineral resources; (c) other key mineral resources (e.g. uranium)?

(ii) Alternatively, should there be a set of laws, for example, the improved Petroleum and Subsoil Laws, and the laws (or inferior acts) regulating specific contracts: product sharing agreements, concession agreements, and, probably, other?

(iii) What should be the subject of the special subsoil and subsoil use legislation: should it cover the post-production relations, including transport, export, et cetera? Should the Subsoil Law or any other special legislation regulate the status of the national oil and gas companies, or should it be a subject of the corporate law, for example, the Law on National Companies?

(iv) Should there be a separate article in the Civil Code dealing with the most important subsoil use contracts which could be further detailed in other legislative (or normative) acts?

Another important aspect – the general regime and the methods of regulation of the subsoil use relations – should make part of the subsoil use legislation concept. Specifically, we mean the balance between the permissive and imperative methods of regulation, in other words, the limit of the government's interference in the economic relations. Unfortunately, the normative acts of 2002 indicate a tendency for an increasingly excessive and largely unjustified interference of the state in the civil legal relations resulting in a violation of the fundamental market principles.

[24] Please see: O. I. Chentsova. Performance of Subsoil Use Contracts: Contractor's Obligations and Control // Invest Kazakhstan. – 2001. – No. 1-2. – P.P.48-55.

[25] Contractual Obligations: Achilles' Heel of Investors // Oil & Gas of Kazakhstan. – 2000. – No.S-6. – P.P. 28-29.

[26] Decree of the Government of the Republic of Kazakhstan No. 1686, dated November 9, 2000.

[27] Order No. 70 of the Ministry of Energy and Mineral Resources, dated March 21, 2001.

[28] Decree of the Government of the Republic of Kazakhstan No. 431, dated April 2, 2001.

[29] Decree of the Government of the Republic of Kazakhstan No. 665, dated May 19, 2001.

6. The Weak Points of the Subsoil Use Legislation

include both legislative gaps and poor legal technique.

Legislative Gaps. As the practice shows, not only the individual aspects of specific subsoil use relations need to be further regulated, but also the large blocks of such relations. An example of such relations can be the contracts, which constitute the main legal instruments in the subsoil use.

Both the Petroleum and the Subsoil Laws contain separate articles, "Contracts"(similar in content) regulating the term and the territory of their application, as well as the Contract execution, performance, and termination procedures (the contract execution procedure is also regulated by a special Government Decree). Thus, the current regulation of these relations is rather detailed, however not exhaustive.

Regarding the regulation of specific types of Contracts, both the Laws allocate only one article to this issue (almost identical Art. 42 of the Subsoil Law and Art. 25 of the Petroleum Law), which mention but not define the specific types[30].

In this article I will not quote the existing (rather short) legal provisions on this issue or discuss their history, but I would like to point out the following. Classification of the subsoil use Contracts by defining their qualification features is, in my opinion, a priority lawmaking objective. The legal regulation of the contracts, however, will require a serious preliminary work on the basis of a scientific legal analysis and the experience of other countries.

Another category of legislative gaps can be described as the regulation of important legal relations in subsoil use by the acts of inadequate level. For example, in my view, both the Petroleum and Subsoil Laws fail to provide any ample or clear regulation of the post-Contract relations. At the same, the Uniform Rules for Preservation of Resources in Developing Solid Mineral Resources, Oil, Gas, and Underground Waters in the Republic of Kazakhstan (URPR)[31] establish the basic regulations and requirements for every phase of development of and commercial production at the fields, evaluation and accounting of the reserves, development and implementation of efficient production systems at the fields, construction and operation of wells of any category, managing the development processes, preservation of resources and protection of the environment. The above document (quite voluminous) determines the legal regime of Contractor's key document – the Field Development Project (various specific forms thereof), including the follow-on procedures. However, the Subsoil and Petroleum Laws totally ignore the Rules and the Contractor's numerous obligations there under, as well as the other relations arising at the stage of pilot and commercial exploitation of the fields and at the stage of termination of Contractor's obligations under the Contract, which, in my view, is a conceptual omission. Obviously, I do not call for reproduction of the huge normative act in a superior legal document; I only speak of fixing the concepts in the Laws with their further detailed regulation in the inferior acts.

Poor legal technique is yet another legislative defect inherent in virtually every normative act on subsoil use. This article provides a sufficient number of the relevant examples, there is no need to add any more of them, especially that no one who is familiar with the situation has any doubts as to their existence. The conclusion is also evident: the serious problems of legal technique entail the serious problems of law enforcement. I would only like to mention a truism that a sound legal technique is an indicator of sound lawmaking, and vice versa.

7. Necessity to Improve Lawmaking.

The quality of lawmaking has always been a very important issue, but it has become so burning lately that not only does it provoke heated (and, regretfully, not always correct) discussions in the press, but becomes, at last, a subject of special research (very low-key at the moment)[32].

As a last example of drafting the amendments to important laws, we will discuss the work on the same basic subsoil use Laws – the Subsoil Law and the Petroleum Law. It is known that the 1999 amendments thereto were largely and justly criticized and that the subsequent corrections were reasonably expected. This is what is being done now – a relevant draft law is underway.

According to the initial Plan of Legislative Work of the RK Government for 2001, the Draft Law was supposed to be submitted to the Government in April 2001 and to the Parliament – in May 2001. Later the deadlines had been repeatedly postponed, and, according to the latest information, the Draft Law was finally submitted to the Parliament only in December 2002.

This article does not intend to describe the cur-

[30] Please note that the tax legislation (including the new Tax Code) recognizes two categories of Subsoil Use Contracts: 1) Product Sharing Contracts with a special tax regime; and 2) other contracts.

[31] Approved by Decree of the Government of the Republic of Kazakhstan No. 1019, dated July 21, 1999. It is worth noting that the Rules almost fully overlap with another important act – Uniform Rules for Development of Oil and Gas Fields in the RK, approved by Decree of the Government of the Republic of Kazakhstan No. 745, dated June 18, 1996, hereinafter, in the context of this section – the "Rules".

[32] An example of such an investigation can be the analyis carried out by K.B. Safinov and described in his monograph: The Government of the Republic of Kazakhstan in the Transition Period. – Almaty, 2002. – P.P. 388-514.

rent difficult and often illogical process. I will only single out two distinctive features thereof: **(i)** no lawyers (except for the departmental lawyers) have been lately involved in the basic work; and **(ii)** there is so much conspiracy about this undoubtedly important, from the point of view of the government interests, work, that the government interests appear to be rather disadvantaged than secured.

Poor planning of the lawmaking work entails the problem of unavailability of information on the expected legislative changes. Naturally, the investors would like to know about the impending changes and to have an opportunity to familiarize themselves in advance with the most important bills pertaining to their operations in Kazakhstan. The best source of such information could be the lawmaking plans of the RK Government, including the long-term ones, if they were reliable.

What factors could improve the quality of lawmaking in subsoil use? I think of the following.

Development of a Concept of Structure and System of the Subsoil Use Legislation, as it has been mentioned above.

In its turn, the concept development will require a deeper legal analysis of the subsoil use issues. The evident lack of research in this area can be explained by objective reasons (firstly, I think, by lack of lawyers of appropriate qualification and a heavy workload on the leading lawyers who could have worked on these issues). Nonetheless, with a proper organization of work, this is a largely solvable problem.

The developers of the concept can and should use the experience of other countries worldwide, including the CIS states. It is known that such global institutions as the World Bank and EBRD have conducted large-scale researches and investigations in this area. In particular, the World Bank has conducted a Mining and Metallurgical Study of the Republic of Kazakhstan (October 2001), the results of which are quite interesting, in my view, and the conclusions and recommendations thereof are useful for the Republic. One of the EBRD's projects under a program implemented by its legal department concentrates on the reform of the concession law in the countries of Central and Eastern Europe and CIS[33]; a significant experience has been accumulated, and Kazakhstan can benefit from it.

In the CIS, for example, the Intergovernmental Council for Exploration, Use and Preservation of Resources adopted on June 23-24, in Minsk, a Draft Structure of Model Subsoil and Subsoil Use Code of CIS Member-States, approved by the CIS countries. Upon examination of the Draft by the Session of the Economic Commission under the CIS Economic Council, it is supposed to be submitted for endorsement to the CIS Inter-Parliamentary Assembly. In 2002 Russia has also intensified the concession research and lawmaking efforts[34]. This experience can also be useful for Kazakhstan.

Correct Composition of Lawmaking Working Groups. Apparently, the world experience, even the most successful, cannot be automatically implanted in an individual state; it should be carefully adapted, where possible, to the existing legal system. EBRD experts, for example, openly admit that the key role in this process will belong to the local lawyers[35]. This circumstance highlights the existing major problem of correct composition of the working groups involved in drafting the laws (normative acts). In my view, a joint input of lawyers, industry experts and, if necessary, economists, to the special laws could be most productive.

Scientific Expertise. Scientific expertise of draft laws is an institution, which is, of course, important for ensuring the quality of the normative acts and which seems to be developing in the Republic[36]; but obviously, its specific methods need to be further elaborated.

Reasonable publicity in drafting the subsoil use normative (primarily, legislative) acts and the input of the investors (including the foreign investors, especially the major companies) could contribute a lot to their quality. The secrecy around the work on the draft subsoil use laws during the last years (primarily aimed at minimizing the influence of the foreign subsoil users) was simply unreasonable. Neither the working groups, nor, moreover, the President, were in the least obliged to accept the investors' recommendations, including foreign, if they did not agree with them; however, such recommendations could be very useful. It is well known that the preparation of the 1995 Petroleum Law involved not only the best Kazakhstan lawyers but also major Western petroleum companies and lawyers: their professional advice contributed a lot to the methodology of the lawmaking. As a result, when enacted, the Law received a high appraisal of the investors for its quality[37]. Unfortunately, at present, such prac-

[33] Please see: Craig Averch, Siaming Cheng, Friderica Dahan, Paul Moffatt, Alexey Zverev: EBRD's Work on Legal Reform: a View into the Transition Stage // Law in the Transition Stage. – Autumn 2002. – P.P.40-41.

[34] Please see the materials of the conference: Concession. Contract of State and Business: Benefits and Risks. – Moscow, November 20, 2002.

[35] Please see: David S. Bernstain: Process Engenders Progress: Main Lessons of the 10 Years of Legal Reform // Law in the Transition Stage. – Autumn 2002. – P.P. 6-7.

[36] See, for example, Decree of the Government of the Republic of Kazakhstan No. 598 of May 30, 2002.

[37] Please see the monograph: Law and Foreign Investment in the Republic of Kazakhstan. – Almaty, 1997. – P.P. 130-131.

tice is very limited (if any) (although the investors have, of course, the opportunity to express their view with regard to the individual draft laws through the Kazakhstan Petroleum Association or the Council of Foreign Investors under the RK President). Today, in preparing the next changes (additions) to the Subsoil and Petroleum Laws, a scrupulous joint work could be very useful.

8. Conclusion.

The recently adopted Concept of the RK Legal Policy provides for improvement of the current legal rules though implementation of such measures as "... *bridging the gaps in legal regulation and its further detailing in the most important spheres of public relations; continuing and expanding the practice of scientific expertise of draft laws..."; "...in order to improve the planning of the lawmaking work, to implement a long-term (3-year) planning".*

The Concept also notes that *"the legislation on the Government needs to be improved to enhance the effectiveness of its work and the responsibility for the decisions taken".*

I believe that with an effective implementation of the above Concept provisions and subject to the resolution of the other existing problems of lawmaking, the legal regulation of subsoil use operations in Kazakhstan and, what is more important, the general economic and legal regime, can be significantly improved.

[38] Approved by Edict No.949 of the President of the Republic of Kazakhstan, dated September 20, 2002.