



Comparison of the Mining Laws of Finland and Kyrgyzstan – Main Features

ENVIRONMENTAL SECURITY, MINING AND GOOD GOVERNANCE



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This briefing paper provides a compact comparison of the mining laws of Finland and the Kyrgyz Republic. The paper has been prepared as part of the research project “Environmental Security, Mining and Good Governance” funded by the Finnish Ministry for Foreign Affairs. The briefing paper contributes to an increased understanding on the part of the project’s parties and stakeholders of the differences in mining legislation in countries like Finland and Kyrgyzstan. The comparison also generally highlights the variety of issues that can be regulated in a legal instrument controlling mining activities.

This note is structured as follows. First, the regulation of mineral exploration in Finland and Kyrgyzstan is briefly compared. Thereafter, the note proceeds to providing over-

views of the countries’ legal regulation on mineral development licensing, mine closure and small-scale mining. The briefing paper concludes with a brief summary of key findings and a few notes on the current state of the Kyrgyz mining policy.

It is to be noted that this brief comparison note is on the part of Finland limited to the examination of the principal legal instrument regulating mining, the Mining Act of 2011.¹ Other relevant legal acts, especially on environmental protection and environmental impact assessment, are more cursorily looked upon. On the part of Kyrgyzstan, other relevant laws besides the Mining Act have been examined, the Law on Subsoil of the Kyrgyz Republic² being naturally the most important one.



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MINERAL EXPLORATION

According to the Mining Act, all have the right for mineral exploration (i.e., doing geological measuring and observations and taking minor samples). Exploration may also be conducted in areas where the operator does not have ownership, provided that no damage is caused, or the harm or disturbance that is caused is only minor.³

An exploration licence is needed from the mining authority if the exploration work does not comply with the legal requirements regarding the harm caused and the areas that are closed to mining, or if the landowner has not consented to the exploration activities. There are also other requirements stipulating conditions when an exploration licence is needed; for instance, if the activities can cause harm to public health or general security.⁴

Mineral exploration (except of small-scale artisanal mining activities⁵) always needs a specific licence in Kyrgyzstan. The licence prescribes the maximum size of the licensed area and the minimum amount of annual investments for geological study per unit of licensed area.⁶ Furthermore, consent of the owner of land rights to conduct geological study is needed,⁷ this means obtaining temporary land-use rights.

LICENSING OF MINERAL DEVELOPMENT

Authority

The Council of State (government) gives permission to redeem a mining site and determines a mining licence for uranium and thorium. The mining authority (Finnish Safety and Chemicals Agency) determines all other mining licence issues.⁸

The State Agency for Geology and Mineral Resources⁹ is the main licensing authority. It issues mining licences and executes licence agreements. Other relevant instruments, such as mineral development or investment agreements, are negotiated and executed by the government. However, concession agreements can be concluded between the mining company and the empowered body, i.e., the State Agency for Geology and Mineral Resources.¹⁰

Local authorities have a role especially in smaller mining projects. Neither the identification or tasks of mining authorities nor their division of work is defined in the current Law on Subsoil.¹¹

Public Participation

The Mining Act of Finland holds that stakeholders must be given an opportunity to make recorded comments before a decision on a mining-related licence is taken. Actors other than stakeholders must be given an opportunity to express their opinions.¹²

The main legal instrument regulating public participation in mining projects is the Act on Environmental Impact Assessment Procedure.¹³ The EIA Act lays down detailed requirements for information-sharing, public hearings and accounting of public inputs in the final decision-making. The EIA procedure is set to include also the relevant social impacts of projects.

The Law on Subsoil does not address public participation in the licensing procedure in any way. Despite recommendations towards increasing openness, the mining permitting process has not been open to direct civil society participation. During recent years, however, the public has been involved, to some extent, in the permitting activities. An advisory board has been established and civil society participation is also allowed in the licensing commission. However, the State Agency for Geology and Mineral Resources has the ultimate power to decide about licences, and public participation may sometimes be more pro forma than really influential on the final outcome. ►

► Public Participation

Kyrgyzstan has made its legislation conform to the requirements of the Aarhus Convention¹⁴ on public's environmental rights. Environmental impact assessments are legally required to be carried out on new mining projects. Public participation is mandatory at all stages of the environmental impact assessment procedure.¹⁵ In addition, Kyrgyz mining-related regulations mention the assessment of social impacts in the instructions on the environmental impact assessment procedure.¹⁶ Despite the advanced guidelines, these practices have been criticized for not ensuring the engagement of public in a proper way.

Reasons for not Issuing a Mining Licence

If there are significant reasons to suspect that the applicant has no means or intention to start mining activities or the applicant has previously seriously neglected obligations related to the Finnish mining law, an application for a mining licence may be rejected. Even if the legal requirements for a mining licence were fulfilled, a licence cannot be issued if the mining activity will cause danger to public security, cause significant harmful environmental impacts or significantly weaken the living and industrial conditions of the area and if these risks and impacts cannot be removed by licence conditions.¹⁷

The Law on Subsoil lays down the conditions on the basis of which a licence application may be rejected. These are: if the applicant has produced erroneous data about itself; if the applicant does not have the required financial resources for effective, technically and ecologically safe development of the subsoil allotment; or if a licence has been already issued or an application has already been registered for the allotment.¹⁸

Duration of Licences

An exploration licence may be issued for up to four years.¹⁹ The duration may be prolonged for up to three years at a time, for the total maximum time of 15 years per licence.²⁰

A mining licence is valid for an indefinite time.²¹ The mining authority must check the conditions of the licence every ten years at a minimum.²² A mining licence may also be issued for a certain period of time if that is reasonable. Such a licence may be issued for the maximum of ten years.²³ The validity of the licence may be prolonged by ten years at a time.²⁴

A licence for gold washing is issued for the maximum period of four years.²⁵ The licence's validity may be prolonged for the maximum of three years at a time.²⁶

An exploration licence is initially issued for the period of up to two years, with the following extension for up to 10 years, provided that the conditions of the licence agreement are observed.²⁷

A licence to develop mineral deposits (a mining licence) is granted for a period established on the grounds of a technical project document, but for no longer than 20 years with the subsequent extension pending the depletion of mineral stocks.²⁸

Licensing Process

The process is in principle very simple: an operator sends in a licence application, after which the appropriate authorities determine whether to grant a licence. The licence will contain all the conditions placed on the exploration or mining activity.

In Kyrgyzstan, after operators have submitted licence applications, the subsoil use rights are granted by a tender and by direct negotiations.²⁹ However, if the applying company has discovered a deposit after a legal exploration, it has an exclusive right to obtain a licence for its mining (i.e., no tender process is needed).³⁰

A licence agreement to be negotiated between the mining operator and the appropriate authority is an integral part of the licence, which is not valid without it.³¹ Mining companies may also enter into more negotiable investment or concession agreements with the government.

Transfer of the Licence to a Third Party

An exploration, mining and gold washing licence may be transferred to a third party if that party fulfils the same requirements posed by the mining law as were applicable to the original holder of the permit.³²

According to the Law on Subsoil, a licensee may, with the consent of the state subsoil use authority, pledge the licence rights to third parties for additional funding of the project with regard to the licensed object. The third party, to which name the licence is re-registered, shall assume obligations of the former licensee set forth in the licence agreement.³³ In addition, the subsoil user has the right to, with the consent of the government agency for subsoil use, to assign the rights provided by licences to geological and industrial development of the subsoil to other persons, provided that the terms of the licence agreement will be observed.³⁴

Mining Security Permit

The Finnish legislation has introduced a special mining security permit.³⁵ Such a permit is needed from the mining authority for the construction and productive operation of a mine. The requirements for the validity of the permit correspond to those of a mining permit.³⁶

The Kyrgyz mining regulations do not recognize a particular security permit, (however, a similar type of permit is issued by another organization: Gosgortekhnadzor)³⁷ the Law on Subsoil merely states that the appropriate government agencies and subsoil users, within the scope of their competence, “must ensure compliance with the requirements of the legislation and safety standards (norms, rules) of subsoil use works approved in accordance with the established procedure.”³⁸

FEES³⁹

The holder of a mineral exploration licence must pay annual compensation to the owners of the real property in the exploration area.⁴⁰ The holder of a mining licence must pay annual quarry compensation to the owners of the real property in the mining area.⁴¹ In addition, compensation payments should be made based on the value of the excavated and utilized minerals and other mining material.⁴² Also gold washers are required to pay annual compensation to the authority that controls the area.⁴³

There are a number of specific fees and taxes that a mining company active in Kyrgyzstan has to pay in different phases of its operations. According to the Kyrgyzstan Tax Code,⁴⁴ a mining company is subject to bonus and royalty payments. The former are one-off payments for the right to use the subsurface for the purpose of a geological survey and the exploration of mineral deposits.⁴⁵ The rate for the bonus is set by the government using a classification chart for all kinds of mineral resources depending on the exploration stage and size of the deposit.

According to the Tax Code, a royalty is paid monthly by mining companies once they have started the extraction of minerals from the subsoil. The royalty is essentially a tax on mineral production. The rate of the royalty is set for each type of mineral resource per unit of physical volume or as a percentage of the proceeds.⁴⁶

The land tax or land-use fee is to be paid on top of the bonus or licensing fee. It is a kind of annual payment for licence rights. The land use fee has different rates for exploration and production.⁴⁷

Other taxes or fees related to mining include an emergency fund payment of 1.5 per cent of gross revenues.⁴⁸

In addition to the official tax regime, the tax rates of mining companies operating in Kyrgyzstan may be determined by the arrangements in mining development agreements. As these agreements are negotiated between the company and the government, they may be made to contain a scheme of special treatment with regard to the tax (mining-related and other) system for the company. This kind of an agreement, ratified by the Kyrgyz Parliament and hence having legal force, has thus far been made on the Kumtor deposit only.

It should be noted that small-scale artisanal mining is exempted from the payment of taxes on use of subsurface.⁴⁹

CLOSURE OF A MINE

When applying for a licence, a mining operator must also provide information concerning the termination of the activity and the related measures.⁵⁰

The mining operator is required in the design and construction of the mine as well as in its operation to prepare for the safe termination of the mining activities and closure of the mine.⁵¹ At the latest after two years after the mining activities have stopped, the mining operator must bring the mining area and the supporting area to the condition that is required by public safety, take measures of repair, clean-up and landscaping and take measures that are in this respect required in the mining and mining security licences.⁵²

The mining authority must conduct a final inspection after it has received a notification from the mining operator that it has completed the measures for mine closure.⁵³

After mining activities have stopped, the mining operator continues to be responsible for monitoring the area, and for the needed reparative measures and their costs that are due to the requirements in the mining licence or in the decision on the termination of mining activities.⁵⁴ The mining authority takes the final decision on the termination of mining activities.⁵⁵

In Kyrgyzstan, once a company has completed mining works, it is legally obliged to close the mine. The Law on Subsoil states that subsoil users must “bring land plots and other natural objects disturbed during the subsoil use into the state that is suitable for further use thereof in compliance with the normative requirements.”⁵⁶ The Land Code requires that the mining operator must at his own expense bring the land plots as close as possible to their initial condition, and where impossible, indemnify the land owner/user for any damages caused by the reduction of the value of the land plot.⁵⁷

The subsoil users who operate under a licence are required to present their financial guarantees for restoration of the damaged environment.⁵⁸ Furthermore, licensing agreements for exploitation of deposits typically require the miner to environmentally restore the mine site after use. Generally, mine closure includes mandatory rehabilitation of the land. A recultivation plan is required from the companies, which shall be approved by the environmental protection and mining supervisory authorities.⁵⁹ In addition, mining companies must make environmental rehabilitation payments. However, it has been reported that in practice such guarantee is not provided due to the absence of established terms and conditions of providing such payments.⁶⁰ The authority responsible for mine closure is the Kyrgyz State Agency for Geology and Mineral Resources.

SMALL-SCALE MINING

The mining law specifically regulates gold washing as a method of small-scale mining. People engaged in such activity need a licence if they operate on state-owned land. The licence covers both exploration and gold washing. The operating area must be unbroken and its size must not be over five hectares.⁶¹ The law also regulates the harm caused by gold washing, the responsibility of the operator to prevent and handle waste, annual reporting to mining authorities and the closure and rehabilitation of the site.⁶²

The Kyrgyz legislation does not pay much attention to small-scale artisanal mining activities. The Law on Subsoil only states that “non-industrial placer exposed minerals may be developed by the individual prospecting method without a licence.”⁶³ Legislation does not provide for specific environmental or other safeguards for small-scale mining.

SUMMARY OF REGULATORY FINDINGS

The legal regulation of mining activities in Finland and Kyrgyzstan has many differences, yet also a number of similarities. Regarding exploration, it is notable that while mineral exploration in Kyrgyzstan always requires the acquisition of temporal land-use rights, in Finland the general principle is that exploration may be conducted without formal land-use rights.

The authority for granting mining licences is very straightforwardly arranged in Finland whereas in Kyrgyzstan the division of work is less clear. Public participation in the licensing procedure has been guaranteed in the Finnish mining law. In Kyrgyzstan, certain procedures nowadays exist, but their effectiveness remains uncertain. The legally specified reasons for not issuing a mining licence are quite similar in both countries. The Kyrgyz requirements appear somewhat more concentrated on financial resources, however. The legal regulation on the duration of mining licences has differences in the countries, but the ideologies do not differ remarkably.

Regarding the mining licensing process, the Kyrgyz version has integrated more pieces into it: tendering, licence agreements and other negotiations. Both Finland and Kyrgyzstan allow the transfer of licence rights to a third party. Finland has introduced a specific mining security permit, which is not recognized by the corresponding Kyrgyz legislation.

In the Finnish Mining Law sections related to fees, the emphasis is on compensation, other required payments are specified in other laws. In Kyrgyzstan, the Tax Code provides for a number of payments for mining operators. In addition, there are several other mining-related fees.

Both countries have quite detailed regulations concerning the closure of a mine.

The Finnish Mining Law specifically regulates gold washing as a method of small-scale mining. A licence is required for such activity if it is practiced on state-owned land. The Kyrgyz legislation does not recognize small-scale mining; it is only stated that such activity does not require a licence.

MINING CONFLICTS IN FINLAND AND KYRGYZSTAN

Extraction of natural resources is an activity and a business sector that almost inevitably nowadays gives rise to some sort of conflict situations at a local – and sometimes national – level.

Finland has experienced a mining boom in recent years. Increased exploration and extraction of minerals have in general been met with a somewhat mixed attitude by citizens. The positive tax revenue-raising and employment effects in the often relatively remote mining districts have been warmly welcomed. It has also been regarded as important that the mining sector has diversified Finland's industrial production. However, conflict potential has been found in a number of issues, especially in 1) relations to other livelihoods and businesses (tourism, agriculture, outdoor recreation, reindeer herding and community image) and 2) environmental risks and effects.⁶⁴

The Talvivaara mine has been a prime example of the realized conflict potential of mining activities in Finland. The establishment of the mine was opposed by a strong group of local people who were afraid of its environmental impacts. These suspicions were later realized as it was found out that the mine had actually caused pollution of the local environment, and also one employee was killed by excessive

sulphur dioxide at the site. These effects and events have received massive publicity in Finland and have made Talvivaara a very controversial business.

Compared to Finland, mining conflicts in Kyrgyzstan are more frequent and strong, having even included violent attacks against companies. The reasons behind the conflicts are manifold, including economic, social and environmental factors. In general, public opinion holds that the mining business operates with an excessively revenue-maximizing attitude, leaving few benefits to the local community despite the huge profits of the sector. Furthermore, local people have not always been satisfied with the prospective employment and health effects of the mines. Finally, the environmental protection measures taken by mining companies have not been viewed as sufficient. Kyrgyz people witness bad legacies of the past environmental destruction caused by irresponsible mining industry, and the general trust in the capacity and willingness of authorities to monitor and enforce environmental regulations is rather low. It is also many times the case that the communication between mining companies and local people is not properly organized, leading to unnecessary suspicions and incomplete information on both sides.

KYRGYZ MINING POLICY

It has been stated that a country willing to attract private investors in the mining sector needs to develop policies in four key areas.⁶⁵ First, it needs to establish sound mining and investment codes with clear rules and guarantees regarding exploration and mining rights. Kyrgyzstan has done quite well in this respect. However, ineffective implementation of the legislation and unpredictable moves by the government have made the mining industry somewhat cautious when planning new investments in Kyrgyzstan. The mining industry has unfortunately experienced on several occasions that the country's legislation does not provide sufficient guarantees for investment decisions.

Second, governments must assure companies that they will have the right to mine following successful exploration, and that they will be permitted to transfer or trade exploration or mining licences subject to explicit criteria. In light of this criterion, Kyrgyzstan appears, again, relatively good at least on paper. Mining licences are usually granted, although the process sometimes appears quite cumbersome.

Third, governments need to enact fiscal regimes that are competitive with and comparable to those in other mining countries. This aspect has been taken care of in the Kyrgyz Republic to some extent. Changes have been introduced to the tax regime in recent years, and nowadays Kyrgyzstan is usually considered as a relatively attractive country in this regard. In addition to the formal fiscal regime, the Kuntor example shows that, at least potentially,

special mining agreements may include provisions on favourable tax treatment.

Finally, governmental institutions, which supervise and regulate the sector, should be capable of performing their duties in a professional, fair, and transparent manner. This is an area where the Kyrgyz Republic has the most room to improve its performance. The division of responsibilities among authorities is not always very clear; they remain financially under-resourced; and corruption is still a problem at all levels of governance.⁶⁶ Transparency of regulation should be improved by possibilities for more effective public participation and monitoring. The latter aspect has seen some progress recently: public oversight boards have begun monitoring government agencies' expenditures, distribution of licences and conduct of tenders. In addition, the government has audited more than 20 mining enterprises.⁶⁷ The findings of these audits have been made known to the public.⁶⁸ The government has also introduced an initiative to engage the public, NGOs and the media in discussing innovations in the mining industry.⁶⁹ These steps have arguably moved Kyrgyzstan far ahead of the other Commonwealth of Independent States members in terms of mining transparency.⁷⁰ The progress is partly due to the Extractive Industries Transparency Initiative programme that requires increasing transparency in the mining policy of the country. As a next step of the initiative, local governments will be required to report to the public on their allocation of mining revenues.⁷¹

NOTES

1. The Mining Act, no. 621 of 10 June 2011. Official English translation of the Act is not yet available, so the translations have been made by the author.
2. The Law on Subsoil, no. 42 of 2 July 1997 as amended. It is to be noted that the Law is currently under review.
3. Art. 7.
4. Art. 9.
5. There is no globally agreed definition for small-scale artisanal mining, nor a definition consistently used in Finland or Kyrgyzstan. Generally, artisanal and small-scale mining refers to mining by individuals, groups, families or cooperatives with minimal or no mechanisation, often in the informal (illegal) sector of the market. See Thomas Hentschel, Felix Hruschka and Michael Priester: Global Report on Artisanal & Small-Scale Mining (IIED and WBCSD, 2002), available at <http://pubs.iied.org/pdfs/G00723.pdf> (visited 2 January 2012).
6. Art. 10 of the Law on Subsoil.
7. Art. 16 of the Law on Subsoil.
8. Art. 33.
9. With the new government stepping in in late 2011, the Ministry of Natural Resources was abolished and its functions (except for mining policy issues) were transferred to the newly established State Agency for Geology and Mineral Resources.
10. Law on Concessions and Concession Enterprises in the Kyrgyz Republic of 6 March 1992, Art. 5.
11. See Provision on the Ministry of natural resources of the Kyrgyz Republic, approved by the Resolution of the Government of the Kyrgyz Republic, no. 734 of 4 December 2009 as amended. It should be noted that the new Law on Subsoil would address this question.
12. Art. 39.
13. Act on Environmental Impact Assessment Procedure, no. 468 of 10 June 1994.
14. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, <http://www.unece.org/env/pp/>.
15. Regulated by the Law on Ecological Expertise, no. 54 of 16 June 1999; the Law on Environmental Protection, no. 53 of 16 June 2009.
16. Instruction on state ecological expertise (1997), available e.g. at <http://www-wds.worldbank.org/external/default/WDS->

ContentServer/WDSP/IB/2010/05/17/000334955_20100517054829/Rendered/INDEX/E24530P120118010EAMP1up dated1060410.txt> (visited 2 March 2012).

17. Art. 48.
18. Art. 16 of the Law on Subsoil. See also Provision on the procedure for subsoil use licensing Approved by the Resolution of the Government of the Kyrgyz Republic, 15 August 2007, no. 336 as amended, para. 10.
19. Art. 60.
20. Art. 61.
21. Art. 62.
22. Art. 63.
23. Art. 62.
24. Art. 63.
25. Art. 64.
26. Art. 65.
27. Art. 10 of the Law on Subsoil.
28. Art. 11 of the Law on Subsoil.
29. Art. 16 of the Law on Subsoil.
30. Arts 10 and 16 of the Law on Subsoil.
31. Provision on the procedure for subsoil use licensing Approved by the Resolution of the Government of the Kyrgyz Republic, 15 August 2007, no. 336 as amended, para. 11.
32. Art. 73.
33. Art. 13 of the Law on Subsoil.
34. Art. 20(4) of the Law on Subsoil.
35. Arts 121–132.
36. Art. 127.
37. Personal communication with Dr. Valentin Bodgetsy, Kyrgyz mining Association (14 April 2011).
38. Art. 29 of the Law on Subsoil.
39. Covered here are only fees and taxes and are peculiar to the mining sector; general corporate income taxes etc. will not be discussed.
40. Art. 99.
41. Art. 100.
42. *Ibid.*
43. Art. 102.
44. Tax Code of 2 October 2008.
45. Arts 298 and 302 of the Tax Code set the tax base.
46. Arts 309–310 of the Tax Code.
47. For the rates, see Art. 339 of the Land Code (1999).
48. World Bank: Sector Licensing Studies: Mining Sector (2009), available at <https://www.wbginvestmentclimate.org/uploads/Sector_Licensing_Mining.pdf> (visited 14 June 2011) p. 46.

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49. Art. 300(1) of the Tax Law.
50. Art. 34.
51. Art. 120.
52. Art. 143.
53. Art. 146.
54. Art. 150.
55. Art. 147.
56. Art. 20 of the Law on Subsoil.
57. Art. 61(2) of the Land Code.
58. Art. 31-1 of the Law on Subsoil.
59. Sean Farrell et al. (eds): Mining. The Regulation of Exploration and Extraction in 32 Jurisdictions Worldwide (Getting the Deal through, 2010) p. 78.
60. Sean Farrell et al. (eds): Mining. The Regulation of Exploration and Extraction in 32 Jurisdictions Worldwide (Getting the Deal through, 2010) p. 78. See also the section on mining fees of this report.
61. Arts 22–23.
62. Arts 24–30.
63. Art. 19(1) of the Law on Subsoil.
64. These controversies are mainly regulated by the Finnish EIA Act and the Environmental Protection Act no. 86 of 4 February 2000.
65. See CEE Bankwatch Network: Mountains of Gold. Kumtor Gold Mine in Kyrgyz Republic (2002 available at <http://www.nodirtygold.org/pubs/200205%20CEE_Bankwatch_Report.pdf> (visited 7 July 2011) p. 20.
66. According to a critical report published in 2009, mining licensing in Kyrgyzstan is “marred by corruption and cronyism”. Bankwatch: Some Aspects of EITI as Performed by Mining Companies. Can a Model Mining Agreement Come into Being in Kyrgyzstan? (2009), available at <http://bankwatch.org/documents/EITI__mining_2009.pdf> (visited 28 September 2011) p. 3.
67. Bakyt Ibraimov: ‘Kyrgyzstan seeks mining industry transparency’, CentralAsiaOnline.com of 22 July 2011, available at <http://www.centralasiaonline.com/cocoon/caii/xhtml/en_GB/features/caii/features/main/2011/07/22/feature-01> (visited 17 August 2011).
68. *Ibid.*
69. *Ibid.*
70. *Ibid.*
71. *Ibid.*

