

A new mining law for Turkey

By Mehtap Yildirim-Öztürk and Sebnem Önder of Çakmak Ortak Avukat Bürosü

After many years of criticism, Turkey has finally replaced its existing foreign investment law with one designed to liberalise the investment environment and reassure local and foreign investors. In parallel with the new foreign investment law of June 2003, the Turkish Parliament has enacted a Law (the 'New Law') which amends certain provisions of the Turkish Mining Law (the 'Old Law'). The New Law also aims to provide foreign investors with a more investment-friendly environment.

For the purposes of this article, the Old Law, as amended by the New Law, shall be referred to as the 'Mining Law'. The New Law amends the Old Law with respect to many issues; we have selected only the major areas for the purposes of this Article after a brief introduction of the Turkish mining regime.

Under Turkey's mining regime, 'underground resources' are subject to the exclusive ownership and disposition of the State and are not considered part of the land where they are located. Under the mining legislation, the State delegates its right to explore and operate the mines to individuals or companies for specific periods by issuing licences subject to payment of a royalty to the State.

LICENCES

Different from the Old Law, the New Law divides minerals into five groups and separately details the licensing procedures for each group of minerals and provides a new term, 'certificate', which shall be issued only to the fifth group of minerals (ie, precious minerals such as diamond, agate, opal, emerald, etc). The New Law allows for multiple licences involving different categories of minerals in the same area. This new licensing approach is likely to create serious problems in many areas including surface rights, environmental management and issues concerning responsibilities of the mining right holders.

The existing 30-month exploration licence period is now extended to three years and the 'pre-operation licence' provided by the Old Law is now repealed. However, it is at the discretion of the Ministry of Energy and Natural Resources (the 'Ministry'), General Directorate of Mining Affairs (the 'Directorate'), to grant similar rights (ie, extracting and selling ores up to 10% of reserves) to the exploration licence-holders.

The existing six-month period to start actual mine operation activities upon obtaining the operation permit is extended to one year. Failure to start operation is now subject to a penalty of 10% royalty on the annual production amount declared in the project, whereas the penalty provided by the Old Law was termination of the licence only.

SECURITY DEPOSITS

In order to prevent the risk of insufficient securities, the New Law provides for a 'minimum security' amount, determined annually by the Ministry of Finance.

Although the Old Law governed the deposition of securities and levies, it did not provide any provision as to the consequences of non-deposition or deficient deposition of securities. The New Law governs the penalties to be applied in such cases (i.e. suspension of mining activities and termination of the licence if the licence-holder fails to make the necessary deposition of security during the granted grace period).

ROYALTY

¹ Authors can be contacted at inquiry@cakmak.av.tr.

Different from the Old Law, the New Law provides for different royalty percentages for different groups of mines. Pursuant to the Old Law, a royalty was collected based on the annual operational gross profit. Royalty will now be collected based on annual total sales. With this amendment, the calculation of a royalty is made simpler, and more practical and beneficial for the State, since calculation of gross profit was previously based on the declaration made by the licence-holder.

In the event that mining activities are conducted within state-owned land, the licence-holder is obliged to pay an additional 30% royalty. This additional payment is imposed as according to the New Law (see Section J.1 below) the licence-holder will not be required to pay for leasing state-owned land for its mining activities

The fees to be paid for utilisation of forest areas are quite high and the New Law aims to protect the rights of licence-holders and avoid multiple payments. The New Law provides that if state-owned land has forest status, then the royalty shall be paid directly to the Forestry General Directorate. For forest areas of more than 5 ha, licence-holders will pay the requisite forest fees but will not be obliged to pay the additional 30% royalty.

INCENTIVES

In the past, mining used to benefit from incentives granted to investments in regions having first priority in national development. The incentives to be granted to mining under the New Law are not clear, since it is stated that the incentives to be granted to mining activities shall be decided by the Council of Ministers. However, it is clear that the first group of minerals (concerning stone quarries) will not, in any event, benefit from any incentives.

The New Law provides a further advantage to the licence-holders of not paying 50% of the royalty if the extracted ores are processed in Turkey to provide an additional value to the Turkish economy.

ILLEGAL ORE PRODUCTION

The New Law aims to clarify the wording of the Old Law, which was subject to misinterpretation. With the amendment, the Mining Law separates the penalties for undeclared production by licence-holders from illegal ore production undertaken without a licence. Accordingly, the New Law aims to provide a system to keep records of the raw material produced and, therefore, avoid illegal production.

TEMPORARY SUSPENSION

The Mining Law now defines 'force majeure' and 'unexpected' events, which form the basis for temporary suspension of mining activities, and leaves less room for the Directorate to interpret the law and to use its discretion in rendering a decision for temporary suspension of a mine due to force majeure events. Additionally, the six-month period (after the expiration of an event causing temporary suspension) in which to resume normal mining activities is now reduced to three months.

BORATES

The Mining Law reserves all provisions of Law No. 2840 concerning the Operation of Boron Salts. All borate minerals are now subject to Law No. 2840, which specifically stipulates that the exploration and operation of boron salts may only be carried out by the State.

STONE QUARRIES

Sand and gravel operations that were subject to a stone-quarry licence are included in the Mining Law. The operation of quarries was subject to a licence issued by the relevant

governor's office in accordance with the Regulation on Stone Quarries. Such an addition aims for centralisation, which will enable the supervision of licences through a single authority.

ENVIRONMENTAL IMPACT ASSESSMENT

Mineral exploration activities are no longer subject to an environmental impact assessment report. The New Law also provides that the Ministry of Environment and Forestry shall finalise the environmental impact assessment transactions for other mining activities within three months following the application. Although this amendment aims to shorten the time spent on bureaucratic transactions, the New Law does not provide any remedy for failure to finalise applications within the required time.

SURFACE RIGHTS

It appears that mining activities will no longer be prevented by investments concerning a public benefit. For such purpose the Prime Minister shall form a committee to resolve the disputes. The New Law does not define investments concerning a public benefit but lists examples such as airports, ports, dams, roads and the like.

- **State-owned lands**

Licence-holders shall have the right to use state-owned lands and lands under the rule of the State free of charge. In other words, licence-holders shall not pay any fee to the State for the state-owned lands that are not allocated for any special purpose. However, as stated previously, mining activities that are conducted within state-owned lands will be subject to an additional 30% royalty.

- **Expropriation**

The Old Law provided an authority to the Ministry to render decisions concerning public benefit with regard to the expropriation of privately-owned lands for mining purposes. However, the Constitutional Court invalidated the relevant provision. The New Law provides mine licence-holders the right to request from the Ministry the issuance of a 'public benefit' decision and, accordingly, expropriation of privately-owned lands needed for mining activities. The previous wording of such provision (before the cancellation by the Constitutional Court) provided for expropriation of privately-owned lands only within the licence area. With the proposed amendment, privately-owned lands that are outside the licence area may also be expropriated. When it is determined by the Ministry that such expropriated land is no longer necessary for mining activities, the licence-holder shall return the land to its previous owner upon receipt of payment (at the market price).

- **Permits for lands allocated for a certain purpose**

The New Law aims to repeal the limitations set by certain laws and regulations regarding mining activities on allocated lands. The criteria to be applied to mining activities on allocated lands, such as forest and planting areas, national parks, agricultural lands, pastures, protected areas etc, shall be governed by a regulation to be issued by the Ministry after obtaining opinions from the relevant ministries. The regulation is expected to be published within eight months following publication of the New Law. The Regulation's aim is to ease the permitting process in the aforementioned allocated areas, avoid multiple payments and repeal the existing prohibition of mining activities, if any, on such lands. Currently, different laws and regulations govern the permits required for change of allocation purposes of lands within a mine licence area. The New Law, in order to shorten the period and avoid the problems that may restrict mining activities in certain lands, aims to authorise the

Ministry as a coordinator in the permitting process. We will be able to evaluate this in detail once the regulation is issued.

The New Law aims to achieve this purpose by also amending other relevant laws such as those concerning Protected Areas, National Parks, National Planting and Forests.

CONCLUSION

Under the Old Law, licence-holders faced many problems such as the lengthy periods required to issue permits and the high fees regarding surface rights. By amending the Old Law and other relevant laws, the New Law, in general, aims to reduce the heavy bureaucratic control imposed upon the licence-holders, shorten and ease the permitting process, reduce the fees to be paid by licence holders, and, most importantly, remove the limitation of mining activities on certain types of lands.

Most of the issues are covered and the picture will become clearer when the implementing regulation is published. One thing is certain, the Turkish Government wishes to attract more investment in exploration and the development of Turkey's natural resources. Time will tell whether the New Law is sufficient to achieve this purpose.

The New Law appears to be more focused on regulating small entrepreneurs and speculators through bureaucratic control rather than on modernising the code to encourage large private investments. The investors' expectation from a modern mining law is its ability to regulate mineral operations with simple and clear laws that provide them with free access to mineral resources through transparent processes, secure tenure, transferable rights, and operational and commercial freedom. Turkey's New Law does not have such a standard and clarity, and the multiple-licence issue is contradictory to investors' expectations.

Mehtap Yildirim-Öztürk and Sebnem Önder are with the legal firm of Çakmak Ortak Avukat Bürosu in Ankara. They can be contacted at :inquiry@cakmak.av.tr