

Turkey

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Mining industry

1 What is the nature and importance of the mining industry?

In parallel with the foreign investment law of June 2003, the Turkish Parliament enacted a law in June 2004, which amends certain provisions of the Turkish Mining Law. The amended Mining Law (as defined below) aims to provide foreign investors with a more investment-friendly environment. Prior to amendment, licence-holders faced many problems such as the lengthy periods required to issue permits and the high fees regarding surface rights. The amendment to the Mining Law also 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 land. The Turkish government wishes to attract more investment in exploration and the development of Turkey's natural resources. Regulations to implement the Mining Law have been recently enacted and inter-agency consultations are under way to clarify the roles of different government bodies. It is also expected that certain clarifications will be brought by virtue of the practice of the relevant authorities. Therefore, time is needed to establish a well-functioning system.

Legal and regulatory structure

2 Is the legal system civil or common law-based?

The Turkish legal system is based on the continental legal system (civil law).

3 How is the mining industry regulated?

The mining industry is regulated by the laws of the Republic of Turkey and the implementing regulations issued thereunder, which shall be applicable to all mining activities within Turkey. The agreements to be entered between the relevant parties simply operate to bind its parties contractually and as such is enforceable only among the parties.

4 What are the principal laws that regulate the mining industry? What are the principal regulatory bodies that administer those laws?

The mining regime is mainly governed by the Turkish Constitution, Mining Law No. 3,213 (published in Official Gazette No. 18,785 dated 15 June 1985). The Mining Law is further amended by Law No. 5,177 published in Official Gazette No. 25,483 dated 5 June 2004) (the Mining Law), the Regulation Concern-

ing the Implementation of the Mining Law (published in Official Gazette No. 25,716 dated 3 February 2005) (the Mining Regulation) and Mining Activities Permitting Regulation (Permitting Regulation) (published in the Official Gazette No. 25852 dated 21 June 2005) (collectively the mining legislation).

The Mining Affairs General Directorate (the Mining Department) of the Ministry of Energy and Natural Resources (the Ministry) is the authorised body to issue mining licences and to administer the applicable legislation.

5 What classification system does the mining industry use for reporting mineral resources and mineral reserves?

The Mining Law divides minerals into five groups and the group of each mineral is listed in the Mining Law. The categories in the Mining Law are (i) sand and gravel; (ii) marble and other similar decorative stones; (iii) salts in solution form that can be obtained from sea, lake and spring waters; (iv) energy, metal and industrial minerals; and (v) precious metals and gem stones.

The Mining Department is the authorised body to determine and announce the group of a mine, which is not listed in the Mining Law.

Mining rights and title

6 Who has title to metallic minerals in the ground?

Pursuant to the relevant provisions of the Turkish Constitution and the mining legislation, 'mines' 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 legal entities for specific periods by issuing licences subject to payment of a royalty to the state.

7 What information/data is publicly available to private parties who wish to engage in mining activities?

The mining registry kept by the Mining Department is open to the public. Any relevant person shall have the right of access to the registry recordings in the presence of a mining registrar.

8 What mining rights may private parties acquire? How are these rights acquired? What obligations does the holder of these rights have?

Exploration licence

The first step for companies wanting to engage in mining activities for metallic mines in Turkey is to apply for an exploration

licence. The right of priority is essential in applications, which is determined in accordance with the date of application. The exploration licence is granted to the mining right holder by the Mining Department in accordance with the area limitations stated in the mining legislation.

The exploration licence is a certificate granting an authority for exploration of a mineral within the determined area. The licence-holder is considered as the finder of the mines.

Operation licence

Before the end of the exploration licence period, the licence-holder shall apply for an operation licence. The operation licence shall only be given to the exploration licence-holders. The individuals or companies will be entitled to an operation licence by making an application. Operation licence is an instrument granting the licence-holder the right to operate a mine in accordance with the mining legislation. The operation licence is granted to the mining-right holder by the Mining Department. The licence-holder may continue exploration activities during the operation period.

An operation licence-holder is obliged to undertake certain obligations as required by the mining legislation. These obligations can be summarised as follows:

- A certain amount of duty and a security deposit must be deposited for each licence.
- The licence-holder must pay the necessary royalty to be collected over the extracted mines.
- All written declarations on technical and financial matters and all reports issued by authorised companies under the mining legislation shall be deemed final and true. The licence holders shall be held responsible for the accuracy of all of their declarations other than the technical matters.
- The operation licence-holder must, by the end of April of each year, submit to the Mining Department all technical documents, a sales information form, and an activity information form relating to its operational activities of the previous year.
- The operation licence-holder must employ at least one mining engineer as a technical supervisor (*teknik nezaretçi*) for supervision of mine extraction activities. Project companies (a) employing at least 30 workers; or (b) employing at least 15 workers and operating the mine with underground production methods, are obliged to employ a permanent technical supervisor.
- The licence-holder is obliged to make the necessary applications for obtaining the necessary permits.

- 9 Is there any distinction between the mining rights that may be acquired by domestic parties and those that may be acquired by foreign parties?

The Mining Law clearly sets forth that the mining rights may only be given to either Turkish citizens or legal entities established under Turkish laws. Accordingly, only Turkish citizens, who are entitled to use their civil rights, and the companies established under Turkish laws specifically for mining purposes are entitled to hold mining rights.

Under Turkish law, foreign persons and companies domiciled abroad may establish a company in Turkey. Companies that are established in Turkey with foreign capital are deemed Turkish companies subject to the provisions of the Turkish Commercial Code. Therefore, they are also entitled to hold mining rights with no specific limitation.

- 10 How are mining rights protected?

The Ministry is authorised to settle disputes to protect the vested rights of the licence-holders. However the decisions of the Ministry are not final and may be challenged before Turkish administrative courts. Since minerals are subject to the exclusive ownership and disposition of the state, any matter including granting or transfer of a mining right and operation of mines are within the exclusive jurisdiction of Turkish courts. Nevertheless, contractual obligations of the parties not relating to the core mining rights may be freely determined by the parties in accordance with the principle of freedom of contract.

- 11 How do the rights of aboriginal, indigenous or currently or previously disadvantaged peoples affect the acquisition or exercise of mining rights?

As stated above the right of priority is essential in applications. Accordingly, the rights of aboriginals are not specifically protected. As for surface rights, the Mining 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. 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).

- 12 What surface rights may private parties acquire? How are these rights acquired?

Under the provisions of the Turkish Civil Code and the mining legislation, mines are accepted as immovable properties (i.e. lands and buildings upon them); therefore the ownership of mines shall be registered with the Mining Registry. However, the ownership of mines does not cover the ownership of the immovable properties where mines are located. Therefore, it is necessary to create a usufruct or easement right over the mine exploration areas in order to realise any drilling works, exploration of underground waters or realisation of any other activities required for mining activities.

Privately-owned land

The legal options to utilise privately-owned land can be summarised as follows: (i) purchasing; (ii) establishing usufruct right over the land (by making an application to the Mining Department); (iii) leasing; and (iv) having the land expropriated in accordance with the mining legislation.

The operation licence-holder is obliged to obtain written approval of the land owner for its mining activities to be conducted 20 metres away from the land. The mining legislation does not govern the consequences in case of failure to obtain the above stated approval of the land owner. In case of such dispute, it is advisable that the licence-holder apply to the Ministry to act as a coordinator in such dispute.

State-owned land

State-owned land covers (a) the land registered in the name of the Treasury; and (b) the land under the ruling and disposal of the State, even if it is not registered in the name of the Treasury.

The legal options to use state-owned land can be summarised as follows: (i) purchasing; (ii) leasing; and (iii) obtaining a usufruct right. In order to benefit from usufruct right over state-owned land, a prior permission needs to be obtained from the Ministry of Finance, National Estate General Directorate. An

undertaking is signed by the beneficiary of the usufruct right and then the right is registered in the relevant land title registry.

Under the Mining Law, mining operations to be carried out on state-owned land will not be subject to any payment for usage of such land. However for mining activities conducted within state-owned land, a 30 per cent mark-up on the royalty shall be charged. In the event that mining activities are conducted within a forest area exceeding five hectares, the above-stated mark-up shall not be charged for areas exceeding five hectares. Instead, forest fees shall be charged for such areas.

Further, the operation licence-holder is obliged to obtain the approval of the Mining Department for its mining activities to be conducted 60 metres away from land allocated for public services such as schools, hospitals, highways, etc.

Duties, royalties and taxes

- 13 What duties, royalties and taxes are payable by private parties carrying on mining activities? Are these duties, royalties and taxes revenue-based or profits-based?

The licence-holder must pay a royalty to be collected over the extracted mines in the amount of 2 per cent of the pit-head sale price for minerals including the metallic minerals. Accordingly, the royalties are revenue-based.

The royalty will be levied by an addition of 30 per cent for the mining activities conducted on state-owned lands. If the state-owned land in use has a forest status, then the royalty shall be paid directly to the Forestry General Directorate. For forest areas of more than 5 hectares, licence-holders will pay the requisite forest fees but will not be obliged to pay the additional 30 per cent royalty. The mining legislation provides an advantage to the licence-holders of not paying 50 per cent of the whole royalty if the extracted ores are processed in Turkey to provide an additional value to the Turkish economy.

The operation licence-holders are obliged to pay an annual licence fee to be determined by the Ministry of Finance every year.

- 14 What tax advantages/incentives are available to private parties carrying on mining activities?

The incentives to be granted to mining under the Mining 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, which has not made a decision yet.

- 15 Is there any distinction between the duties, royalties and taxes payable by domestic parties and those payable by foreign parties?

There is no distinction between the duties, royalties and taxes payable by Turkish licence-holder companies and those payable by foreign capital Turkish companies.

Business structures

- 16 What are the principal business structures used by private parties carrying on mining activities?

The licence-holders can either be (i) Turkish citizen individuals; or (ii) legal entities incorporated under the laws of Turkey for mining purposes; or (iii) public authorities and organisations vested with the necessary powers.

Limited liability company (LS) and joint stock companies (AS) are the most commonly-used business structures.

Financing

- 17 What are the principal sources of financing available to private parties carrying on mining activities? What role, if any, does the domestic public securities market play in financing the mining industry?

The principal source of financing for mining activities is balance sheet financing. Project financing is rarely used. The domestic public securities market does not play a major role in financing the mining industry.

Restrictions and limitations

- 18 What restrictions and limitations are imposed on the import of machinery and equipment or services required in connection with mining activities?

The import of new machinery and equipment required in connection with mining activities is not subject to any restriction or limitation. However, the import of certain machinery and equipment, which is older than 10 years, is either restricted or prohibited. Pursuant to the Communiqué No. 2006/9 Concerning the Import of Old, Used or Renewed Materials, certain goods which are over 10 years old, may not be imported into Turkey, depending on their customs tariff statistical positions. For example, windlass winches used in mining activities which are over 10 years old are prohibited to be imported into Turkey.

- 19 What restrictions and limitations are imposed on the use of domestic and foreign employees in connection with mining activities?

The health and safety rules apply to both domestic and foreign employees without any difference. However foreign personnel are required to obtain a work permit from the relevant authorities before starting to work.

- 20 What restrictions or limitations are imposed on the processing, export or sale of metallic minerals?

Concerning the export of the minerals, pursuant to article 4 of the Export Regime Decree No. 95/7,623 dated 22 December 1995 (Published in the Official Gazette No. 22,515 dated 6 January 1996), the export of all goods other than (i) those restricted by the Ministry to which the Undersecretariat of Foreign Trade is affiliated for certain reasons such as public order, public health and environmental protection. To our knowledge, there are no restriction or limitation imposed by the relevant Ministry; and (ii) those which are prohibited to be exported by laws, decrees and international agreements is allowed. The Undersecretariat of Foreign Trade issued the Decree No. 96/31 Concerning the Goods Export of Which is Prohibited or Subject to Authorisation (published in the Official Gazette No. 22,762 dated 19 September 1996) in order to clarify the export of which goods are prohibited or restricted by laws, decrees or international agreements. Pursuant to the Decree, the export of minerals is not prohibited or subject to any restriction.

We are not aware of any legislation restricting or limiting the processing or sale of minerals within Turkey. Nevertheless, a Council of Ministers' Decree to govern the principles regarding export of borate is expected.

- 21 What restrictions or limitations are imposed on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals?

The mining legislation does not provide any restriction or limitation on the import of funds for mining activities or the use of the proceeds from the export or sale of metallic minerals.

Pursuant to Article 41 of Communiqué No. 91-32/5 (published in the Official Gazette No. 20907 dated 20 June 1991), other than the loans obtained from or guaranteed by a foreign export credit agency, external loans must be utilized through Turkish banks or financial institutions. Drawdowns from a foreign loan must always be made through a Turkish bank and the borrower is not allowed to make drawdowns from any foreign bank.

Environment, health and safety

- 22 What are the principal environmental, health and safety laws applicable to the mining industry? What are the principal regulatory bodies that administer those laws?

The Labour Law No. 4,857, the Environmental Law No. 2,872 (published in the Official Gazette No. 18,132 dated 11 August 1983), and the Environmental Impact Assessment (EIA) Regulation (published in the Official Gazette No. 25,318 dated 16 December 2003) are the principal legislation applicable to the mining industry. However there are many other laws, regulations, communiqués and circulars applicable to the mining industry to govern the working principles in a mine, application of certain safety rules during extraction of minerals, usage of explosives, flammable and dangerous substances, complying with the necessary criteria to prevent environmental pollution, etc.

The relevant departments of the Ministry of Environment and Forestry and the Ministry of Labour are the regulatory bodies that administer the application of relevant legislation.

- 23 What is the environmental review and permitting process for a mining project? How long does it normally take to obtain the necessary permits?

Mineral exploration activities are not subject to an environmental impact assessment report. In other words, only mine operation activities are subject to the EIA Regulation. The Mining Law provides that the Ministry of Environment and Forestry shall finalise the environmental impact assessment transactions for mining activities (other than exploration) within three months following the application. Although this provision aims to shorten the time spent on bureaucratic transactions, the Mining Law does not provide any remedy for failure to finalise applications within the required time.

The Mining 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 afforestation areas, hunting areas, special protection areas, national parks, natural parks, natural monuments, protected areas, agricultural areas, pastures, cultural protection areas, water basins, coastal areas and shore strips, territorial waters, tourism regions, culture and tourism protection and development areas, military forbidden zones and city reconstruction areas are governed by the Permitting Regulation. The purpose of the Permitting Regulation is to regulate the principles and procedures to be followed for the application of mining activities in the above stated allocated areas. Applications for the permits within the scope of the Permitting Regulation must be made to the Mining Department. The Mining Department

shall transfer such application files to the relevant governorates or public enterprises.

In addition to the above-stated EIA report and permits for allocated lands, mining activities, depending on the technology of the project, require many other permits such as a facility permit, a non-hygienic establishment permit (required for establishments that may cause environmental pollution or biological, chemical, physically, psychologically or socially harmful effects on the environment such as mining quarries) water discharge permit, etc. Finalisation of such permits may take a long period of time.

- 24 What is the closure and remediation process for a mining project? What performance bonds/guarantees and other financial assurances are required?

Upon termination, expiration or abandonment of a mining licence, the licence-holder is obliged to harmonise the mine area with the environment in accordance with its operation project. Further, all assets will be transferred to the state; the licence area will be automatically opened to new activities and the licence will be tendered through public auctions. The penalties applicable to the licence-holder, in case of the licence-holder's failure to operate the mine properly or in the event the licence-holder causes any error or deficiency in the operation of the mine, are: registering the security deposit as income and termination of the licence. The licence-holder will not be subject to any further legal sanctions.

A certain amount as security deposit must be deposited for each licence. The security deposit is equal to 0.3 per cent of the annual licence fee per hectare. The Council of Ministers is authorised to increase or decrease this rate by half. However, licence security cannot be less than the annual licence fee. In the event that the security deposit is registered as income or certain deductions are made pursuant to the Mining Law, the licence-holder must deposit the deficient amount within three months. If the licence-holder fails to deposit the outstanding amount (which shall be doubled with each late payment) within the determined period, then a second period of three months will be granted. If the licence-holder fails to deposit such amount within the second period as well, the mining activities shall be ceased. If the licence-holder fails to deposit the deficient amount by the end of the subsequent six months, the licence shall be terminated.

International treaties

- 25 What international treaties apply to the mining industry or an investment in the mining industry?

There are a number of treaties, to which Turkey is a signatory, of a general nature that are also applicable to the investments in the mining sector. Such treaties include the following:

- The Convention for Settlement of Investment Disputes between States and Nationals of other States (The ICSID Convention was ratified by Law No. 3460 and published in Official Gazette No. 20011 dated 6 December 1988), commonly known as the ICSID Convention, which basically allows the investors of one member country to submit its investment disputes with the host country to ICSID Arbitration; and
- bilateral Investment Treaties with more than 50 countries, including the United States of America and most of the European and Asian countries.

There are also several treaties on the mining industry and mining investments to which Turkey is a signatory. Among these the most essential are:

- several agreements with the United Nations aimed to develop the Turkish mining sector;
- several agreements with countries such as Germany, Russia Romania and Yemen for the improvement of bilateral cooperation in the mining sector; and
- certain agreements aimed to improve health protection and safety measures in the mining sector.

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