

**Theme 5:**  
**Oil and gas as the investment objects.**  
**Legal regulation of precious metals**  
**excavation**

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# Plan

- Development of the RK laws on investments and challenges of legal groundwork for interests of foreign investors in oil & gas sector
- Legal protection of interests of foreign investors in subsoil use field.
- Problems of improvement of legal regulation of the investment activity and remedies of investors in oil and gas field

- The raw materials (сырьевой материал) base, especially oil, is for Kazakhstan a symbol of sovereignty, the means of subsistence (существование), and the source (источник) of future prosperity. Nowadays the largest oil & gas deposits are developed.
- There are raw hydrocarbons on the Caspian Sea shelf, being the potential reserve of the country
- After the collapse of the USSR the new countries, especially the ones of the Caspian region (Azerbaijan, Kazakhstan, Turkmenistan, Russia) did not have financial resources not only to develop rich oil deposits, but even to support the mining operations level reached during the Soviet period.

- Consequently, they were forced to turn to Western countries and transnational energy corporations for financial aid.
- In the eyes of the Western countries the Caspian Sea is the second Persian Gulf. Therefore many energy corporations were interested in investing in these countries for the large-scale (масштабный) development, first of all, of oil and gas fields.
- These investments were made in the Caspian region, and nowadays many world companies are running businesses, not only in subsoil use, but also rendering (представлять) services and providing the deposits infrastructure, take part in the developing the mineral resources in Caspian bordering countries.

- This swift (быстрый) invasion of the world energy companies, influential financial lobbyists, representatives of high governmental authorities of Western countries in Caspian region is explained as follows:
- 1) ever-increasing (всё возрастающий) importance of energy resources in the economy of the developed countries, forcing them to ensure their energy security;
- 2) Dissociation of the Caspian bordering countries with the insufficiently developed political systems (system is oriented only at power of the country's leader in the absence of real democratic institutes), insecurity by the valid collective agreement, for example, as OPEC countries. All they go through political and economic difficulties of the prolonged transition period;
- 3) Profitability of the oil business and keen competition in investing in this field.

- At the beginning of the 90's of the previous century Kazakhstan did not have another way out except for attracting foreign capital to implement the field development plans.
- Under these circumstances in the Republic of Kazakhstan there was taken the only sound decision - to open the way for foreign investments, and this is a great endeavor of the President of the RK N.A. Nazarbayev who personally participated in negotiations with the first investors who invested their capital in subsoil use.

- At that time Kazakhstan raised the first significant (значительный) foreign investments in oil and gas field in conditions when the proper relations regulation policy in this sector of the economy was not developed, proper legislative framework directed at developing the market economy lacked, scarcity of funds not only for the development of industry, but also for solution of topical social challenges was experienced.
- In these crisis conditions the foreign investor in Kazakhstan, providing significant funds to develop the oil and gas field, to the fullest extent protected their interests through signing the contract which would make it possible for him not only to return his money but also to generate (вырабатывать) income.
- In this complicated political and economic situation there were signed the first investment agreements and the first contracts granting the subsoil use rights which stipulated the terms (срок) of implementation of the investments projects ensuring (обеспечивать) the balance of interests of both parties.



- At this stage Kazakhstan provided foreign investors some tax benefits and preferences, special terms to perform export import, and currency transactions, special rules to employ foreigners, etc. All these special rules were set forth in contracts, and contracts, as a rule, were approved by Decrees of the Government of the RK or special acts of the country's President.
- Just that approach made it possible for Kazakhstan to create an attractive investment regime, being one of the prerequisites of rapid economic recovery, industrial development, and not only in the oil and gas field, but also in non-oil-gas sector of the economy.
- Attracting foreign investments helped to solve the most complicated social problems and favored the assertion (заявление) of Kazakhstan as a serious partner in foreign economic relations.



- Firstly, in the period of entering into the first investment subsoil use agreements and contracts in Kazakhstan there were already many valid legislative and other acts which made it possible for the Government of Kazakhstan and domestic business entities to attract (привлекать) foreign investments and provide them specific tax benefits and preferences.
- For instance, the Law of the Kazakh Soviet Socialist Republic dated 7 December 1990 No.383-XII (void) established that the «subject of foreign investments in a Kazakh Soviet Socialist Republic there can be the enterprises, share interest in the property of Soviet legal entities, shares and other securities, other property, as well as purchased property rights to use the natural resources in the Kazakh Soviet Socialist Republic to run business and other activity in Kazakh Soviet Socialist Republic» (Article 3).
- Pursuant (в соответствии) to Article 9 of this Law, foreign investing was allowed in any fields of business and other activity, except for military activity. The legal entities with foreign ownership were granted a right to take decisions on the terms of employment, dismissal, work schedule, as well as provision of benefits, guarantees, and compensation to all company's employees on their own (Article 12). The property imported in Kazakhstan as investments of foreign investors not held for sale was not imposed charges (Article 16), etc.

- **Secondly**, the Code of Kazakhstan «On Subsoil Assets and Mineral Processing», which was valid at the time, dated 30 May 1992 (void) envisaged the possibility of the lease of the subsoil assets to companies with foreign ownership, as well as to foreign legal and natural persons on terms of contract or concession (уступка, Article 10).
- Besides, subsoil assets (актив) were provided to the mentioned entities on the basis of the lease agreement which, in particular, envisaged: period and terms of lease of subsoil assets; environmental requirements; quotas for the annual volume of leased mineral deposits; payment dates and amounts of payments for leasing the subsoil assets; subsoil assets protection measures; special terms on the used technology; provided benefits (Article 14 of the Code), etc.

- **Thirdly**, at that time there were valid other regulatory legal acts making it possible for the state to lease subsoil assets and land plots to foreign investors.
- For instance, the Land Code of the Kazakh Soviet Socialist Republic dated 16 November 1990; Regulation «On Procedure for Leasing Land to Joint Ventures, Companies, International Associations, and Organizations, Foreign Legal Entities and Citizens to Carry out the Activity in the Republic of Kazakhstan» approved by Decree of the Government of the RK on 3 July 1992 under No. 1516-XII (void); Regulation «On Procedure for Exploitation (Transfer, Exchange, Sale) of Information about Subsoil Assets approved by Decree of the Government of the RK dated 8 December 1992 No.1034 (void) and others.

- The legislative acts which at that time were based on the fundamental principles and rules of the civil law, especially the institutes of property and law of obligations were involved.
- Besides, in the applicable investment laws there are more contraventions (противоречие) with the fundamental legal entities of civil law.
- For example, the Law of the RK «On Investments» provides for the right of the authorized public authority to unilaterally terminate the agreement which conflicts with the general provisions of the civil law, comprising the rule that any agreement can be terminated by consent of the parties or judicially.

- The investment laws of Kazakhstan were changed, amended and improved, the investment law appeared and firmly established in the legal science as a field of Kazakh law, fundamental works dedicated to legal regulation of the investment activity were published, that is, for the short historical period there was created the investment law system and the investment legislation system.
- The end of the 90's there has taken place the throwback (переключение) from the reached level of attractiveness of the investment climate.
- In general this is a common phenomenon, since from 2000 Kazakhstan has almost emerged from the internal crisis, created the respective market-driven economic base, set up the necessary political government institutions, created the non-governmental bank system, attracted large foreign investments, including in oil and gas field, therefore, as a sovereign state was entitled to change the rules of the game, create the new legal base conforming to new economic realities and political situation in the country.

## **Legal protection of interests of foreign investors in subsoil use field.**

- General guarantees of legal protection of the investors' activity in Kazakhstan equally apply to the activity of foreign investors.
- Subject to applicable investment laws, the investor is provided full and absolute protection of rights and interests. The Law of the RK «On Investments» (2003) establishes that:

- 1) the investor is entitled to compensation of damages as a result of promulgation by the public authorities of the acts not conforming to the legislative acts of the Republic of Kazakhstan, as well as a result of illegal actions (omissions) of the officials of these authorities;
- 2) investor is guaranteed the stability of terms of the investment agreement made between the investor and the public authority, unless the agreement is amended by consent of the parties.



● Here it should be borne in mind that these guarantees are not in force in cases of:

- changes in laws of the Republic of Kazakhstan and/or coming into effect and/or change of the international agreements which amend the procedure for and terms of import, production, sale of excisable goods which according to the tax laws, comprise, particularly, crude oil and gas condensate;

- changes and amendments made in the legislative acts to ensure the national and environmental protection, health care and good morals.

- In conformity with the law, the investor may at his own discretion use the income generated from his activity after paying the taxes and other compulsory payments to the budget.
- Besides, the guarantees of the state provided pursuant to the Law of the RK «On Subsoil Assets and Subsoil Use» are also applied to the activity of the investors running their business in the subsoil use business.
- For example, the subsurface user is guaranteed the protection of his rights in accordance with the laws. The changes and amendments in laws aggravating the situation of the subsurface user are not applied to contracts made before introducing these changes and amendments. These guarantees are not applied to changes in the field of national security protection, defense potential, environmental security, health care, taxation, and customs regulation.

- Thus, the national laws comprise clear and particular provisions on stability of contracts, being a favorable legal regime for investors and subsurface users.
- The weakness of these provisions is that having provided for legislatively the exceptions from the general legal regime, ensuring the guarantees of stability of the investments agreements and subsoil use contracts, the state did not develop the clear mechanisms of their realization, giving complete control to the officials and the competent authority.
- This can be a prerequisite for the subjective interpretation and, as a result, cause reconsideration of contracts.

## **Problems of improvement of legal regulation of the investment activity and remedies of investors in oil and gas field**

- The outflow (ОТТОК) of own capital from the country continues, and this is a negative sign. In this regard it is necessary to emphasize a number of factors, impeding the increase in raised investments, including the foreign ones, in particular:
  - low business activity on the market of Kazakhstan business entities;
  - instability and inefficiency of laws and regulatory economic measures;
  - low cash liquidity worsened by the non-payment crisis;

- acute (острый) shortage of accurate and complete information about the economic situation;
- high level of corruption;
- inefficient monitoring of the activity of investors;
- frequent change of the managers of branch ministries, not favoring the effectiveness of the work of central authorities and not ensuring the succession of taken decisions.

- As important tools of state investment policy, there are also economic factors, possibility to provide the investors tax and customs benefits and preferences, since the stable and uniform tax regime is not always enough for the inflow of investments.
- A stable tax regime, as a rule, is characteristic for the economically developed countries. If still to pursue the object to apply the general tax regime to all business entities, including the investors, working in the subsoil use field, the tax and customs rates should be decreased and correspond to the generated income.

- The activity on reinvestment of generated income in the field of subsoil use in other industries, for example, in the processing industry, agriculture, mechanical engineering, and other socially oriented sectors require the creation of the legal regime. Return to creation of free economic zones in the field of socially important fields, which can give rise to increase in the investment inflows in these fields can favor this.



- The interest of foreign investors in oil and gas field should be used to solve critical state problems on economic recovery as a whole.
- To achieve the result, the subsoil use contracts and the investment agreements should contain clear and specific terms of the obligations of subsoil users-investors to place orders on supply of equipment and spare parts with domestic companies, employment of domestic staff, deduction of the defined amounts for construction and renovation of the social facilities.
- These terms have to be set forth in the agreements and should not depend on imperative laws and mood of the public servants.