



CHAMBERS
Global Practice Guides

Mining

Afghanistan – Law and Practice

Contributed by
Kakar Advocates LLC

2018

AFGHANISTAN

LAW AND PRACTICE:

p.3

Contributed by Kakar Advocates LLC

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Kakar Advocates LLC

CONTENTS

1. General Structure of Mineral Ownership and Regulation	p.5
1.1 Ownership of Mineral Deposits	p.5
1.2 Regulation of Mining Industry	p.5
1.3 Administration of the Mining Industry	p.5
2. Required Authorisations and Permits	p.5
2.1 Requirements to Conduct Prospecting	p.5
2.2 Requirements to Conduct Exploration	p.5
2.3 Requirements to Conduct Mining	p.5
2.4 Environmental Requirements to Conduct Exploration and Mining	p.5
3. Duties and Rights Derived from a Mining Title or Concession	p.5
3.1 Rights Granted by Mining Title to Holder	p.5
3.2 Duties Acquired by Title Holder	p.6
3.3 Rights Acquired by Title Holder	p.6
3.4 Duties Acquired Towards Landowners	p.6
3.5 Duties of Title Holder at End of Life	p.6
4. Environmental	p.7
4.1 Principal Environmental Laws	p.7
4.2 Bodies of Environmental Competence	p.7
4.3 Environmental Obligations	p.7
5. Miscellaneous	p.7
5.1 Special Rules or Taxes	p.7
5.2 Restricted or Excluded Zones	p.7
5.3 Rights of Indigenous or Ethnic Communities	p.7
5.4 Unilateral Termination of a Mining Title	p.8
5.5 Taxes of Royalties	p.8

AFGHANISTAN LAW AND PRACTICE

Contributed by *Kakar Advocates LLC* **Authors:** Kawun Kakar, Thomas Kraemer, Mohammad Tariq Kareemi

Kakar Advocates LLC is a full-service law firm based in Kabul, Afghanistan, with US and Afghan licenced attorneys from an extensive range of backgrounds and experiences. Kakar Advocates provides a full-service offering to prominent national and international clients, including legal services, tax and financial advice, development and strategic consultancy services. With a rich combination of

local knowledge and experience, the firm's practice areas are primarily composed of Corporate, Litigation, Taxation, Employment, Mining, International Trade, Banking, Public Procurement and Telecommunications sectors. The firm's clients include major international companies and contractors, the Afghan Government and international organisations.

Authors



Kawun Kakar is the Founder and Managing Partner of Kakar Advocates. He has experience in negotiating major deals with large multi-national companies. He led an effort for acquisition of a bank and obtained its approval by the Afghan

Central Bank, has worked on share-purchase agreements, international financing facilities, real estate purchase agreements, partnerships and distributorship agreements, employment contracts, tax matters and business licences, in addition to working with other attorneys in multiple jurisdictions in the Middle East and the United States. Mr Kakar also has vast experience in contractual negotiation involving merger in mining, real estate development, media logistics and other sectors. Mr Kakar has served as local counsel with reputable international law firms on major legal reform focusing, including developing regulatory framework for Public Private Partnership (PPP) and Islamic Finance. He has also served as Chairman of the Supervisory Board of a commercial bank where, among other responsibilities, he reviewed Loan and Loss Recovery Reports, Investment Reports and ensured that the bank followed best international practices, the Banking Law and guidelines and instructions of the Central Bank of Afghanistan.



Thomas Kraemer is an American lawyer specialising in complex commercial matters with admission in Supreme Court of Ohio. Tom has been practising law since 1990, and has represented clients ranging from start-ups to Fortune 500

companies. He has extensive experience in contracts, intellectual property, antitrust, class actions, media, privacy, consumer protection, and employment matters. Tom has practised in the US state and federal courts at all levels, including litigating cases in the United States Supreme Court. He has been appointed as a mediator by the United States District Court for the Southern District of Ohio on multiple occasions. His experience in Afghanistan includes business registrations, visas, tax exemptions and other tax matters, customs, and employment law. Before moving to Afghanistan, Tom took time off to utilise his Master of Public Health degree by working in a private hospital in Hargeisa, Somaliland, for several years.



Mohammad Tariq Kareemi spent several years working as an immigration law specialist in Australia, and was awarded a Graduate Certificate in Australian Immigration Law. While working in Australia, he also gained valuable experience in business, real property, and litigation matters.

Tariq has also worked as an attorney in Afghanistan, and is familiar with the Afghan court system and procedures. At Kakar Advocates, Tariq continues to grow his sphere of expertise, particularly in business, consultancy and mining matters. At Kakar Advocates he is expanding his knowledge and experience in mining law matters and research which is a growing field in Afghanistan.

1. General Structure of Mineral Ownership and Regulation

1.1 Ownership of Mineral Deposits

The mineral deposits in the subsoil are the property of the state, and the government as owner has the right to administer, control and monitor the affairs of natural resources.

1.2 Regulation of Mining Industry

The mining industry in Afghanistan is regulated by the following laws and regulations:

- Mineral Law, Official Gazette No 1143, dated August 2014;
- Oil and Gas (Hydrocarbons) Law, Official Gazette No 972, dated February 2009;
- Regulation of Mineral Processing, Official Gazette No 1007, dated December 2009;
- Hydrocarbon Regulation, Official Gazette No 1000, dated November 2009;
- Amendment and addition to some articles of Mineral Law, Official Gazette No 1168, dated March 2015.

The Mineral Law and the Regulation on Mineral Processing contain the general provisions relevant to the mining industry, the processing of the minerals, and quarrying, while the Oil and Gas (Hydrocarbons) Law regulates all matters relevant to prospecting, exploration, exploitation, royalties, protection and production of oil and gas.

1.3 Administration of the Mining Industry

The Ministry of Mining and Petroleum (MOMP) is the main government body that oversees the mining industry. Also within the MOMP, the Afghanistan Petroleum Authority, which was established in 2013, has the responsibilities of project management, governance, regulation and supervision of the country's oil and gas industry. Moreover, an Inter-Ministerial Commission (IMC) is responsible for the monitoring, supervision, endorsement and rejection of oil and gas contracts and other relevant issues.

With respect to contracts involving a capital investment exceeding USD50 million, the ministry shall, after the endorsement of the Council of Ministers and before the conclusion of the contract and bidding process, provide the Houses of the National Assembly [House of Representatives and the Upper House] with a report on the eligibility/qualification, experience, expertise and the financial capability of the qualified bidder. In practice, the High Economic Council (HEC), which is chaired by the President and includes a number of key officials such as the Ministry of Finance, the Minister of Mines and Petroleum, the Minister of Commerce, the Minister of Foreign Affairs and representatives from academia and the private sector, also plays a role in investment policy development and approval of mining contract.

2. Required Authorisations and Permits

2.1 Requirements to Conduct Prospecting

Prospecting requires a prospecting licence that MOMP grants upon application and approval. The MOMP may, after conducting the necessary evaluation and determining the capability and qualifications of the applicant, grant a Prospecting License for all or part of the area included in the application or reject the application. If the application is rejected, the MOMP shall provide the applicant with written reasons for the rejection. A Prospecting License shall be granted for up to two years and may not be extended.

2.2 Requirements to Conduct Exploration

An exploration licence is required to conduct exploration, which is granted through a bidding process. The MOMP shall review the applications within three months and forward its written findings to the IMC; the Commission shall decide whether to endorse, not to endorse (reject), or to amend the findings within thirty days. Where the Commission endorses the proposal, the MOMP may propose it to the Council of Ministers (COM) for their approval. In case the Commission rejected, amended or did not approve a proposal, the MOMP shall provide the bidder with the reasons in writing and if the COM endorses the proposal, the MOMP shall issue an Exploration License to the winning bidder.

2.3 Requirements to Conduct Mining

For the conduct of mining, the law specifies three types of licences; one is a small-scale mining licence, one is artisanal and the other one is a professional (large-scale) mining licence. An Artisanal Mining License may be applied for in accordance with the provisions of Mineral Law and relevant Procedures at the MOMP.

2.4 Environmental Requirements to Conduct Exploration and Mining

A Screening Report and an Environmental Impact Assessment (EIA) are the required documents for exploration, exploitation and mining. An environmental and social screening report shall be included with the application for professional mining and exploitation licences. As a part of the requirements for application, the applicant shall include a Screening Report and an EIA to both the MOMP and NEPA. Following the approval of the MOMP, the NEPA is the authority that approves the EIA and issues the licence.

3. Duties and Rights Derived from a Mining Title or Concession

3.1 Rights Granted by Mining Title to Holder

In both exploitation and large-scale mining, the licenceholder is entitled to conduct exploitation of the mineral substances within the area covered by the authorisation, to

have access to the licence area, to conduct the activities for an exploration program, subject to the conditions and obligations set forth in the Mineral Law, the Mining Regulations and the authorisation. In addition, the title-holder has the right to hold, use, transport and freely sell the products of artisanal exploitation extracted from within the relevant area.

A title-holder in an Exploration and Production Sharing Contract of oil and gas is entitled to the exclusive right to explore for hydrocarbons and, in the event of a commercial discovery, to develop and produce hydrocarbons. Furthermore, under a Service and Production Sharing Contract, the contractor is granted the exclusive right of operation to upgrade and rehabilitate hydrocarbons production facilities, including well-servicing operations, in accordance with the provisions of law, and is entitled to the specified share from the products.

3.2 Duties Acquired by Title Holder

The title-holder generally has the following responsibilities:

- no extraction, removal and/or disposition of mineral resources is allowed within a distance of 1 km from the boundaries of reservoirs established for public water supply, cultural and historical sites, or of any public or private works or structures, unless the prior clearance of the concerned governmental authorities or owner is obtained;
- the extraction, removal and/or disposition of quarry materials or tailings shall be confined within the area specified in the Exploitation Authorization, the boundaries of which are established on the ground with prominent markings;
- the title-holder shall assume full responsibility and be liable for damages to private and/or public property that may be caused by its mineral activities;
- the title-holder shall manage its operations in a technically and environmentally responsible manner to achieve a safe, non-polluting and self-sustaining post-disturbance landform;
- the title-holder shall take into consideration the established law, rules and regulations regarding the health and safety of workers;
- the title-holder shall not interfere with the rights of other licence or title-holders;
- the title-holder shall recognise and respect the rights, customs and traditions of local communities; and
- the title-holder shall immediately stop its activities if cultural or historic artefacts are found, and shall notify the Mining Inspectorate of such findings and shall not resume its activities until authorised by the Mining Inspectorate.

Other obligations include: the duty to pay the mineral royalty that is imposed on holders of Exploitation Licences and on holders of authorisations for the Exploitation of Quarries, Tailings, or Artisanal Mining; contribution towards community development, minimising the negative social impacts;

the removal within one month from the date of the expiry of the authorisation of any large-scale mining installations, temporary buildings, equipment or machinery; rehabilitation of the surface land to the satisfaction of the Mining Inspector; and compliance of licence-holder with closure activities and plan.

In terms of small-scale mining, the licence-holder has the responsibility to employ Afghan citizens, and to procure goods and services from Afghanistan. This responsibility applies where the Afghan goods and services are similar and equivalent in quality, quantity, and price to imported foreign goods and services; in this case the contractor shall be obliged to purchase and procure the Afghan goods and services.

In addition, the title-holder shall provide rights of way to establish waterways, canals, pipelines, sewers/drains, transmission lines, public roads, and other public utilities installations provided that they do not interfere with mining operations.

3.3 Rights Acquired by Title Holder

The owner of land cannot use the surface land within an area subject to a licence for the purpose of cultivation, planting trees, waterways, grazing livestock, or constructing buildings or infrastructures, except with written agreement of the title-holder. The title-holder can use the land for the purposes of exploration, exploitation and commercial discovery as specified in the authorisation and law, consistent with environmental standards and rights of the local people.

3.4 Duties Acquired Towards Landowners

The holder of a licence shall conduct mineral activities in a manner to avoid any unsafe activities that may create hazardous waste dumps or other hazards likely to endanger the livestock or crops, and any other activity that can harm the landowner or local residents.

3.5 Duties of Title Holder at End of Life

The main responsibilities in regard to mine closure include:

- implementation of reclamation and mine closure plans in accordance with the provisions of the law, relevant regulations and the licence;
- removal of waste and tailings in accordance with the title-holder's Waste Management Plan;
- removal and transfer of all temporary buildings, equipment or machinery that have been erected or installed, and rehabilitation of the surface of the land to the satisfaction of the Mining Inspectorate within two months from the date of expiry of the licence, unless the Ministry of Mines and Petroleum decides otherwise.

4. Environmental

4.1 Principal Environmental Laws

The principal environmental laws that affect the mining industry are the Afghanistan Environmental Law, Official Gazette No 912, dated January 2007, and the Evaluating Environmental Impact Regulation, Official Gazette No 939, dated March 2008.

4.2 Bodies of Environmental Competence

The NEPA is the independent authority that maintains environmental integrity and promotes the sustainable use of natural resources. The Environmental Protection Department of the Ministry of Mines has a role similar to NEPA.

4.3 Environmental Obligations

The licence holder shall comply with the conditions set forth in the licence and other applicable laws and conduct an assessment of environmental and social impacts which shall include:

- a detailed study of the natural and artificial environment of the licence area prior to any mineral activities, based on measurements and indices with respect to the quality of air and water, soil, trees, and animals, and other flora and fauna, in order to provide a comprehensive environmental baseline to be measured from that time; and
- preparation of an Environmental and Social Management Plan that includes a detailed description of reclamation activities and mine closure.

Whenever the title-holder proposes to materially amend its work programme, it shall provide sufficient proof to the relevant agency that it will implement an appropriate environmental and social management plan.

5. Miscellaneous

5.1 Special Rules or Taxes

There are no special rules for foreign people/companies. However, a foreign natural person will not be granted an Artisanal Mining Licence.

Likewise, there is no special tax regime for foreign people or foreign companies.

5.2 Restricted or Excluded Zones

Excluded Areas

The Ministry of Mines and Petroleum may, for the purpose of preserving the national interest (including the health and safety of the population; national security; securing the public order; the incompatibility of the mineral activities with other uses of the soil, land surface, and underground resources; or impacting/damaging the environment, archaeo-

logical or cultural relics or other natural values), after the endorsement of the Commission and approval of Council of Ministers, declare an area to be a Prohibited Area. The same applies to the oil and gas mining sector.

Restricted Areas

All radioactive minerals and rare earth elements are considered to be restricted minerals. Any exploration and exploitation activities for such minerals may be carried out only under a developmental, economic and technological programme, based on a proposal of the Commission, endorsement of the Council of Ministers and approval of the National Assembly.

Oil and gas mining operations are also excluded in the following areas, unless the MOMP grants authorisation:

- any land containing archaeological or cultural remains as specified by the relevant law;
- any land inside the site or located within 100 m of any state-owned building or water dams;
- any land forming part of an airport or a cemetery;
- any land used or owned by the Ministry of National Defense;
- any land used for public roads, highways, railways, pipelines or other public utilities; and
- any area declared as a disputed area, identified by the Ministry of Mines and Petroleum.

5.3 Rights of Indigenous or Ethnic Communities

Community Development Plan is a part of the requirement for mining licences and contracts which the applicant shall submit as a part of application, detailing its contribution towards local community economic and welfare development. MOMP is the authority that will assess it and approve it. The applicant needs to share it also with relevant community and government representatives.

The holder of an Exploitation Licence or a Small-Scale Mining Licence shall, in consultation with local communities and affected persons, prepare and implement a Community Development Agreement that shall include a detailed Environmental and Social Impact Assessment or Screening Report. This Environmental and Social Management Plan shall be prepared for the different phases of the mining operations.

The government shall also ensure the licence-holder's compliance with community development programme conditions during the exploitation process. The licence-holder shall conduct its mining activity in accordance with the law and avoid any activity that can endanger livestock, crops or any lawful activity of the landowners or local residents.

A community development plan for the purpose of assisting the local communities affected by mineral activities and to promote sustainable local economic development, the general welfare and quality of life of the local communities, respecting the rights, customs and traditions of local communities, is another responsibility of the miner. The government has the responsibility to allocate 5% of the generated revenue from mining activity to the local community where the mine is located for the improvement of their social, economic and environmental situation. This amount is separate from the allocated funds in the National Budget.

5.4 Unilateral Termination of a Mining Title

Unilateral termination of a mining title by the State can take place under certain circumstances as follows:

- failure to comply with the terms and conditions of the Processing Authorization;
- violation of any provision of the Minerals Law or Regulations;
- failure to pay the taxes and fees due to the government for two consecutive years;
- any misrepresentation in any statement made in the authorisation or those made later in support thereof;
- when national interest and public welfare so require or for environmental protection or ecological reasons; and
- where no commercial discovery is made during the exploration phase of the oil and gas contract.

The title-holder shall keep records of the quantity of mineral substances removed or extracted from the area, as well as the quantity disposed of or sold, their selling prices, the names and addresses of the persons or parties to whom the same were sold or disposed. Failure to do so will result in termination of the title.

5.5 Taxes of Royalties

The title-holder shall pay all fees, rentals or surface right fees, taxes and royalty accordance with the related legislative documents. The obligation to pay the royalty as per the contract commences from first date of commercial production.

Royalties: the obligation to pay mineral royalties is imposed on title-holder and on holders of authorisations for the exploitation of quarries, tailings, artisanal mining and large-scale mining. Reconnaissance License and Exploration License activities are not subject to royalty. However, holders of Exploration Licenses or Authorizations for Quarry Exploration may also be required to pay royalties if included as a condition of the mineral rights.

License and authorization-holders, contractors, sub-contractors, advisors, experts and their employees shall be obliged to pay all applicable taxes, customs duties, levies and other taxes in accordance with the provisions of the applicable laws. No licence or authorisation-holder or contractor is obliged to pay land taxes.

Kakar Advocates LLC

House No.1063

Lane 2

Street 15

Wazir Akbar Khan

Kabul

Afghanistan



Tel: +93783300400

Email: office@kakaradvocates.com

Web: www.kakaradvocates.com