Hogan Lovells

Mining Industry Newsletter

Contents

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Welcome

Hogan Lovells' Mining Industry Team is excited to announce a new service for its valued clients: Hogan Lovells Mining Industry Newsletter. This periodic newsletter will inform legal, regulatory, and compliance staff to the most recent mining laws and news and examine their potential impact on how companies conduct business.

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Mongolia revises its regulatory framework for foreign and domestic investment

Further to our recent client note on the proposed amendments to the investment regime in Mongolia, we wish to update our clients that on 3 October 2013, Parliament approved the Law of Mongolia on Investment (Investment Law) along with other supporting amendments. The official version of the Investment Law was made available on the Mongolian Parliament's website on 30 October 2013.

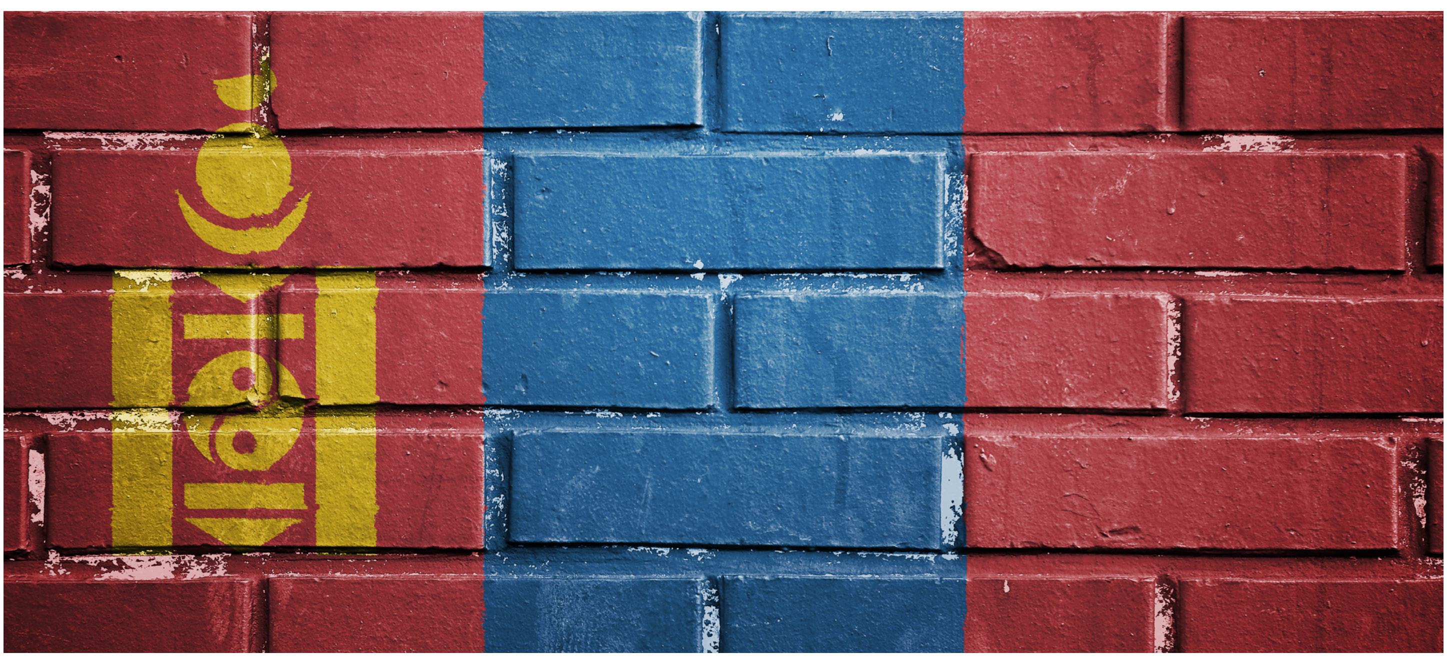
The Investment Law comes into effect on 1 November 2013 and replaces the Law of Mongolia on Foreign Investment, enacted on 10 May 1993, as amended (Foreign Investment Law) and the Law of Mongolia on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance, enacted on 17 May 2012, as amended (SFI Law).

As expected, the Investment Law eases the regulatory approval requirements for foreign private investment and streamlines the registration process for foreign direct investment. Further, it sets out certain legal guarantees and incentives so as to promote investment activities in Mongolia.

1. OVERVIEW

The key features of the Investment Law are:

- It applies to both foreign and domestic direct investments.
- It consolidates the registration process for setting up a subsidiary by stipulating that private investment from foreign sources need only register with the Legal Entities Registration Office (LERO).
- No approval requirements are imposed on foreign private investment.
- It increases the minimum capital requirements for foreign- invested entities in Mongolia which have two or more foreign shareholders by requiring that each foreign shareholder contributes US$100,000 if foreign investor(s) hold a 25% or more interest therein.
- It provides the definition of a foreign state-owned legal entity (FSOE) as "a legal entity in which a foreign state directly or indirectly holds more than 50 per cent of the entity's issued shares".



- It removes the classification of strategic economic sectors for foreign private investment, but maintains the approval requirements for certain equity investments made by FSOEs in those sectors that were regarded as strategically important under the SFI Law.
- It appoints the Ministry of Economic Development (MED) as the approval authority for certain investments by FSOEs.
- It establishes an ad hoc board with a mandate to issue opinions on applications for tax stabilisation certificates made under the Investment Law.
- It provides legal guarantees to protect investment in Mongolia and sets out tax and non-tax incentives so as to promote investment in Mongolia.
- It offers tax stabilisation incentives in the form of "tax stabilisation certificates" and "investment agreements".

In addition to the repeal of the SFI Law and the Foreign Investment Law, 9 other laws, including the Law of Mongolia on the State Registration of Legal Entities, enacted on 23 May

2003, as amended (Legal Entities State Registration Law), are amended in order to implement the Investment Law. Further, the Law of Mongolia on the Implementation Procedure for the Investment Law (Implementation Procedure) was approved to provide for application of the Investment Law to existing investment.

2. SCOPE OF THE LAW

The scope of the Investment Law extends to the regulation, protection and promotion of investment by foreign and domestic entities in Mongolia.

Under the Investment Law, "investment" is defined as "tangible or intangible assets invested in share capital of a legal entity carrying out profit-making activities in Mongolia as reflected in the financial statements".

A foreign-invested entity is defined as a business entity (i) which is incorporated in accordance with the laws of Mongolia; (ii) in which foreign investor(s) hold(s) a 25% or more interest; and (iii) the capital contributions made by each foreign investor (shareholder) exceeds US$ 100,000 or the MNT equivalent of the same. This means that a joint venture

between Mongolian and foreign investors may need to comply with higher share capital requirements than those which existed under the Foreign Investment Law. It is not clear whether existing foreign-invested companies must comply with the new capital requirements.

The Investment Law expressly does not apply to investments by Mongolian state authorities with State funding nor to investments by international organisations, NGOs and private persons in the form of donations or ex gratia grants. Further, the relevant provisions of the Investment Law will not apply to the entry into of investment agreements relating to the nuclear energy sector.

3. STATE REGULATION OF INVESTMENT

The MED will continue to have the main authority to implement state policy and laws and regulations on investment. Among other powers, the MED issues approvals for certain equity investment made by an FSOE.

Further, the MED will create an Investment Agency, a separate agency with a mandate to promote, advertise and regulate investment activities in Mongolia. This agency will also be in charge of issuing tax stabilisation certificates as well as ongoing monitoring and inspection of the activities of holders of such stabilisation certificates. Unlike the current Foreign Investment Regulation and Registration Department of the MED (FIRRD), the agency will not have any role in registering foreign-invested entities established by private investors.

The Investment Law provides that an ad hoc board (including representative(s) of investor(s)) will be established by the cabinet minister in charge of investment matters (currently the Minister of Economic Development) with a mandate to provide opinions and recommendations for the issue of tax stabilisation certificates. The Minister of Economic Development will issue regulations for the composition and operational procedure of such ad hoc board.

4. GENERAL FRAMEWORK FOR INVESTMENT

Subject to approval requirements for FSOEs, investors

may invest in any production or services sector which is not prohibited or restricted by law. Prohibited sectors are specified as narcotics, gambling, pornography, or pyramid sales or marketing. Certain regulated sectors are also subject to licensing requirements.

The form of investment may be incorporation of a Mongolian- incorporated entity, purchase of securities, merger of companies, entry into of concession, production sharing, marketing or management agreements, or franchise or financial leasing agreements.

According to the Implementation Procedure, existing foreign- invested companies and representative offices that are registered with FIRRD must re-register with LERO following the expiry of their FIRRD certificates. Otherwise, such entities or representative offices may continue their operations under existing certificates.

Registration Framework for Foreign Investment

Under the Investment Law, foreign investors may establish a presence to do business in Mongolia only through (i) a

foreign-invested business entity or (ii) a representative office. No other form of corporate vehicle such as a branch, is currently provided for. Although a reference is made to "business entity" which may include any corporate forms for profit-making activities, in practice a limited liability company is the most common vehicle used to establish a presence in Mongolia.

The Investment Law expressly provides that a foreign or domestic investor may make an investment on the basis of registration of a legal entity in accordance with the Law of Mongolia on Companies, (as revised) enacted on 6 October

2011, the Legal Entities State Registration Law and other relevant laws and regulations. This is similar to the process under the Foreign Investment Law where foreign-invested entities need to be registered with FIRRD and LERO, save that the two-stage process has become a one-step registration. However, an FSOE may only make an investment upon obtaining approval from the MED as specified in the Investment Law as discussed below.

Accordingly, investment made by foreign or domestic private investors will no longer be subject to general approval requirements, other than registration to the extent required, and licensing or other requirements under sector-specific legislation.

Regulation of Investment by an FSOE

The Investment Law stipulates that an FSOE must fulfil the MED's approval procedures for investments exceeding a 33 per cent or more interest in Mongolian-incorporated legal entities which operate in any of the following sectors:

(a) minerals;

(b) banking and finance; and

(c) media and telecommunications.

The Investment Law does not define these sectors as having strategic importance, but these are identical to the sectors that were considered as strategic under the SFI Law.

The Investment Law sets out the application procedure for seeking approval and the required documentation for making an application to the MED. The MED will determine the application within 45 days of the receipt of the application.

The Investment Law maintains certain criteria specified in the SFI Law for assessing the application which are rather subjective, such as whether the investment will contradict with the national security policy of Mongolia, restrict competition, or have adverse impact on the budget policy and state revenues.

According to the Implementation Procedure, the approval requirements under the Investment Law will not apply to changes in the shareholding structure in Mongolian entities in which FSOEs owned a 75% or more interest as at the date of enactment of the Investment Law.

5. GENERAL LEGAL GUARANTEES AND OBLIGATIONS

To ensure a stable regulatory framework, the Investment Law provides that any proposed amendment to or repeal of the Investment Law will only be effective upon the affirmative vote of at least two-thirds of members of Parliament. This could help to prevent arbitrary or sudden changes in the investment environment. Nonetheless, this provision may raise constitutional issues as it seeks to bind future parliaments.

Further, the State may issue a guarantee for stable tax treatment upon request by an investor in accordance with the Investment Law. If approved, an investor would be entitled to enjoy stable tax treatment for a specific period of time in the form of tax stabilisation certificates or investment agreements.

The Investment Law provides general legal guarantees of investments such as protection from nationalisation (by setting out conditions under which nationalisation is permitted), protection of intellectual property rights, the right to repatriate profits (following the payment of relevant taxes), and freedom to choose a dispute resolution forum.

Further, the Investment Law sets out general rights and obligations of investors in relation to their operations. Both foreign and domestic investors are obliged:

(a) to comply with Mongolian laws and regulations;

(b) to provide work and services that are in compliance with national and international standards;

(c) to maintain accounting records and registers in accordance with international standards;

(d) to provide necessary information to relevant state authorities, including tax authorities, on a timely manner;

(e) to implement investment activities that are in the interests of customers, environment-friendly, and supportive of human development;

(f) to pay social insurance and health insurance contributions in relation to their employees in accordance with applicable legislation;

(g) to provide training and improve the professional skills of employees and to introduce good corporate; and

(i) for those who hold stabilisation certificates, to make investment in accordance with the Investment Law.

The relevant state authority may impose administrative sanctions on those who failed to comply with the statutory obligations specified in items (b) to (f) and (i). Imposition of sanctions for non-compliance with comparatively open-ended obligations could be problematic.

6. PROMOTION OF INVESTMENT

The Investment Law specifies tax and non-tax incentives available to investors for making investment in Mongolia.

NON-TAX INCENTIVES

To facilitate the operations of investors, the Investment Law provides certain non-tax incentives in relation to land rights, customs clearance, foreign labour quotas, and immigration matters.

General incentives are provided in relation to land rights or immigration and residency permits. Further, certain incentives would be available for those who will implement projects in free economic zones[1], industrial and technological parks[2] or projects in the infrastructure, production, science and education fields, or innovation projects[3].

The Investment Law provides a general framework for such incentives and the detailed regulations will be provided in sector-specific laws.

1 *Law of Mongolia on Free Zones*, enacted on 28 June 2002 regulates matters relating to the legal status of free (economic) zones in Mongolia.

2 Industrial and technological parks are regulated by the *Law of Mongolia on the Legal Status of Industrial and Technological Parks*, enacted on 17 December 2009.

3 *Law of Mongolia on Innovation*, enacted on 22 May 2012 regulates matters relating to innovation.

TAX INCENTIVES

In relation to tax incentives, investors may be entitled to enjoy the following:

(a) exemption from the payment of certain taxes; (b) preferential tax treatment;

(c) accelerated depreciation and amortisation that is deductible from taxable income;

(d) carrying forward of losses; and

(e) deduction of employee training expenses from taxable income.

Further, equipment and technology imported for the following purposes may be exempt from import duties and enjoy a reduced rate of value added tax (to zero per cent) during the construction period:

(a) construction of plants for processing of construction materials, petroleum, or agricultural products or export-oriented plants;

(b) construction of plants for nano-, bio- or innovation technology; and

(c) construction of power plants or railways. Specific details of tax incentives will be provided in the relevant tax legislation.

TAX STABILISATION

Qualifying projects may enjoy a stable tax environment in accordance with the Investment Law. According to the Implementation Procedure, not only new projects but also those projects that have been implemented within the 5 years preceding the adoption of the Investment Law and that meet the requirements of the Investment Law will be eligible to enjoy tax stabilisation benefits. The investment amount will be verified by reference to audited financial statements.

The benefits of tax stabilisation will not apply to investment made in activities relating to the production, import, and sale of tobacco products or alcoholic beverages. Further, investors who already have entered into investment or stability agreements with the Government would not be eligible to apply for a Stabilisation Certificate. According to the Implementation Procedure, existing stability or investment agreements (such as the Oyu Tolgoi Investment Agreement) will not be affected by the Investment Law and will remain in force until such time as their term expires.

Tax Stabilisation Certificates

To promote large-scale investment in Mongolia, the Investment Law proposes to introduce tax stabilisation certificates (Stabilisation Certificate), which will entitle the holder to enjoy stable tax treatment for a period of up to 18 years (and up to 27 years for priority projects). Further, in the event the stabilised tax rates are reduced, a holder of the Stabilisation Certificate is entitled to the more favourable tax treatment.

The criteria for the issuance of a Stabilisation Certificate are:

- the investment amount exceeds the relevant threshold specified in the Investment Law;
- environmental impact screening has been carried out;
- the investment creates new jobs in a sustainable way; and
- the investment introduces advanced technology.

The most important and quantifiable criteria for a Stabilisation Certificate is the amount of investment and this is determined by reference to specific sectors and the geographical area within which the investment to be made. For capital-intensive mining or industrial projects, the capital expenditure requirements to qualify for tax stabilisation are higher than for other projects. Further, investment in certain regions of Mongolia will attract preferential treatment and a potentially longer term of tax stabilisation.

In respect of mining, heavy industry, or infrastructure projects, Stabilisation Certificates may be issued as follows:

Amount of Investment (in billion MNT)	**Term of a Stabilisation Certificate** (years)					**Period within which the investment must be made** (years)
	Ulaanbaatar region	**Central Region** (Gobisumber, Dornogobi, Dundgobi, Darkhan-Uul, Umnugobi, Selenge, Tuv)	**Khangai Region** (Arkhangai, Bayankhongor, Bulgan, Orkhon, Uvurkhangai, Khuvsgul)	**Eastern Region** (Dornod, Sukhbaatar, Khentii)	**Western Region** (Bayan-Ulgii, Gobi-Altai, Zavkhan, Uvs, Khovd)	
30 to 100	5	6	6	7	8	2
100 to 300	8	9	9	10	11	3
300 to 500	10	11	11	12	13	4
More than 500	15	16	16	17	18	5

In all other sectors, the following terms will apply:

Amount of Investment (in billion MNT)					**Term of a Stabilisation Certificate** (years)	**Period within which the investment must be made** (years)
Ulaanbaatar region	**Central Region** (Gobisumber, Dornogobi, Dundgobi, Darkhan-Uul, Umnugobi, Selenge, Tuv)	**Khangai Region** (Arkhangai, Bayankhongor, Bulgan, Orkhon, Uvurkhangai, Khuvsgul)	**Eastern Region** (Dornod, Sukhbaatar, Khentii)	**Western Region** (Bayan-Ulgii, Gobi-Altai, Zavkhan, Uvs, Khovd)		
10 to 30	5 to 15	4 to 12	3 to 10	2 to 8	5	2
30 to 100	15 to 50	12 to 40	10 to 30	8 to 25	8	3
100 to 200	50 to 100	40 to 80	30 to 60	25 to 50	10	4
More than 200	More than 100	More than 80	More than 60	More than 50	15	5

The effective period of a Stabilisation Certificate will be extended by 1.5 times the period specified in the Investment Law in relation to projects:

(a) that will contribute to the sustainable long-term social and economic development of Mongolia by way of producing products to replace imported goods, or export-oriented products and that will require investment of more than MNT 500 billion and have a development period of more than 3 years; or

(b) that will produce value-added (processed) products for export.

A Stabilisation Certificate will be issued either (i) to a legal entity that implements the project or (ii) to a parent company if two or more affiliated companies implement the project.

The Stabilisation Certificate will stabilise the applicable rates for the following taxes:

(a) corporate income tax;

(b) customs duties;

(c) value-added tax; and

(d) minerals royalties.

The Investment Law sets out the procedures to apply for, issue, and terminate a Stabilisation Certificate.

Investment Agreements
Another option to stabilise the tax environment provided under the Investment Law is entry into of an investment agreement with the Government.

If an investor whose proposed investment exceeds MNT500 billion (approximately US$ 300 million) so applies, it is possible to enter into an investment agreement with the Government with the objective of stabilising the operational environment for making such investment, including the tax environment. The Minister of Economic Development will enter into an investment agreement with an applicant investor.

The scope of investment agreements include providing legal guarantees as specified in the Investment Law, stabilisation of tax environment, and certain regulatory and financial incentives. The term of an investment agreement should be similar to that of Stabilisation Certificates.

Thus, an investor who makes investment in an amount exceeding MNT 500 billion has the option of either obtaining a Stabilisation Certificate or entering into an investment agreement.

Compared to Stabilisation Certificates, investment agreements would most likely provide better protection for investors given that such agreements create binding contractual obligations for the Government, as opposed to a Stabilisation Certificate which is an administrative act by the Investment Agency.

7. SANCTIONS

Non-compliance with the Investment Law attracts administrative penalties as specified above.

Also, those who obtained Stabilisation Certificates in breach of the Investment Law will be subject to administrative penalties in the form of monetary fines, repayment of taxes, and confiscation of revenues. Where officials have unlawfully refused to grant or revoked Stabilisation Certificates, fines may be imposed.

8. CONCLUSION

The Investment Law is certainly a welcome development which should assist to promote domestic and foreign investment in Mongolia. Following the tumultuous investment environment after adoption of the SFI Law, it is a positive step in streamlining the investment environment and creating more favourable investment conditions.

The Investment Law removes rather subjective and confusing approval requirements imposed on certain equity investment by foreign private investment. It further simplifies the registration process before a single body in place of the previous dual registration with FIRRD and LERO. The concept of Stabilisation Certificates and investment agreements suggests a more routine handling of significant investment. However, effective implementation is subject to further regulations to be issued by the MED and the Government, and therefore the main concern of foreign and domestic investors remains to be tested in relation to consistent application of the Investment Law and a stable operating environment.

It is not clear whether the amendment to the current regime which requires each foreign investor in a foreign-invested Mongolian entity to contribute a minimum of US$100,000 to the share capital of such entity is an unintended consequence of the legislative drafting process.

The approval system for investment by FSOEs is somewhat discretionary, and there is a considerable degree of subjectivity in a number of the general obligations on domestic and foreign investors.

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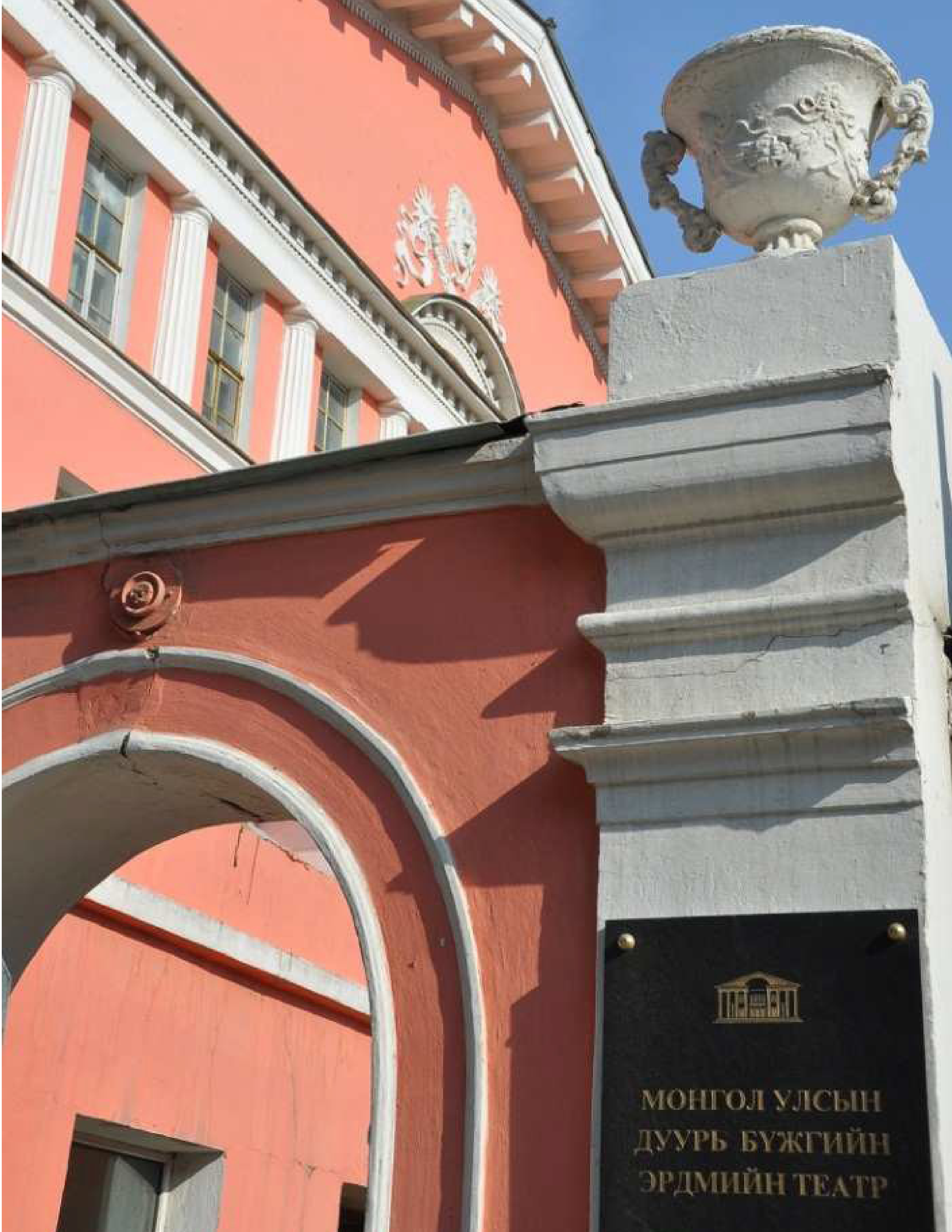
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The Securities Act Industry Guide 7

In 1981 the U.S. Securities and Exchange Commission (SEC) adopted Industry Guide 7 governing disclosure for mining companies publicly traded in the U.S. It has not been updated since then. It contains several pages of disclosure guidance, including a notably outdated view on what can be disclosed about mineral resources. Guide 7 sets forth the SEC's definition of "reserves" (legally and economically extractable) and prohibits disclosure of anything other than reserves — other than permitting highly qualified disclosure of "mineralized material," a term that has no recognized definition in the mining industry, or unless such other information is required to be disclosed by foreign or state law, or in certain mergers where such information has been disclosed to the acquirer. This approach is badly out of step with the mineral resource disclosure regimes that have come into place since 1981 across the world that permit disclosure of not just mineral reserves but also "mineral resources," including "measured, indicated and inferred resources." This "resource" terminology is recognized by regulatory agencies in Australia, South Africa, Canada, Hong Kong, the European Union, and Russia. The problem presented by Guide 7's prohibition of disclosing resources is especially acute for U.S. issuers who are placed at a significant disadvantage to non-U.S. issuers in the disclosure permitted in their public reports and prospectuses.

The Society of Mining, Metallurgy & Exploration (SME) has had a longstanding request to the SEC, along with many law firms and companies, seeking to have the SEC update its mining company disclosure requirements. The SME has membership from 85 countries and has led the charge to revise Guide 7. The latest letter from the SME to the SEC was dated 1 October 2012 and was a formal request that the SEC undertake rulemaking to update Guide 7. There was no public response.

A Glimmer of Hope

On 15 October 2013 the first public comment from the SEC on updating Guide 7 emerged in a speech by the new Chairwoman of the SEC, Mary Jo White. In her speech, Chairwoman White gave the first glimmer of hope to the industry. She noted that mining and other industries regulated by the SEC's Industry Guides have "changed drastically since [the Guides] were published and yet the Guides often have not been revised." She singled out the mining industry noting,

"Take the mining industry. Like so many industries, it has become an increasingly international one, and the international mining community actually has developed comprehensive standards for reporting resources and reserves. Several foreign jurisdictions use these standards in their securities laws. Should our Guide 7 disclosure guidance applicable to public mining companies here be modeled on the international standards?"

This acknowledgement by Chairwoman White is the first public indication that the SEC, which no doubt has a very busy agenda, is going to tackle the subject of mining disclosure and potentially move to the international "resource" standard. We should all encourage her to follow up.

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Potential Relaxing of Indonesia's Share Divestment Policy for "Downstream" Mining Activities; Ore Export Ban Approaches

Officials from Indonesia's Ministry of Energy and Mineral Resources have indicated that share divestment requirements may be relaxed for companies engaged in "downstream" mining activities — smelting and other value added processes. The divestment requirement, which provides that a percentage of shares in a foreign-owned Indonesian mining company must be gradually sold to domestic investors, has been progressively tightened since issuance of Indonesia's 2009 Mining Law in January 2009. Given the Indonesian government's expressed interest in facilitating foreign investment in "downstream" mining activities — including the development of an integrated aluminum industry, the strengthening of downstream nickel industries, and the further development of steel smelting and stainless steel production capacity within Indonesia — a relaxation could be welcome news for investors in Indonesia's metals sector.

Policymaking in this area is now approaching a critical juncture, as regulations have contemplated a complete ban on the export of unprocessed ore and other raw materials being instituted in January 2014. There has been continued speculation, however, that the Indonesian government may exempt from the ban companies that are already operating, or are planning to build, smelters or other processing plants.

In 2010, divestment levels were set at 20%, required to be attained after five years of mine production. In 2012, the divestment level was increased to 51%, which must be attained by the end of the 10th year of mine production and must be achieved gradually starting from the end of the sixth year of mine production. The regulations since 2010 have also required that divestment be conducted through competitive tender, with preferences being given to governmental bodies and government-owned entities. In September 2013, the government issued a regulation that provided more details — and stricter requirements — relating to the divestment process and foreign ownership in the mining sector. These changes in divestment policy have been primarily articulated as applying to mining companies operating pursuant to government-issued licenses (known as IUPs), rather than under contracts with the Indonesian government (known as contracts of works). The January 2014 export ban has been presented as applying to all mining companies, however.

Pending a change in divestment policy direction, investment decisions with respect to "downstream" mining projects in Indonesia are expected to remain challenging (especially considering market conditions). Nevertheless, the Indonesian government maintains that numerous investors have demonstrated a commitment to build smelters in Indonesia and notable market participants have reportedly announced or confirmed plans to do so in recent months.

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Greenland Revokes Uranium Ban, Opening the Way for Rare Earths Project

Greenland's parliament narrowly approved revocation of a long standing ban on the mining of uranium and other radioactive materials. The vote was 15-14, with two members of Parliament absent. The vote opens the way for a rare earth project that would produce some uranium as a byproduct. Denmark controls Greenland's national security and may have a say in the ultimate fate of any uranium mined in Greenland. Greenland is also looking at revisions to a law that would limit the number of foreign workers on the project.

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Rwanda Transitions from Civil Law to Common Law

The East African Community (EAC) would like its member states to adopt common law legal systems. When Rwanda joined the EAC in 2007, and then the British Commonwealth in 2009, it began to accelerate reforms to move from a civil law system to a common law system. Rwanda, along with the EAC, believes that a common law system will encourage foreign investment in Rwanda. Historically, Rwanda operated on a civil law system inherited from the Germans and Belgians. Rwanda is in a curious spot, poised halfway between civil law and common law. Its lawyers and judges are already relying more on precedent, but there will need to be much more training and acclamation to manage the transition. In addition, the EAC is developing its own legislation in an attempt to provide greater uniformity in the law of its member states. Determining the applicable law, and the substance of that law, in Rwanda over the next few years will be ... interesting.

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Hogan Lovells Expands in Africa

Global law firm Hogan Lovells and leading South African law firm Routledge Modise have combined. The combination took effect from 1 December 2013 with Routledge Modise expected to rebrand and relaunch as Hogan Lovells in early 2014. The Johannesburg office will comprise 120 legal professionals, including 41 partners, and will focus on corporate, commercial, litigation, mining and employment work.

Africa is gaining increasing significance as one of the world's key emerging markets. With accelerated economic growth across a number of countries and sectors, high returns on investment, and progress in the areas of political reform, macroeconomic stability, and social development, it is becoming an attractive region for international investment.

Projections indicate that Africa's growth is set to continue strongly over the coming years. Coupled with a regulatory boom as Governments across the continent look to promote foreign investment by adapting their legal systems to better suit the changing realities of the African investment environment, investing in Africa has never been so appealing. However, whilst the benefits and opportunities of investing in Africa are profound, the legal and business landscapes can be challenging.

Hogan Lovells' team includes lawyers from across the continent (including Nigeria, Gambia, Libya, Kenya, Egypt and Sierra Leone), with many dual-qualified. Our lawyers bring an understanding of the culture, allowing us to provide our clients with local insight and knowledge. Our experience and expertise means that we have a comprehensive overview of the legal systems in Africa, and are therefore perfectly placed to help our clients anticipate and respond to the complex business and legal issues faced when operating, or looking to invest in Africa.

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