

China

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1. Introduction

China is now one of the largest mining countries in the world. According to the Ministry of Land and Resources (MLR), China's 2010 annual production of raw coal yielded 3.3 billion tonnes and increased by 8.2% as compared with 2009.¹ China produced 34.24 million metric tonnes of 10 major non-ferrous metal products in 2011, an annual growth rate of 10.6%, according to data from the National Bureau of Statistics of China.² On the other hand, China is the world's largest coal consumer and according to the National Bureau of Statistics, China consumed 3.25 billion tonnes of coal in 2010.³ Furthermore, China is also the world's largest consumer of steel and cement. The annual consumption of steel is projected to reach 646 million tonnes in 2012.⁴

Given the importance of the mining industry to China, the Chinese government has, since 1986, gradually promulgated and implemented the Mineral Resources Law⁵ and its implementation rules as well as more than 20 further regulations and rules, and together these have established the fundamental legal framework for the management of the mineral resources of China. In addition, there are various types of taxes and levies to be imposed on enterprises which engage in the exploitation of the mineral resources in China.

China's current prodigious economic growth is driving demand for resources and, as a result, is shaking up the mining industry, both domestically and overseas. For example, some industry experts expect that stainless steel consumption in China will grow by 5% to 7% in the next five to 10 years.⁶

At present, most of the foreign investment in China's mining sector has been relatively small scale, with the world's largest mining companies preferring to sell metals and minerals to China, rather than develop infrastructure inside the country. Those companies which have committed to production within China have tended to be relatively small.

According to figures from the Foreign Investment Directory on Mining in China,⁷

1 See <http://www.mlr.gov.cn/zygk/#>.

2 See <http://www.chinamining.org/Statistics/2012-01-31/1327977168d53781.html>.

3 See http://www.stats.gov.cn/tjgb/ndtjgb/qgndtjgb/t20110228_402705692.htm.

4 See <http://www.zggxg.cn/news32799.html>.

5 The Mineral Resources Law of the People's Republic of China (PRC) was first passed by the standing committee of the National People's Congress on March 19 1986, and revised on August 29 1996.

6 News published by China Mining Association on June 9 2011, <http://www.chinamining.org/News/2011-06-09/1307579956d46408.html>.

7 See http://www.chinamining.com.cn/report/default.asp?V_DOC_ID=1023.

by the end of 2010 the overall volume of international trade of mineral products had generally increased over the preceding decade, with a significant drop in 2009 due to the economic downturn. In 2010, the volume of international trade of mineral products reached US\$712.5 billion, representing a quarter of the state's total volume of trade. More than 50% of the oil and iron consumption in China relies on importation.

China's outward-looking approach to securing energy supplies overseas is well-established. In past years, billions of US dollars were directly invested in mining overseas. Such investments are likely to increase in the future, and the Chinese government and its state-controlled mining companies will be eager to retain control of resources they deem to be strategic.

China's domestic mining sector is highly fragmented. China has about 80,000 state-owned mining companies and approximately 200,000 collectively-owned mines.⁸ The Chinese government's response has been to push for greater consolidation in order to create larger and more competitive Chinese mining players.

Lacking technology and capital, many small mining companies rely on manpower alone to extract metals and minerals from the ground. As a result, the mining industry in China faces many challenges in addressing environmental, safety and productivity issues.

Currently, two forces are driving the restructure of the mining sector in China. First, enormous demand from industry is driving companies to expand output as fast as possible, either from domestic sources or overseas. Second, with the goal of creating fewer, more efficient, more productive, safer and cleaner mining companies, the government wants smaller mines to be merged, acquired or closed. As noted above, the government is encouraging the emergence of a relatively small number of large mining companies to replace the many thousands of companies that are currently active across the country.

The government promotes the proper exploration and exploitation of mineral resources. As explicitly stated in China's twelfth five year plan, it encourages enterprises to adopt advanced technologies to improve the exploitation of mineral resources. Foreign enterprises are encouraged to invest in exploration and exploitation of many types of mineral resources; however, there are also restrictions the mining of certain valuable and scarce resources.

2. International agreements and regulations on minerals and mining activities

To promote development and international cooperation in the mining and mineral industry, China has entered into memoranda of understanding (MOU) with countries such as United States, India, the United Kingdom and Mexico. These set out forms and terms for cooperation on exploration, exploitation, utilisation of mining products, and technological development schemes in the relevant countries. International cooperation on mining is encouraged, especially for those that utilise

8 See <http://www.asiaminer.com/magazine/current-news/news-archive/35/177-technical-paper-investment-potential-in-china.html>.

advanced technology, improve the utilisation of unrecoverable resources, and minimise the impact on the environment.

Since China joined the World Trade Organization (WTO) in December 2001, newly promulgated amendments to the principal regulations governing foreign participation in mining projects have brought regulations in line with China's WTO commitments.

The 2011 Foreign Investment Industrial Catalogue 2011 Catalogue sets out detailed lists of industries and specific activities according to whether foreign investment is encouraged, restricted, or prohibited. It should be noted that the 2011 Catalogue expressly requires that foreign investment in certain mining activities be pursued in cooperation with Chinese partners.

According to the 2011 Catalogue, foreign enterprises are encouraged to engage in:

- exploration, exploitation and utilisation of coal-bed methane gas (limited to equity joint ventures and cooperative joint ventures);
- venture exploration and exploitation of petroleum and natural gas (limited to equity joint ventures and cooperative joint ventures);
- exploitation of oil and gas deposits (fields) with low permeability (limited to equity joint ventures and cooperative joint ventures);
- development and application of new technologies that increase the recovery ration of crude oil (limited to equity joint ventures and cooperative joint ventures);
- development and application of new oil exploration and exploitation technologies such as geophysical exploration, well drilling, well logging, and downhole operation (limited to cooperative joint ventures);
- prospecting and exploitation of oil shale, oil sand, heavy oil and extra heavy oil and other unconventional crude oil resources (limited to cooperative joint ventures);
- exploration, mining and selecting of iron ores and manganese ores;
- development and application of new technologies for enhancing the utilisation rate of mine tailings, and the comprehensive application of technology for ecological recovery of mines; and
- exploration and exploitation of sea-bed combustible ice (limited to cooperative joint ventures).

However, foreign investors are also prohibited from engaging in:

- exploration and exploitation of tungsten, molybdenum, tin, antimony, fluorite;
- exploration, mining, and selection of rare earth; and
- exploration, mining, and selection of radioactive mineral products.

Foreign investors are permitted to engage in mining and mineral activities, other than those listed above.

In practice, most foreign enterprises participate in the mining and mineral industry through joint ventures with Chinese partners; while in some cases they manage to set up a wholly foreign-owned enterprise (WFOE). Although foreign

enterprises are not prohibited from acquiring land use rights, mineral exploration rights or mining rights, in a typical foreign-invested mining project, the Chinese party will generally own the legal instruments required for the project and will contribute such right as its investment into the project company whereas the foreign party will generally inject capital or provide the required technology.

3. National regulations on minerals and mining activities

3.1 Mineral Resources Law and its implementation rules

The Mineral Resources Law and its implementation rules set out provisions in relation to the exploration and exploitation activities and legal liabilities of engaging parties.

Parties who wish to set up a mining enterprise must satisfy the requirements prescribed by the state and related authorities. Only parties who have been approved by related authorities in terms of their mining area, plan, production and technological conditions, as well as safety and environmental protection measures will be allowed to set up mining enterprises. Enterprises are required to obtain approval from the State Council if they seek to mine mineral resources which are of significantly high value, or in large quantities, or within the territorial sea of China, or which are under protective measures of the state.

During the mining process, enterprises must abide by relevant regulations regarding labour and health and safety issues and they must do all that is reasonably necessary to ensure the safety of personnel during production. Mining enterprises and individuals must also abide by relevant regulations on environmental protection. Enterprises and individuals must use land economically and recover any damage caused to the environment due to mining. Mining enterprises and individuals must also pay taxes and levies in accordance with related provisions.

Enterprises and individuals engaging in mining must endeavour to improve their technologies and increase their recovery rates, as well as minimising any waste of mineral resources.

Mining without the requisite licences, or beyond the approved quantity or area, or the illegal transfer of mining products and licences, and any other unlawful actions set out in related provisions will be subject to criminal or civil penalties.

3.2 Regulations on the exploration and exploitation of state-protected mineral resources

State-protected mineral resources must be explored and exploited under proper planning and inspection from authorities. The exploration and exploitation of such resources must be comprehensively planned; the production quota must be strictly controlled and distributed; and the resources must be appropriated, exploited and utilised.

The MLR will determine the annual production quota for each provincial region in relation to state-protected mineral resources. The MLR of each provincial region will then distribute the quota to the mining enterprises under its jurisdiction based on the reserves of resources and the level of resource utilisation. In turn, the mining

enterprises set up accounts on the reserves of resources, production, as well as sales and must report the production volume of the state-protected mineral resources to the local MLR on a monthly basis.

Enterprises which explore or mine non-state protected mineral resources must report to the local MLR if they discover any associated state-protected mineral resources. Applications from foreign-invested enterprises in relation to the exploration and/or exploitation of state-protected mineral resources must be processed in accordance with the 2011 Catalogue.

3.3 Safety measures

The government encourages mining enterprises to promote advanced technologies to improve the safety of employees. Mining enterprises are required to complete the construction of safety facilities prior to commencing operations and such safety facilities must comply with national standards on ventilation, electricity supply, hoisting and transportation systems. They must also conduct regular safety checks on their safety facilities so as to minimise exposure to danger. Mining enterprises are also required to set aside a portion of their revenues to fund safety precautions and this fund must not be used for any other purposes.

Mining enterprises must establish safe production systems, and mine managers are responsible for safety on their sites. Employees of mining enterprises must also comply with requisite rules regarding safe production. Employees are only allowed to work at mines after completion of safety training and must be provided with protective equipment. Labour unions involved in mining enterprises must protect the safety of employees by reporting any non-compliance with safety rules and must urge the relevant enterprises to take appropriate action in relation to potential safety issues.

Authorities must supervise the safety precautions of mining enterprises and urge improvements for those which do not meet national or local standards. Authorities must inspect the implementation of laws and regulations on mining safety, supervise and approve the design and construction of safety facilities, and organise training on safe production for employees. Furthermore, the authorities must investigate and deal with mining accidents.

4. Legal instruments relating to minerals and mining activities

Mineral exploration rights and mining rights are the basic legal instruments for which enterprises must apply, in order to engage in mining activities in China.

The MLR released a circular in 2005 which stipulated that local departments can grant mineral exploration rights and mining rights to foreign companies (subject to various restrictions), but also stated that foreign-invested enterprises should be treated in the same way as domestic companies in this regard. However, in practice, it is extremely difficult, if not impossible, for a foreign company to obtain mineral exploration rights or mining rights directly.

4.1 Mineral exploration rights

Mineral exploration rights are rights which allow an enterprise to explore mineral resources in a designated area. Mineral exploration rights are granted by MLR in