LLINKS Law Offices
通力律师事务所

Shanghai
19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
Tel: (86 21) 3135 8666
Fax: (86 21) 3135 8600

Beijing
Units 902-903
Winland International Finance Centre
No.7 Finance Street, Xicheng District
Beijing 100140 P.R.China
Tel: (86 10) 6655 5050
Fax: (86 10) 6655 5060

上海
上海市银城中路68号
时代金融中心19楼
邮政编码: 200120
电话: (86 21) 3135 8666
传真: (86 21) 3135 8600

北京
北京市西城区金融大街7号
英蓝国际金融中心9楼02-03单元
邮政编码: 100140
电话: (86 10) 6655 5050
传真: (86 10) 6655 5060

www.llinkslaw.com
master@llinkslaw.com

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Legal Restrictions on Foreign Investments in Mineral Exploration

By David Yu and Sam Feng

The *Measures for the Administration of Foreign-Invested Mineral Exploration Enterprises* (the **Measures**) jointly promulgated by the Ministry of Commerce and the Ministry of Land and Resources have come into force as of 20 August 2008. The Measures, together with the previous *Catalogue for the Guidance of Industries for Foreign Investment* effective as of 1 December 2007 (the **Catalogue**), have been regarded as an important step of the Chinese government to strengthen the regulation on foreign investments in the mineral exploration industry.

Adjustments under the Catalogue

Compared with the old version of the Catalogue, the new Catalogue as adopted on 1 December 2007 has adjusted the policies on foreign investments in the mineral industry as follows: (1) reducing the species of minerals in the Encouraged Category, and requiring most of the exploration or mining activities in the Encouraged Category to be in the form of Sino-foreign joint ventures rather than wholly foreign owned enterprises; (2) strengthening the protection of scarce or non-renewable mineral resources, such as categorizing the mining and cradling of phosphorus and the mining of oceanic manganese nodule and sea sand into the Restricted Category, and shifting the exploration and mining of tungsten, molybdenum, tin, antimony and fluorite from the Restricted Category into the Prohibited Category.

Said policy adjustments indicate that the Chinese government has paid more attention to the protection and sustainable utilization of mineral resources. It also shows the Chinese government's intention to restrict the inflow of foreign investments into the mineral industry.

Restrictions on Foreign-Invested Mineral Exploration Enterprises under the Measures

如果您需要本出版物的中文本，请与下列人员联系：

韩东红: (86 21) 3135 8709
Publication@llinkslaw.com

If you would like other Llinks publications, please contact:

Lily Han: (86 21) 3135 8709
Publication@llinkslaw.com

Llinks Law Offices
www.llinkslaw.com

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Under the Measures, land and resources administration departments and the departments in charge of commerce will make joint efforts to regulate foreign investments in the mineral industry. The Measures also set forth certain restrictions on foreign-invested mineral exploration activities as follows:

- Capital Contribution in the form of Mineral Exploration Rights

  Article 6 of the Measures provides that Chinese investors may use their lawfully-owned mineral exploration rights, as well as the geological survey information relating to such mineral exploration rights, as part of their capital contributions or conditions of cooperation when setting up mineral exploration enterprises. However, capital contributions in the form of mineral exploration rights require the transfers of mineral exploration rights from the investors to the invested enterprises. For such transfers, the mineral exploration rights must satisfy a number of conditions as specified in the *Measures for the Administration of Transfer of Mineral Exploration Rights and Mining Rights* promulgated by the State Council in 1998, for example, no transfer is allowed until the "expiry of two years from the date of issuance of the mineral exploration permit, or otherwise discovery of mineral resources for further exploration or exploitation within the exploration operation area".

  In addition, in the Measures, only Chinese investors are referred to as being allowed to make capital contributions in the form of mineral exploration rights. Therefore, it is a grey area, if not explicitly prohibited, that foreign investors can make their capital contributions to Sino-foreign joint ventures or wholly foreign owned enterprises with mineral exploration rights.

- Approval Authority

  With references to each other, the Measures and the Catalogue jointly set up an examination and approval system for the inflow of foreign investments into the mineral exploration industry. The regulations dedicate the powers and responsibilities of the examination and approval of foreign-invested mineral exploration enterprises to different levels of departments in charge of commerce. According to Article 7 of the Measures, for foreign-invested mineral exploration enterprises in the Restricted Category of the Catalogue, the Ministry of Commerce is in charge of the examination and approval, and for the non-restricted categories, the local departments in charge of commerce should be responsible.

Change in Processes for Foreign Investors to Obtain Mineral Exploration Rights

In China, mineral exploration rights are usually granted by means of public bidding, auction or listing as the law requires. Before the issuance of the Measures, foreign investors could directly participate in the public bidding, auction or listing without having any entities or presence in China. After being awarded, the foreign investors could choose to carry out the mineral exploration activities by incorporating a foreign-invested company in China, or to employ a Chinese local mineral exploration company to carry out the mineral exploration activities.

After issuance of the Measures, some local governments start to require foreign investors to establish foreign-invested entities in China in accordance with the Measures in order to receive mineral exploration rights and permits and to carry out mineral exploration activities only through the local enterprises. However, at present the processes for foreign investors to obtain mineral exploration rights still vary from one province to another. Since the Measures have not been fully implemented, when and how the processes will be changed is still a question and needs further observation.

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Llinks contact.

Shanghai	Beijing
David Yu Tel: (86 21) 3135 8666 - 8686 David.Yu@llinkslaw.com	**Wayne Chen** Tel: (86 10) 6655 5050 - 1022 Way.Chen@llinkslaw.com
Ming Zhang Tel: (86 21) 3135 8666 - 8777 Ming.Zhang@llinkslaw.com	