

---

## Legal Updates & News

### Legal Updates

---

#### New Measures Governing Acquisition of Mineral Rights

January 2007

by [Paul D. McKenzie](#), [George Y. Zhao](#)

#### Related Practices:

- [International](#)

---

The last eighteen months have seen significant regulatory developments in relation to the acquisition of mineral exploration and mining rights (collectively below “Mineral Rights”) in China.

In August, 2005, China’s State Council issued a directive to local governments and central government ministries to actively review the lawfulness of current Mineral Rights holdings.[\[fn1\]](#)

In September, 2005, the Ministry of Land and Resources (“MOLAR”) issued a circular clarifying which level of government is authorized to grant different categories of Mineral Rights and when the acquisition of Mineral Rights is subject to auction or other formalities.[\[fn2\]](#)

On January 20, 2006, MOLAR issued a notice to standardize procedures for the grant of Mineral Rights. This notice sets out a few limited circumstances where Mineral Rights can be obtained by agreement or on a “*first come, first served*” basis, as well as the circumstances when it may be necessary to obtain Mineral Rights through invitation to bid, auction, or listing procedures.[\[fn3\]](#)

On September 30, 2006, the State Council approved a pilot program for obtaining Mineral Rights for value in regard to coal, jointly proposed by the Ministry of Finance (“MOF”), MOLAR, and the National Development and Reform Commission.[\[fn4\]](#) The Pilot Program required “cash” payments for the acquisition of new Mineral Rights in regard to coal that had been invested in by the State or obtained from the State free of charge.

Most recently, on October 25, 2006, MOLAR and MOF jointly issued two new sets of provisions:

- The *Circular on Strengthening Reform of the System for Obtaining Mineral Exploration Rights and Mining Rights for Value* (Cai Jian [2006] No. 694) (《关于深化探矿权采矿权有偿取得制度改革有关问题的通知》) (the “Circular”).
- The *Administrative Measures on Payment for Mineral Exploration Rights and Mining Rights Through Conversion into Equity Interest (Trial)* (Cai Jian [2006] No. 695) (《以折股方式缴纳探矿权采矿权价款管理办法 (试行)》) (the “Measures”).

The Circular and Measures together represent the latest effort of the Chinese government to reform the system of obtaining Mineral Rights. Salient features of the Circular and Measures include emphasis on payment of cash consideration for Mineral Rights and on bidding, auction, and listing procedures. Most significant perhaps are the transitional measures provided for in relation to Mineral Rights already granted prior to issuance of the Circular and the Measures where the holder of Mineral Rights did not pay consideration for Mineral Rights and where there was prior State investment in development of the Mineral Rights. Such Mineral Rights are subject to a rectification process administered by MOLAR and MOF. Key features of this process include: valuation of the Mineral Rights undertaken by MOLAR and MOF; valuation to be based on the quantity of remaining reserves; except as specifically provided under regulation, the consideration payable in cash and

NOT in exchange for equity. By operation of these provisions, holders of existing Mineral Rights may in some circumstances be subject to payment of additional consideration for those rights that they may not have anticipated at the time the rights were granted.

Set forth below is a discussion of the key points of these two provisions.

## Circular

The Circular repeals an existing regulation in this area – the *Measures Governing the Conversion of Payment for Mineral Exploration Rights and Mining Rights to Increase State Capital* (探矿权采矿权价款转增国家资本管理办法), jointly issued by MOF and MOLAR on August 17, 2004.

The Circular expands certain provisions (including the “cash” payment requirement) governing acquisition of Mineral Rights in relation to coal under the Pilot Program to other minerals, and reiterates the bidding and auction requirements applicable to the grant of Mineral Rights under the terms of existing regulations. The main provisions of the Circular include the following:

1. Open market procedures (such as invitation to bid, auction, or listing) must be used in granting all new Mineral Rights except where MOLAR or its local counterparts have approved the grant by agreement or on a “*first come, first served*” basis.<sup>[fn5]</sup>

2. Except where expressly permitted, consideration for Mineral Rights payable to the State should be in cash, and Mineral Rights should not be provided as State assets or given in exchange for equity.

3. In regard to relevant Mineral Rights granted before the Circular was issued, MOLAR, along with MOF, will undertake evaluation of the exploration rights invested in by the State, including contributions made by the central government and/or local governments and the mining rights obtained from the State free of charge (collectively, “State-invested Mineral Rights”), with the valuation of mining rights to be based on the quantity of remaining reserves.

4. The Circular expressly provides that, in respect of State-invested Mineral Rights granted before the Circular was issued, where payment of cash as required under the Circular would cause hardship, provision of equity will be permitted in the following circumstances:

- Mineral Rights granted prior to the promulgation of the *Measures for Registering to Explore Mineral Resources Using the Block System* (“State Council Decree No. 240”) and the *Measures for the Registration of the Mining of Mineral Resources* (“State Council Decree No. 241”) (both dated February 12, 1998).
- Mineral Rights provided in exchange for equity at their valuated price as part of an enterprise restructuring approved by the State Council or the provincial people’s government.
- Other circumstances expressly provided by the State Council.

5. Payment of cash required under the Circular must be made on a lump-sum basis unless government approval is obtained for installment payments. Installment payments for exploration rights can be extended to no more than two years, and the first year’s payment shall be no less than 60% of the total payment. Installment payments for mining rights can be extended to no more than 10 years, and the payment during the first year shall be no less than 20% of the total payment.

6. State-held equity interests shall be calculated on the basis of the ratio between the payment price for the State-invested Mineral Rights and the net assets of the enterprise.

7. Equity interests received by the central government in exchange for Mineral Rights shall be held by the Central Geological Exploration Fund (“CGEF”) on behalf of the State. Equity interests received by the central and local governments in exchange for Mineral Rights jointly contributed shall be held by the CGEF and local government agencies in accordance with their capital contributions.

8. Mineral Rights for minerals that are exclusively operated (专营) by the State, such as uranium, may not be converted into equity interests.

## Measures

The Measures detail the application and approval procedures for conversion of State-invested Mineral Rights into equity in lieu of a partial or full cash payment as contemplated in the Circular:

1. Applications with respect to Mineral Rights invested in by the central government shall be submitted directly to MOF and MOLAR. Applications with respect to Mineral Rights invested in by local governments shall be submitted to MOF and MOLAR through their local counterparts.
2. Upon approval by MOF and MOLAR, the Mineral Rights holders are required to amend the articles of association and update the shareholders.
3. CGEF will nominate its appointees to the board of directors or the shareholders meeting. With respect to major issues decided by the board of directors/shareholders meeting, CGEF shall report to MOF and MOLAR for instructions prior to making any decision.
4. Dividends or sales proceeds derived from CGEF's equity holdings shall be deposited into CGEF.

---

## Footnotes

<sup>1</sup> Notice Concerning the Comprehensive Rectification and Standardization of the Regulation of Mineral Resource Development, Guo Fa [2005] No. 28 (《国务院关于全面整顿和规范矿产资源开发秩序的通知》国发[2005] 28号).

<sup>2</sup> *Circular on Relevant Issues in Standardizing the Authorization to Grant Exploration Permits and Mining Licenses*, Guo Tu Zi Fa [2005] No. 200 (《关于规范勘查许可证采矿许可证权限有关问题的通知》国土资发[2005]200号); discussed in our earlier client update: <http://www.mofo.com/news/updates/files/update02087.html>.

<sup>3</sup> *Notice of Further Regulating the Administration of the Grant of Mineral Rights*, Guo Tu Zi Fa [2006] No. 12 (《关于进一步规范矿业权出让管理的通知》) (“No. 12 Notice”); discussed in our earlier client update: <http://www.mofo.com/news/updates/files/update02180.html>.

<sup>4</sup> *Pilot Program on Deepening Reform of the System of Obtaining Coal Mining Rights for Value (“Pilot Program”)*, Guo Han [2006] No. 102 (《国务院关于同意深化煤炭资源有偿使用制度改革试点实施方案的批复》, 国函〔2006〕102号).

<sup>5</sup> The No. 12 Notice lists the circumstances under which grant by agreement and grant on a “*first come, first served*” basis are permitted. See our earlier client update: <http://www.mofo.com/news/updates/files/update02180.html>.