

Kluwer Arbitration Blog

Mongolia: Investment Related Developments in the Mining Sector

Byambasuren Narantuya, Charles ('Chip') B. Rosenberg · Tuesday, March 26th, 2024

Mongolia is a country rich in natural resources. Its estimated mineral wealth is \$1-3 trillion, with coal, copper, and gold making up the primary reserves. Having been so well endowed by Mother Earth, Mongolia would seem to be an obvious choice for international investors with capital and expertise to exploit these valuable opportunities.

However, the U.S. State Department recently cautioned foreign investors about investing in Mongolia:

Mongolia's frontier market and vast mineral reserves represent potentially lucrative opportunities for investors but vulnerability to external economic and financial shocks, ineffective dispute resolution, and lack of input from stakeholders during rulemaking warrant caution . . . Unless and until Mongolia embraces a stable business environment that transparently creates and predictably implements laws and regulations, investors will likely find Mongolia too risky and opt for more competitive countries.

This article provides an overview of Mongolia's international investment climate and explores recent developments.

I. Mongolia's International Investment Climate

A. Mongolia's International Investment Program

Following its democratic transition in the early 1990s, Mongolia swiftly moved to establish its presence in the global investment community. Mongolia ratified 44 bilateral investment treaties ("BITs") and signed the European Economic Community-Mongolia Trade Cooperation Agreement and Energy Charter Treaty ("ECT"). The majority of these treaties were signed before 2000, reflecting Mongolia's immediate and significant efforts to open its economy and attract foreign investment. More recent advancements in Mongolia's international investment initiatives include the Canada-Mongolia BIT (2016) and Japan-Mongolia Economic Partnership Agreement (2015) (which replaced and superseded the Japan-Mongolia BIT (2001)).

Since 2016, Mongolia has been working to establish a new model BIT to guide the negotiation of new BITs and the renegotiation of existing BITs. As part of its broader economic strategy outlined in the [Mongolia Development Plan for 2024](#), Mongolia plans to sign an economic partnership agreement with Korea and a free trade agreement with China. Mongolia also aims to review and update its BITs with [Vietnam](#) and [India](#).

B. Mongolia's International Investment Disputes

Mongolia has been a respondent in six publicly-known investment treaty arbitrations. Of these, one settled, and three concluded with awards or decisions on liability. The three concluded cases involved the mining sector (gold, uranium, and iron ore).

Alstom Power v. Mongolia was an ICSID arbitration under the [Italy-Mongolia BIT](#) and the ECT involving a dispute over works to be performed under a contract for the refurbishment of a thermal electric station. In 2006, the parties settled and the case was discontinued.

Paushok v. Mongolia was an UNCITRAL arbitration under the [Russia-Mongolia BIT](#) involving the imposition of a windfall profit tax on gold sales exceeding a certain price. In 2011, the tribunal ruled that the windfall profit tax did not breach the BIT. However, the tribunal did find that Mongolia breached the fair and equitable treatment protection in the BIT by taking ownership of the gold, exporting it abroad for refining, and depositing it or its value in an unallocated account in England to increase the country's currency reserves. The tribunal directed the claimants to indicate their intention to seek damages, but no damages claim was ever made.

Khan v. Mongolia was an UNCITRAL arbitration under the ECT involving the invalidation of a uranium mining license. In 2015, the tribunal held that Mongolia had unlawfully expropriated the license in breach of the Foreign Investment Law which constituted a breach of the umbrella clause in the ECT. The tribunal found that Mongolia failed to "point to any breaches of Mongolian law that would justify the decisions to invalidate and not re-register" the license. The tribunal awarded \$80 million in damages.

Beijing Shougang v. Mongolia was an UNCITRAL arbitration under the [China-Mongolia BIT](#) involving the expropriation of a mining license for an iron ore deposit. In 2017, the tribunal concluded that it did not have jurisdiction *ratione materiae* over the claimants' expropriation claim. The tribunal reasoned that the BIT only provided for international arbitration of disputes over "the amount of compensation for expropriation" – not of disputes over whether there had been an expropriation.

Mongolia is currently a respondent in two pending investment treaty arbitrations, both of which involve the mining industry. *Mohammed Munshi v. Mongolia* is an SCC arbitration under the [UK-Mongolia BIT](#) and ECT involving the freezing of the claimant's coal assets and suspension of its licenses. *WM Mining Company v. Mongolia* is an ICSID arbitration under the [U.S.-Mongolia BIT](#) involving the invalidation of mining licenses for the Big Bend placer gold mine.

C. Mongolia's Domestic Law

The mining sector plays a central role in Mongolia's economy, contributing significantly to its growth. In 2020, the mining sector accounted for 21.6% of the country's GDP, 57% of total industrial production, and 42% of total investments. Consequently, the legal framework governing the sector is inherently dynamic, responding continually to both internal and external economic, political, and social pressures as well as to global market fluctuations. Mongolia's past legal reforms in the mining sector were primarily driven by resource nationalism and political populism. These reforms centered on state involvement and equity participation in strategic mineral deposits, and increased national benefits from its rich mineral resources.

The major laws that shaped and continue to influence the regulatory landscape of Mongolia's mining industry include the 2006 Mining Law (replacing the 1997 Mining Law), the 2006 Windfall Profits Tax Law (repealed in 2009 following years of condemnation by gold and copper miners and a decline in mineral prices due to the global financial crisis), the 2009 Nuclear Energy Law, the 2009 River Law (renewed in 2015) which prohibits exploration and mining in headwaters and protected zones of water and forested areas, the 2012 Strategic Foreign Investment Law (repealed in 2013 after receiving much disapproval from the Mongolian business community and foreign investors), and the 2013 Foreign Investment Law (replacing the 1993 Foreign Investment Law). This history of frequent legislative changes undermined investor confidence in the predictability and stability of Mongolia's regulatory environment, a key factor behind the cautious outlook adopted by the U.S. State Department.

Between 2005 and 2011, Mongolia experienced a substantial increase in foreign direct investment ("FDI"), surging from \$187.6 million to \$4.5 billion. However, this trend reversed in subsequent years, with FDI declining to \$2.0 billion in 2013 and further dropping to less than \$95.0 million in 2015. Notably, in 2016, Mongolia faced a significant downturn in FDI, registering a negative inflow of \$4.1 billion. This continued decline was largely due to commodity price changes and concerns about the regulatory uncertainties and precarious legal environment.

In an effort to increase FDI, Mongolia's State Minerals Policy of 2014 called for developing a transparent and responsible mining industry driven by the private sector, while fostering a stable investment climate. This commitment is further echoed in Mongolia's long-term development strategies such as Vision 2050 and the 2020-2024 Government Action Plan, which emphasize fostering a favorable environment for foreign investment through sophisticated regulatory support and consistent protection of foreign investors. Indeed in 2021, the Prime Minister of Mongolia reaffirmed Mongolia's commitment to a stable and attractive investment environment and extended apologies to foreign investors for past uncertainties and challenges.

Furthermore, the 2006 Mining Law and the 2013 Investment Law are expected to undergo major revamping in the near future to continue enhancing Mongolia's investment climate. In 2023, Mongolia held extensive consultations on the draft laws, deepening its engagement with stakeholders and demonstrating a commitment to transparency. Currently, the draft Investment Law is under debate in Parliament, and has become a focal point for both public and investor concerns. Key provisions of the draft include removing the \$100,000 capital requirement, reaffirming investment agreements and stabilization certificates, and allowing international arbitration in investor-state disputes (following a six-month negotiation period). Additionally, the draft proposes an investor complaint resolution council to mediate and facilitate effective resolution of investor complaints. While some provisions address investor concerns, the mandatory negotiation period and the resolution council may add layers of complexities. The draft Mining Law is also expected to be submitted to the Parliament soon.

II. Conclusion

Mongolia's abundant mineral wealth offers significant potential, but its historically volatile and patchwork regulatory framework remains a major challenge. Past policy shifts driven by populist resource nationalism, along with rapid legislative changes, created a perception of unpredictability that discourages foreign investors. While Mongolia's current focus on regulatory reforms and compliance with international treaties is a positive shift, the U.S. State Department's caution highlights the need for a sustained demonstration of commitment to transparency and predictable implementation of investor-friendly policies. Foreign investors are closely watching the ongoing reforms to key laws such as the Mining Law and the Investment Law, supported by the long-term policies like Vision 2050, which aim to bolster investor confidence and help Mongolia re-emerge as a more attractive and reliable destination in the global mining arena.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Newly updated

Profile Navigator and Relationship Indicator Tools

Request your free trial now →

Wolters Kluwer

This entry was posted on Tuesday, March 26th, 2024 at 8:54 am and is filed under [Investment](#), [Investment Disputes](#), [Mining Sector](#), [Mongolia](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.