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Points of Interest in Japanese Onshore Prospecting Right Due Diligence: Managing the Risk of Post-Investment Invalidation

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Under the Mining Law of Japan¹ there are two types of tenement for mining activities; Prospecting Right (*Shi-ku-tsu-ken*) and Digging Right (*Sai-ku-tsu-ken*), both of which are granted by the Ministry of Economy, Trade and Industry of Japan (“METI”) pursuant to Article 59 of the Mining Law. A Prospecting Right is a right to drill in an area where a subject mineral has not yet been confirmed present. A Digging Right, on the other hand, is a right to drill in an area where a subject mineral deposit has already been located. Granting of both types of tenement are at METI’s discretion, which shall be registered in the mining registry (*Ko-gyo-gen-bo*) upon approval by METI.

This newsletter outlines the main points in the Prospecting Rights due diligence process for those who consider investment in a tenement holder reconnoitering for gold, silver, or other metals in onshore areas of Japan.

While the validity of a Prospecting Right can be verified by looking at the most recent mining registry², it is also prudent to check if there is any risk of such right being invalidated or terminated at some time in the future. We outline in this newsletter two of the common causes whereby a Prospecting Rights is invalidated or terminated; failure to commence drill work and expiration of statutory tenure of Prospecting Right.

¹ Law No. 289 of 1950 as amended thereafter. For more information, please see: Konno H, Otsuki Y (2019) Mining in Japan, pp. 12-13. In: Bourassa MJ, Lacy A (eds) Mining 2019, Law Business Research Ltd., London.

² The most recent mining registry (*Ko-gyo-gen-bo*) is kept by the bureau of METI having jurisdiction over the region in which the relevant mining area is located.

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1. Timing of Prospecting Right's Registration

The Mining Law prescribes no rules concerning the timeframe in which METI must respond to an application for a Prospecting Right application. Based on METI's past practice, there is no discernable "standard" timeframe for approval on a Prospecting Right, instead it depends on the practice of the METI's bureau with jurisdiction over the region in which the application has been placed. In this regard, factors such as available labor, their experience and efficiency levels, the number of applications, and the other administrative aspects inside and outside the relevant bureau of METI, will influence the rapidity of such decisions. The timing of registration also depends on coordination with the relevant local government in terms of environmental protection matters and other aspects of public interest. Some regions see approvals by METI in ten (10) to 12 months, while others may see the same types of applications waiting over 18 months, both after the relevant applications for Prospecting Rights were placed to METI.

Accordingly, the practices of such individual METI bureaus with jurisdiction over the region in which the mining area is located should be referenced when you apply for a Prospecting Right by yourself in such region, or you attempt to invest in another who has applied for a Prospecting Right there. The most thing that an applicant can do is request that METI prioritize some of their applications (as a matter of practice, several applications for Prospecting Rights with respect to several mining areas are typically and permissively submitted together by a single applicant at the same time), provided that such request does not have an effect, in a legal sense, to compel METI or its bureau to comply with it, in other words, even if METI does not prioritize such application over the others by the same applicant, there is no legal right given to the applicant to object such decision by METI.

An applicant for a Prospecting Right might feel that these levels of discretion and bureaucracy given to METI would make sometimes the mining projects and investments therein unprofitable. On the other hand, too swift of an approval would be troublesome to some other applicants in terms of the obligation to commence drill work within a statutory period after the registration of the Prospecting Right. We will discuss this issue in section 2, below.

2. Obligation to Commence Drill Work within Six Months of Prospecting Right's Registration

Under the Mining Law, once a Prospecting Right is registered, the holder must commence the drill work contemplated thereby within six (6) months. Please note that the requirement here is "drill work", and accordingly, simple surface level exploration of the land does not suffice. This requirement is set out in the Mining Law in order to prohibit any wrongful (or haphazard) application undertaken with the aim of just "holding" the Prospecting Right (i.e. without drilling); for example, in an effort to prevent potential competitors from exploring a particular area. As such, when conducting due diligence over a Prospecting Right, it is advisable to investigate whether drill work has commenced. If not yet commenced, it is advisable to check how much time has lapsed since the registration of the Prospecting Right and whether the holder of the Prospecting Right is expected to (and is able to) commence the drill work within the remainder of such six month period.

The six months' deadline for commencement of drill work may be postponed if approved by METI, provided that the holder of the Prospecting Right demonstrates that there is a convincing reason for such postponement. In other words, the holder must demonstrate that commencement of the drill work will eventually become possible if the deadline is extended beyond the six month period. If this is successfully demonstrated, the deadline for commencement of work is typically postponed for an additional one (1) year period.

Please note however that, it is practically difficult to postpone the deadline twice, given that the duration of a Prospecting Right is, as outlined below, two (2) years. Even if METI grants a holder two times of postponements of deadline (assuming one year per postponement), the holder would essentially be "timed out" of his Prospecting Right (i.e. the postponed period would exceed the

duration of the Prospecting Right itself). In such a case, METI would be unlikely to approve an extension of the Prospecting Right itself upon its expiration of two years period (as discussed in section 3 below).

Caution is advisable in respect of the above issue, in that there is a risk that the Prospecting Right might be cancelled pursuant to the relevant provisions under the Mining Law if you breach this obligation to commence drill work within six months of registration. For the sake of certainty, this obligation to commence drill work counts from the date of the “registration” of a Prospecting Right, which is different than the date on which the application for a Prospecting Right is accepted by METI.

3. Extension of Prospecting Right’s Duration and Reservation of Subsequent Digging Right

The duration of a Prospecting Right is two years after its registration by METI, provided that it may be extended for another two (2) years up to twice. Accordingly, a Prospecting Right can last for six years at maximum.

In order for a Prospecting Right to be extended, provided that it will never exceed six years as noted above, it must be demonstrated that the holder: (i) has undertaken diligent exploration of the subject land, (ii) is required to continue such exploration work to check the situation of the mineral deposit, and (iii) has paid the relevant area’s mining tax. Please note that, if the holder is approved by METI to postpone the deadline for commencement of drill work during the two years duration of the Prospecting Right, and thereby the holder has not commenced the drill work within the two years duration it would raise doubts concerning the first requirement set out above (i.e., the requirement of diligent exploration).

Upon expiration of all potential extensions, i.e., six years (if extended twice), the Prospecting Right becomes void. If the holder of a Prospecting Right needs to continue the exploration work contemplated under the Prospecting Right, the holder must submit a *new* application for another Prospecting Right immediately after expiration of the current one. The Mining Law prohibits submission of a new application while a current Prospecting Right is still valid. Under the Mining Law, the precedence of an application for a Prospecting Right over an area is determined on a “first come, first serve” basis. Accordingly, upon the expiration of six years period of the Prospecting Right (if extended twice), the incumbent holder of the Prospecting Right is at risk of losing its precedence over the mining area unless he/she submits an application for another Prospecting Right over the same area before his/her competitor.

When it comes to a Digging Right, there is no system whereby a holder of a Prospecting Right can convert the Prospecting Right into a Digging Right. However, the holder can reserve precedence for a Digging Right by submitting a Digging Right application while their Prospecting Right for the same mining area is still valid. This is a *de facto* effect of the Mining Law which prohibits any application for a Digging Right over a mining area that is subject to the Prospecting Right of any other person (i.e., the holder of a Prospecting Right is the only person who can apply for a Digging Right over the same mining area while the Prospecting Right is still valid).

Digging Rights are not subject to limited durations.



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