



MONGOLIAN INVESTMENT LAW: REGULATORY FRAMEWORK

The Parliament of Mongolia approved the *Law of Mongolia on investment* (“**Investment Law**”) on 3 October 2013. The Investment Law came into effect on 1 November 2013. Prior to the Investment Law, *the Law of Mongolia on Foreign Investment*, adopted on 10 May 1993, as amended (“**Foreign Investment Law**”) and *the Law of Mongolia on the Regulation of Foreign Investment in Business Entities Engaging in Strategic Importance Sectors*, adopted on 17 May 2012, as amended (“**FISIS**”) were the main legislations for foreign investments, however, the Foreign Investment Law and the FISIS negatively impacted the foreign direct investment (“**FDI**”) into Mongolia.

In addition, due to lack of an investment policy, depending on the Parliament election results, the legal framework for investment was unstable. For example, namely among investors “Long Named Legislation”, *the Law of Mongolia on Prohibition of Mineral Prospecting Exploration in Water Basin and Forest Areas* (“**Long Named Legislation**”) was enacted in July 2009 through a Mongolian Parliament session. Upon the Long Named Legislation came into effect, a huge number of special permits were revoked. As of today, the Government of Mongolia has yet determined the regime for the estimated compensation for those affected by the regime.

Therefore, sudden approval of the FISIS by the Parliament in 2012 prior to Parliament election gave a tremendous worry to investors that the FISIS may bar them from participating in key sectors for investment. Even though, FISIS is no longer in effect and force, until today investors consider Mongolia a riskier country to invest than it usually was. The legislation regarding the windfall tax in the amount of 68% that was imposed on unsmelted copper and gold concentrates that was produced in Mongolia, also adversely impacted the investment outlook of Mongolia.

Nevertheless, upon approval of the Investment Law, the following main regulatory improvements are seen:

- the scope of the Investment Law extends to the regulation, protection and promotion of investment by foreign and domestic investors in Mongolia. Furthermore, the Investment Law provides general legal guarantees for investments such as protection from nationalization (by setting out conditions under which nationalization is permitted), protection of intellectual property rights, the rights to repatriate profits (following the payment of relevant taxes), and freedom to choose a dispute resolution forum;
- the separate registration and licensing requirement for setting up a foreign invested entity has been repealed under the Investment Law. In other words, a foreign entity’s legal capacity arise upon its registration to the State registration authority of Mongolia;
- the Investment Law sets out tax and non-tax incentives available to investors for making investment in Mongolia;



- the State may issue a guarantee for stable tax treatment upon request by an investor in accordance with the Investment Law. If approved, an investor would be entitled to enjoy stable tax treatment for a specific period of time in the form of tax stabilization certificates or investment agreements; and
- the definition of a foreign invested entity has amended as a business entity (i) which is incorporated in accordance with the laws of Mongolia; (ii) in which foreign investors hold a 25% or more interest; and (iii) the capital contributions made by each foreign investor exceeds US\$ 100,000 or the MNT equivalent of the same.

Non-tax and tax incentives

The tax and non-tax incentives are available to all investors. The Investment Law provides some non-tax incentives, which are in relation to land rights, customs clearance, foreign labor quotas, and immigration matters. As for tax incentives, investors may be entitled to enjoy (i) exemption from the payment of certain taxes; (ii) preferential tax treatment; (iii) accelerated depreciation and amortization that is deductible from taxable income; (iv) carrying forward of losses; and (v) deduction of employee training expenses from taxable income.

Stabilization certificate v investment agreement

Qualified projects may enjoy a stable tax environment according to the Investment Law. Tax stabilization benefits are exercised through a tax stabilization certificate. However, the most important and quantifiable criteria for a stabilization certificate is the amount of investment and this is determined by reference to specific sectors and the geographical area within which the investment to be made. Further, investment in certain regions of Mongolia will attract preferential treatment and a potentially longer term of tax stabilization.

Another option to stabilize the tax environment provided under the Investment Law is entry into of an investment agreement with the Government. If an investor whose proposed investment exceeds MNT500 billion (approximately US\$ 300 million) so applies, it is possible to enter into an investment agreement with the Government for the purpose of guaranteeing more stable Government policies for making such investment, including the tax treatment.

The Minister of Economic Development will enter an investment agreement with an applicant investor. The scope of investment agreements include providing legal guarantees as specified in the Investment Law, stabilization of certain taxes, and some regulatory and financial incentives. Therefore, investment agreements would most likely provide better protection for investors given that such agreements create binding contractual obligations for the Government (*if the Government breaches certain obligations under the investment agreement, the investor may bring the dispute to the international arbitration, such as ICSID*), as opposed to a stabilization certificate, which is an “administrative act” by the authority.

Further, the Investment Law has repealed the limitless actions of the authorities under the ambiguity term “strategic sector”, therefore, now, investors are entitled to invest in all sectors.



Although the Investment Law provides certain investment friendly legal environment, there are still certain legal barriers to investors under existing legislations for participation in certain activities or sectors, which includes:

-under *the Law of Mongolia on Land Rights* (2002), a foreign invested entity may be entitled to possess a land use right;

-when a foreign invested entity applies for a construction permit in Mongolia, a foreign invested entity is required to provide its special permit that is granted by its country of origin;

-a foreign invested entity is obliged to qualify additional legal requirements for engaging into banking sector of Mongolia, is opposed to that of a domestic invested entity;

-in a tender bidding in the value of works, goods and services less than MNT10,000,000,001, an foreign citizen or a foreign invested entity is prohibited to participated for a potential tender bidding in Mongolia;

-the Government of Mongolia shall grant a permit to a foreign invested entity who wants to engage in activities in the agricultural sector, taking into account of species of plants and geographical locations;

-a foreign invested entity is prohibited to possess the land use rights in the territory of special protected zones; and

-the Ministry of Health grants a permit to a foreign invested entity who wants to engage in business activities in the health care sector besides the fact that a permit is granted to others at the city or provincial level.

The Mongolian State is confronted the regulatory challenged ahead upon the Investment law came into effect in November 2013.

ASHID ADVOCATES LLP

**Ulaanbaatar
2015**