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Memorandum to: Our Clients and Friends

**Re: Certain PRC Legal Issues on
Foreign Investment in China's Energy and Resource Sectors**

The energy and resource sectors are playing an increasingly important role in the economic development of all countries worldwide. In China, the exploitation of energy and resources is still at a fairly early stage of its development, characterized by a high level of energy consumption, large amounts of pollution and a low level of integration. Thus there is huge room for further development in these sectors. As a result, the Chinese government is highly motivated to encourage the restructuring and upgrading of these sectors by introducing solid funding support and advanced technologies. Given the inherent non-renewable nature of energy and resources, as well as the scarcity and strategic importance of certain special categories of energy and resource products, the Chinese government is also quite cautious about introducing foreign investment into these sectors and has set out various regulatory restrictions. Foreign investors are therefore faced with both opportunities and challenges when seeking to invest in China's energy and resource sectors.

In this memorandum, we have briefly discussed and analyzed, mainly from the PRC legal perspective, the foreign investment entry issues in the PRC energy and resource sectors. In addition, we have addressed several other issues that should be noted as particularly important during the relevant due diligence investigation process, in the hope that it will be of some help to foreign investors interested in investing in these sectors.

I. Foreign Investment Entry Issues

1. Industrial Policy

According to the currently effective *Catalogue for the Guidance of Foreign Investment Industries* (the "Catalogue"), within the energy and resource sector, investment in certain areas is encouraged but subject to restrictions on the form of investment (e.g., foreign investment in exploration, mining and selection of iron mines and manganese mines falls under the encouraged category but can only be made through Sino-foreign equity or cooperative joint ventures), investment in certain areas is restricted and foreign investors are not allowed to take controlling positions (e.g., the exploration and mining of diamonds, other precious non-metals or "special and scarce kinds of coals" falls under the restricted category for foreign investment and must be controlled by the Chinese parties), while investment in certain areas is prohibited (e.g., exploration, mining

and selection of rare earths).

It should be noted that, as the Catalogue only sets out the general principles and there are almost no supporting written rules to give explanations or clarifications to ambiguous provisions, foreign investors, under certain circumstances, will need to first find out to which category their proposed investment will be subject before they proceed further. For example, with respect to the “exploration and mining of special and scarce kinds of coals” under the Catalogue, the text only provides that it falls under the restricted category and shall not be controlled by the foreign parties, but does not give any proper definition of the said “special and scarce kinds of coals”. Additionally, we find that no further clarification has been made under other relevant regulations or government policies. According to our experience, in the absence of a clear definition/clarification by laws or government documents, local practice may vary from location to location and from one government authority to another. From this point of view, when the relevant industry policy looks ambiguous, it is important for foreign investors to seek opinions and confirmations from competent PRC government authorities on a case by case basis so that their proposed deals will not be suspended or otherwise annulled due to violation of foreign investment industrial policies.

2. National Security Review

According to the *Circular of the General Office of the State Council on Establishment of National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* and the *Interim Provisions of the Ministry of Commerce on Matters Regarding Implementation of the National Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, effective from March 5, 2011, any foreign investment in domestic PRC enterprises engaged in important energy/resource business with the effective control of such enterprises to be acquired by the foreign investors should be subject to national security review led by the PRC Ministry of Commerce (“MOFCOM”), in addition to the requirements of the Catalogue mentioned above.

Again, however, there is no clear stipulation on the scope of these “important energy and resources” by relevant laws or government authorities. In addition, no clear explanation is made as to whether “the effective control may be acquired by foreign investors” should include the situation where the foreign controlling shareholder of a joint venture intends to further enhance its controlling positions in the joint venture. Therefore, in the absence of clear stipulations in PRC law, if foreign investors intend to take control of a PRC entity that is likely to be engaged in “important” energy/resource business, they are highly recommended to first communicate with and seek opinions from such competent PRC government authorities as MOFCOM and the National Development and Reform Commission about whether their proposed M&A deals should be subject to PRC national security review. Note that according to the aforesaid regulations of the General Office of the State Council and MOFCOM, if the foreign investors fail to submit for national security review any M&A transaction that should be subject to such a review, the underlying transaction may be suspended or annulled.

3. Anti-Monopoly Review

If any transaction that a foreign investor proposes to conduct in the energy and resource sector constitutes the “concentration of business operators” under the *PRC Anti-Monopoly Law* and reaches the statutory threshold for an anti-monopoly filing (or, though the threshold is not reached, there is evidence

indicating that the proposed transaction may preclude or restrict competition), the foreign investor should apply to the Anti-Monopoly Bureau of MOFCOM for an anti-monopoly review (the Anti-Monopoly Bureau may also initiate the anti-monopoly review on its own if it deems necessary).

Therefore, when foreign investors, especially large multinational industrial groups, intend to make investments in PRC energy and resource sectors, they will need to evaluate whether their proposed investment should be subject to PRC anti-monopoly review based on the size of the proposed transaction, the volume of their business turnover, among others. Where the foreign investors are not sure whether their proposed transaction should be subject to PRC anti-monopoly review, it is recommended to consult with the Anti-Monopoly Bureau of MOFCOM first. It should be noted that according to the *PRC Anti-Monopoly Law*, if any transaction fails to be submitted for an anti-monopoly review when it is required to, such transaction may be suspended or annulled and relevant parties may be subject to penalties.

II. Certain Issues Related to Due Diligence

1. Special Qualification Requirements

Energy and resource operations are frequently exposed to dangers and risks. Therefore they are subject to special regulations under applicable PRC law. For example, for coal mining enterprises, in addition to the certificates and licenses generally required for all PRC enterprises, they will need to obtain and effectively maintain a variety of special operating permits/licenses such as a mining permit, a safe production license, a coal production license, and an explosives use permit. Workers employed for a coal mining enterprise are also required to possess some specific skills and qualifications. For example, the coal mine manager should obtain a mine manager qualification certificate and a mine manager safety qualification certificate, while gas inspectors, coal miner drivers and other technical workers should also obtain their respective operation qualification certificates.

Therefore, for due diligence exercise, especially the legal due diligence exercise, it is necessary to carefully check, among others, whether the target has duly obtained and effectively kept all the required operating licenses, permits, and qualifications, whether such licenses, permits, and qualifications are close to expiration or will need to be reapplied for as a result of foreign investment or control, and whether there is any substantive obstacle in extension, update or re-application thereof.

2. Mineral Reserves, Safety Facilities and Other Technical Issues

With respect to issues that require special expertise such as mineral reserves, the actual production capacities of an operation, the status and safety of facilities, among others, although their PRC legal counsels may assist with the document review and field investigations, given the strong expertise required, foreign investors should also retain specialized technical advisors to provide professional assessments on these technical aspects.

3. Land Use, Soil and Water Conservation, and Etc.

Energy and resource mining operations will in many cases involve the occupation and use of land to which others have already acquired the use right. In order to legalize the occupation and use of such land, energy and resource enterprises should obtain approvals from the competent land administrative authorities, and duly complete the procedures in connection with the proposed

change of land nature and purpose of land use (e.g., to convert agricultural land to land legally suitable for industrial construction) and properly settle other issues such as potential compensations to the original land users, as well as land reclamations and rehabilitations. Otherwise, resource and energy enterprises may get into disputes with the original land users, or may be ordered by the government authorities to return the illegally occupied land, demolish established buildings and structures in a specified period, and/or pay fines, among other penalties. If the noncompliance or violations are serious, the person directly in charge and other responsible persons may be subject to criminal penalties, and the production and operation of the enterprises may consequently become subject to material adverse effects.

In addition, as the energy and resource business often involves surface and underground operations which in turn may cause soil and water losses, the underlying soil and water conservation becomes a unique and important obligation for enterprises engaged in this sector (as a matter of fact, this soil and water conservation issue is also closely related to the safety production of the relevant enterprises). Under applicable PRC law, the operating enterprises are required to obtain approvals from the competent water resource authorities for their soil and water conservation plans before commencement of any construction. After such construction is completed, a completion acceptance inspection of the underlying soil and water conservation facilities will further be conducted by the relevant water resource authorities.

Therefore, attention to the regulatory compliance status of the target company with respect to its use of land, soil and water conservation, among others, should also be paid during the due diligence process. Moreover, in addition to engaging legal counsels and accountants to check whether the target has obtained the required approvals and paid off the relevant land grant fees, compensations, among others, the investors may also need to seek professional advice from environmental experts as necessary.

* * *

This memorandum is only a brief and preliminary introduction to several PRC legal issues with respect to foreign investment in China's energy and resource sectors based on our knowledge of the applicable PRC laws, regulations and practice. It is for your general reference purpose only and should not be relied upon as any formal PRC legal opinion with respect to any general or specific PRC legal issues.

If you have any questions or comments thereof, please do not hesitate to contact us at inquiry@hanyilaw.com for a further discussion.

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外商投资中国能源资源行业的几个法律问题初探

能源资源行业在各国经济发展中的地位应该说都举足轻重。就中国而言，一方面，其能源资源行业的开发利用尚处于高能耗、高污染、集约化程度不高的初级阶段，存在很大的发展空间，中国政府无疑希望通过引进资金和先进的技术，予以改造和升级；但另一方面，考虑到能源资源固有的不可再生性以及一些特殊能源资源的稀缺性和战略重要性，中国政府对于该领域的招商引资（尤其是引进外资）又抱着审慎的态度，在法律和实践层面都设置了诸多限制。因此，对于外国投资者而言，这一行业领域可谓是机会和挑战并存。

本备忘录将就外商投资中国能源资源行业所涉及的准入问题以及在该领域进行尽职调查尤其是法律尽职调查时值得特别关注的一些事项进行初步的探讨和分析，希望能够对有兴趣的外国投资者有所裨益。

一、 外资准入相关问题

1. 产业政策

根据现行有效的《外商投资产业指导目录》，能源资源行业中的一些领域属于鼓励类但有投资形式的限制（例如，铁矿、锰矿的勘探、开采及选矿，属鼓励类，但限于合资、合作），一些领域属于限制类且外商不得控股（例如，金刚石等贵重非金属矿的勘查、开采，“特殊和稀缺煤种”的勘查、开采，属限制类且需由中方控股），另外还有一些行业属于禁止类即外商不得投资（例如，稀土的勘查、开采和选矿）。

值得注意的是，由于《外商投资产业指导目录》对有关问题的界定较为原则和模糊，且又缺乏配套的规定予以说明或澄清，因此在某些情况下，确定其拟投资进入的某个具体的能源资源领域所属的产业类别，就成为外国投资者在投资决策前需要首先解决的问题。以该《目录》下的“特殊和稀缺煤种勘查、开采”为例，《目录》本身仅原则性地将其列为限制类且不允许外资控股，但并未就何谓“特殊和稀缺煤种”作出解释，其他相关法律法规或政府文件也未就此作出进一步说明。根据我们了解的情况，由于没有法律法规或政府文件的统一界定，实践中不同的政府部门、不同的地方对此问题的解释和把握也不尽相同。鉴于此，在中国出台法律法规或政府文件予以澄清之前，对外国投资者而言，与地方及国家相关主管部门做好事先的沟通和确认工作就显得尤为重要，因为这关系到相关投资能否在最大程度上避免发生因违反（或涉嫌违反）外资产业政策，在各项投资准备工作就绪后、交割前被主管部门叫停或在投资完成之后被责令清退等大家都不愿意看到的情况。

2. 安全审查

根据今年3月5日起实施的《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》和《商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定》，外资并购境内重要能源和资源企业，且实际控制权可能被外国投资者取得（当然，前提是符合《外商投资产业指导目录》的规定）时，外国投资者应当就该并购交易报商务部进行并购安全审查。

与《外商投资产业指导目录》未对“特殊和稀缺煤种”作明确界定相类似，“重要能源和资源”的范围目前也并未见明确规定。此外，对于《通知》中提到的“实际

控制权可能被外国投资者取得”，是否包括外国投资者已是合资企业的控股股东，又通过认购合资企业增资或购买合资企业中方股权的方式增强其控制权等情形，也找不到明确说明。因此，在法无明确规定的情况下，为谨慎起见，外国投资者如欲取得或加强“疑似”重要能源和资源行业的企业的控股权，应先就所涉能源资源是否属于“重要能源和资源”与商务部、发改委等有关主管部门进行事先的沟通和确认，以确定是否需要将相关交易提交外资并购安全审查（请注意，根据国务院办公厅和商务部的前述通知和规定，应提交但未提交安全审查的外资并购交易，将面临被叫停或撤销的风险）。

3. 反垄断审查

如果外国投资者拟在能源资源行业进行的某项交易构成中国《反垄断法》下的“经营者集中”，且达到法定的反垄断申报标准（或虽未达到法定标准，但有证据和事实表明该项交易具有或可能具有排除、限制竞争的效果），则外国投资者有义务向商务部反垄断局提请反垄断审查（反垄断局也有权依其掌握的情况，主动进行反垄断调查）。

因此，外国投资者（尤其是一些大型的跨国产业投资集团）在投资能源资源行业时，还需视拟进行的交易的规模、交易各方对市场的占有情况（比如营业额）等，依据中国反垄断的有关法律法规，评估和确定是否需要提交反垄断申报（对不确定是否有申报义务的，可依程序事先与商务部反垄断局进行磋商）。需要注意的是，根据《反垄断法》，应提交而未提交反垄断审查的交易，很可能将承担被叫停、撤销并恢复交易前原状及罚款等不利后果。

二、尽职调查相关事项

1. 特殊经营性资质

能源资源行业往往带有较高危险性和专业性等特点，因此从事该行业需要取得并有效保持一些特殊的资质证明和许可。以煤矿开采企业为例，就企业自身而言，除需取得一般性企业证照外，还需要取得包括采矿许可证、安全生产许可证、煤炭生产许可证、爆炸物品使用许可证等在内的一系列特殊的经营性证照。就其相关工作人员而言，矿长需取得矿长资格证书、安全资格证书，瓦斯检验工、采煤机司机等特种作业人员需取得特种作业人员操作资格证书等许可证。

因此，在尽职调查的过程中（当然，这主要属于法律尽职调查的部分），考察目标公司是否具备相应的经营资质，其各项证照是否齐全、合法有效，是否即将到期或是否需要因外资入股、控股而重新取得以及延期或变更是否存在实质性障碍等等，是必不可少的。

2. 储量、安全设施等技术性问题

对于矿产储量、实际产能、矿井安全设施等专业性较强的问题的分析，通常需具备相当的专业知识和技术手段，因此尽管律师可以协助核查相关证照、批文，也可以协助进行实地考察，但为谨慎起见，外国投资者还是应当聘请专业的技术顾问作出进一步的评估和判断。

3. 用地和水土保持等问题

进行能源资源开采、经营作业在不少情况下会涉及占用他人已经拥有使用权的

草原、林地甚至耕地等土地。为此，能源资源企业需要事先取得草原、林地等主管部门的审核同意，并妥善解决土地的性质和用途变更（比如将农用地变更为建设用地等）、对土地原权利人的补偿、土地复垦、植被恢复等问题。否则，企业一方面可能与原权利人发生纠纷，另一方面也可能面临被主管机关责令退还非法占用的土地、限期拆除地上建筑物（比如已搭建的矿井、职工宿舍）和罚款等行政处罚，情节严重的，直接负责的企业主管人员及其他责任人员甚至可能构成犯罪，企业日后的生产经营也将因此而受到重大不利影响。

此外，由于能源资源行业往往涉及地表及地下作业，相较其他行业而言更容易造成水土流失等破坏（对企业自身而言，水土保持其实也与其安全生产等方面息息相关），因此，水土保持问题对该行业的企业来说也属于一项较为特别而重要的义务。根据规定，相关企业在建设项目开工前和竣工后，需要分别取得水利主管部门对其水土保持方案的批准和相关设施的验收。

鉴于此，考察目标公司在用地及水土保持等方面的合法合规性，也是需要投资者在尽职调查的过程中予以关注的事项。除律师可以协助核查相关批文是否取得，会计师可以协助核查土地出让金、补偿费等款项是否付清外，投资者也需要视情形聘请环境顾问作出专业评估。

* * *

以上为我们根据中国现行法律法规，并结合我们在相关领域的一些经验，对外商投资能源资源行业几个法律问题所作的简要分析和总结。本备忘录仅供一般性参考，并不能视为我们就相关事项出具的任何正式中国法律意见。

如阁下对于本备忘录述及之内容有任何疑问，敬请随时与敝所联系（inquiry@hanyilaw.com）。

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