

# Mining 2019

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# Mining

## 2019

**Contributing editors****Michael J Bourassa and Alison Lacy**

Fasken

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Mining*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Michael J Bourassa and Alison Lacy of Fasken, for their continued assistance with this volume.



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# Mining in Japan

Hiroyasu Konno and Yoshiaki Otsuki

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## Overview

### Principal law governing mining activity in Japan

The principal law that regulates the mining industry in Japan is the Mining Law (Law No. 289 of 20 December 1950). The mining right is defined in the Mining Law of Japan as the generic name for the prospecting right and the digging right. It is necessary to obtain a prospecting right to conduct exploratory digging and a digging right to conduct digging for production.

### Special treatment of certain types of mineral

The 'Specified Mineral' procedure is different from the one for any other types of minerals. With respect to a Specified Mineral, a tender bid must be conducted for each specified area to be designated by the government, whereby the most competitive applicant will be granted the mining right for such specified area. The Specified Minerals designated under the Mining Law of Japan is as follows:

- oil and combustible natural gas;
- gold ore, silver ore, copper ore, lead ore, bismuth ore, tin ore, antimony ore, mercury ore, zinc ore, iron ore, iron sulfide ore, manganese ore, tungsten ore, molybdenum ore, nickel ore, cobalt ore, uranium ore, thorium ore and barites, which constitute hydro-thermal deposits located subsea or beneath the sea;
- copper ore, lead ore, zinc ore, iron ore, manganese ore, tungsten ore, molybdenum ore, nickel ore and cobalt ore, which constitute sedimentary deposits located subsea or beneath the sea; and
- asphalt.

Mining rights for minerals other than Specified Minerals are granted on a first-come, first-served basis, whereby the mining right will be granted to the applicant who has lodged the application faster than the other applicants.

### Ownership of land and minerals

Regardless of the registration of the mining rights, the surface rights of the land shall be kept by the landowner. On the other hand, minerals are deemed to belong to the nation before they are dug out. However, once they are dug out over the land, the minerals shall become the property of the holder of the relevant mining right, either prospecting right or digging right, as outlined below.

### Prospecting right

#### Reservation of preference of application for a prospecting right

With respect to a Specified Mineral, the most competitive applicant will be granted the prospecting right; accordingly, nothing is 'reserved' by merely submitting the first (or faster) application.

For types of minerals other than Specified Minerals, on the other hand, the applicant with precedence over the land is determined according to the 'time of dispatch of the application'. The time of dispatch of the application is to be proven by certification of the time of the undertaking issued by the post office that delivers the application.

If the applicant is the first person to dispatch an application for a prospecting right, the applicant will have precedence over any others for the area, unless and until such application is rejected by the Ministry of Economy, Trade and Industry (METI) thereafter.

Regardless of whether it is a Specified Mineral, after the applicant is granted a prospecting right, the applicant will then have precedence over any others for the area pursuant to such prospecting right, as long as such prospecting right remains valid.

### Assessment period of application

For a Specified Mineral, a tender bid period (eg, six months) is designated by the government, after which each application is assessed. The period for assessing the application for the Specified Mineral depends on the situation. For minerals other than the Specified Mineral, on the other hand, METI's standard review period is around six months, in addition to the statutory consultation with local government taking around three months; therefore, the standard period for assessment of an application for prospecting right is nine months in total.

### Review process of application

The items to be reviewed by METI with respect to an application for a prospecting right are the same both for the Specified Mineral and other types of minerals. No mining right, either prospecting or digging right, can be granted unless the applicant is a Japanese national or a Japanese corporation. As long as the applicant is a Japanese corporation, however, the shareholder thereof may be a foreigner (it can be a foreign-controlled entity).

Subject to these conditions, METI will review, among others, the applicant's financial basis, technical ability and social reliability. The financial basis is verified by looking at the amount of funds necessary to conduct the relevant mining activities and the source of such funds (eg, own funds, group company loan or bank loan), as well as by looking at the applicant's balance sheet and profit or loss statement. Technical ability will be verified by looking at the management structure of the technicians and the experience of each technician, in particular verifying whether the technicians are experienced concerning the type of mineral for which the application is submitted.

### Denial of granting a prospecting right

As noted above, for a Specified Mineral, the most competitive applicant will be granted a prospecting right.

For the other types of minerals, whenever the requirements explained in the paragraph above are not satisfied in METI's opinion, the application must be rejected. As explained in the first paragraph of this section, the applicant will lose precedence if its application is rejected by METI. There are two ways in which the applicant can appeal against such rejection: appeal against METI itself; or sue METI before the court.

### Minimum work obligation upon granting of a prospecting right

There is no requirement for minimum work obligation or expenditure upon the applicant is granted a prospecting right. However, the holder of the prospecting right has to begin some exploratory digging work within six months of the prospecting right being granted. The meaning of 'begin the exploratory digging work' will be determined based on the situation; but one of the benchmarks is whether the work set out in the operational plan for the planned mining activities – which must be submitted to METI – has been commenced.

### Negotiation with landowner

In principle, this depends on the individual negotiation with the landowner. If the individual negotiation is not successful, the holder of a mining right can seek METI's permission to enter the land without the landowner's approval.

### Extension of tenure of prospecting right

A holder of a prospecting right can extend the prospecting right by two years just twice, which means the duration of the prospecting right may be six years in total as a maximum. However, the prospecting right for oil and combustible natural gas is valid for four years, extendable twice (those obtained before the amendment of the Mining Law in 2012 are valid for two years, extendable three times).

In any case mentioned in the preceding paragraph, the holder of prospecting right must satisfy the following requirements in order to extend the prospecting right:

- he or she must demonstrate that it has diligently explored the minerals;
- it is necessary to continue the exploration activity to confirm the status of the mineral deposit; and
- the prospecting right's holder has paid the mining lot tax.

### Taxation related to prospecting right

There are two types of Japanese local tax on mining activities, whereas there is no national tax.

A mining lot tax is imposed proportionate to the size of the mining area for which the mining right is granted (either a prospecting right or digging right).

A mineral product tax is imposed proportionate to the amount of the minerals produced. As far as there is any production of minerals, the mineral product tax will be imposed even if only the prospecting right is granted.

### Digging right

#### Conversion from a prospecting right to a digging right

As mentioned above, for the Specified Mineral, the most competitive applicant will be granted the digging right; accordingly, no other applicant will be granted the same right for the same specified area.

For the other types of minerals, in order to apply for a digging right the applicant must demonstrate that it has found the mineral deposit and it makes commercial sense to dig for the minerals, given the amount and quality thereof. There is no statutory system under the Japanese Mining Law to convert a prospecting right into a digging right automatically; however, the applicant can maintain precedence over the mining area by applying a digging right while its prospecting right is valid.

#### Review process of application for a digging right

The review process of the application for a digging right is almost the same as the one for a prospecting right. However, in case of application for a digging right, the applicant must submit an explanatory document outlining the location, strike, dip, thickness and any other information regarding the status of the mineral deposit discovered under the prospecting right.

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### Denial of granting digging right

This is the same as for prospecting rights.

### Minimum work obligation upon granting of digging right

This is the same as for prospecting rights. The applicant must commence the work set out in the operation plan for the purpose of digging the minerals within six months of the digging right being granted, whether it is construction of production facilities or any other digging activities.

### Negotiation with landowner

This is the same as for prospecting rights.

### Tenure of digging right

Unlike the prospecting right, there is no tenure for the digging right, which lasts forever after the digging right is registered in the official mining registry. However, if the digging rights holder discontinues digging activity for over one year, the digging right may be revoked at METI's discretion.

### Recent developments in the Mining Law

In 2011, the Japanese government discussed how to procure minerals such as oil, gas and methane hydrate, given the recent trend towards 'resource nationalism' arising in oil-producing countries. To address this problem, an amendment to the Mining Law was effected in January 2012, under which the Specified Mineral regime noted above was introduced, whereby the most competitive applicant will be granted a mining right for a Specified Mineral such as oil, gas, gold ore, and silver ore.

Under the Mining Law as amended in 2012, the Japanese government was scheduled to examine the enforcement of, and any other situation around, the amended Mining Law five years after the amendment, which was January 2017. Based on this examination, METI recently amended the relevant standards for its approval of extension of tenure of prospecting right, and those for its approval of the postponement of commencing operation or cessation of the same under either the prospecting right or digging right. This amendment came into effect as of 1 April 2018.

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