

CLIENT ALERT

Yours, *Mine*, or Ours? Mitigating the Risks of Resource Nationalism

Winter 2014

Mining companies have undoubtedly faced a new wave of resource nationalism over the past several years. In fact, Ernst & Young ranked resource nationalism as the number one risk facing mining and metals companies worldwide for 2011-2012 and for 2012-2013, and as the number three risk for 2013-2014.

On the other hand, a mining company's recognition that resource nationalism poses a major threat to its operations or investments does not necessarily translate into that company developing strategies to address the problem. Instead, there is a tendency for mining companies to perceive resource nationalism as a monolithic phenomenon resulting from circumstances that are largely unpredictable, unavoidable, or both: for example, general political or social instability, or a desire to increase government revenues at times of rising commodity prices. As a result of this perception, mining companies often assume that standardized, broad-brush solutions – such as purchasing political risk insurance or implementing high-level government and community relations campaigns – are the best or only means of dealing with the threats posed by resource nationalism.

Although these general risk-mitigation strategies certainly have an important role to play in investment protection, mining companies should not assume that resource nationalism is merely a function of market cycles, populism, or social inequality or unrest. At its core, resource nationalism stems from a sense of ownership of the land, the subsoil, and their natural products. Unfortunately, the questions of (i) who has (or ought to have) property rights in the natural resources necessary for mining; (ii) when such rights arise; (iii) what their scope may be; and (iv) how they are to be balanced, are often fraught with ambiguity or contention. Depending upon the circumstances, competing claims to ownership may be credibly espoused by the State as an institution; by subnational administrative units such as provinces; by indigenous groups; by local landowners; and, of course, by mining companies.

Therefore, in order to effectively understand and mitigate the risks of resource nationalism, mining companies should take the time to study the particular legal, social and cultural approaches to: (i) the ownership of natural resources; and (ii) the acquisition and protection of property rights in their target jurisdictions before making significant capital investments there. The goal of this exercise should be to identify any ambiguities or deficiencies in the relevant property rights that may be acquired by the company, as well as any potential areas of conflict of interest with the State and/or other interested parties. In some cases, potential deficiencies and conflicts can be effectively addressed through ex-ante agreements. To the extent that such agreements cannot be negotiated, the company can then make an informed decision whether to proceed

Mining Law Monitor Winter 2014

- [SMCRA: It's Back in the News and That's Not Good News For Coal](#)
- [How Mining Companies Can Mitigate Risks and Protect their Investments, Part I: International Investment Agreements](#)
- [Yours, *Mine*, or Ours? Mitigating the Risks of Resource Nationalism](#)
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with its planned mining project, and about which additional risk-mitigation measures – such as, for example, structuring its investment to provide recourse to investment treaty arbitration – it ought to adopt.

The present article is intended to provide a brief introduction to the relationship between ownership of natural resources, property rights and resource nationalism. Part I addresses some different approaches to the ownership of *in situ* minerals. Parts II and III then explore the risks posed to mineral ownership and investments in light of resource nationalism as expressed at both national and local levels, respectively.

Ownership of *In Situ* Minerals

In order to determine how resource nationalism is likely to manifest itself in relation to a given project, mining companies must first consider the basic issue of who owns the *in situ* minerals. (For purposes of this article, the term "*in situ* minerals" refers to minerals as found in their natural state in the earth, but excludes sand, gravel, aggregate and other substances that are the target of quarrying operations.) Quite often, incidents of resource nationalism arise out of misunderstandings or disagreements over this basic issue.

1. Public vs. Private Ownership Regimes

In general, all mining regimes can be divided into two categories: those in which some or all *in situ* minerals can be subject to private ownership; and those in which *in situ* minerals are considered property in the public domain. The private ownership regime is related to the notion that original ownership of land conveys ownership over the subsoil and its products, sometimes referred to as the principle of *cuius est solum, eius est usque ad coelum et ad inferos* (whoever owns the soil, it is theirs up to heaven and down to hell).

Although private ownership of *in situ* minerals by landowners was widespread in Europe until at least the period of the French Revolution, and was exported across the territories of the former British Empire, it has now largely been phased out in the major mining jurisdictions. In some jurisdictions, such as Australia and New Zealand, limitations on private ownership have been implemented over time, through future reservations to the State, and without any outright prohibition. Similarly, in India, ownership of *in situ* minerals is not absolutely vested in the State, as recently affirmed by a landmark Supreme Court decision upholding claims to subsoil minerals raised by a group of hereditary landowners in Kerala. As a practical matter, however, almost all subsoil minerals in these various jurisdictions have now been reserved to the State, regardless of surface ownership. The only major jurisdiction in which private ownership has not been specifically limited is the United States.

Obviously, it is important for mining companies to determine whether any *in situ* minerals they hope to exploit in their target jurisdictions are capable of being subject to private ownership, as this will have a significant impact on both their ability to acquire mining rights and the scope of those rights. In most jurisdictions, absolute ownership of subsoil minerals will be vested in the State on behalf of the people, and the State will consequently be prohibited (often as a matter of constitutional law) from divesting ownership of those minerals to any private party. However, as discussed further below, the State is generally permitted to grant rights of use to private parties in relation to these minerals in order to serve the needs of the public interest, and may expropriate and lease surface lands to the mining company in order to effectuate these rights of use. In public ownership systems, it is imperative that mining companies understand the scope of the rights of use that may be granted by the State, and the precise circumstances under which these rights can be obtained and maintained.

2. The Significance of Local Stakeholders in Public Ownership Regimes

Although the public ownership system is now the norm internationally, it is important to point out that in many countries the system is still relatively untested. In South Africa, for example, the State was not legally deemed to be the owner of subsoil minerals until 2002, breaking with a long tradition of private ownership. In that country, the switch to a public ownership regime was implemented with the aim of redressing historical disenfranchisement of the local black population.

Furthermore, the transition to a public ownership regime – even when formally undertaken long ago – does in some cases continue to give rise to complex conflicts between the State, mining companies, and local communities. In Ghana, for example, ownership of the surface land as well as the subsoil and its minerals had long been vested in the local communities in accordance with native customary law, which continued to apply with few modifications during the British colonial period. Furthermore, mining is viewed as a cultural patrimony for certain of the country's primary ethnic groups. The abrupt assumption of ownership and control of minerals by the State following independence was out of step with these traditions, contributing to a proliferation of illegal mining activities and to increased conflicts between the local population and mining companies exercising rights legally granted by the State.

In the Philippines, some form of public ownership of *in situ* minerals has formally existed for centuries. However, since the restoration of full democracy in 1986, local communities and provincial governments have been at the forefront of a series of challenges to the Philippine State's efforts to attract and permit foreign mining investment, which is perceived as being contrary to traditional land use rights and to local prerogatives.

As these few examples demonstrate, mitigating the risks of resource nationalism in public ownership regimes requires not only an understanding of how the State's ownership of *in situ* minerals is to be balanced against the mining company's rights of use, but also how it may conflict with the perceived rights and interests of the relevant subnational constituencies.

Mitigating the Risk of Resource Nationalism by the State

Georgius Agricola's 1556 treatise, *De Re Metallica*, cautioned that a miner should never be ignorant of the law, in order "that he may claim his own rights ... that he may not take another man's property and so make trouble for himself, and that he may fulfil his obligations to others according to the law."

Over 450 years later, waves of European colonialism have come and gone, the Iron Curtain has risen and fallen, and the development of international norms has brought the rights of indigenous groups and the protection of the environment to the forefront of governmental consciousness. Against the backdrop of these momentous changes, the search for mineral wealth has taken mining companies into ever more diverse and remote corners of the world, embroiling them in an increasingly complex array of legal and social issues.

In the midst of this complexity, the importance of legally defined property rights is greater than ever. The scope of the property rights that may be acquired by mining companies in relation to their mining activities, and the obligations they will owe to the State and to third parties in relation to those rights, is subject to significant variation and should be the subject of close attention. Nevertheless, the legal protection of these property rights, as an institution, is essentially universal. Indeed, in almost all jurisdictions around the world, the protection of property rights is enshrined in the Constitution or in a higher-order legal norm as a fundamental obligation of the State – and serious questions should be raised about the suitability as an

investment destination of any jurisdiction where this is not the case. Furthermore, the acquisition of property rights is often the touchstone for access to international investment protection regimes, and the gateway to international dispute resolution.

The practical implication of this is that the boundaries of a company's property rights under the local law generally also provide the boundaries of permissible actions by the State or private parties, *vis-à-vis* that company's mining operation. Importantly, these boundaries apply not only to the State's application of the existing legal framework (for example in an administrative process), and to its enforcement of that framework *vis-à-vis* third parties (for example by preventing encroachment onto land required for the mining company's operations), but also to the State's adoption of changes to that framework. Thus, while the State generally has broad discretion to exercise its legislative prerogatives in the manner best suited to the public interest – which may or may not be in the interest of the mining company – it also has a superseding obligation not to revoke or refuse recognition to a vested property right unless it makes payment of appropriate compensation.

In view of the foregoing, the acquisition of property rights should be seen as the lodestar for any strategy aimed at minimizing the risk of resource nationalism as manifested through action or inaction by the State. Foremost among the relevant property rights are the rights in the target minerals, which, as noted above, will generally need to be acquired from the State in the form of administrative, judicial, or sometimes contractual entitlements. Furthermore, the mining company will also need to acquire rights in any auxiliary resources and project components that are required to carry out its operations, including surface land, water, roads and railroads, electricity, *etc.* These rights may need to be obtained through entitlements from the State or from third parties.

Finally, the mining company should consider what rights it has in any future revenue to be earned from its operations. While many local laws (as well as international law) place limitations on the State's right to interfere with future revenues in such a way as to render the mining company's property rights valueless, such laws do not ordinarily provide an entitlement for the company to make a certain return on its investment. On the other hand, certain rights in this regard can be obtained through agreement with the State. (See [footnote 1](#) for a representative, but not exhaustive, list of issues that should be considered in relation to the acquisition and definition of property rights by the mining company – and in turn the scope of the State's right to intervene in the company's operations.)

Mitigating the Risk of Resource Nationalism by Subnational Constituencies

As set out above, the acquisition of property rights is essential to protect against resource nationalism by the State, since the State is ordinarily bound to respect property rights granted in accordance with its own laws. On the other hand, the local population does not always accept the legitimacy of these laws, particularly where their own claims to land and mineral use may pre-date the existence of the State itself. In this context, the position of indigenous populations (or at least the recognition of indigenous rights by the State) becomes particularly important. For instance, the indigenous population may understand that the land and natural resources belong to the resident community as a whole rather than being subject to ownership by private individuals or the State. Or, as occurs in Canada, the State may recognize indigenous surface rights but assert overriding national rights over the minerals as necessary.

The United Nations estimates that there are more than 370 million indigenous peoples spread across 70 countries worldwide. Through law, custom, or a combination of the two, these indigenous peoples often have a claim of ownership to land and natural resources that are also potential sources of mining development. Even where indigenous peoples' claims of ownership are not formally recognized by the State, a mining company's failure to understand and address these claims exposes it to significantly increased risks of resource nationalism.

Claims of indigenous peoples to rights over land and natural resources can arise in a number of different contexts, including:

- Where they have legally recognized ownership or control over the land and natural resources in the form of treaties, land claim agreements, or tribal reserves;
- Where they are occupants or users of land and natural resources (either as customary owners or as people whose customary lands are elsewhere);
- Where they have traditionally used the land and natural resources for activities such as hunting, trapping, artisanal mining, or fishing;
- Where the land contains or may contain sites, objects, or natural resources of cultural significance to them; and
- Where their community's social, economic, or physical environment will be negatively affected by mining activities.

(See [footnote 2](#) for a discussion of how national and international law are increasingly recognizing the rights of indigenous populations to limit the acquisition and exercise of mining rights.)

In view of the potential for conflicts to arise in relation to the assertion of rights over land or resources by indigenous communities, mining companies wishing to develop or operate projects on or near land customarily utilized (whether or not legally owned) by indigenous peoples should take additional measures to mitigate the risk of resource nationalism over and above those that it adopts *vis-à-vis* the State, whether or not they are required by law. There are important ethical and financial motivations for mining companies to ensure the effective management of their relationships with indigenous communities. From an ethical perspective, indigenous land is often the primary source of food, medicine, and shelter for the community, and may be considered as a physical representation of the community's culture and identity. Mining projects therefore have the potential to significantly impact the livelihood and culture of indigenous populations and care should be taken to minimize these disruptions.

From a financial perspective, poor relations with an indigenous community can result in tangible financial consequences for the company, such as litigation, delays, vandalism, negative publicity and risk to corporate reputation, or even the ultimate termination of the project.

Thus, in any context where indigenous rights could become relevant, mining companies should proactively seek out and consult with the indigenous communities from the outset of the potential project by engaging in a comprehensive and inclusive dialogue with all elements of the affected community, including women and youth.

In this consultation, the company should seek to communicate the company's long-term and short-term plans and to discover:

- any conflicts that may arise with respect to who owns the land and natural resources;
- what steps may be taken to mitigate/avoid adverse affects of the proposed mining project on the indigenous community;
- any unique indigenous knowledge about the local environment (*e.g.*, location of sacred lands, valuable traditional knowledge and experience in how to manage the local environment in a sustainable manner); and
- the nature of any economic and community benefits that can be offered to indigenous communities, such as training, employment, bidding opportunities on service and supply contracts, literacy programs, educational scholarships, health clinics, *etc.*

Where warranted, mining companies should consider negotiating Community Development Agreements (CDAs) on the basis of their consultation with the relevant indigenous communities. These agreements are increasingly being used as a key mechanism for defining the obligations of mining companies *vis-a-vis* impacted communities and are mandated in a number of countries as part of the regulatory consultation process (*e.g.*, Papua New Guinea, Chile, South Africa).

Unfortunately, resolving tensions between the claims of indigenous peoples and the rights of mining companies is complex and time-intensive for all involved, especially where national legislation does not yet adequately address the issues. Nevertheless, as previously indicated, the best way to mitigate the risk of resource nationalism is to define conflicting rights at the outset on a mutually acceptable basis, and it remains incumbent upon mining companies to attempt to do so whenever possible.

CONCLUSION

Resource nationalism is a complex phenomenon, but that does not mean that mining companies cannot adopt targeted strategies to mitigate the risks that it may pose for their projects. By carefully considering the acquisition and scope of property rights in relation to the planned mining project, as well as any competing claims of ownership that may be espoused by the State or by third parties, mining companies can more effectively anticipate and weather the impacts of resource nationalism across regions, and in all market cycles.

Footnote 1: List of issues to consider re scope of property rights

- **Are there any conditions imposed on who can hold mining rights?**
 - Is there a local ownership requirement?
 - Is the State entitled to a participation interest?
- **What sort of entitlement is necessary, if any, to explore for minerals in the target area?**
 - Is there priority in acquisition of the entitlement based on date of application?
 - Does this entitlement confer exclusive rights upon the holder?
 - What is the duration of the entitlement? Can it be extended and, if so, under what circumstances? Are the circumstances clearly stated in the law?
- **Is there a separate entitlement for exploration and mining, or are they unified? If the entitlements are separate, what is the specific relationship between them?**
- **What are the conditions to acquire a license or concession to mine a deposit? Are the conditions defined in the law? Are they objective?**
- **Does the law set limits on the area of mining concessions, regardless of the size of the discovered deposit?**
- **Does the right to mine include all minerals that may be discovered, or is it limited to certain minerals? Can mineral rights over the same area be co-existent?**
- **Does the State maintain a reliable cadastre recording the mineral rights of third parties? What is the effect of registration of mineral rights in the cadastre?**
- **Do the entitlements granted by the State confer a right of surface access?**
 - How does the law deal with the rights and obligations of third party surface owners?
- **Are there any legal limitations on mining as a use of the land?**
 - Restricted or protected areas?
- **Does the law, license or agreement address the issue of the miners' rights to install and maintain required infrastructure? Do they address rights of access to transportation routes, water, electricity, and other resources, whether public or private?**

- Does the State retain any control over the minerals once they are extracted?
 - How does the law deal with processing, transport, export and marketing rights?
 - Does the law require the minerals to be beneficiated locally?
 - Can the mining rights be subject to encumbrance? Are they transferable?
 - Are there conditions that must be met in order for mining rights to be maintained, *e.g.*, minimum work obligations or fee requirements?
 - Are there requirements as to when extraction of minerals must begin? Is time for development activities adequately accounted for?
 - What specific limitations are imposed upon the exercise of exploration and mining rights, *e.g.*, environmental and health and safety requirements, *etc.*?
 - Which specific permits are required? Are the conditions and timelines for obtaining these permits clearly stated in the law?
 - What are the grounds for revocation of mining rights? Are they clearly stated in the law?
 - To what extent can rights be acquired to limit actions by the State in respect of future mining revenues, *e.g.*, does the law provide for rights to exemptions or stabilization of taxes or royalties under certain circumstances?
 - What are the conditions to acquire such rights? Are they clearly stated in the law?
 - To the extent that the scope of the property rights conferred on the mining company under the law or under the standard State contract is ambiguous or deficient, can these ambiguities and deficiencies be addressed in a more detailed mining or investment agreement with the State?
 - Does the mining company have the right to submit disputes under any such agreements to international arbitration?
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Footnote 2: International and National Responses to Indigenous Peoples' Assertion of Rights Over Land and Natural Resources

The Indigenous and Tribal Peoples Convention (Convention 169), which was adopted on June 27, 1989, is an International Labour Organization Convention and one of the most important operative international laws guaranteeing the rights of indigenous peoples. Convention 169 is legally binding for those States that have ratified it and recognizes indigenous peoples'

right to self-determination, while setting standards for national governments regarding indigenous peoples' right to land as well as economic and political rights.

Building upon the principles of Convention 169, the United Nations General Assembly adopted the Declaration for the Rights of Indigenous Peoples (UNDRIP), on September 13, 2007, which also sets out the individual and collective rights of indigenous peoples, including rights to culture, identity, language, employment, health, education and other issues. In contrast to Convention 169, UNDRIP is not legally binding, although it reflects obligations of States under other sources of international law, such as customary law and general principles of law. Although ILO Convention 169 and the UN Declaration were negotiated at different times by different bodies, they are mutually reinforcing and compatible in their focus on the need for national legislation to provide protection of indigenous rights.

Of specific interest to the mining industry, both the ILO Convention and the UN Declaration provide that indigenous peoples should have the legal right to be consulted on projects affecting their land and natural resources, which may include the right to say "no" to proposed mining activities.

At the international level, these instruments have been accepted by multilateral development agencies, NGOs, and prominent members of the investment community. For example, in August 2011, the International Finance Corporation (IFC) released a revised Sustainability Framework requiring its clients to obtain the free, prior, and informed consent (FPIC) of indigenous peoples under certain circumstances, including the exploitation of natural resources on lands traditionally owned by or under the customary use of indigenous peoples.

At the national level, States are establishing formal recognition of indigenous peoples' rights at varying levels in the legal framework – although typically in a manner that is less expansive than the formulation set forth in Convention 169 and the UNDRIP. For instance, Australia's national legislation requires explicit consent by traditional landowners as a pre-requisite for a mining project to proceed (although the State can override a "no" decision if the project is determined to be in the national interest). Other States mandate consultation with indigenous peoples as a part of the regulatory permitting process, with varying degrees of commitment by the State to ensure that consent is obtained (*e.g.*, Canada, Peru, Columbia, Papua New Guinea, Chile, South Africa, and the Philippines).

Although national legislation on this subject covers a broad spectrum, the trend appears to be moving toward a clearer recognition of indigenous rights to consent to minerals projects and the imposition of consultative requirements on the part of the extractive industry.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ashley R. Riveira

Counsel – Washington, D.C.

Phone: +1.202.624.2983

Email: ariveira@crowell.com