



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Capturing the benefits of a transfer of mineral rights - scenarios to capture by contract/legislation/regulation and issues to consider

Indirect transfers		
<p>There is no direct transfer or assignment of the rights in the project. A new agreement (e.g., mining license) is not signed.</p> <p>There is a change in control of the company* which holds the mining license which may be carried out in a foreign country – as a result of a sale of shares of either the company holding the mining license, or in one of the companies in the chain of ownership of that company (e.g., the holding company or the ultimate parent company).</p>		
Scenario 1	Scenario 2	Scenario 3
<p>A locally incorporated company (Local Co) holds the rights, or a part of the rights, to a project (e.g., through a mining license).</p> <p>Local Co is ultimately owned by a foreign company, Foreign Co. There may be an intermediary holding company, in another foreign jurisdiction (Holding Co).</p> <p>Foreign Co is sold on a foreign stock exchange, in a takeover of all of its shares by another company, New Co.</p> <p>By acquiring all of the shares in Company Foreign Co, New Co now owns or controls</p>	<p>A joint venture company is established in the country (locally incorporated) (Joint Venture Co) and holds the rights to a project (e.g., through a mining license).</p> <p>The shares in Joint Venture Co are owned by a number of foreign companies (Company A, Company B and Company C) who established the joint venture in order to carry out the project. They may own their shares directly, but usually own the shares via an intermediary company (located in a third jurisdiction).</p> <p>Joint Venture Co signs the agreement for the rights to the project, but is controlled by Company</p>	<p>A foreign company, Foreign Co, directly holds the rights or a part of the rights, to a project (e.g., through a mining license).</p> <p>Foreign Co is sold on a foreign stock exchange, in a takeover of all of its shares by another company, Purchaser Co.</p> <p>By acquiring all of the shares in Foreign Co, Purchaser Co now holds the rights to the project.</p>

<p>Holding Co (if applicable) and Local Co. New Co therefore holds the rights (indirectly) to the project.</p> <p><u>Example, Rio Tinto's acquisition of Riversdale - Mozambique</u></p> <p><i>Rio Tinto purchased all of the shares in Riversdale Mining Limited (an Australian company) on the Australian Stock Exchange, for around US\$ 4 billion. Riversdale Mining Limited had a subsidiary, Riversdale Energy (Mauritius) Limited (a company registered in Mauritius) which owned the local company, Riversdale Mozambique Limitada (RML).</i></p> <p><i>RML held the rights to the coal projects in Mozambique. Through its takeover, Rio Tinto indirectly acquired the rights to the Mozambique coal projects. The value of Riversdale Mining Limited was due to its rights in the Mozambique coal projects.</i></p>	<p>A, B and C.</p> <p><u>Scenario 2(a)</u> Company A (or B or C) sells its shares in Joint Venture Co to another company, New Co. New Co now holds shares in Joint Venture Co, and therefore in the project.</p> <p><u>Scenario 2(b)</u> One of the foreign companies (Company A) owns its shares in Joint Venture Co through an intermediary company, Intermediary Co or a number of intermediary companies, also incorporated in a (different) foreign jurisdiction.</p> <p>Company A sells all of its shares in Intermediary Co (or if more than one intermediary, in all of the intermediary companies) to another company, Company F. Company F now owns Intermediary Co, and therefore indirectly owns shares in Joint Venture Co and in the project.</p> <p><u>Example (2(b)): Talbot Group sale of shares in Minas de Revuboe</u></p> <p><i>Talbot Group, an Australian company, owned shares in Minas de Revuboe, a company registered in Mozambique. There are two other shareholders in Minas de Revuboe, Nippon Steel and Posco. Talbot Group owned its shares in Minas de Revuboe through two intermediary companies, Jockeys Financial Ltd and Midrev Resources Mining Mauritius.</i></p> <p><i>Talbot Group (through the intermediary companies) sold all of its shares in the intermediary companies (Jockeys Financial Ltd and Midrev Resources Mining Mauritius) so that it effectively sold 100% of its shares in Minas de Revuboe to Anglo-American Corporation for a</i></p>	<p><u>Example: Acquisition of shares in Nimini Holdings Limited by Polo Resources – Sierra Leone</u></p> <p><i>Nimini Holdings Limited is a company registered in the British Virgin Islands. It holds licenses to gold projects in Sierra Leone. Polo Resources Limited, also registered in the British Virgin Islands acquired all of the shares in Nimini Holdings Limited, in two steps, on the Toronto Stock Exchange from Axminn Inc, a Canadian company.</i></p> <p><i>By acquiring all of the shares in Nimini Holdings Limited, Polo Resources became the holder of the Sierra Leone licenses.</i></p>
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<p><i>Mozambique is in the process of amending its laws so as to capture transactions such as this in future.</i></p>	<p><i>profit of US\$ 675 million.</i></p> <p><i>By owning shares in the intermediary companies, Anglo-American Corporation owned shares in Minas de Revuboe.</i></p> <p><i>In this case, Talbot Group notified the Ministry of Mineral Resources in Mozambique of its intention to sell its shares in the intermediary companies. In response, a commission was set up including staff from the Ministry of Mineral Resources and from the Mozambique Tax Authority which determined that a tax of 40% of the Talbot Group's capital gains should apply.</i></p>	<p><i>Polo Resources Limited subsequently issued new shares representing 10% of the issued share capital in Nimini Holdings Limited to Plinian Guernsey Limited (which is a 100% owned subsidiary of Plinian Capital Limited, based in the United Kingdom and appointed as operator of the projects).</i></p>
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Issues to consider

- The host country of the mining rights should be able to capture the benefits of the transfer, provided that the mining license and/or regulations and laws contain appropriate provisions.
- The country could capture the gains arising from the sale of shares of the foreign company (whether the ultimate parent company or an intermediary) on the basis that the foreign company holds underlying assets which are in the country. **This is looked at as an indirect transfer of the local assets (i.e., the local company and the mining license).**
- Contracts and regulations must cover not just direct transfers of rights, but also indirect transfers which can occur by a change in control of the ultimate parent company of the company which holds the rights, which company may be located outside of the jurisdiction.
- In order to be in a position to capture such gains, the government should require that all license holders disclose the identification of their ultimate parent company and its location, as well as the company's group structure (ie including all intermediary companies).
- Because there is no direct change to the agreement governing the project, and because it is occurring outside of the country, the government may have no advance notice of the transaction.
- Accordingly, any regulations should require that the government be given prior notice of such transactions along with relevant documents relating to all of the entities involved in the transaction. For example, the company should provide information as to the value of the transaction, **as well as how much of the total value of the entity which was sold is due to the project in the host country.**

Tax consideration and suggestion: the tax would apply only if the local company(or a non-resident company with Permanent Establishment in the host country) held mostly, say 50% or more, mineral related assets and then only if the sale involves a transfer directly or indirectly of more than say, 10%, of the share of the non-resident company owning the local company. If the sale involves assets other than the local tainted mineral

properties the tax would be based on the ratio of the value of the tainted assets to the total assets. The purchaser would be required to collect the tax by withholding from the purchase price. The tax rate could be the local capital gains rate or the applicable corporate tax rate if no capital gains rate. If the seller believes that it has been overtaxed it can file a tax return and pay tax on its actual gain against which the tax withheld would apply and a refund provided. If the tax is not collected you may consider imposing a lien on the concession agreement and/or other assets of the local company to cover defaulted tax obligations. Alternatively, the shares of the local company would be considered to be held in trust for the government.

Direct transfers

There is a direct transfer/assignment of the rights in the project (e.g., the mining license or a part of it is assigned from one company to another). There is no change of control/sale of shares of the company holding the license. What occurs is a transfer of rights in the license either between foreign companies, between domestic companies or between foreign and domestic companies

Scenario 4

A locally incorporated company Local Co holds a part of the rights to a project (e.g. through a mining license).

Scenario 4(a)

Local Co sells its part of the rights to the project to another company (New Local Co), which is also locally incorporated.

Scenario 4(b)

Local Co sells its part of the rights to the project to another company (New Foreign Co) which is incorporated in a foreign jurisdiction.

Scenario 5

A foreign company, Foreign Co, directly holds the rights or a part of the rights, to a project (e.g. through a mining license).

Foreign Co sells its rights, or its part of the rights, to another foreign company, New Foreign Co, with the sale concluded in a foreign jurisdiction. New Foreign Co now owns rights, or a part of the rights, in the project.

Example: Tullow purchase of Heritage Oil's share in a project - Uganda

Tullow (a company incorporated in the Isle of Man) and Heritage Oil (a company incorporated in Mauritius, ultimately owned by a company incorporated in the United Kingdom) were both signatories to Production Sharing Contracts (PSC) for 2 blocks in Uganda, each holding a 50% stake. Heritage Oil sold its part of the rights in the blocks to Tullow for US\$ 1.45 billion. Tullow became the sole signatory to the PSCs.

The sale agreement between Tullow and Heritage was signed outside of Uganda, in the Channel Islands (off the coast of France).

The government of Uganda sought to impose a capital gains tax on the value of the sale.

However, Heritage disputes that such a tax is applicable as a) it is not referred to in the Production

Sharing Contract, b) the sale took place outside of Uganda and c) Heritage is not a Ugandan company.

There is an arbitration on foot in London (designated in the PSCs as the jurisdiction for dispute resolution), where Heritage is disputing the requirement to pay the tax. The Uganda Tax Tribunal also examined the issue and ruled in the government's favor.

Issues to consider

- The profit made on the transfer/assignment of the right should be captured. Appropriate provisions should be included in licenses and/or regulations and legislation.
- The license or regulations and legislation should require that prior notice be given to the government (with provision for the government to approve the transaction, for example, subject to an evaluation of the financial and technical capabilities of the proposed New Company).
- The license or regulations and legislation should require that companies provide all the necessary information, including:
 - Value of transaction
 - Names of acquirer and company structure (including holding companies and ultimate parent companies)

Taxation consideration and suggestion: a nonresident should be taxed in the same way as a resident if the nonresident owns a substantial portion, say 10% of the resident entity.

*Although we refer in this note to a company, it is important to consider capturing individuals, limited liability companies (LLCs), partnerships, trusts and any other entities that might be used in this type of transaction, including permanent establishments of foreign entities. In addition to the common transactions described above, there are other types of transactions that these entities can carry out in order to try to avoid paying tax on gains, such as step transactions, transference of assets through reorganizations, changing corporate domiciles and so on. For this reason, implementation of a general 'anti-avoidance of tax' rule can be considered.

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