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PROTECTING THE RIGHT TO TAX MINING INCOME:

Tax treaty practice in mining countries

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IISD HEAD OFFICE

111 Lombard Avenue
Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

IISD.org
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The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) supports more than 75 nations committed to leveraging mining for sustainable development to ensure negative impacts are limited and financial benefits are shared. It is devoted to optimizing the benefits of mining to achieve poverty reduction, inclusive growth, social development and environmental stewardship.

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IGF/IISD OTTAWA OFFICE

220 Laurier Avenue W.
Suite 1100
Ottawa, Ontario
Canada R3B 0T4

IGFMining.org
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INTERGOVERNMENTAL FORUM on Mining, Minerals, Metals and Sustainable Development

Protecting the Right to Tax Mining Income: Tax treaty practice in mining countries

November 2021

Written by Alexandra Readhead and Jaqueline Taquiri

This practice note has been prepared under the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) program to address some of the challenges developing countries are facing in raising revenue from their mining sectors. It complements action by the Platform for Collaboration on Tax and others to produce practice notes on top-priority tax issues facing developing countries.

The IGF program to address tax base erosion and profit shifting in mining (the BEPS in Mining program) builds on the OECD BEPS Actions to include other causes of revenue loss in the mining sector.

The program covers the following issues:

1. Excessive Interest Deductions
2. Abusive Transfer Pricing
3. Undervaluation of Mineral Exports
4. Tax Incentives
5. Tax Stabilization
6. International Tax Treaties
7. Offshore Indirect Transfers of Mining Assets
8. Metals Streaming
9. Abusive Hedging Arrangements
10. Inadequate Ring-Fencing

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ABOUT THE AUTHORS

Alexandra Readhead is Lead, Tax and Extractive Industries at IGF.
Jaqueline Taquiri is Policy Advisor, Tax and Extractive Industries at IGF.

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ACRONYMS

ATAF	African Tax Administration Forum
BEPS	tax base erosion and profit shifting
BIT	bilateral investment treaty
DFR	Diamond Field Resources
FDI	foreign direct investment
HMRC	Her Majesty's Revenue and Customs
ICTD	International Centre for Tax and Development
IMF	International Monetary Fund
MAP	Mutual Agreement Procedure
MCA	Mining Concession Agreements
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument)
Models	Model Tax Conventions
OECD	Organisation for Economic Co-operation and Development
PCT	Platform for Collaboration on Tax
PE	permanent establishment
RBC	Royal Bank of Canada
UN	United Nations

INTRODUCTION

INTRODUCTION

Large-scale mining in developing countries is often undertaken by investors, licence holders, service providers, and suppliers who are not residents in the country. This is reflective of the significant foreign direct investment (FDI) often required to develop and operate mining projects. However, this context also gives rise to a range of cross-border transactions between the company where the mine is located and foreign companies in other jurisdictions. These transactions might include but are not limited to offshore indirect sales of mining assets or licences, interest payments on foreign loans, or intra-group services.

A key question that emerges is which country should tax what proportion of the income from these transactions to avoid the same income being taxed twice. Double Taxation Agreements, or "tax treaties," as they are referred to in this practice note, aim to resolve this question by allocating taxing rights between two contracting countries on income from cross-border transactions. Consequently, tax treaties may significantly impact how much tax governments collect from transactions involving foreign companies. They may also impact how much profit investors realize on their investments after deducting taxes due.

Mining involves a finite, non-renewable resource. Countries that host such resources only get one chance to tax the income arising from their extraction. This fact, and the prevalence of investment from foreign multinationals, makes the impact of tax treaties on mining revenue collection critically important to resource-rich developing countries. Unless treaties are designed with this sector in mind, and considering the potential impact on revenue collection, governments may end up collecting substantially less than they expected from mining investments. In addition, tax treaties could be inappropriately used by mining investors to reduce or avoid paying taxes.

ABOUT THIS PRACTICE NOTE

This practice note has been written for governments of resource-rich developing countries that are considering negotiating or renegotiating a tax treaty. Governments should not infer from this note that tax treaties are either necessary or advisable in all cases. There are risks and benefits to tax treaties. Countries should consider these carefully when deciding whether to enter a treaty, including in relation to economically significant sectors. In the mining sector, for instance, tax treaties may be less relevant to attracting investment because of the location-specific nature of the resource. Having said that, tax treaties apply to all sectors, not just mining, and may be relevant to investors in terms of added tax certainty and dispute resolution.

Governments of resource-rich developing countries that decide that they would benefit from entering tax treaties must consider the implications for the mining sector to avoid giving up more revenue than necessary. There have been many instances of resource-rich developing countries losing vital

mining revenues because of tax treaties.[1] This practice note serves as a guide for governments on how to avoid similar occurrences from happening again. The goal is to equip governments of resource-rich developing countries to decide if tax treaties are necessary and, if they are, to design them in a way that safeguards their right to tax mining income at all stages of the mining value chain.

The practice note is divided into five parts:

1. Introduction
2. Part One: Tax Treaties Are Agreements Between States That Assign Taxing Rights
3. Part Two: The Benefits and Costs of Tax Treaties in a Mining Context
4. Part Three: Negotiating Tax Treaties That Protect the Right to Tax Mining Income
5. Part Four: Recommendations

WHO IS THIS PRACTICE NOTE FOR?

The practice note is primarily intended for use by government tax treaty negotiators and other policy-makers. It aims to generate informed, well-grounded decisions, particularly with respect to tax treaty design. It may also be used by tax administrators to identify potential risks to the mining tax base because of tax treaties and shape tax audit priorities as a result. Finally, the practice note may help international organizations to advise resource-rich developing countries on tax treaty issues and civil society to examine tax treaties to strengthen government accountability.

WHAT GAP IS THIS PRACTICE NOTE FILLING?

Information is available on tax treaties and the extractives sector. Readers should refer to Daniel et al., *International Taxation and the Extractive Industries* (2017) and the United Nations (UN) *Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries* (2017). In addition, there is guidance on tax treaty design and negotiation more broadly, notably, the Platform for Collaboration on Tax (PCT) *Toolkit on Tax Treaty Negotiations* (2020) and the International Centre for Tax and Development (ICTD) Tax Treaties Explorer, including the working paper prepared by Martin Hearson (2016) that sets out conclusions from descriptive work using the dataset.

This practice note seeks to address two gaps identified in the literature. The first gap is guidance for government officials in resource-rich developing countries on the design and implementation of specific tax treaty articles that may otherwise limit their ability to collect mining revenues. The second gap was insights into what resource-rich countries do in practice—how they

1 See Loeprick, J. & Beer, S. (2018).

modify or adapt their tax treaties to better protect their right to tax mining income. Much of the guidance that exists is based on the Organisation for Economic Co-operation and Development (OECD) (2019) and United Nations (2018) Model Conventions. This practice note goes beyond these models, analyzing over 80 tax treaties and, in some cases, domestic law to provide concrete examples of tax treaty practice among resource-rich countries that may be particularly instructive for resource-rich developing countries. The methodology for determining "tax treaty practice" is described below.

BOX 1. THE IGF'S TAX TREATY DATABASE: DETERMINING TAX TREATY PRACTICE IN THE EXTRACTIVES SECTOR

The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development's (IGF) survey of tax treaty practice—how resource-rich countries, developed and developing, have modified their treaties to better protect their right to tax mining income—is the primary contribution of this practice note. It is the basis for the analysis and guidance given in Part 3 of the practice note.

The survey included 86 tax treaties signed by resource-rich countries. They were selected to achieve a mix of countries and treaties based on the following parameters: resource-rich and non-resource-rich; high income and low income; high tax and low tax; and geography. The goal was to have a broad cross-section of countries and treaties to identify any trends correlating with these factors.

Once the treaties were selected (hereafter referred to as "sampled treaties"), the text of the articles most relevant to extractives (Articles 5, 6, 13 in the OECD and UN models) was transferred into a word document. Any extractives-related language in the sampled treaties was highlighted and compared with the corresponding articles in the OECD, UN, and African Tax Administration Forum (ATAF) models. Language in the treaties that deviated from the models was analyzed and sorted into the various treaty practices described in this practice note.

Readers can clearly see the different approaches that resource-rich countries have adopted, which of these are more common, and to what extent they deviate from the models. This provides a strong empirical basis for other resource-rich countries to consider similar options when negotiating tax treaties.

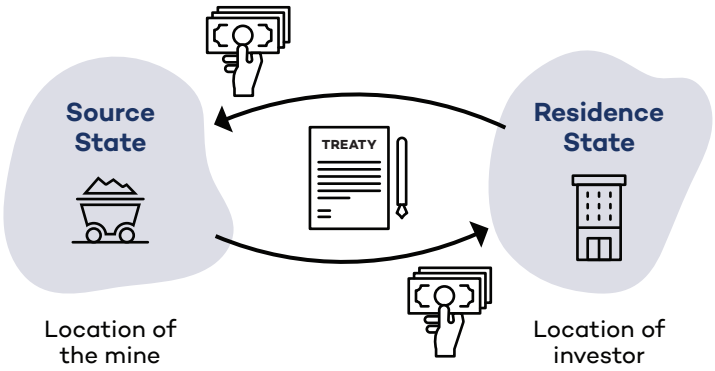
PART ONE:

TAX TREATIES ARE AGREEMENTS BETWEEN STATES THAT ASSIGN TAXING RIGHTS

Tax treaties are international agreements governed by the Vienna Convention on the Law of Treaties that assign taxing rights between two contracting states on income from cross-border transactions. They limit the abilities of the source state to tax income earned/sourced by non-residents within their jurisdiction and of the residence state to tax its residents on their worldwide income. Finally, where taxing rights are not assigned to either jurisdiction, a tax treaty will also provide relief from the double taxation that may arise as a result.

- The **"source state"** is where income is earned or derived (e.g., the location of the mine).
    - Capital-importing countries are typically source states. These are countries that are net importers of capital. Often, they are developing countries.
- The **"residence state"** is where the investor is incorporated, headquartered, managed, and controlled, or meets other similar criteria that indicate a strong connection with a country.
    - Capital exporting countries are typically residence states. These are countries that are net exporters of capital (i.e., developed and emerging economies).

FIGURE 1. How tax treaties work



Treaties determine how much of the profit each country gets to tax

Tax treaties generally cannot create tax liabilities that do not exist in domestic law.[2] This means that if, for example, a country does not have the domestic right to tax interest expense on loans sourced from abroad, it generally cannot introduce this right through its tax treaties. However, a treaty can reduce the rate of the withholding tax on interest expense compared to domestic law. Domestic law remains an important source for treaty interpretation, particularly when seeking to define specific terms that have not been elaborated in the treaty.

2 There are some limited exceptions. Australia and France, for example, follow the practice that tax treaties may establish a tax liability (UN, 2017, p. 38).

Once a tax treaty is established, it typically, although not always, becomes the prevailing law in relation to cross-border transactions involving that treaty partner. Whether a tax treaty takes precedence over domestic law is highly debated and depends on the jurisdiction and how they coordinate international and national tax law. In most cases, however, any subsequent changes to a country's domestic tax law will not modify existing tax treaties, although this depends on the constitutional arrangements in the country in question. The primary way to amend a treaty is to renegotiate it bilaterally or through the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known as the Multilateral Instrument) (see Renegotiating a Tax Treaty on page 9). The exception is a tax treaty override, which subjects a specific aspect of existing or future treaties to domestic law.

Finally, countries should consider that most cross-border investments are not strictly bilateral, but involve multiple entities and jurisdictions, each with its own purpose. Investors may use the host country treaty network, not just a single treaty, to structure their investments into the host country. In this sense, a country's tax base is only as safe as the protections afforded by its worst (or most investor favorable) treaty. Therefore, while each treaty negotiation is nominally bilateral, it is in fact affected by all existing treaties.

TAX TREATY MODELS

Countries often use the Model Tax Conventions as the basis for negotiating a tax treaty. The main models are the OECD Model (OECD, 2019) and the UN Model (2018). However, there are also regional models, such as the ATAF Model Tax Agreement (n.d.) ("ATAF Model"). The models include articles supplemented by Commentaries.

There are similarities between these three texts. However, the OECD Model was drafted exclusively for developed countries, whose priorities were eliminating double taxation and reducing source country taxation. The UN Model, which came later, agreed with the OECD's first objective but not the second. Consequently, the UN and ATAF models represent a limited compromise between the economic interests of developed and developing countries, as they leave intact more taxing rights for the source state (Whittaker, 2016). Table 1 sets out the differences between the three models that are most relevant to the mining sector.

Many countries have their own tax treaty models or positions that reflect their policy objectives. The model or position forms the basis for negotiating tax treaties. It could deviate from the OECD, UN, or ATAF models to reflect the specificities of that jurisdiction. Box 2 describes the process Colombia has gone through to update its tax treaty model from the perspective of the extractives industry.

TABLE 1. Differences between the OECD, UN, and ATAF models that are relevant to mining

Article	OECD Model	UN Model	ATAF Model
Article 5 – Permanent Establishment (PE)	The source state has the right to tax a building or construction project 12 months after it begins.	The source state has the right to tax a building or construction project 6 months after construction begins. It also has the right to tax a non-resident that performs services in their territory over a defined period ("Services PE").	The period for triggering the right to tax a building or construction project is agreed between states. The source state has the right to tax activities carried on by an enterprise in connection with the exploration and exploitation of natural resources in that state.
Article 12 – Royalties	Only the residence country has the right to tax royalties paid to non-residents.	The right to tax royalties is shared between source and residence countries. Definition of royalties is wider; it includes payments for the use of or the right to use industrial, commercial, or scientific equipment.	The right to tax royalties is shared between source and residence countries.
Article 12A – Fees for Technical Services	This article is not included.	The right to tax fees for technical services is shared between source and residence countries.	Same as the UN Model.
Article 12B – Income from Automated Digital Services	This article is not included.	The right to tax income from automated digital services is shared between source and residence countries.	This article is not included.

Article	OECD Model	UN Model	ATAF Model
Article 13 – Capital Gains	Only the residence country can tax gains derived from the sale of shares, except when the value of the shares is derived from immovable property in the source state.[3]	The source state has the right to tax the sale of shares if over an agreed threshold (substantial shareholdings).	Same as the UN Model.
Article 21 – Other Income	Only the residence country has the right to tax other income.	The right to tax other income is shared between source and residence countries.	Same as the UN Model.

BOX 2. COLOMBIA REVIEWS ITS TAX TREATY MODEL FROM THE PERSPECTIVE OF THE EXTRACTIVES INDUSTRIES

Extractive industries contributed an average of 15% of total government revenues in Colombia between 2013 and 2017. With support from the IGF, the National Directorate of Taxes and Customs (DIAN) reviewed its tax treaty model from the perspective of the extractive industries.

1. First, it looked at the role of tax treaties in attracting investment in extractives in Colombia.
2. Second, it considered the extractive industry value chain in Colombia and any tax treaty issues arising as a result (e.g., the role of subcontractors in the offshore oil and gas sector).
3. Finally, it compared the treaty articles most likely to impact the extractives sector—Article 5, Article 6, Article 12, and Article 13—to tax treaty practice in other resource-rich countries.

This process enabled the DIAN to update its treaty model to better protect Colombia's right to tax its natural resources.

RENEGOTIATING A TAX TREATY

Countries may choose to renegotiate their tax treaties bilaterally. They may also update their treaties via the Multilateral Instrument (MLI). The MLI is an output of the OECD Base Erosion and Profit Shifting (BEPS) project—a global action plan to limit corporate tax avoidance. Among other things, the

3 Royalty refers to payment for the use of intellectual property, not the extraction of minerals.

MLI aims to limit the risk of treaty shopping. Countries that sign the MLI are agreeing to automatically update their covered tax agreements with other countries also party to the MLI to reflect the BEPS minimum standards. "Covered tax agreements" are an existing tax treaty with respect to which each party to the tax treaty has agreed to update according to the MLI.

Whether countries choose to address the risk of treaty abuse and other BEPS issues by renegotiating bilaterally or signing the MLI will depend on each country's situation and the positions of its treaty partners. Countries with a large treaty network may find it convenient to join the MLI, whereas those with fewer (and older) treaties may prefer to renegotiate bilaterally. Another consideration is the causes of BEPS they wish to address. Certain articles are not minimum standards: Article 9, for instance, covers the right to tax offshore indirect transfers of assets. Only the articles classified as a minimum standard will automatically apply. All other articles, including Article 9, are optional, leaving countries to negotiate them. The MLI also does not address maximum withholding tax rates, other core aspects of the permanent establishment definition, and provisions covering technical service fees. Table 2 briefly analyses the extent to which the MLI addresses some of the main treaty risks in the mining sector identified in this practice note.

Some IGF members have expressed interest in receiving guidance on how to successfully renegotiate tax treaties. While detailed advice is beyond the scope of this note, some practical tips from treaty negotiators are set out below in Box 3.

TABLE 2. Does the MLI address the main tax treaty risks in the mining sector?

Risk to mining revenue	Does the MLI address the risk?[4]
Unable to tax the offshore indirect sale of mining assets.	Yes. Article 9(4) introduces the right to tax indirect transfers of immovable property, but it is not a minimum standard (optional provision).
Unable to tax income earned by mining subcontractors.	Partially. Article 14 is an anti-abuse rule that addresses the risk of subcontractors splitting up contracts to avoid meeting the time threshold required to trigger a permanent establishment.
Reduced withholding tax on revenue earned by foreign companies providing goods, services, loans, or intellectual property rights to the mine. Low or zero tax rates in the source country may exacerbate profit-shifting risks.	Not directly, although Articles 6 and 7 (minimum standards) aim to prevent treaty abuse, including scenarios where multinationals take advantage of low or zero withholding tax rates in tax treaties through treaty shopping arrangements. In addition, Articles 12 to 15 contain a number of provisions to prevent the artificial avoidance of the permanent establishment status (which is the threshold that triggers taxing rights for the source country).

4 Assuming that all conditions for the entry into force of specific MLI provision are met (Articles 34, 35 and following).

BOX 3. PRACTICAL TIPS ON HOW TO SUCCESSFULLY RENEGOTIATE A TAX TREATY

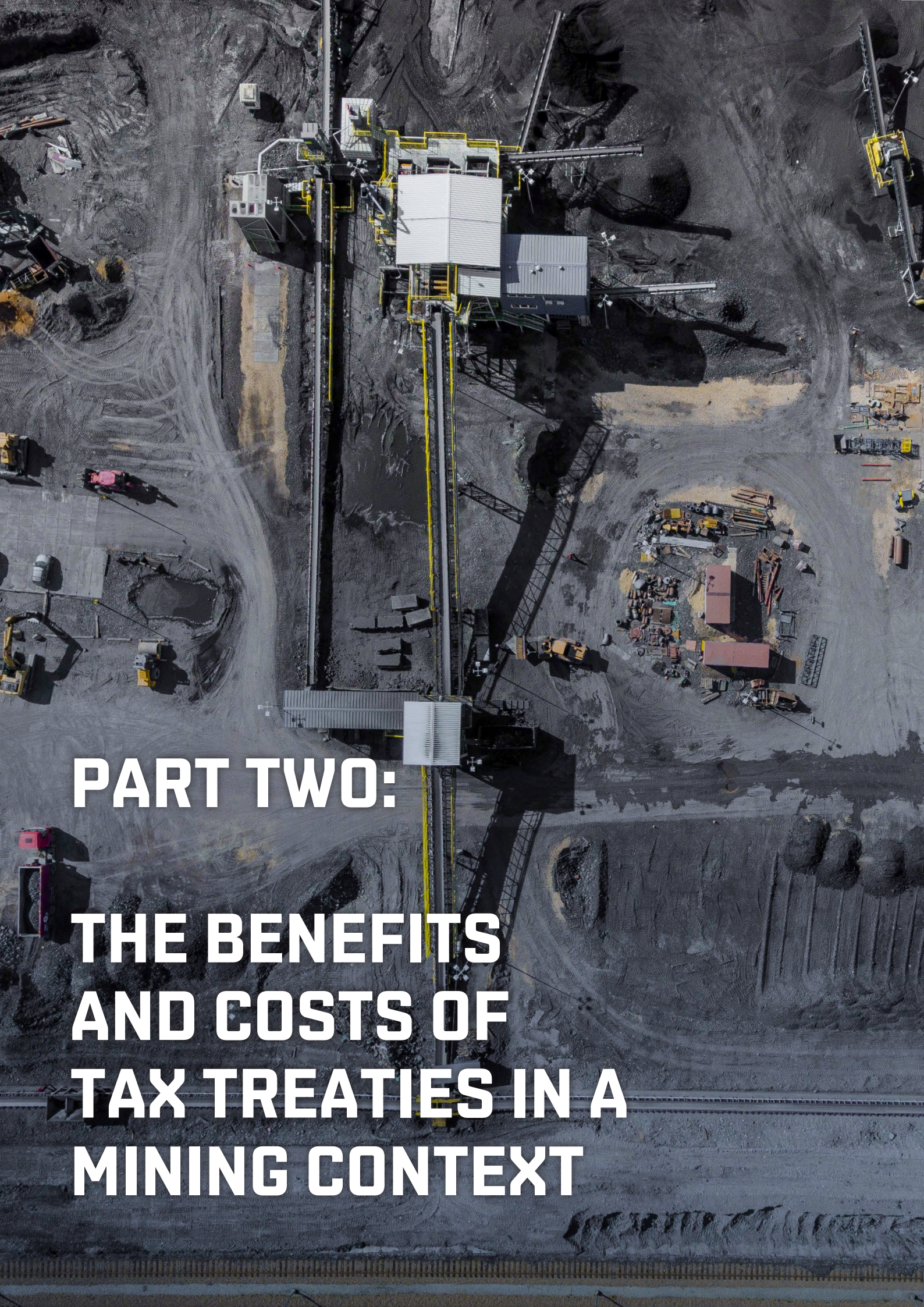
1. Adopt a consistent treaty policy based on a robust treaty model that has been approved at the ministerial level. A clear, consistent approach will make it easier to convince treaty partners to renegotiate and for negotiators to withstand internal political pressure.
2. Identify the specific articles you want to renegotiate. A treaty partner is more likely to agree to renegotiate a pre-defined set of articles as opposed to a wholesale review of the treaty. But be prepared for them to want to renegotiate other articles as well.
3. Explain to the treaty partner why it is important to your country to renegotiate these articles. Include specific examples of the revenue at stake if the issue is not resolved. Help the treaty partner effectively communicate why the treaty needs to be changed to their constituents that benefit from the status quo.
4. Be prepared to terminate the treaty if you do not get the result you want, otherwise, you lose all strength in the negotiation. Make sure you have the support of other relevant ministries (e.g., the ministry of foreign affairs) to terminate the treaty should it be necessary.

TERMINATING A TAX TREATY

Sometimes the source state may choose to terminate a tax treaty. The reduction in source taxation may be too great—for example, according to the Senegalese government, it lost USD 257 million over 17 years because of its treaty with Mauritius (Fitzgibbon, 2020). If a treaty partner is unwilling to modify or replace the existing treaty, the source state may be left with no choice but to terminate unilaterally. There has been a recent spate of terminations by resource-rich developing countries, such as Argentina, Kenya, Mongolia, Senegal, and Zambia.[5] Some developed countries are also following suit—Russia, for example. Notwithstanding, countries should be mindful that if done too often, terminating tax treaties may risk discouraging foreign investors who value a stable investment environment.

For more guidance on whether developing countries should sign the MLI, see the Centre for Global Development (Oguttu, 2018), *Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty Related Base Erosion and Profit Shifting Measures?* and the United Nations University Series on Regionalism Vol. 19 (Arias Esteban & Calderoni, 2021), *The Suitability of BEPS in Developing Countries (Emphasis on Latin America and the Caribbean)*.

5 Argentina terminated its treaties with Switzerland, Spain, and Chile. Mongolia terminated its treaties with Kuwait, Luxembourg, the Netherlands, and the United Arab Emirates. Senegal and Zambia terminated their treaties with Mauritius.



PART TWO:

THE BENEFITS AND COSTS OF TAX TREATIES IN A MINING CONTEXT

There are benefits and costs associated with entering a tax treaty.[6] On the one hand, tax treaties will generally reduce the amount of tax a source state can charge non-residents compared to its domestic law. In addition, tax treaties may exacerbate or create new profit shifting risks, particularly where a treaty is concluded with a low-tax jurisdiction and does not contain provisions to prevent treaty shopping. On the other hand, countries can access information and receive assistance from treaty partner countries that may help improve compliance. From an investor's perspective, the benefits include less risk of double taxation, increased tax certainty, and measures to resolve treaty-related disputes. It is important to consider the benefits and costs before entering a tax treaty.

Developing countries that depend on mining revenues should consider the costs and benefits of tax treaties in the context of the extractives sector, including in relation to MCAs. Some of the costs and benefits are general in nature and hence are not discussed here (e.g., exchange of information, administration). Those that raise specific questions for the mining sector are analyzed below.

TABLE 3. Comparing the benefits and costs of entering a tax treaty

Benefits	Costs
1. Reduces the risk of double taxation, which *may* remove some obstacles to increase FDI, although the impact on mining is likely to be more limited due to the location-specific nature of the resource and the prevalence of Mining Concession Agreements (MCAs). 2. Prevention and resolution of disputes in relation to different forms of double taxation, although developing countries may lack the technical expertise and resources to fully apply the international standards on Mutual Agreement Procedure (MAP). 3. Access to taxpayer information from treaty partner countries may increase countries' ability to counteract international tax avoidance and evasion.	1. Loss of tax revenues: restrictions on source taxation may result in a direct loss compared to the tax collection under domestic law if the capital flows and economic transactions between the contracting states remain the same after the treaty entered into force *(ceteris paribus)*. Whether the loss is necessary to attract investment will depend on a cost-benefit analysis. 2. Tax treaties may be inappropriately used for tax planning; this risk is especially high where the treaty is with a low-tax jurisdiction. Countries should consider whether their tax treaty network or domestic law includes sufficient safeguards to prevent BEPS, including through treaty abuse. 3. Costly to negotiate and administer, and difficult to modify, replace, or terminate. Countries should consider whether they have the internal capacity to commit to complex treaty negotiations.

6 See potential cost and benefits of tax treaties in subsection A2 of The PCT Toolkit on Tax Treaty Negotiations.

THE POTENTIAL BENEFITS OF TAX TREATIES

1. ATTRACTING FOREIGN DIRECT INVESTMENT

Many developing countries have used tax treaties to attract FDI to boost economic development. The evidence for that is mixed.[7] Academic studies before 2009 show the positive, neutral, or, in some instances, negative effects of tax treaties on investments. Since then, studies using more comprehensive and granular data have found more positive effects.[8] Nevertheless, it remains unclear overall whether tax treaties have generated new investment in developing countries. What is clear, however, are the risks of concluding tax treaties. The decision to enter a treaty, therefore, is a trade-off between certain risks and uncertain benefits regarding investment.

The role of tax treaties in attracting investment in the mining sector is particularly unclear. Mining is location specific. This means that tax competition, including the effect of tax treaties, which may reduce the level of source taxation, is likely to be a less significant factor in mining investment decisions than in more mobile sectors, such as manufacturing and the location of intellectual property rights. According to mining investor surveys, geology accounts for 60% of investment decisions, while policies and other measures, of which tax treaties are a small part, form 40% (Fraser Institute, 2019)—that is, unless there are policies in place that are extremely harmful to potential investors. Of course, investors will take the impact of tax treaties into account, in particular, lower rates of source taxation, which may reduce the cost of investing.[9] However, overall, tax rates, including tax treaties, remain a secondary concern for mining investors compared to the quality of the resource (Fraser Institute, 2019).

MCAs are another important factor when considering the role of tax treaties in attracting mining investment. An MCA is between a host government and a mining investor, specifically, the entity (or entities) investing in and developing the resource. They often contain bespoke fiscal terms. Such terms may be more favourable to investors than under a relevant tax treaty. An MCA may also be flexible enough that the investor can choose to apply the treaty benefits should they turn out to be more favourable than under the MCA, notwithstanding fiscal stabilization. Consequently, to the extent that mining companies consider tax rates when making investment decisions (subject to geology, etc.), tax treaties may be even less relevant for attracting mining FDI in countries that offer MCAs that address tax issues.

2. RESOLVING CROSS-BORDER DISPUTES

As globalization continues, the number of cross-border transactions and the potential for disputes between governments with respect to their right

7 For a summary of the empirical discussion see Appendix 5 of IMF, 2014.

8 Barthel et al., 2010; Castillo-Murciego & López-Laborda, 2018; Davies et al., 2009; Millimet & Abdullah, 2007; Neumayer, 2007; Quak & Timmis, 2018.

9 See Hearson, 2018, p. 251.

to tax international trade and investments under tax treaties are likely to increase in number and scope. Governments and foreign investors are rightly concerned about the need for clear and timely dispute resolution mechanisms.

Tax treaties are the primary tool for resolving cross-border tax disputes. Mining investors, however, may have additional options for dispute resolution under MCAs, bilateral investment treaties (BITs), or other international agreements (e.g., the Energy Charter Treaty). Consequently, tax treaties may be less critical for mining investors specifically, at least from a dispute resolution perspective. The options are compared in Table 4.

ALTERNATIVE WAYS TO ACHIEVE OTHER TAX TREATY BENEFITS

There may be ways to achieve tax treaty benefits through other instruments or by negotiating a "light treaty" limited to (i) information exchange, (ii) commitment to transfer pricing principles, and (iii) dispute resolution procedures. For more information on alternative ways to achieve tax treaty policy objectives, see Section A.3 of *The PCT Toolkit on Tax Treaty Negotiations* (PCT, 2020b).

TABLE 4. Comparing dispute resolution mechanisms under MCAs, tax treaties, and BITs

	MCA	Tax Treaty	BIT
Who initiates the claim	The investor makes and prosecutes the claim against the government, but governments can also initiate claims against the investor (e.g., for non-payment of taxes). This distinction may not be as great as it first appears since an investor seeking MAP relief normally will already have pursued an objection to the proposed host country taxation.	An investor can request a MAP; however, it is their home tax administration that will argue for its tax relief. The proceedings will be between the tax authorities and will not include the investor. The investor will be notified about the outcome, which could be a solution they did not want or no resolution at all. Many developing countries have little or no MAP experience, so this is clearly not a route regularly used by investors in those countries.	The investor may access investor–state dispute settlement (ISDS), provided it is an eligible investor under the BIT. Certain BITs specifically carve out issues of taxation.
Scope of dispute	Domestic laws (i.e., taxes not covered by tax treaties such as mineral royalties), the MCA, and tax treaties.	Tax treaty-related disputes.	Investment treaty-related disputes, domestic law, and/or MCAs.

THE POTENTIAL COSTS OF TAX TREATIES

1. LOSS OF TAX REVENUES

Depending on how tax treaties are designed, there may be several risks to mining revenue collection. The three most material risks include:

- **The taxation of offshore indirect transfers of mining assets:** Tax treaties may prevent source states from taxing profits from the sale of shares or comparable interests in mining assets located in their country.
- **The taxation of mining subcontractors:** Subcontractors may avoid paying taxes in the source state by restructuring their activities to not exceed the time threshold for triggering a taxable presence under the tax treaty.
- **The taxation of fees for technical and management services:** Tax treaties may prevent source states from collecting withholding tax on payments a mine makes to foreign companies in return for technical and management services.

These risks are not hypothetical. Figure 2 shows millions of dollars at stake if resource-rich countries, developed and developing, fail to anticipate the risks to mining revenues when they negotiate tax treaties, draft domestic law, or sign MCAs. The examples show how critical it is that resource-rich countries consider the implications for mining when they negotiate tax treaties to avoid giving up revenue unnecessarily. More information on the cases referenced below can be found in the Appendix.

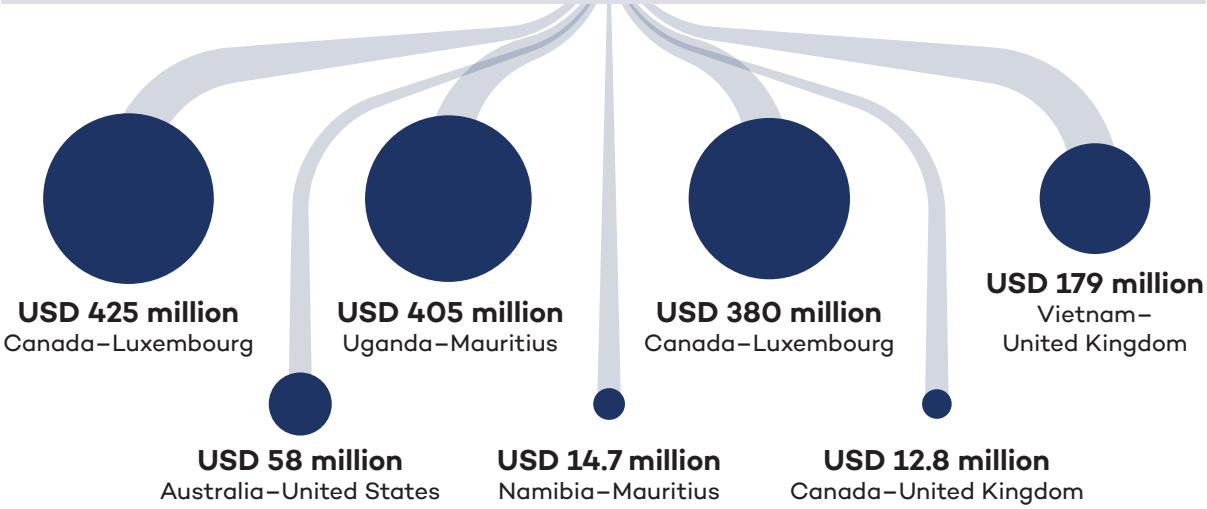
2. TREATY SHOPPING

"Treaty shopping" is where investors use tax treaties to reroute investment and income flows, potentially increasing the risk of profit shifting. For example, Paladin, an Australian mining company, took advantage of Malawi's tax treaty with the Netherlands by routing payments via a Dutch company to avoid paying withholding tax in Malawi (see Box 4). The case in Malawi is not an isolated incident. An IMF study of tax treaties between sub-Saharan Africa countries and investment hubs (often referred to as tax havens because they reduce or eliminate taxes on many transactions) suggests that not only do treaties not increase FDI, but they may result in non-negligible revenue losses in source countries (Loeprick & Beer, 2018). Therefore, in addition to conferring certain tax benefits on investors, tax treaties and treaty shopping may also help facilitate tax avoidance.

FIGURE 2. Tax treaty risks in the extractives sector: Key causes and scale of revenue loss

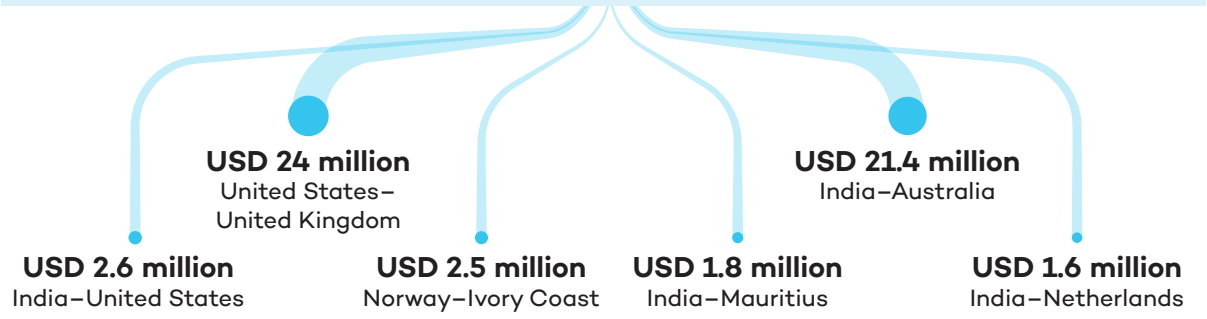
1 Risk to Revenue: Taxation of offshore indirect transfers of mining assets

Tax treaties may prevent source states from being able to tax profits from the sale of shares or comparable interests in mining assets located in their country.



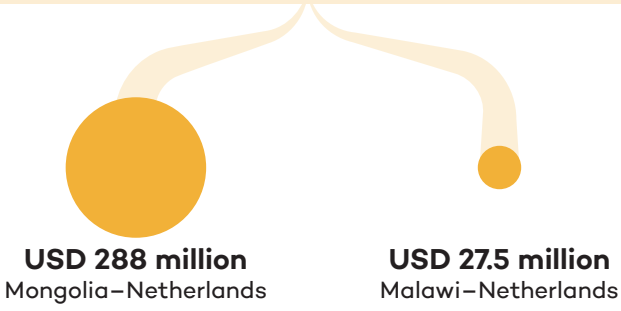
2 Risk to Revenue: Taxation of mining subcontractors

Subcontractors may avoid paying taxes in the source state by restructuring their activities to not exceed the time threshold for triggering a taxable presence under the tax treaty.



3 Risk to Revenue: Taxation of fees for technical and management services

Tax treaties may prevent source states from collecting withholding tax on payments a mine makes to foreign companies in return for technical and management services.



Note: More information on the cases referenced can be found in the Appendix.

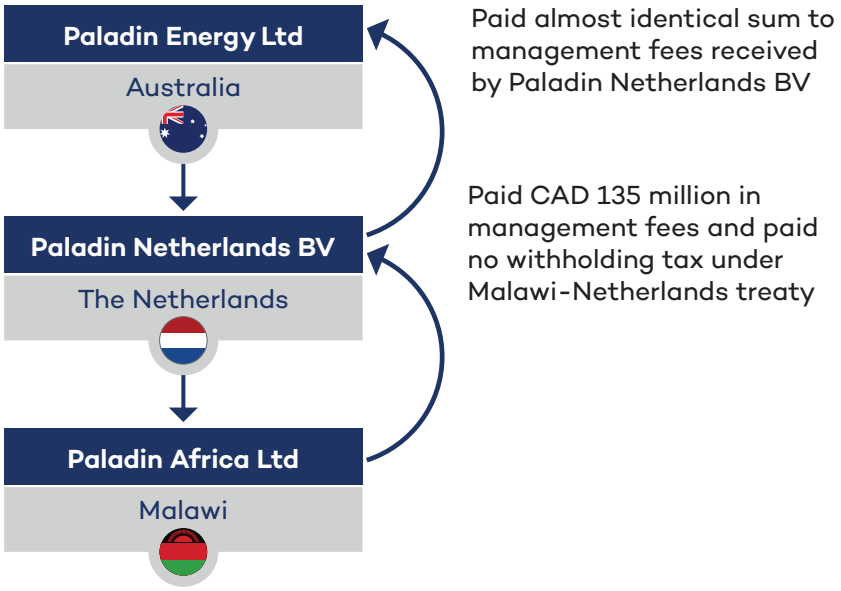
BOX 4. MALAWI LOSES USD 27.5 MILLION IN WITHHOLDING TAX FROM TAX TREATY WITH THE NETHERLANDS

In 2007, the Government of Malawi granted a mining licence to Paladin, an Australian company, to exploit uranium. Between 2009 and 2014, Paladin Africa Ltd paid management fees of USD 134.55 million and interest payments of USD 48.95 million to related company Paladin Netherlands BV. Paladin Netherlands BV, in turn, paid an almost identical sum of money as management fees and interest payments back to the parent company in Australia, Paladin Energy Ltd.

Normally, an intra-company management fee and interest payment out of Malawi would incur a 15% withholding tax in Malawi. However, because the transactions were subject to the tax treaty between Malawi and the Netherlands, there was zero withholding tax on services and interest payments. The routing of the management fees and interest payments via the Netherlands facilitated this tax reduction in Malawi. The tax treaty did not have any anti-abuse measures that might decrease the risk of treaty shopping.

The Netherlands and Malawi have since renegotiated the tax treaty. Among other improvements, it includes a 10% rate of withholding tax on interest and anti-abuse provisions (Government of the Netherlands, 2015).

FIGURE 3. The case of Paladin Energy in Malawi



Source: Actionaid, 2015.

While the MLI has the potential to resolve some aspects of treaty shopping, not all countries have signed up, and not all treaties are covered tax agreements. Moreover, the MLI's main anti-treaty shopping provision is the principal purpose test. Under that rule, treaty benefits should not be available where one of the principal purposes of certain transactions or arrangements is to secure those benefits. This depends on a facts and circumstances test, which, for developing countries with limited experience

applying general anti-abuse concepts, is unlikely to be very helpful in combatting treaty shopping, making this risk still very relevant today (de Mooij et al., 2021, p. 168).

THE STABILIZATION OF TAX TREATIES

There is the added risk in the mining sector that any loss of tax revenue from a tax treaty will be locked in by stabilization. Many developing countries have signed MCAs with mining investors containing specific fiscal terms that are stabilized, meaning that they are frozen at the time of signing a contract. In some cases, this includes the stabilization of tax treaty benefits, which continue to apply to the investor even if the source state renegotiates or terminates the relevant treaty (see Box 5).

BOX 5. OYU TOLGOI MCA STABILIZES MONGOLIA'S APPLICABLE TAX TREATIES

In Mongolia, for example, the concession agreement for the Oyu Tolgoi copper mine purports to stabilize the tax treaties in force at the date of the agreement. Mongolia terminated its tax treaties with the United Arab Emirates and Kuwait in 2015, as well as its treaties with Luxembourg and the Netherlands in 2014, due to the potential for certain treaties to give rise to tax planning and reduced revenue collection. For example, the Luxembourg and Netherlands treaties imposed zero withholding tax on dividends. This would impact future dividends from the Oyu Tolgoi project in Mongolia, where the concession agreement seeks to stabilize the tax treaties in force at the date of the agreement. The Mongolian Tax Authorities have issued Oyu Tolgoi with amended assessments in relation to a range of issues, one of which is withholding tax, which is impacted by the stabilization of the tax treaty.

Resource-rich countries should be careful to limit the time and scope of stabilization provisions in domestic law and MCAs to avoid locking in financially unsustainable tax benefits arising from tax treaties. These issues are dealt with in detail in IGF's forthcoming practice note *Implementing the New Standard on Stabilization: OECD Guiding Principles on Durable Extractive Contracts, Principles VII and VIII*.

For further guidance on navigating the costs and benefits of tax treaties, see Subsection A2 of the Platform for Collaboration on Tax's (2020) *Toolkit on Tax Treaty Negotiations;* Appendix 5 of the IMF's (2014) policy paper, *Spillovers in International Corporate Taxation;* Beer and Loeprick's (2018) *The Cost and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa;* and the United Nations' (2016), *Manual for Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries*.

PART THREE:

NEGOTIATING TAX TREATIES THAT PROTECT THE RIGHT TO TAX MINING INCOME

Countries that depend on mining to contribute taxes and generate economic growth should carefully consider the characteristics of the industry, including potential international tax risks, when designing and negotiating tax treaties. In too many cases, countries have only come to fully appreciate the impact of tax treaties on mining revenue collection after the treaty has been signed, and in some cases, stabilized in MCAs. By this time, it is generally too late or too difficult to make a change to the tax treaty, in which case the country may end up forgoing significant revenue. To avoid these occurrences happening in the future, resource-rich countries should consider safeguarding mining revenues when negotiating tax treaties.

This section provides guidance to governments on how to design certain tax treaty articles to protect against the most material risks to mining revenues. It is structured as follows:

- Establish and retain the right to levy capital gains on indirect transfers of mining assets.
- Provide a comprehensive definition of immovable property.
- Design broad rules on a permanent establishment.
- Retain the right to tax income from management and technical services.

Each section follows the same format. It explains what the concept is, why it matters for the mining sector, what are the risks to mining revenues that countries should look out for when negotiating the relevant treaty article(s), and finally, how to address these risks.

What is it?

Why does it matter?

What are the risks?

How can they be addressed?

ESTABLISH AND RETAIN THE RIGHT TO CHARGE CAPITAL GAINS TAX ON THE INDIRECT TRANSFER OF MINING ASSETS

WHAT IS CAPITAL GAINS TAX?

When a company sells or transfers an asset, it can make a capital gain or a capital loss. The gain is the full amount received from the sale or transfer, minus the purchase price. There are two ways to tax capital gains. One is through a separate tax on capital gains, and the other is by incorporating the gain into taxable income that is subject to corporate income tax. These options are discussed in the UN (2017) *Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries*.

WHY IS CAPITAL GAINS TAX IMPORTANT TO MINING?

The direct or indirect sale or transfer of a mining licence or any other right, interest, or asset related to mining activities is likely to generate considerable capital gains. The country where the mine is located is entitled to share in those gains, typically through capital gains tax, which can be very significant (see Her Majesty the Queen Canada v. MIL (Investments) S.A. [2006] in Box 6). It is also important because a mine typically changes hands several times during the lifetime of the resource, potentially resulting in numerous capital gains tax events.

WHAT ARE THE RISKS THAT RESOURCE-RICH COUNTRIES SHOULD CONSIDER WHEN NEGOTIATING ARTICLE 13?

When a local mining asset or right or interest relating to that asset is sold, the country where the resource is located will generally have the right to collect capital gains tax on the sale, under both its domestic law and tax treaties. This is a "direct transfer."

Where the situation becomes more complex is if the asset or licence is sold indirectly through a chain of ownership. An "indirect transfer" is where the shares in the mine or shares in the foreign company that owns the mine are sold. The sale can take place offshore, even without the knowledge of the resource-rich country. See Figure 5 for a depiction of a direct versus an indirect transfer.

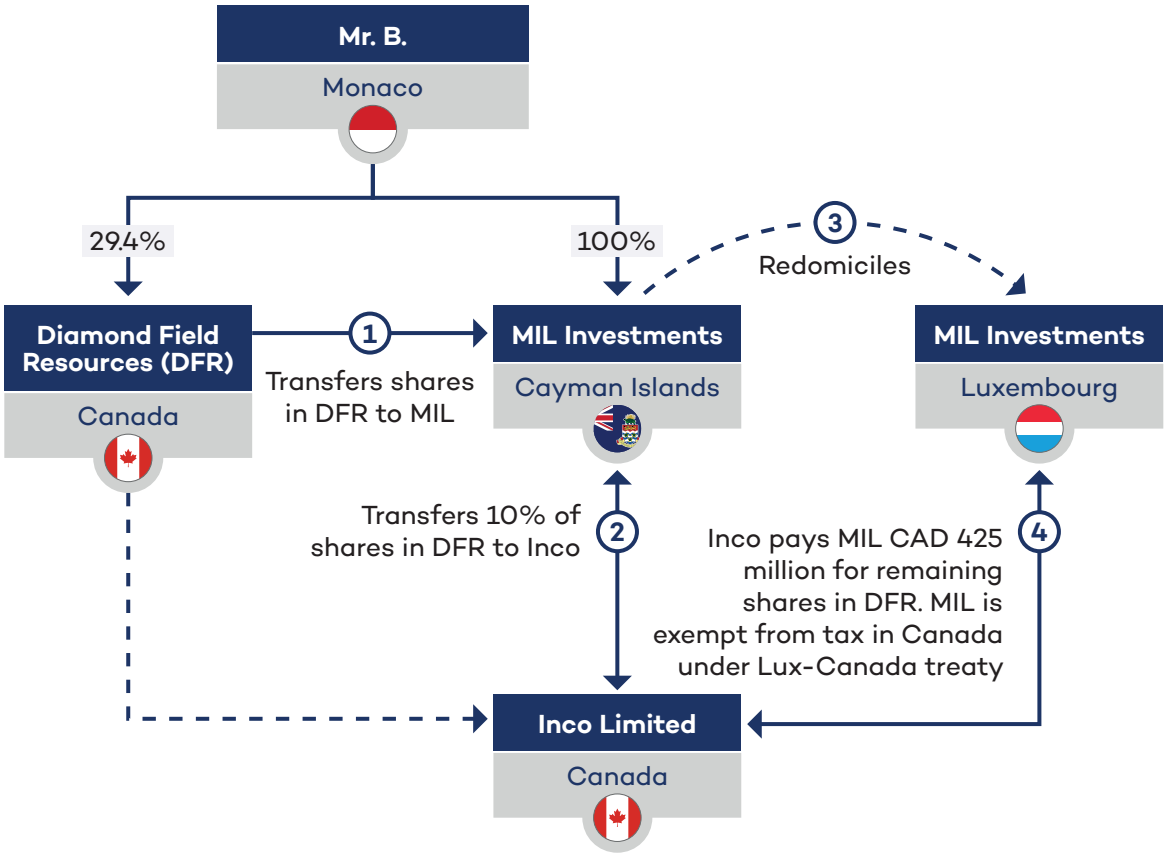
The right to tax indirect transfers is the primary objective for resource-rich countries with respect to Article 13 of their tax treaties. Yet, despite the significant tax at stake, only 35% of all tax treaties include the right to tax indirect transfers. It is even less likely where one party is a low-income, resource-rich country, by about six percentage points (PCT, 2020a, p. 33). It is critically important to ensure that resource-rich countries have the right to tax indirect transfers in their domestic law and retain this right in their tax treaties.

BOX 6. HER MAJESTY THE QUEEN CANADA V. MIL (INVESTMENTS) S.A. (2006)

Mr. B, a resident of Monaco, acquired a 29.4% shareholding in Diamond Field Resources (DFR), a Canadian company engaged in mining exploration. In 1993, Mr. B transferred his shares in DFR to MIL Investments, a company in the Cayman Islands, wholly owned by Mr. B.

In 1995, MIL Investments exchanged shares of DFR for shares of Inco Limited (Inco), another company in Canada, leaving MIL Investments with less than 10% of DFR. Mr. B moved MIL Investments from the Cayman Islands to Luxembourg, which had a tax treaty with Canada that exempted capital gains tax. In 1996, Inco purchased MIL Investments' remaining shares in DFR. MIL Investments realized a gain of CAD 425 million for its shares. MIL claimed that this gain was exempt from Canadian tax under the treaty.

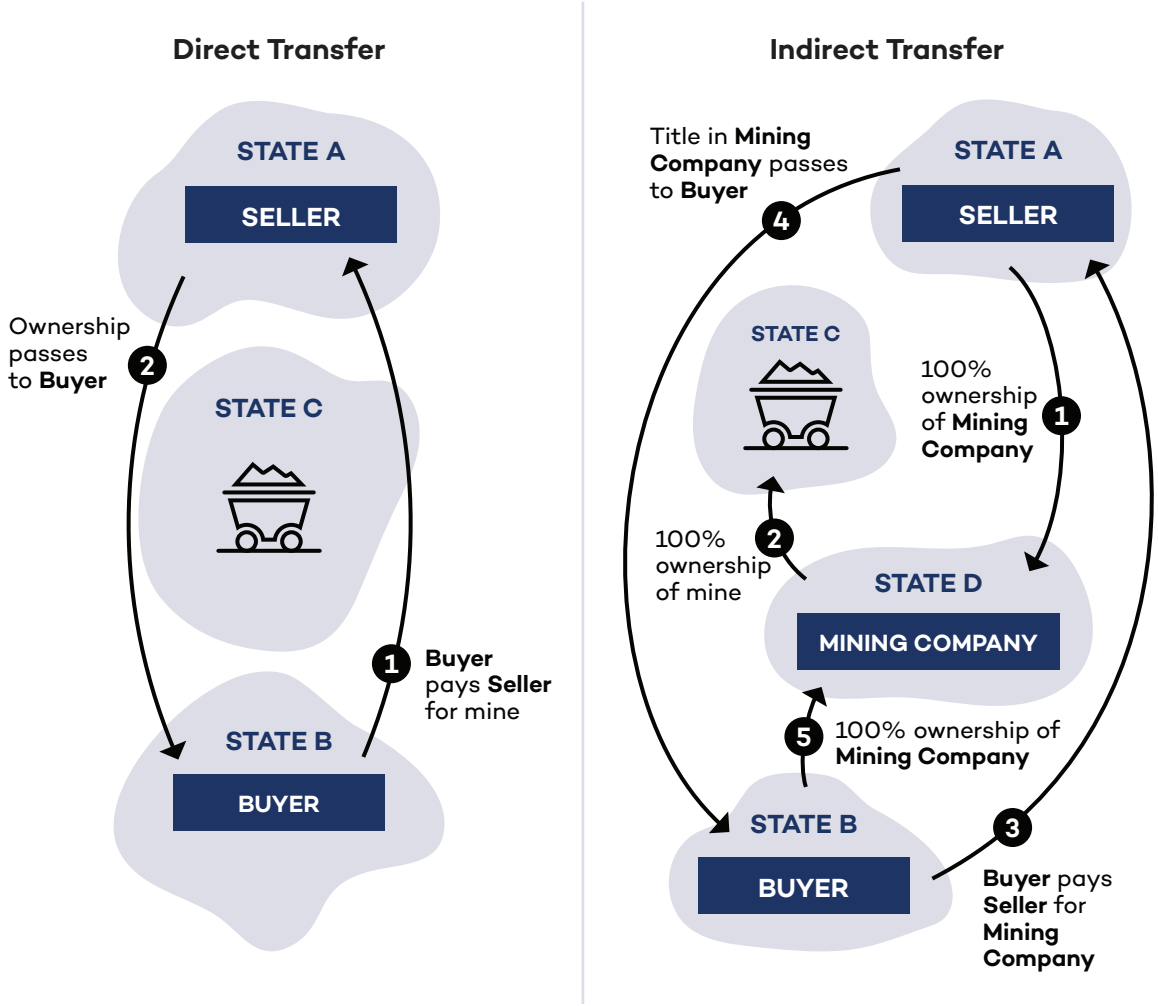
FIGURE 4. Her Majesty the Queen Canada v. MIL (Investments) S.A. (2006)



The Canadian Revenue Agency argued that the benefit obtained by MIL was an abuse of the treaty that should be disallowed under Canada's General Anti-Avoidance Rule. However, the court found no evidence of abuse. It was clear that MIL's stake in DFR was exempt from tax under the treaty.

The taxation of indirect transfers also raises several practical questions for tax administrations—for example, how to calculate the value of the underlying licence or asset. These implementation issues, as well as some design considerations, are addressed in a forthcoming practice note from IGF and the OECD on *The Taxation of Offshore Indirect Transfers in the Mining Sector.*

FIGURE 5. Comparing direct and indirect transfers



HOW CAN RESOURCE-RICH COUNTRIES ADDRESS THESE RISKS?

1. Provide a Comprehensive Definition of Immovable Property in the Domestic Law

Article 13(1) of the models says that the source state can only tax offshore indirect transfers if the underlying asset or right is considered immovable property. Per Article 6, the term "immovable property" is given the meaning it has under the domestic law of the state where the property is situated. It is critical, therefore, that resource-rich countries

have a comprehensive definition of immovable property in their domestic law (see Provide a Comprehensive Definition of Immovable Property in Domestic Law on page 29).

2. Establish the Right to Tax Indirect Transfers in the Domestic Law

A tax treaty cannot create a right to tax indirect transfers; this must exist in domestic law. There are two models for establishing the right to tax indirect transfers in domestic legislation (see Table 5).[10]

TABLE 5. Different models for including the right to tax indirect transfers in domestic law

Model	Description
Model 1: deem a direct sale by a resident	This model taxes the indirect transfer as though a direct sale of assets had occurred. Specifically, the source state treats the local entity that directly owns the asset in question as having disposed of and reacquired its assets for their market value.
Model 2: source the gain in the country where the immovable property is located	This model taxes the non-resident seller on a transfer of shares or comparable interest in a company located in the source state. It does this either directly or implicitly by a source of income rule, which provides that a gain is sourced in the location country when the value of the interest disposed of is derived, directly or indirectly, principally from immovable property located in that country.
A combination of both models with different thresholds and an ordering rule	These two models can be combined, with Model 1 applying over a percentage change of ownership and Model 2 to transactions under that threshold.

Having established the right to tax indirect transfers, countries must determine the percentage or value of the gain to be derived from source state assets for the tax to be triggered and what proportion of the gain should be taxed. These issues are discussed below.

DETERMINE THE THRESHOLD FOR A GAIN TO BE TAXABLE IN THE SOURCE STATE ("SOURCING RULE")

Model 1 does not require a rule to create a source taxing right because it deems an indirect transfer to have occurred domestically. But Model 2 does. The "sourcing rule" means that only gains substantially related to assets located in the source state will be subject to tax. The OECD and UN models, as well as the MLI, set the sourcing rule at 50%. This means the shares that are sold must derive 50% or more of their value from assets in the source

10 For a detailed discussion of the advantages and disadvantages of each model, see PCT, 2020 and Oxfam, 2020.

state. If this threshold is met, the gain is taxable in the source state. If not, the gain is exempt in the source state.

The implication of setting the sourcing rule at 50% is that source countries whose assets do not meet the threshold will not have the right to tax capital gains on their mining assets. For example, if the threshold is 50% and yet the shares transferred offshore derive only 40% of their value from a mining asset, the source state loses the right to tax. Many developing countries may want to tax any capital gains on their mining assets, regardless of the percentage that the value of their mining assets represents in the multinational company's portfolio.

The first alternative is to adopt Model 1 to avoid any sourcing rule consideration, whether in domestic law or tax treaties. The second alternative, under Model 2, would be to adopt a lower threshold (e.g., 20%) but only impose a tax on the proportion of the gain derived from the asset in the source state (discussed in point ii). Kenya has adopted this approach for extractives.

DETERMINE THE PROPORTION OF A GAIN TO BE TAXED IN THE SOURCE STATE

Under Model 2, once the sourcing rule is met, general practice is for the source state to tax 100% of the gain regardless of whether the offshore company also holds assets in other jurisdictions. In other words, a transfer of shares in an offshore company that derive 50% of their value from a mine in the source state will be subject to tax on the entire gain, even if the company has other assets elsewhere.

Alternatively, if countries decide to adopt a lower threshold for the indirect transfer of mining assets (mentioned above), it may be appropriate to only tax the proportion of the gain attributable to assets located in the source state. This balances the interest of the source state to collect capital gains tax on a greater number of indirect transfers and the risk of double taxation. However, while this might be considered a fairer application of the tax, it introduces the complexity of having to split the gain, which may be difficult in the absence of full information on the respective value of all of a company's assets.

Under Model 1, only the transfer of domestic assets is taxable, so there is no risk that a source country taxes capital gains on foreign assets. However, the deeming provision of Model 1 is typically triggered by a change of ownership of 50% or more, which can lead source countries to tax both realized and unrealized capital gains.

Countries seeking further guidance on the domestic law framework for offshore indirect transfers should refer to the forthcoming practice note from IGF and the OECD on *The Taxation of Offshore Indirect Transfers in the Mining Sector*.

3. Maintain the Right to Tax Indirect Transfers in Tax Treaties

Under Model 2, once resource-rich countries have established the right to tax indirect transfers in their domestic law, they should maintain this right in their tax treaties; otherwise, they open themselves up to the risk of treaty shopping. This can be achieved through Article 13 or a standalone extractive industries article. Model 1 provisions should apply in most cases regardless of sourcing rules and relevant tax treaty provisions.

MLI ALERT

Article 9

Article 9 of the MLI amends Article 13 of the OECD Model. For countries lacking Article 13(4)—the right to tax indirect transfers—Article 9(4) of the MLI incorporates this provision into their treaties.

For countries that already have Article 13(4), the MLI offers two options for enhancing it.

- Article 9(1) introduces a testing period into Article 13(4). Provided that the relevant value threshold (e.g., 50%) is met at any time during the 365 days preceding the sale, the source state shall have the right to tax the indirect transfer. This prevents companies from selling off portions of the overall shareholding (e.g., 20% at a time) to avoid triggering the threshold.
- Article 9(1) also expands the scope of Article 13(4) to include interests comparable to shares, such as interests in a partnership or trust.

Article 9 of the MLI is not a minimum standard and must therefore be negotiated.

NEGOTIATE ARTICLE 13 TO INCLUDE THE RIGHT TO TAX INDIRECT SALES

Countries should negotiate Article 13 to include the following:

- The source state has the right to tax gains from the sale of "shares or comparable interests." Only 60% of the sampled treaties included shares and other similar rights or interests.
- A sourcing rule of at least 50%. Countries with a lower threshold in their domestic law should try to replicate it in their treaties, but it is possible that not all their treaty partners will agree to it, creating a risk of treaty shopping. Countries may find it easier to negotiate a lower threshold in a standalone extractive industry article (see below).
- The period during which the shares derive their value principally from immovable property in the source state can be any time during the 365 days prior to alienation. This is an anti-avoidance measure designed to ensure that a taxpayer cannot escape source taxation

by selling off multiple small parcels of shares that together form a substantial holding. It is meant to prevent the value from being "watered down" prior to the transfer of ownership.

NEGOTIATE A STANDALONE EXTRACTIVE INDUSTRY ARTICLE

Some countries have chosen to rely on a standalone article on extractive industries to secure their right to tax indirect transfers. The benefit of a standalone article is that it includes an explicit reference to the indirect transfer of *extractive assets*, including clear definitions of exploration and exploitation rights (this option is discussed in detail in Design Broad Rules on Permanent Establishment on page 34). Because the standalone extractives industries article is already a deviation from the models, countries may find it easier to negotiate a lower sourcing rule for the indirect transfer of mining assets, as per 2(i) and (ii).

RECOMMENDATIONS

1. Resource-rich countries should adopt a comprehensive definition of immovable property in their domestic law (see the recommendations on immovable property in the next section).
2. Resource-rich countries should establish the right to tax indirect transfers in their domestic law. Countries with limited enforcement capacity may prefer Model 1 in Table 5 (the local entity is deemed to have sold the right or asset), although the risk of double taxation is higher than in the case of Model 2.
3. Resource-rich countries should include in their tax treaties the right to tax the sale of shares or comparable interests that derive at least 50% of their value from assets in the source state. They should also negotiate an anti-abuse rule in line with Article 9(1) of the MLI.
4. In addition, resource-rich countries could consider adopting a standalone extractive industries article that includes the right to tax indirect transfers in the extractives sector specifically. This provision could include a lower sourcing rule for mining assets, combined with pro rata taxation of the gain to limit the risk of double taxation.

For further reading on the taxation of offshore indirect transfers, see the Platform for Collaboration Tax's (2020) *The Taxation of Offshore Indirect Transfers – A Toolkit;* Chapter 4 of the UN's (2017) *Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries,* and Toledano et al.'s (2017) *Designing a Legal Regime to Capture Capital Gains Tax on Indirect Transfer of Mineral and Petroleum Rights: A Practical Guide.*

PROVIDE A COMPREHENSIVE DEFINITION OF IMMOVABLE PROPERTY IN DOMESTIC LAW

WHAT IS IMMOVABLE PROPERTY?

Immovable property generally refers to land and fixtures or structures upon the land (e.g., a mineral deposit). It may also include equipment or accessories to the immovable property (e.g., a drilling rig). Article 6 of the models gives the right to tax income from immovable property to the country where the property is located, regardless of whether the activities constitute a permanent establishment. This is justified by the close economic connection between the source of the income and the country where the assets are located.[11] Article 6 also states that the term "immovable property" shall have the meaning it has under the domestic law of the state where the property is situated.

WHY IS IMMOVABLE PROPERTY IMPORTANT FOR MINING?

Immovable property is important for two reasons:

1. The ability of the resource-rich country to collect capital gains tax from the transfer of mining or exploration licences depends on the definition of immovable property in the domestic law of the state where the property is situated. If the domestic law definition of immovable property is too narrow, the resource-rich country may miss out on significant tax revenue.
2. Article 6 on immovable property is a backstop to Article 5 if the resource-rich country is unable to prove that extractive activities give rise to a permanent establishment. Provided that the income derived by a non-resident is from an operation related to immovable property, it is subject to taxation in the country where the extractive activities are located, regardless of whether it has a permanent establishment.

WHAT RISKS SHOULD RESOURCE-RICH COUNTRIES CONSIDER WHEN DEFINING IMMOVABLE PROPERTY?

Article 6(2) states that the definition of immovable property depends on the domestic law of the state where the property is situated. Notwithstanding, it also lists assets and rights that shall, in any case, be regarded as immovable property. The list includes "rights to variable or fixed payments as consideration for the working of, or the right to work mineral deposits, sources and other natural resources." "Working a resource" means removing the resource from the landed property. This generally means that resource-rich countries should be able to tax income arising from extraction.

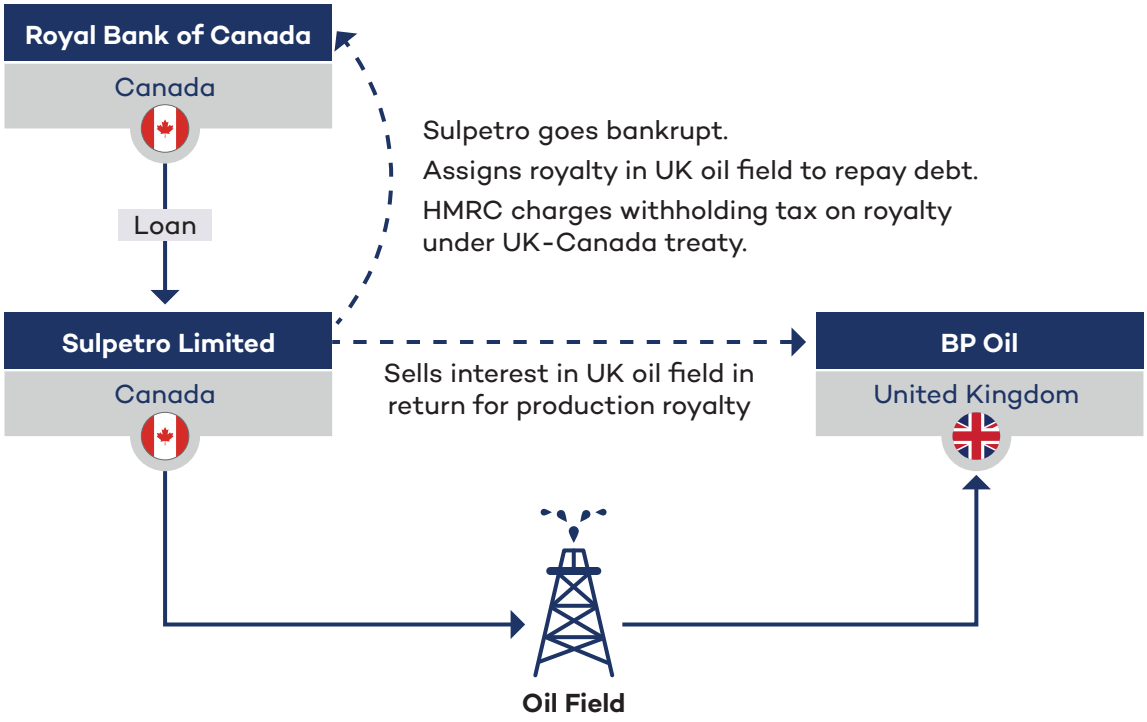
11 OECD, 2019, Commentary 1, Art.6(1)

BOX 7. ROYAL BANK OF CANADA V. HMRC (2020)

The Royal Bank of Canada (RBC) loaned funds to a Canadian oil and gas company, Sulpetro Limited, to help fund the exploration and extraction of oil in the United Kingdom sector of the North Sea. Sulpetro later had financial difficulties and sold its interest in the oilfield to the BP group. The consideration for the sale included an entitlement to royalty payments based on the value of production from the oil field.

Sulpetro ultimately went into receivership. After the remainder of its assets were sold, it still owed RBC about CAD 185 million, and its rights to all future production royalty payments were formally assigned to the bank with the approval of the Canadian courts.

FIGURE 6. Royal Bank of Canada v. HMRC



The British tax authority, HM Revenue and Customs (HMRC), argued that the royalty payments were related to immovable property situated in the United Kingdom and should therefore be subject to tax in the United Kingdom. The court upheld HMRC's view, claiming that there was no reason to limit the scope of Article 6(2) of the United Kingdom–Canada treaty to cover only payments that are made directly to the owner of the rights in exchange for the grant of a right to exploit them. They said, "it would be irrational and inconsistent with the apparent purpose of the provision if it were possible to avoid local taxation on that profit simply by interposing an assignment of the royalty rights (possibly even to an associated company resident in a low-tax jurisdiction) after they had been granted." HMRC collected USD 12.8 million in tax.

However, other sources of mining income may not be taxable in the resource-rich country unless expressly included in the definition of immovable property in the domestic law—for example, income from the sale of the right to explore, depreciable assets (e.g., plant and machinery), seismic surveys, and other non-public information related to immovable property. Furthermore, rights to payments not from the sale of a mineral right or tangible property but computed by reference to the value of the mineral deposit may not be taxable (see Royal Bank of Canada v. HMRC in Box 7).

The objective for resource-rich countries should, therefore, be to adopt a domestic law definition of immovable property that is broad enough to capture income arising from all activities and assets along the mining value chain.

HOW CAN RESOURCE-RICH COUNTRIES ADDRESS THESE RISKS?

Resource-rich countries require a robust definition of immovable property in their domestic law.[12]

1. Include Exploration Assets or Rights as Immovable Property

- The definition of immovable property should include the following:
- The physical mine (i.e., the land on which a deposit is situated)
- Any building or part of a building, including machinery, plant, etc.
- The right to mine (i.e., the licence)
- The right to explore.

The right to explore is particularly important. If read narrowly, the reference to the "right to work mineral deposits" in Article 6 may be taken to mean that only assets or rights relating to mineral production or exploitation qualify as immovable property. Consequently, income derived by a non-resident from exploration activities may not be subject to tax in the source state.

To avoid any ambiguity, resource-rich countries should clarify in their domestic law that immovable property covers both the "right to explore" and the "right to mine," as well as the right to receive income from the "right to explore for or exploit" natural resources. For example, in Australia, Taxable Australian Property includes "a mining, quarrying or prospecting right to minerals, petroleum or quarry materials in Australia" (Australian Taxation Office, n.d.). Similarly, in Chile, the domestic law definition of immovable property includes exploration and exploitation rights, plus buildings, facilities, and other objects attached.

To avoid any ambiguity with respect to exploration, in particular, countries may wish to include the right to explore in Article 6(2) of their treaties (see the example from New Zealand–Papua New Guinea, 2012, in Box 8). Only

12 Article 6(2) ("domestic law") refers to the entire law rather than only tax law (Vogel, 1997, p. 376).

4% of the sampled tax treaties include the right to explore in the definition of immovable property. All these tax treaties include China as a contracting state,[13] most likely because Chinese domestic law includes the right to explore in its definition of real property.

BOX 8. TREATY PRACTICE: INCLUSION OF EXPLORATION ASSETS OR ACTIVITIES IN ARTICLE 6(2)

New Zealand—Papua New Guinea (2012)

"6(2) The term 'immovable property'.... shall in any case include ..., rights to explore for or exploit natural resources (including mineral deposits, oil or gas deposits or quarries) ..., and rights to variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore for or exploit natural resources (including mineral deposits, oil or gas deposits or quarries) ..."

2. Include Other Payments Calculated by Reference to Mineral Production

Some countries may choose to adopt an even broader domestic law definition of immovable property that includes payments calculated by reference to the value of mineral production (see Canada's definition of immovable property in Box 9).

BOX 9. DEFINITION OF IMMOVABLE PROPERTY IN CANADA

Canada (Income Tax Conventions Interpretation Act. R.S.C., 1985, c. I-4)

"Immovable property and real property, ... are hereby declared to include:

a. any right to explore for or exploit mineral deposits and sources in Canada and other natural resources in Canada, and

b. **any right to an amount computed by reference to the production, including profit, from, or to the value of production from, mineral deposits and sources** in Canada and other natural resources in Canada; *(biens immobiliers* et *biens immeubles).*"

Canada's definition recognizes that there are multiple ways to derive income from mineral deposits that are not limited to the right to explore or to mine, such as royalty financing arrangements. This is a financing mechanism in the mining sector that gives the lender the right to a production royalty, often in perpetuity, in return for an upfront payment to the mine. Under Canada's

13 Three out of 86 tax treaties.

definition, the lender would be subject to tax on the production royalty it receives from the mine in Canada. These arrangements are becoming increasingly common, making it important for resource-rich countries to consider adopting a broad definition similar to Canada's.

3. Specify That the Right or Asset Is Situated Where the Immovable Property Is Located

Some resource-rich countries also specify in their tax treaties that the right referred to in the definition of immovable property "shall be regarded as situated where the land, mineral, oil or gas deposits or sources, quarries or natural resources, as the case may be, are situated or where the exploration may take place" (see the example from China–New Zealand, 2019, in Box 10). This is particularly common in Australia's tax treaties. It puts beyond doubt that income from the sale of a mining or exploration right is subject to tax in Australia, which is particularly relevant where the right is indirectly owned (and potentially sold) by a foreign company (see Article 13 of the models).

BOX 10. TREATY PRACTICE: SITUATE THE RIGHT TO EXPLORE OR EXPLOIT WHERE THE RESOURCE IS LOCATED

China–New Zealand 2019

Article 6 – Income from Immovable Property

"Any right referred to in paragraph 2 of this Article shall be regarded as situated where the property to which it relates is situated or where the exploration or exploitation may take place."

RECOMMENDATIONS

1. Resource-rich countries should include the following items in their domestic law definition of immovable property:
    i. Any right to explore or mine mineral deposits in the source state.
    ii. Any right to an amount computed by reference to the production, including profit, from or to the value of production from mineral deposits in the source state.
    iii. Specify that the mining asset or right is situated where the immovable property is located. This avoids any doubt about the source state's right to tax income derived from mining activities or assets linked to immovable property.
2. Countries that are yet to update their domestic law definition of immovable property can still negotiate a broader definition in their tax treaties, as long as it does not constrain or void the existing definition in the domestic law.

DESIGN BROAD RULES ON PERMANENT ESTABLISHMENT

WHAT IS A PERMANENT ESTABLISHMENT?

The business profits of an enterprise resident in Country A are only taxable in Country B if the enterprise has a permanent establishment in Country B, and only to the extent that the profits are attributable to that permanent establishment. For it to have a permanent establishment, the requirements in Table 6 must be met. These are referred to as the "general rule" in Article 5(1) of the models.

The focus of this section is on designing permanent establishment rules for the mining sector. Determining how much profit should be attributed to a permanent establishment once it is identified is an equally complex and challenging area for governments. For more on this topic, see the OECD (2018) *Additional Guidance on the Attribution of Profits to Permanent Establishments*.

TABLE 6. Requirements of the general rule of a permanent establishment

Permanent Establishment Requirement	Description
Having a place of business at their disposal	Having the effective power to use that location for a sufficient duration. Does not have to be under constant control, e.g., use of subsidiary's office by a supervisor from the parent company.
Having a fixed place of business	Two conditions must be met to be considered a fixed place: a certain degree of permanency ("time threshold") and a specific geographical spot ("location test").
The business should be carried on through the permanent establishment	Any situation where business activities are (wholly or partly) carried on at a particular location at the disposal of the enterprise for that purpose.

WHY IS PERMANENT ESTABLISHMENT IMPORTANT FOR MINING?

The complexity and specialization required by the extractive industries mean that foreign enterprises will frequently be part of the extractive process where the mine is located. It will therefore be important to the source state that it has the right to tax business profits earned directly by foreign companies arising from activities related to the exploration and exploitation of its location-specific, non-renewable mineral resources.

WHAT ARE THE RISKS THAT COUNTRIES SHOULD CONSIDER WHEN DESIGNING PERMANENT ESTABLISHMENT PROVISIONS FOR THE MINING SECTOR?

An exploration or mining licence holder will generally have a permanent establishment in the source state. In both cases, the activity is linked to a specific geographical point (a "fixed place of business") and typically lasts longer than 6 months,[14] thus satisfying the general rule.

Right to Tax Subcontractors

The main permanent establishment risk for the mining sector is the right to tax subcontractors. Subcontractors have a higher capacity to avoid having a permanent establishment, and hence paying tax in the source state, than an exploration or mining licence holder.

- Compared to licence holders, subcontractors can more easily structure their activities to avoid exceeding the time threshold and thus triggering a permanent establishment. The risk is higher during exploration that involves shorter periods (see PGS Geophysical AS 2004 in Box 11).
- Subcontractors are more likely to move locations, especially within the exploration phase. For example, vessels used to undertake seismic surveys move continuously within the area being explored.
- Subcontractors may carry out supervisory activities (e.g., planning and managing construction of a mine) that do not necessarily trigger a permanent establishment, at least according to the OECD Model, although the Commentaries do state that an "on-site supervising party" will have a permanent establishment.

MLI ALERT

Article 14

Article 14 of the MLI is an anti-abuse rule that addresses the risk of subcontractors splitting up contracts to avoid meeting the time threshold required to trigger a permanent establishment. It does this by amending Article 5 of the OECD Model. Where an enterprise carries on activities at a building site in the source state for more than 30 days and connected activities are carried on at the same building site by one or more closely related enterprises, each for more than 30 days, then those closely related enterprises' time will be added to the time of the first enterprise to determine its total time at the building site.

Article 14 is not a minimum standard and must therefore be negotiated.

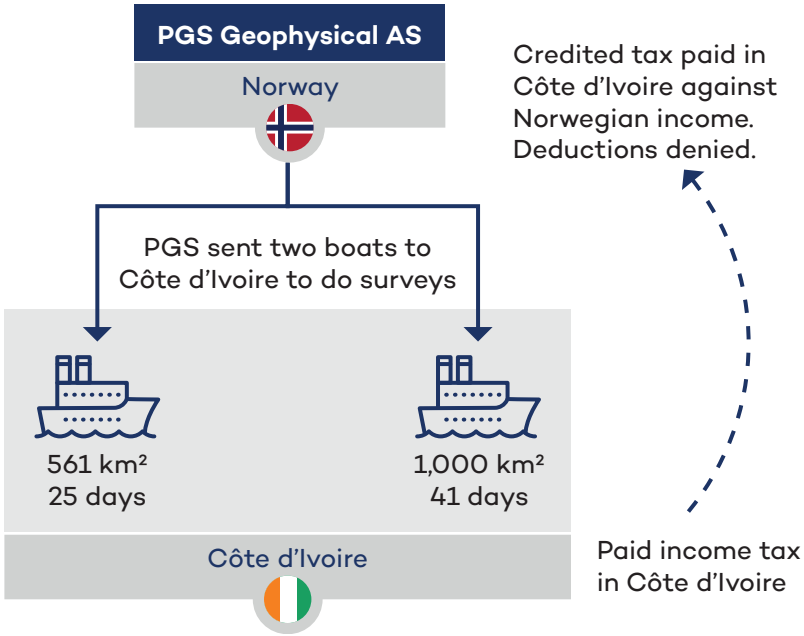
14 In Africa, the average duration of a mining exploration licence is 3 years (Gajigo et al., 2012).

The ease with which subcontractors can avoid triggering a permanent establishment may create an incentive for mining companies to use related-party subcontractors located in low-tax jurisdictions to perform part of the operations, and in doing so, transfer profits offshore.

BOX 11. PGS GEOPHYSICAL AS (NORWEGIAN SUPREME COURT) 2004

PGS Geophysical AS (PGS), a Norwegian company, performed seismic surveys for two foreign companies on the continental shelf of Côte d'Ivoire. One vessel carried out seismic surveys in a contractual area of 561 km^2. Another vessel performed seismic surveys in an area of 1,100 km^2. The missions took 25 days and 41 days, respectively.

FIGURE 7. PGS Geophysical in Côte d'Ivoire



PGS assumed that each vessel had a taxable presence in Côte d'Ivoire and paid taxes on income earned there. It credited the tax paid in Côte d'Ivoire against its income in Norway, reducing the tax paid in Norway. The Norwegian Tax Authority denied the tax credit, arguing that PGS did not have a taxable presence in Côte d'Ivoire.

The Norwegian Supreme Court upheld the tax authority's position, deciding that PGS's activities on the Ivorian continental shelf were too short to trigger a tax liability in Côte d'Ivoire under the Norway–Côte d'Ivoire treaty. PGS was forced to pay tax on its income to Norway from its activities in Côte d'Ivoire.

Remote Operations: The mine of the future

An emerging permanent establishment risk is the remote operation and servicing of mine sites. In the future, it is likely that some mines will be almost entirely operated by control rooms overseas. Technology companies will also play a bigger role in servicing mining projects. Under this scenario, the licence holder will continue to have a permanent establishment regardless of whether workers are physically present at the mine site. This is because the mine itself is a fixed place of business, satisfying the general rule. However, subcontractors, including technology companies that remotely service the mine, are less likely to have a permanent establishment in the source state.

The definition of permanent establishment will need to evolve to include businesses providing goods and services digitally. A shift is already starting to occur under the OECD and G20 Inclusive Framework initiative to address the challenges arising from taxing the digital economy (OECD, 2020b). Additionally, the introduction of Article 12B into the UN Model allows source states to charge a withholding tax on "income from automated digital services." The term **digital services** refers to any service provided on the Internet or an electronic network requiring minimal human involvement from the service provider. It does not include payments qualifying as "fees for technical services" under Article 12A.

While important developments, neither the OECD and G20 global tax reforms or Article 12B address the issue of mining subcontractors operating remotely. The best option for a resource-rich country at the time of writing is to adopt Article 12A of the UN Model, which will allow it to charge withholding tax on payments for technical services provided by non-residents. There is no requirement for the non-resident subcontractor to have a permanent establishment in this instance (see Retain the Right to Tax Income from Management and Technical Services on page 49).

HOW CAN RESOURCE-RICH COUNTRIES ADDRESS THESE RISKS?

This section starts by comparing Article 5 of the OECD and UN models from the point of view of the mining sector. Overall, the UN Model is more favourable to source states, particularly the lower time threshold required to trigger a permanent establishment, making it more likely that they will be able to tax mining subcontractors.

For further guidance on permanent establishment in the mining sector, see Chapter 3 of the UN's (2017) *Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries* and Columbia Center on Sustainable Investment's (2018) *Understanding How the Various Definitions of Permanent Establishment Can Limit the Taxation Ability of Resource-Rich Source Countries*.

TABLE 7. Comparing Article 5 of the OECD and UN models in relation to mining

	General description of the provision	UN Model	OECD Model	ATAF Model
Para 2 Illustrative list of permanent establishments	Operations that are • Prima facie a permanent establishment • Still subject to general rule • Not exhaustive	A mine, an oil or gas well, a quarry or any other place of extraction of natural resources	Identical	Identical
Para 3	Construction PE • Construction/ installation projects • Has its own time threshold, which may be shorter than the general rule	6 months Includes supervisory activities	12 months	Also includes supervisory activities Time threshold agreed between states
	Services PE • Services furnished in the source country (including consultancy services)	More than 183 days in any 12-month period.	Not included	Included Time threshold agreed between states
	Extractives PE • Activities in connection with exploration and exploitation of natural resources in the source state • Time threshold agreed between states	Not included	Not included	Included
Para 4	Preparatory or auxiliary activities, e.g., transportation of crude oil.	Delivery of goods is NOT considered a preparatory or auxiliary activity	Delivery of goods is considered a preparatory or auxiliary activity	

Except for the ATAF Model, which includes a specific reference to mining-related activities in Article 5(3), the OECD and UN models have relatively little to say about the mining sector other than in the illustrative list. Consequently, some resource-rich countries have sought to deviate from the models by adopting more demanding permanent establishment rules for the extractives sector.

The next section explores four alternative approaches to permanent establishment in the mining sector that have emerged from the treaty practice of some resource-rich countries.[15] They are ranked in order of the extent to which they protect the source state's right to tax mining income.

Option 1: Standalone Extractive Industries Article

The best option for resource-rich countries to safeguard their right to tax the income of a permanent establishment at all stages of the mining value chain is to include a standalone extractive industries article covering offshore and onshore mining, as well as oil and gas activities.

The term "standalone article" refers to a special clause that deals exclusively with permanent establishment issues in the mining sector. It may also include other items of income, such as capital gains arising from the alienation of mining assets and employment income. This is a treaty practice of major resource producers, including Norway and Mexico (Boxes 12 and 13).

The benefits of a standalone article:

- It gives primacy to non-renewable natural resources. This may be appealing for resource-rich countries concerned with maintaining their source taxing rights with respect to this sector.
- It can cover multiple items of income, for example, business profits, capital gains, and employment income. In this sense, a standalone article may be more comprehensive than the other approaches listed in this section.
- It can explicitly cover offshore activities, which are harder to prove have a permanent establishment under Article 5. This includes offshore mining activities (often referred to as "deep-sea mining") within a state's territorial waters and continental shelf, provided the standalone article is not limited to oil and gas activities, which some are.

The risks of a standalone article:

- It may be hard to convince some treaty partners, particularly developed countries, to accept a wider scope for source taxation. One way to make this proposal more acceptable is to limit the extent of source taxation to extractive industry activities or offshore activities.

15 Some treaties have more than one approach. For example, some treaties include a reference to exploration in Art. 5(2) and an Extractives PE in Article 5(3), or one of the other approaches.

BOX 12. TREATY PRACTICE: OFFSHORE ARTICLE

Summary of Article 21 of Norway–United Kingdom (2013)

Article 21. Miscellaneous rules applicable to certain offshore activities (selected provisions)

2. Offshore activities are carried on offshore in connection with the exploration or exploitation of the seabed and subsoil and their natural resources situated in that state.

3. An enterprise carrying on offshore activities in the other contracting state is deemed to have a permanent establishment except under paragraphs 4 and 5.

4. Paragraph 3 shall not apply:

a) Offshore activities must be carried on for a period or periods less than 30 days in aggregate over any 12-month period. For the purposes of this sub-paragraph:

i) Where two associated enterprises carry out substantially similar offshore activities in the contracting state, the time spent by each enterprise will be added together to compute the time threshold. This is an anti-avoidance rule.

ii) Enterprises are associated if one participates directly or indirectly in the management, control, or capital of the other or if the same person or persons participate directly or indirectly in the management, control, or capital of both enterprises.

5. Profits derived in connection with the offshore activities of ships or aircraft designed primarily for the purpose of transporting supplies or personnel, or for towing or anchor handling, shall be taxable only in the resident state.

6. Salaries, wages, and other similar remuneration received in respect of employment connected with offshore activities may, to the extent that the duties are performed offshore in the source state, be taxed in that other contracting state.

7. Gains derived by a resident of a contracting state from the alienation of exploration and exploitation rights, property situated in the other contracting state and used in connection with offshore activities, or shares deriving their value or the greater part of their value directly or indirectly from such rights or such property or from such rights and such property taken together, may be taxed in that other state.

EXPANDING THE SCOPE TO INCLUDE ONSHORE ACTIVITIES

Standalone articles have typically targeted extractive industry activities taking place offshore. This is because of the difficulty of monitoring permanent establishments offshore, plus a narrow scope means it is less likely to interfere with other treaty articles. However, there is no reason why a standalone article cannot be used to cover both onshore (necessary for mining) and offshore activities. Mexico has pioneered the onshore option in relation to oil and gas (see the example of Mexico–Argentina, 2015 in Box 13).

The main implementation challenge of an onshore provision will be determining which activities trigger a permanent establishment. For an activity to be a permanent establishment, it must be carried out "in connection with the exploration or exploitation of the seabed and subsoil and their natural resources situated in that State." Establishing a connection is less of an issue for offshore activities simply for practical reasons—there are fewer activities taking place. This is more challenging onshore—for example, is a catering firm that provides services to a mine subject to the standalone article? Determining whether there is a sufficient connection may create uncertainty for taxpayers. Countries could issue guidance on what onshore extractive activities are likely to constitute a permanent establishment.

BOX 13. TREATY PRACTICE: ONSHORE/OFFSHORE ARTICLE

Summary of Article 21 of Mexico–Argentina (2015)

Article 21 – Hydrocarbons

2. An enterprise that carries on activities which consist of or are connected with the exploration, production, refining, processing, transportation, distribution, storage, or commercialization of hydrocarbons for a period or periods exceeding in the aggregate 30 days in any 12-month period shall be deemed to have a permanent establishment.

3. Where two associated enterprises carry on identical or substantially similar activities, or these activities are part of the same project, all activities will be considered for computing the limit. "Associated enterprises" is given meaning under the domestic law where the activities are carried on.

4. Salaries, wages, and other similar remuneration received in respect of employment connected with the exploration, production, refining, processing, transportation, distribution, storage, or commercialization of hydrocarbons may be taxed in the state where the activities are performed. However, such remunerations shall be taxable only in the resident state if the employment is performed for an employer who is not a resident of the other state and provided that the employment is performed for a period that, in aggregate, does not exceed 30 days in any 12-month period.

BOX 14. A CHECKLIST OF WHAT TO INCLUDE IN A STANDALONE EXTRACTIVE INDUSTRIES ARTICLE

A standalone extractive industries article should be self contained. It should categorically state all the items of income it covers, including the rules of application, and any specific thresholds that apply. As the article is standalone, there is no need for it to align with other articles that also cover the same type of income (e.g., the sourcing rule for the offshore indirect transfer of mining assets can be lower in a standalone article than in Article 13(4) of the same treaty).

- ☑ Specify that the article covers the exploration and exploitation of non-renewable natural resources, regardless of whether the activities take place onshore or offshore.
- ☑ Include a supremacy clause clarifying that the standalone extractive industries article prevails over other provisions of the treaty.
- ☑ Deem a permanent establishment in the case of activities carried on by a non-resident enterprise in connection with the exploration and exploitation of natural resources in the source state. Include a time period (e.g., 30 days in aggregate in any 12-month period).
- ☑ Include additional anti-fragmentation rules (see Article 14 of the MLI)
- ☑ Deem employment income derived by a non-resident in connection with the exploration and exploitation of natural resources in the source state to be taxable in the source state.
- ☑ Include a time period (e.g., 30 days in aggregate in any 12-month period).
- ☑ Specify that gains derived by a non-resident from the alienation of exploration and exploitation rights, property, and shares/interests are subject to tax in the source state.
- ☑ Include a sourcing rule at least 50% or lower, considering this provision relates specifically to the sale of mining assets.

If a country cannot negotiate a standalone article, an alternative is to propose a self-standing "Extractives PE" provision in Article 5, elaborated below (and other extractives-related modifications to Articles 6, 13, and 15). This combination can achieve the same result as a standalone extractive industries article while staying within the confines of the models.

Option 2: Self-standing "Extractives PE" in Article 5

The next best option after a standalone article is to establish a self-standing Extractives PE in Article 5. A self-standing Extractives PE deems a permanent establishment to exist in the case of any exploration and exploitation activities, regardless of whether these take place onshore or offshore (see the example of Australia–Germany, 2015 in Box 15). Compared to a standalone extractive industries article, a standalone Extractives PE in Article 5 may be easier to negotiate. The downside is that it only covers one item of income—business profits—and is therefore less comprehensive.

BOX 15. TREATY PRACTICE: SELF-STANDING EXTRACTIVES PE IN ARTICLE 5

Australia–Germany (2015)

"(4) Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State:

(b) carries on activities (including the operation of substantial equipment) in the other State in the exploration for or exploitation of natural resources situated in that other State for a period or periods exceeding in the aggregate 90 days in any 12-month period; or

….., such activities shall be deemed to be carried on through a permanent establishment that the enterprise has in that other State, unless the activities are limited to those mentioned in paragraph 6 and are, in relation to the enterprise, of a preparatory or auxiliary character."

The benefits of a self-standing Extractives PE compared to the models:

- It effectively displaces the general rule.
- It provides a faster taxing right for the source state.
- It reduces the risk of companies structuring their activities to avoid triggering a permanent establishment.
- It may include exploration and exploitation. Exploration is not included in the positive list of permanent establishments in Article 5(2) of the models.

The risks of a self-standing Extractives PE:

- Deeming a permanent establishment can increase the risk of double taxation if the residence state does not give a corresponding deduction.
- It may lead to disputes regarding the attribution of profits to the permanent establishment.

Notwithstanding these risks, resource-rich countries such as Australia have pursued a self-standing Extractives PE for many years without significant

opposition from treaty partners. Permanent establishment provisions in tax treaties have also become more source-based over time, which means that recent treaties expand the circumstances in which source states can tax foreign companies' profits within their borders.

POTENTIAL SCOPE OF A SELF-STANDING EXTRACTIVES PE

There is no limit to what resource-rich countries could include in a self-standing Extractives PE. The OECD Commentaries envisage a self-standing provision specifically for exploration; however, as in the case of the Australia–Germany treaty, this could be extended to include exploitation and extraction as well. A self-standing Extractives PE would typically cover subcontractors and licence holders, provided subcontractors are carrying on activities in connection with exploration and exploitation.

TIME THRESHOLD (IF ANY)

Self-standing means there is no requirement to set a time threshold for triggering an Extractives PE. Those countries that do opt to include a duration test will typically use a lower threshold than the general rule (e.g., 90 days in any 12-month period, as is the case in Australia's tax treaties) (see discussion on page 45).

Countries should consider that activities caught by a self-standing Extractives PE—for example, those performed by subcontractors—may also trigger a Construction PE or Services PE, depending on which model the treaty is based on. If the time threshold for the self-standing Extractives PE is lower than the Construction PE, for instance, subcontractors may be incentivized to claim a Construction PE to potentially avoid a tax liability. There are two options to limit this risk:

- Harmonize all time thresholds in Article 5; however, this would undermine the objective of having a stricter self-standing provision on extractives.
- Alternatively, countries could include a priority rule for the mining threshold if the self-standing provision is stricter. This option is preferable.

Option 3: Extractives PE in Article 5(3)

The next best option for resource-rich countries is to include an Extractives PE in Article 5(3), as in the ATAF Model. This is also recommended by the Columbia Center on Sustainable Investment (2018) in its briefing note on permanent establishment issues in the resource sector. Unlike a self-standing Extractives PE, an Extractives PE in Article 5(3) must include a time threshold. Despite this limitation, there is a growing number of countries using this approach. Twenty per cent of the sample included a dedicated extractives provision in Article 5(3). [16]

16 Seventeen out of 86 treaties.

POTENTIAL SCOPE OF AN EXTRACTIVES PE IN ARTICLE 5(3)

There is no limit to what resource-rich countries could include in such a provision. It should provide the most coverage of the sector possible. Exploration and exploitation/extraction were included in virtually all examples of a dedicated provision in Article 5(3). Some countries also included a reference to an installation, drilling rig, or ship, presumably to bring offshore activities within scope. Others chose to deem a permanent establishment where a non-resident leases equipment and machinery to be used for extractive industry activities or where an enterprise uses substantial equipment in connection with resource extraction. Both variations are likely to catch subcontractors. Box 16 contains some examples.

BOX 16. TREATY PRACTICE: INCLUDING AN EXTRACTIVES PE IN ARTICLE 5(3)

Peru–Japan (2021)

3. The term permanent establishment shall also include: "activities carried on in a Contracting State in connection with the exploration or exploitation of natural resources situated in that Contracting State, but only if such activities last more than six months."

Chile–United States (2010)

"(3) A permanent establishment likewise encompasses:

(a) an installation used for the on-land exploration of natural resources only if it lasts or the activity continues for more than three months;

(b) a building site or construction or installation project and the supervisory activities in connection therewith, or a drilling rig or ship used for the exploration of natural resources not referred to in subparagraph (a) only if it lasts or the activity continues for more than six months; …"

Cameroon–South Africa (2015)

"Where an enterprise provides services or supplies equipment and machinery on hire, or to be used in exploration, extraction or exploitation of mineral resources."

TIME THRESHOLD

Unlike a self-standing provision, an Extractives PE in Article 5(3) must include a time threshold. However, this can be different from the time threshold in the general rule, creating some leeway to set a lower threshold for extractives. Most of the sampled treaties that included a dedicated mining provision in Article 5(3) set a threshold of 6 months or less. Those that only mention exploration in Article 5(3) typically used 3 months, reflecting a shorter period of operation for subcontractors during exploration. There is a trend toward lower thresholds in recent treaties.

The choice of where to set a time threshold (or whether to set a time threshold at all in the case of a self-standing provision) will depend on a cost-benefit analysis:

- Does the potential additional tax revenue (and related risk of revenue loss) from triggering more short-term permanent establishments outweigh the increased administration of having to identify and monitor those permanent establishments?
- Would it be easier and more reliable to collect revenue through a withholding tax on gross revenue through Articles 10, 11, and 12, or a separate article on technical services?

Answers to these questions will vary based on countries' domestic laws and administrative capacities. In general, however, a lower time threshold better protects resource-rich countries' right to tax mining income, for subcontractors particularly.

Option 4: Include exploration in the illustrative list of permanent establishments in Article 5(2)

At a minimum, resource-rich countries should include exploration in the positive list of permanent establishments in Article 5(2)—for example, "a mine, oil or gas well, a quarry or any other place of extraction or exploration of natural resources." While this does not guarantee that exploration activities will be considered a permanent establishment (they must still satisfy the general rule, according to the OECD and UN Commentaries), it is more likely than if the treaty were to remain silent on exploration.

SUMMARY OF THE FOUR ALTERNATIVE APPROACHES

Table 8 summarizes the main differences between the four approaches to permanent establishment in the mining sector. Which option a country chooses will have implications for other treaty articles (see Figure 8).

Recommendations

1. The best option for resource-rich countries seeking to protect their right to tax the income of a permanent establishment at all stages of the mining value chain is to adopt a standalone extractive industries article. It should cover the whole mining value chain. The definition of "contracting state" in Article 3 of the treaty should cover the seabed and its sub-soil over which the contracting state has sovereign rights.
2. Alternatively, resource-rich countries that do not wish to adopt a standalone article or are unable to negotiate one should consider the following modifications to Article 5 (in order of priority), as well as other extractives-related modifications to Article 13:
    i. Deem a permanent establishment to exist in the case of exploration and exploitation of non-renewable natural resources. A self-standing Extractives PE would not be subordinate to the general rule in Article 5(1). This provision could include a time

threshold or not. Not including a time threshold creates a faster, more reliable source taxing right; however, there may be other considerations, such as the compliance cost of monitoring more permanent establishments.

ii. Include an Extractives PE in Article 5(3). Unlike a self-standing Extractives PE, Article 5(3) does not have to follow the general time threshold; instead, it can adopt a lower threshold (e.g., 3 months or less).

3. At a minimum, all resource-rich countries should include exploration activities in the positive list in Article 5(2). This will make it more likely that exploration activities trigger a permanent establishment, although this still depends on the general rule in Article 5(1) being satisfied.

TABLE 8. A summary of the four alternative approaches to permanent establishments in the extractives sector

Article	Does it increase the likelihood that the source state will have the right to tax mining income?	Easy to negotiate with treaty partners?	What stages in the mining value chain does it cover?	What part of treaty practice (% of sampled treaties)?
Standalone extractive industries article	Very likely	Challenging because it is an entirely new article. It will depend on each negotiation	Exploration to sales	6% (5 treaties)
Self-standing Extractives PE in Article 5	Likely	Easier than a standalone article, as it is still within Article 5; however, it will depend on each negotiation	Typically, exploration and exploitation	7% (6 treaties)
Extractives PE in Article 5(3)	Likely, because it does not have to satisfy the general time threshold, although other aspects of the general rule must be met	Easier, although it depends on various factors, i.e., threshold	Typically, exploration and exploitation	20% (17 treaties)
Reference to exploration in Article 5(2)	Unlikely, as it must satisfy the entire general rule	Easy to negotiate	Typically, exploration and extraction	33% (28 treaties)

FIGURE 8. Mapping the interaction between different approaches to permanent establishment and other treaty articles

STEP 1 Include the right to mine and explore in Article 5(2).

STEP 2 Choose a package of treaty measures that best address the main risks to mining revenues in your country context.

OPTION 1

RIGHT TO TAX SUBCONTRACTORS: Standalone Article

Advantages

- Gives primacy to natural resources.
- Covers permanent establishment, right to tax indirect transfer, and salaries.
- Can explicitly cover offshore activities.

Challenges

- May be difficult to negotiate.
- May be challenging to distinguish onshore activities that are "connected" and those that are not.

RIGHT TO TAX FEES FOR TECHNICAL AND MANAGEMENT SERVICES

OPTION 2

RIGHT TO TAX SUBCONTRACTORS: Self-standing Extractives PE in Article 5

Advantages

- Same as a standalone article: provides a faster taxing right for the Source State; and eliminates risk of companies structuring their activities to avoid triggering a permanent establishment.

Challenges

- Unlike a standalone article, it does not cover the right to tax indirect transfers, or salaries, hence the need to include the other Articles listed below.

RIGHT TO TAX FEES FOR TECHNICAL AND MANAGEMENT SERVICES

RIGHT TO TAX OFFSHORE INDIRECT TRANSFERS OF MINING ASSETS

RIGHT TO TAX EMPLOYEE INCOME

OPTION 3

RIGHT TO TAX SUBCONTRACTORS: Extractives PE in Article 5(3)

Advantages

- Cover permanent establishments at all stages of the mining value chain.

Challenges

- Some aspects of the general rule must still be met. No certainty that all activities at all stages of the value chain will have a permanent establishment; subbcontractors during exploration.

RIGHT TO TAX FEES FOR TECHNICAL AND MANAGEMENT SERVICES

RIGHT TO TAX OFFSHORE INDIRECT TRANSFERS OF MINING ASSETS

RIGHT TO TAX EMPLOYEE INCOME

LEGEND

RIGHT TO TAX FEES FOR TECHNICAL AND MANAGEMENT SERVICES

1. Standalone Technical Services Article
2. Expand the definition of royalties to include fees for technical services in Art. 12
3. Extractives PE and/or Services PE in Article 5(3)

RIGHT TO TAX OFFSHORE INDIRECT TRANSFERS OF MINING ASSETS

Establish a comprehensive definition of immoveable property in Art.6(2); and ensure right to tax indirect transfers in domestic law and Art. 13(4)

RIGHT TO TAX EMPLOYEE INCOME

Ensure right to tax employees connected to extractives in Art. 15

RETAIN THE RIGHT TO TAX INCOME FROM MANAGEMENT AND TECHNICAL SERVICES

WHAT ARE MANAGEMENT AND TECHNICAL SERVICES FEES?

Mining subsidiaries may access administrative and technical services from their parent company or a dedicated related-party services company. Management services are typically administrative (e.g., accounting or legal), whereas technical services involve specialized support to the mining operation (e.g., geological testing). The parent or services company usually charges the subsidiary a fee for service, which it can deduct from its taxable income, reducing the tax base of the source state.

WHY IS THE RIGHT TO TAX MANAGEMENT AND TECHNICAL SERVICES IMPORTANT FOR MINING?

Management and technical services fees are a major source of outbound payments in the mining sector. Such fees are normally subject to a withholding tax in the country where the mine is located, providing a reliable and predictable source of government revenue. Countries that relinquish the right to tax services under their domestic law or tax treaties not only forgo revenue but potentially incentivize companies to inflate these payments to strip profits out of the mine and transfer them offshore, usually to a low-tax jurisdiction[17] (see the Paladin Case in Box 4).

WHAT RISKS SHOULD RESOURCE-RICH COUNTRIES CONSIDER WHEN NEGOTIATING THE RIGHT TO TAX FEES FOR MANAGEMENT AND TECHNICAL SERVICES?

Source states have the primary right to tax fees for services on a gross basis under their tax treaties. The benefit of this approach is that source countries can collect a withholding tax on income from services without the need for a permanent establishment to be triggered. This reduces the risk that companies restructure their activities to avoid having a permanent establishment in the source state and lowers the administrative costs of having to monitor numerous permanent establishments.

HOW CAN RESOURCE-RICH COUNTRIES ADDRESS THESE RISKS?

Countries should explicitly refer to management and technical services payments in their tax treaties. The most reliable solution is to include a standalone article on fees for technical services, same as Article 12A of the UN Model. Alternatively, some countries have expanded the definition of royalties in Article 12(3) to include technical services. Others have sought to include a Services PE in Article 5(3) or fallback on Article 21 (Other Income).

17 OECD (2015), *Measuring and Monitoring BEPS, Action 11—2015 Final Report* (supra note 23, 157) recognizes that withholding taxes "can influence cross-border tax planning opportunities" and can "discourage profit shifting via strategic allocation of debt and intangible assets."

Each of these options is considered below.[18] They are ranked in order of which option best protects the source state's right to tax management and technical services income.

1. Adopt a Standalone "Fees for Technical Services" Article

The most reliable option is to adopt a standalone "fees for technical services" article. This approach was introduced by the UN Model (2017) in response to concerns from developing countries regarding their ability to tax technical services fees. It gives the source state the primary right to tax fees for services on a gross basis, provided it has this right under its domestic law (see an example from Cameroon–South Africa, 2017 in Box 17).

BOX 17. TREATY PRACTICE: CAMEROON-SOUTH AFRICA (2017)

Article 14 – Technical Fees (summarized)

1. Shared taxation on technical fees between both the source and the residence states.
2. Tax on technical fees should not exceed 10% of the gross amount.
3. "Fees for technical services" means payments of any kind to any person, other than to an employee of the person making the payments, in consideration for any services of a technical, managerial, or consultancy nature.
4. The abovementioned fees do not apply if the beneficial owner of the technical fees carries on business through a permanent establishment in the source state, and the services are connected to that permanent establishment.

The standalone article is a recent innovation. Therefore, it is not surprising that only 7% of the sampled treaties followed this approach.[19] The benefits are significant, however, and resource-rich developing countries are encouraged to consider this option.

18 Some treaties have more than one approach. For example, some treaties must have both a reference to technical services in Article 12 (Royalties) and Services PE/Extractives PE in Article 5.

19 Six out of 86 tax treaties.

TABLE 9. Benefits and risks of a standalone fees for technical services article

Benefits	Risks
• Source countries can collect some tax on services income without needing to find a permanent establishment. This reduces the risk that companies can structure their activities to avoid having a tax liability and lowers the administrative costs of having to identify and monitor permanent establishments. It also enables the source state to tax income from services provided remotely (see discussion of remote mining operations on page 37) • Article 12A has primacy over Article 7. This means that fees for services will not constitute a business profit under Article 7 (taxed on a net basis) if they are dealt with in Article 12 (taxed on a gross basis). The only exception is if the company providing the services has a permanent establishment in the source state and the services are connected to that permanent establishment, in which case Article 7 has priority.	• The term "services" is not defined, which may create interpretation challenges. • Some OECD countries may be reluctant to agree to a new article that deviates from the OECD Model without concessions on other matters.

Finally, Article 12A allows the contracting states to negotiate the rate of tax to be levied on services income. The rate should be the same as in domestic law to avoid the risk of treaty shopping.

2. Expand Article 12(3) to Include Payments for Technical Services

Article 12 gives source states the right to charge a withholding tax on royalty payments for the use of or the right to use intellectual property, equipment, or know-how—for example, payments for the use of trademarks, trade names, copyright, or intellectual property.

Some countries have expanded the definition of royalties to include fees for technical services. Most importantly, they include technical services as a separate source of royalty payments, rather than embed them in other services for which royalties are due (see Argentina–Chile, 2015, in Box 18)—as ancillary and subsidiary to the use of property, rights, equipment, and information, for instance (see India–US, 1989, in Box 19). While this may cover situations where a non-resident provides technical services to a mine as part of assisting it to use equipment provided under Article 12(3)(b), most

services are unlikely to qualify, leaving the source state unable to tax the associated payments.

BOX 18. TREATY PRACTICE: INCLUSION OF TECHNICAL SERVICES IN ARTICLE 12

Summary of Article 12 of Argentina–Chile (2015)

3. The term "royalties" means payments of any kind received as a consideration for the use of, or the right to use, news, any copyright of literary, artistic or scientific work (including cinematograph films), or films or tapes used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience, and payments for the rendering of technical assistance.

BOX 19. TREATY PRACTICE: EMBEDDED TECHNICAL SERVICES IN ARTICLE 12

Summary of Article 12 of India–United States (1989)

5. Definition of the term "Royalties" covers "fees for included services," specifically, payments for the rendering of any technical or consultancy services, if such services:

a. Are ancillary and subsidiary to the right, property, or information

b. Make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Countries that include technical services in Article 12(3) will also need to clarify the interaction with Article 14 – fees for personal services. Article 14 (2) of the Argentina-Chile treaty defines personal services as including, in particular, "independent activities of a scientific, literary, artistic, educational or pedagogical nature, as well as the independent activities of doctors, lawyers, engineers, architects, dentists and accountants." This makes it relatively clear that technical services provided by mining subcontractors and the like are not covered by Article 14 but left to Article 12.

3. Include an Extractives PE or a Services PE in Article 5

The next best option is for countries to adopt an Extractives PE in Article 5. An Extractives PE deems a permanent establishment to exist in the case of exploration and exploitation activities (see Australia–Germany, 2015, in Box 15). Its main advantage over a Services PE, which is found in

Article 5(3) of the UN and ATAF models, is that it displaces the general rule, reducing the risk that non-resident entities can restructure their activities to avoid having a permanent establishment in the source state. A Services PE, on the other hand, must still satisfy the general time threshold, which is typically 6 months in any 12-month period, or, less often, a 24-month period.

BOX 20. MEASURES ADOPTED BY THE SOUTH AFRICAN REVENUE SERVICE TO HELP IDENTIFY PERMANENT ESTABLISHMENTS IN SOUTH AFRICA

- South Africa requires a resident that is or will be the recipient of services to report this arrangement to the South African Revenue Service within 45 days of reaching an agreement with a non-resident.
- Failure to disclose can result in a penalty of ZAR 50,000 (approximately USD 4,000) for the participant and ZAR 100,000 (approximately USD 8,000) for the promoter each month that the failure continues, up to a maximum of 12 months.
- The amount of penalties is doubled if the anticipated tax benefit achieved by the arrangement exceeds ZAR 5 million (approximately USD 35,000) and is tripled if the benefit exceeds ZAR 10 million (approximately USD 70,000).

It is possible to include both a Services PE and an Extractives PE in Article 5. However, countries that do this must clarify that the Extractives PE takes precedence where services are provided to a resident involved in the exploration or extraction of natural resources. Otherwise, non-residents may claim the Services PE that is subject to a longer duration test, making it easier to avoid.

Irrespective of whether countries adopt a Services PE or Extractives PE to tax management and technical services, insofar as they rely on Article 5, they should implement additional measures to help with identifying permanent establishments. See an example from South Africa in Box 20.

Fallback Option: Article 21 (Other Income)

Countries with existing treaties based on the UN Model that do not contain any of the three options already discussed may argue their right to tax fees for technical services under Article 21 ("Other Income"). The UN Model gives the source state the right to tax other income as long as it is sourced there, whereas only the residence state has the right to tax other income under the OECD Model.

Provided the source state has the right to tax other income, two conditions must be met:

- Services income is not dealt with elsewhere in the treaty.

- The income has its source in the source state. The word "source" is of critical importance. Ideally, the source state's domestic law would deem the item of other income in question, for instance, management services income, to be sourced in the state.

There is no guarantee that management and technical services will be caught by Article 21. Quite the opposite. It is highly uncertain how the courts are likely to interpret "other income." Taxpayers may argue that services income is, in fact, a "business profit" under Article 7, in which case there is no tax due in the source state unless the non-resident is found to have a permanent establishment. The outcome will depend, among other things, on how services income and business profits are defined in the domestic law of both states. While some countries have been successful in relying on Article 21 to tax management fees (see *Copesul v. Brazilian Tax Authority, STJ, 2012)*, it is a risky bet that countries should avoid if possible.

TABLE 10. Comparing the three approaches to taxing management and technical services fees

Article	Covers a broad range of services	Requires the service provider to have a permanent establishment in the source state	Easy to negotiate	Part of treaty practice (% of sampled treaties)
Standalone fees for technical services article	Yes	No	May be harder to negotiate, being that it is a standalone article	7% (6 treaties)
Technical services included in Article 12(3) (Royalties)	Yes, if technical services are defined broadly, and not contingent on other transactions (e.g., the transmission of know-how)	No	Easier to negotiate as it is still within Article 12	19% (16 treaties)
Extractives PE and/or Services PE in Article 5	Yes	Yes, although it may be easier to trigger an Extractives PE, subject to a lower time threshold, than a Services PE which must satisfy the general time threshold.	Depends on various factors, i.e., time threshold	62% (53 treaties)[20]

20 This approach is more common than a standalone article because it is what was practical before the UN introduced Article 12A in 2017, not because it is more comprehensive or reliable.

SUMMARY OF THE THREE APPROACHES TO TAXING MANAGEMENT AND TECHNICAL SERVICES FEES

Table 10 summarizes the main differences between the three approaches to taxing management and technical services fees in the mining sector.

RECOMMENDATIONS

1. Resource-rich developing countries should adopt a standalone "fees for technical services" article like Article 12-A of the UN Model. One advantage of this option is that source states can tax remote service providers. This will be important as mines become increasingly automated and digitized.
2. Alternatively, resource-rich countries that do not wish to adopt a standalone article or are unable to negotiate one should consider the following options in order of priority:
    i. Expand Article 12(3) to include technical services as a separate source of royalty payments rather than embedded in other services.
    ii. Include an Extractives PE and/or a Services PE in Article 5. An Extractives PE is preferable because it displaces the general rule, making it harder for non-residents to avoid tax in the source state. Countries could include both options but make it clear that the Extractives PE takes priority where services are provided to residents involved in the exploration and extraction of natural resources. Either way, a Services PE or Extractives PE (or both) should be combined with an anti-contract splitting rule (see Article 14 of the MLI).

PART FOUR:

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

The use of tax treaties by developing countries is controversial. The best-case scenario is that they help to attract foreign direct investment by reducing the risk of double taxation. Evidence for this is weak, particularly in mining, which is location specific. The worst-case scenario is that they become a vehicle for multinational tax avoidance leading to significant revenue losses for developing countries.

Despite the widely recognized risks, many developing countries have determined that they would still benefit from signing tax treaties because of some specificities in their jurisdictions. In such cases, an understanding of good treaty practice—how countries in a similar position have negotiated, reviewed, or modified their treaties to better protect their tax base—can help lay the foundations for fairer and more sustainable tax treaties.

Resource-rich developing countries should pay particular attention to tax treaty practice related to offshore indirect transfers, permanent establishment, and the taxation of management and technical services. These are some of the most material risks to mining revenues, especially when tax treaties are not negotiated with the sector in mind or there are weaknesses in domestic law.

Addressing these risks may require countries to deviate from the model conventions. Not only have many resource-rich countries done this before, but it is entirely justifiable considering the finite, non-renewable nature of mineral resources. Resource-rich countries should take all reasonable steps to negotiate (or renegotiate) tax treaties that protect their right to tax mining income at all stages of the value chain, subject to their other policy goals.

The following recommendations are intended to help governments of resource-rich developing countries make informed, grounded decisions about whether to enter a tax treaty and, if so, how best to safeguard mining revenues.

GENERAL RECOMMENDATIONS

1. Tax treaty negotiators in resource-rich countries should carefully analyze the costs and benefits of entering a tax treaty, including in the context of the mining sector specifically. They should also consider whether tax treaty policy objectives could be achieved through other means.
2. Tax treaty negotiators should review their tax treaty models from the perspective of the mining sector, considering the articles that are most likely to impact mining revenue collection.
3. Tax treaty negotiators should map cross-border transactions along the mining value chain, identifying key international tax risks that can be reduced through careful tax treaty design.

4. Resource-rich countries should limit the time and scope of fiscal stabilization provisions in domestic law, as well as in MCAs. In particular, the adoption of bona fide anti-avoidance measures or the interpretation of existing laws by host governments to protect the revenue base against BEPS consistent with internationally recognized tax practices should not be considered a change in law constrained by stabilization.

ESTABLISH AND RETAIN THE RIGHT TO TAX GAINS FROM THE INDIRECT TRANSFER OF MINING ASSETS

1. Resource-rich countries should adopt a comprehensive definition of immovable property in their domestic law (see the recommendations on immovable property in the next section).
2. Resource-rich countries should establish the right to tax indirect transfers in their domestic law. Countries with limited enforcement capacity may prefer Model 1 in Table 5 (the local entity is deemed to have sold the right or asset), although the risk of double taxation is higher than in the case of Model 2.
3. Resource-rich countries should include in their tax treaties the right to tax the sale of shares or comparable interests that derive at least 50% of their value from assets in the source state. They should also negotiate an anti-abuse rule in line with Article 9(1) of the MLI.
4. In addition, resource-rich countries could consider adopting a standalone extractive industries article that includes the right to tax indirect transfers in the extractives sector specifically. This provision could include a lower sourcing rule for mining assets, combined with pro rata taxation of the gain to limit the risk of double taxation.

PROVIDE A COMPREHENSIVE DEFINITION OF IMMOVABLE PROPERTY IN THE DOMESTIC LAW

1. Resource-rich countries should include the following items in their domestic law definition of immovable property:
    i. Any right to explore or mine mineral deposits in the source state.
    ii. Any right to an amount computed by reference to the production, including profit, from or to the value of production from mineral deposits in the source state.
    iii. Specify that the mining asset or right is situated where the immovable property is located. This avoids any doubt about the source state's right to tax income derived from mining activities or assets linked to immovable property.
2. Countries that are yet to update their domestic law definition of immovable property can still negotiate a broader definition in their

tax treaties, as long as it does not constrain or void the existing definition in the domestic law.

DESIGN BROAD RULES ON PERMANENT ESTABLISHMENT

1. The best option for resource-rich countries seeking to protect their right to tax the income of a permanent establishment at all stages of the mining value chain is to adopt a standalone extractive industries article. It should cover the whole mining value chain. The definition of "contracting state" in Article 3 of the treaty should cover the seabed and the sub-soil over which the contracting state has sovereign rights.
2. Alternatively, resource-rich countries that do not wish to adopt a standalone article or are unable to negotiate one should consider the following modifications to Article 5 (in order of priority), as well as other extractives-related modifications to Article 13:
    i. Deem a permanent establishment to exist in the case of exploration and exploitation of non-renewable natural resources. A self-standing Extractives PE would not be subordinate to the general rule in Article 5(1). This provision could include a time threshold or not. Not including a time threshold creates a faster, more reliable source taxing right; however, there may be other considerations, such as the compliance cost of monitoring more permanent establishments.
    ii. Include a reference to exploration and exploitation of natural resources or resource-related structures or installation used for the exploration and exploitation of natural resources in Article 5(3). Article 5(3) does not have to follow the general time threshold; instead, it can adopt a lower threshold (e.g., 3 months or less).
3. At a minimum, all resource-rich countries should include exploration activities in the positive list in Article 5(2). This will make it more likely that exploration activities trigger a permanent establishment, although this still depends on the general rule in Article 5(1) being satisfied.

RETAIN THE RIGHT TO TAX INCOME FROM TECHNICAL AND MANAGEMENT SERVICES

1. Resource-rich developing countries should adopt standalone fees for a technical services article like Article 12-A of the UN Model. One advantage of this option is that source states can tax remote service providers. This will be important as mines become increasingly automated and digitized.

2. Alternatively, resource-rich countries that do not wish to adopt a standalone article or are unable to negotiate one should consider the following options in order of priority:
    i. Expand Article 12(3) to include technical services as a separate source of royalty payments rather than embedded in other services.
    ii. Include an Extractives PE and/or a Services PE in Article 5. An Extractives PE is preferable because it displaces the general rule, making it harder for non-residents to avoid tax in the source state. Countries could include both options but make it clear that the Extractives PE takes priority where services are provided to residents involved in the exploration and extraction of natural resources. Either way, a Services PE or Extractives PE (or both) should be combined with an anti-contract splitting rule (see Article 14 of the MLI).

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APPENDIX

TABLE A1. Tax treaty disputes in the extractives sector over the last 20 years

Court case/Public report	Year	Revenue at stake	Result for government
Risk 1: Taxation of offshore indirect sales of mining assets			
Alta Energy (Canada–Luxembourg)	2020	USD 380 million	Lost
Royal Bank of Canada (Canada–United Kingdom)	2020	USD 12.8 million	Won
ConocoPhillips, Perenco (Vietnam–United Kingdom)	2017	USD 179 million	TBD
Resource Capital Fund III LP (Australia–United States)	2014	USD 58 million*	Lost
Paladin Energy (Namibia–Mauritius)	2014	USD 14.7 million	Lost
Heritage Oil and Gas Company (Uganda–Mauritius)	2010	USD 405 million	Won
MIL Investments (Canada–Luxembourg)	2006	USD 425 million	Lost
Risk 2: Taxation of subcontractors			
Adams Challenge (UK) Ltd. (2021) (United States–United Kingdom)	2021	USD 24 million	Won
GIL Mauritius Holdings Ltd. (2018) (India–Mauritius)	2018	USD 1.8 million *	Lost
Clough Projects Intl. Pvt. Ltd. (2010) (India–Australia)	2010	USD 21.4 million*	Lost
Fugro Engineers BV (2008) (India–Netherlands)	2008	USD 1.6 million*	Won
BHP Minerals Intl. Exploration Inc. (2007) (India–United States)	2007	USD 2.6 million	Lost
PGS Geophysical AS (2004) (Norway–Côte d'Ivoire)	2004	USD 2.5 million	Lost
Risk 3: Taxation of management and technical services			
Oyu Tolgoi (2021) (Mongolia–Netherlands)	2021	USD 288 million[21]	N/A
Paladin Energy (Malawi–Netherlands, renegotiated 2015)	2015	USD 27.5 million	N/A

Note: An asterisk (*) means that the figure refers to the total profits or gains rather than the capital gains tax due.

21 A range of issues is covered by the amended assessments. One of them relates to withholding tax and is therefore impacted by tax treaties.

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