IGF

INTERGOVERNMENTAL FORUM
on Mining, Minerals, Metals and
Sustainable Development

Protecting the Right to Tax Mining Income: Tax Treaty Practice in Resource-Rich Countries

Alexandra Readhead and Jaqueline Taquiri, IGF

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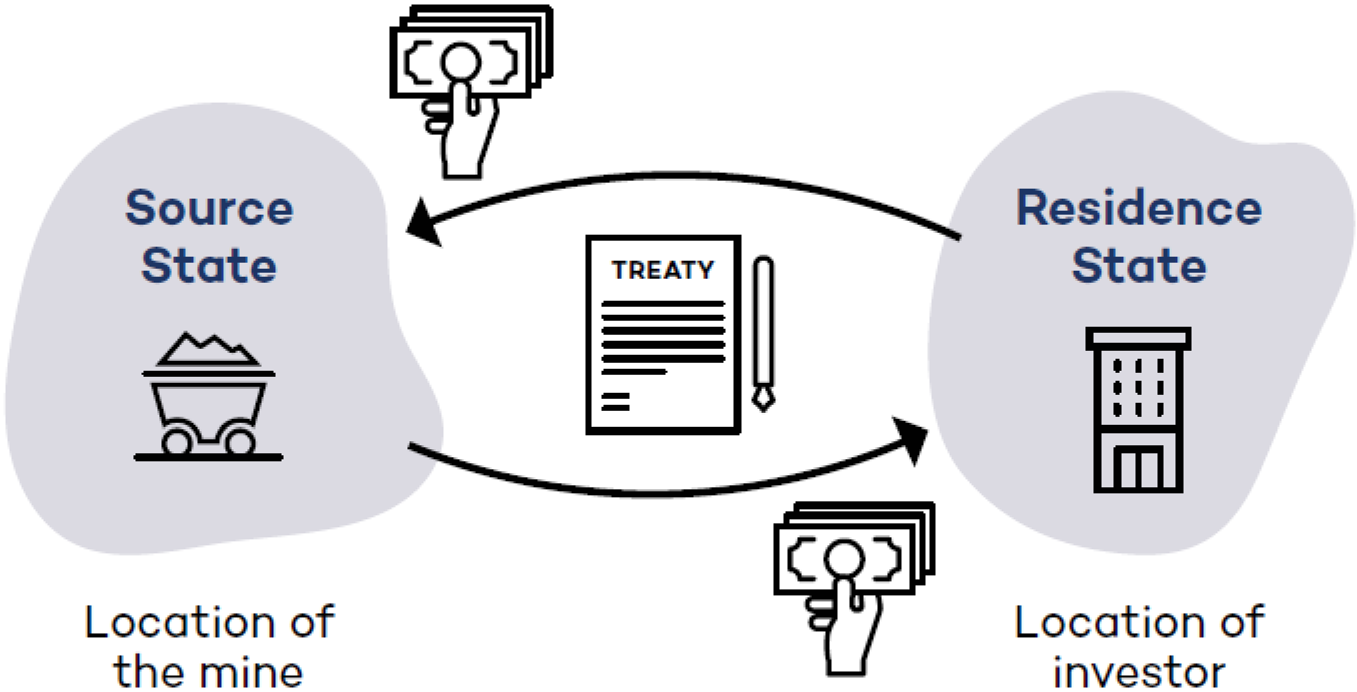
What is a tax treaty, and how do they work?



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

Should resource-rich countries sign treaties?

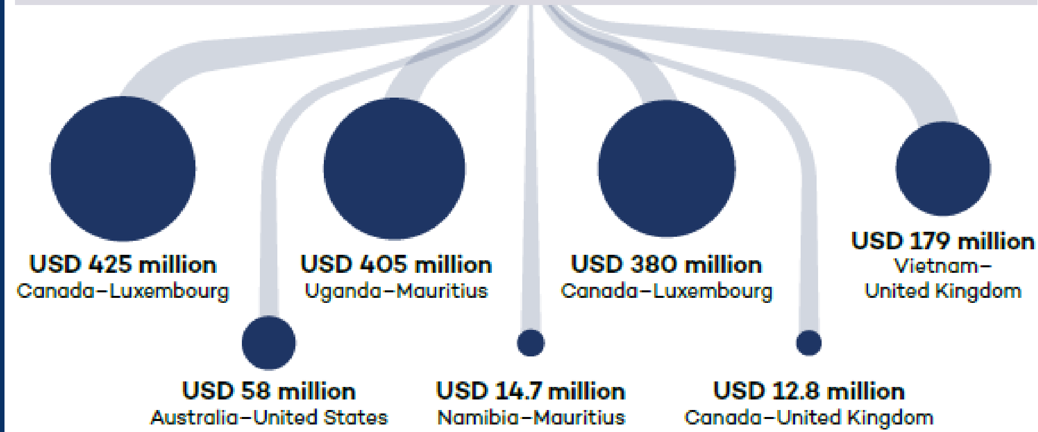
Benefits	Costs
1. Reduces double taxation which **may** increase FDI, **but** impact on mining is limited due to location-specific resource and use of Mining Concession Agreements. 2. Dispute resolution. 3. Access to information from treaty partner countries.	1. Loss of tax revenues. 2. Risk of treaty abuse – loss of revenues due to tax planning. 3. Costly to negotiate and administer.

Uncertain benefits, widely recognised risks…

Hundreds of millions of dollars at stake

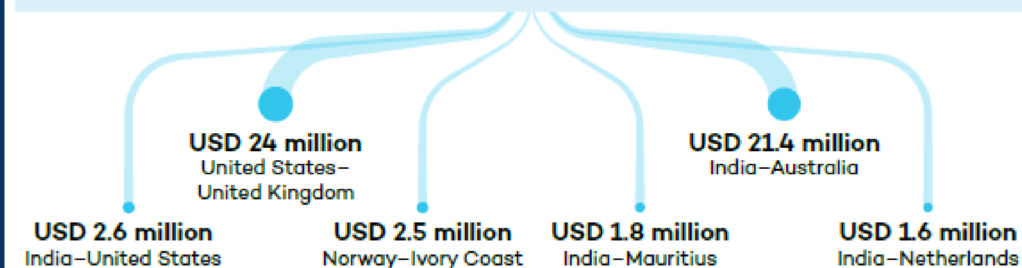
1 Risk to Revenue: Taxation of offshore indirect transfers of mining assets

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.



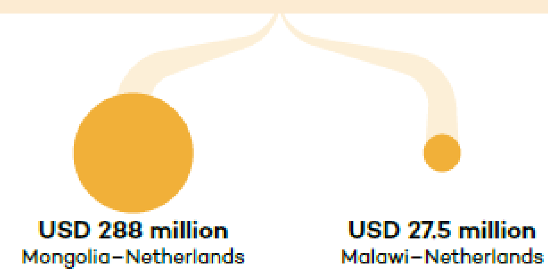
2 Risk to Revenue: Taxation of mining subcontractors

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.



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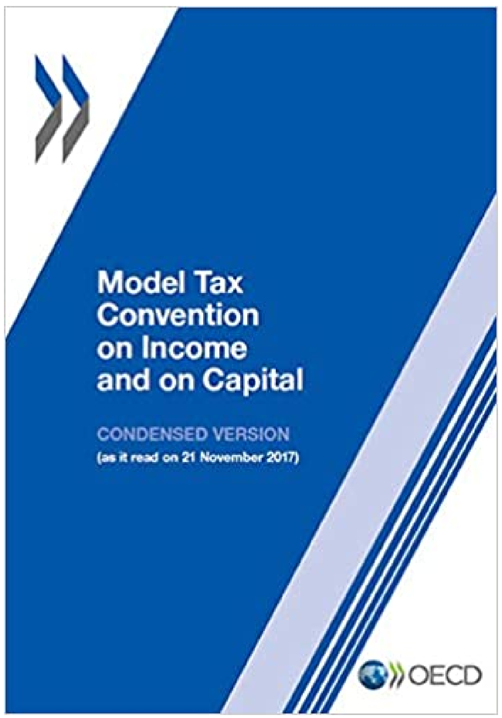
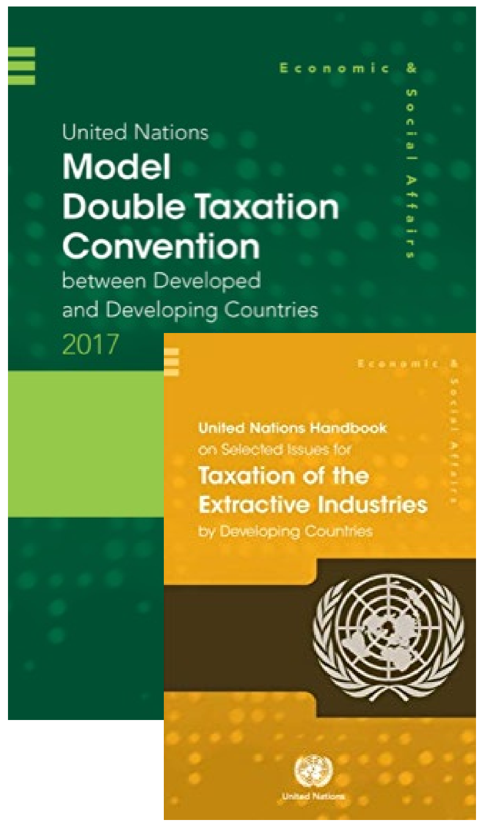
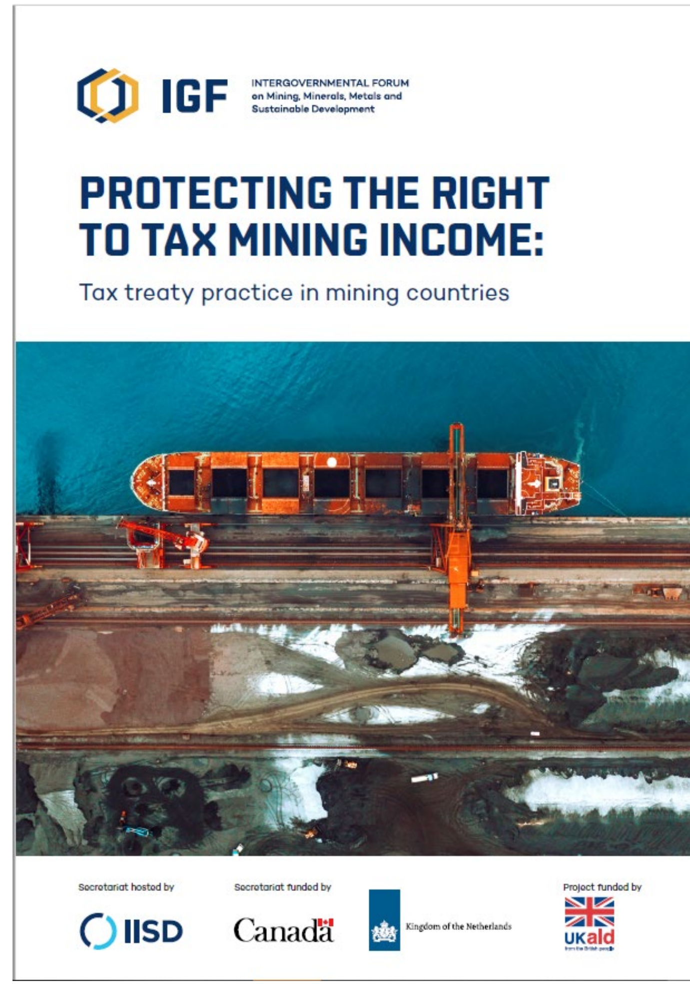
Countries that choose to sign treaties – how can they protect mining taxes?







86 tax treaties

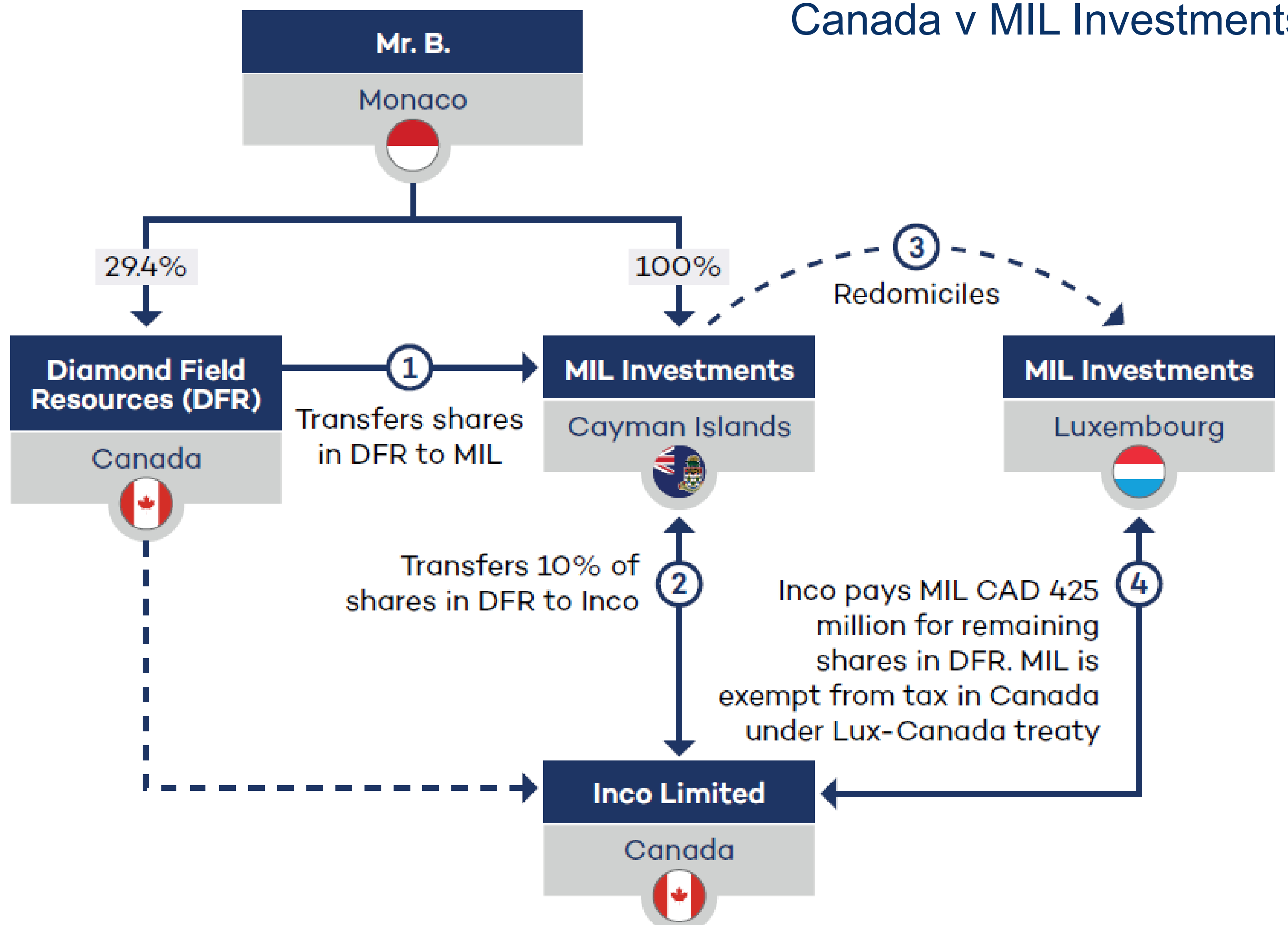
18 countries

Articles 5,6,13

Africa | LAC | Asia

1. Establish the right to tax indirect transfers

Canada v MIL Investments (2006)



1. Establish the right to tax indirect transfers

Indirect sale or transfer of mining license likely to generate considerable capital gains which should be subject to tax in the source country.

- E.g., MIL Investments v Canada, CAD 425 million

- Definition of immoveable property is too narrow (next section)
- Only 35% of treaties include the right to tax indirect transfers; and only 29% when one party is a low-income, resource-rich country (PCT, 2020).

Recommendations:

1. Establish a robust definition of immoveable property (next section)
2. Establish the right to tax indirect transfers in domestic law –
3. Negotiate Article 13 to include the right to tax indirect transfers; and
4. Negotiate a standalone extractive industry article (e.g. Norway)

2. Adopt an exhaustive definition of immoveable property

The ability to tax indirect transfers depends on Art 6. If the definition is too narrow, the resource-rich country may miss out on significant tax revenue.

- OECD/ UN definition “working a resource” does not cover rights to exploration, production, depreciable assets, non-public information.
- Only 4% of sampled treaties include the right to explore.
- E.g., Royal Bank of Canada v HMRC (2020), $12.8mn tax

Recommendations:

1. Include exploration assets or rights as immoveable property
2. Include other payments calculated by reference to mineral production
3. Specify that right/asset is situated where immoveable property is located

3. Design broad rules on Permanent Establishment

General Rule: Profits of a non-resident entity are only taxable in the source country if they have a fixed place of business – location test, time threshold.

Mine site

Subcontractors

Remote mining

3. Design broad rules on Permanent Establishment

Complexity and specialisation required by mining means foreign enterprises will frequently be part of the process. Source country must have right to tax.

- Right to tax subcontractors which are more mobile than license holders
  - E.g., PGS Geophysical (Norway-Ivory Coast)
- Remote mining operations – may not have a physical presence

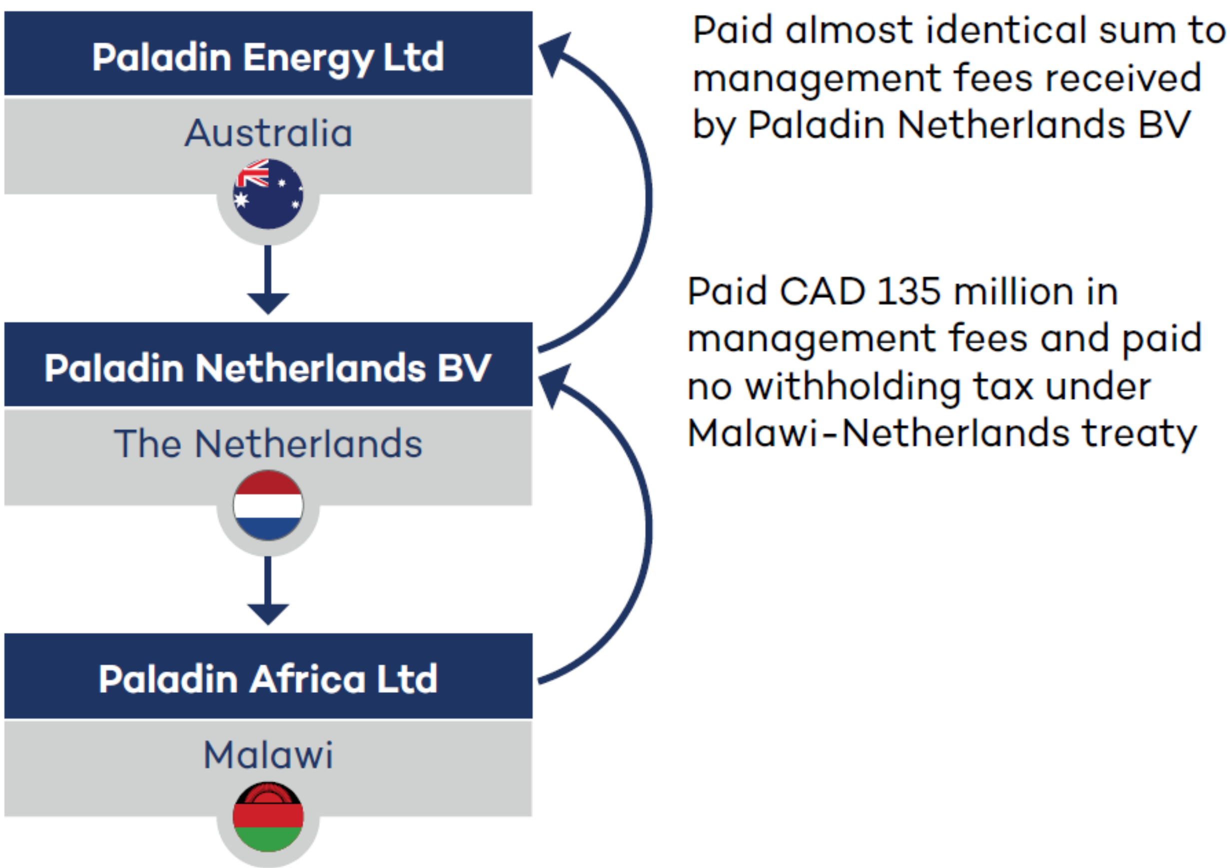
Recommendations:

Minimum – Include a reference to mining activities in Art 5(2) (33%); PLUS

1. Deem a PE to exists in a standalone extractive industries article (6%); or
2. Deem a PE to exist for exploration and exploitation in Art 5 (7%); or
3. Include a reference to mining related activities in Art 5(3) (20%).

4. Retain right to tax income from management and technical services

The case of Paladin Energy in Malawi



4. Retain right to tax income from management and technical services

Major source of outbound payments in the mining sector.

Countries that relinquish the right to tax management / technical services fees forgo withholding tax and increase the risk of BEPS.

Recommendations:

1. Adopt a standalone fees for technical services article – Art 12A (7%); or
2. Expand definition of royalties in Art 12 to include technical fees (19%); or
3. Include an extractives PE or a Services PE in Art 5 (62%)

- Extractives PE is preferable – displaces general rule

Join us for the launch of the

Tax Treaties Explorer

A website that allows you to visualise a new dataset of almost every tax treaty signed by developing countries

Dec 1st 9:00-11:00 EST (14:00-16:00 GMT)

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