“A PRACTISE WHICH WOULD CLEARLY NOT BE ENCOURAGED IN RELATION TO DEVELOPING NATIONS”: A NEGOTIATING HISTORY OF IRELAND’S NEW TAX TREATY WITH GHANA

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Unless otherwise noted, all documents reproduced in this report were released by Ireland's Department of Foreign Affairs and Trade (DFAT) in response to the author's Freedom of Information requests. I have added highlights (in yellow) to particular sections, and have redacted (in blue) officials' names and contact details. All other redactions (in black) were made by DFAT prior to release.

ABBREVIATIONS AND GLOSSARY

ASIC	Africa Strategy Implementation Committee
ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
CDIS	Coordinated Direct Investment Survey
Dáil Eireann	*The lower house (principal chamber) of Ireland's parliament, the Oireachtas*
DFAT	Department of Foreign Affairs and Trade (Ireland)
DTA	Double Taxation Agreement
EI	Enterprise Ireland
EU	European Union
FDI	Foreign Direct Investment
FOI	Freedom of Information
GDP	Gross Domestic Product
GIPC	Ghana Investment Promotion Centre
GRA	Ghana Revenue Authority
HoM	Head of Mission
IDEAS	Irish Development Experience Sharing (programme)
IMF	International Monetary Fund
MBA	Masters' of Business Administration
MFA	Ministry of Foreign Affairs
MFN	Most Favoured Nation
ODA	Official Development Assistance
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
Oireachtas	*Ireland's parliament*
Taoiseach	*The prime minister and head of government of Ireland*
TD	Teachta Dála *(Irish parliamentary representative, a member of the Dáil Eireann)*
UN	United Nations
UNDP	United Nations Development Programme
WHT	Withholding Tax

SUMMARY

This paper aims to shine a light on a process that may affect thousands of taxpayers, but happens entirely behind closed doors. It examines the political story of how Irish officials negotiated with the government of Ghana to set limits to how much Ghana may tax the income and profits of multinational companies and foreign investors. These limits, imposed through a new tax treaty between Ireland and Ghana, were agreed by the two countries in February 2018, but are currently awaiting ratification by Ghana's parliament.

Based on interviews with individuals involved in the negotiations, and previously unpublished internal government documents obtained through Freedom of Information laws, this paper shows how:

- The Irish government set out unilaterally to target four developing African economies including Ghana for new tax treaties with Ireland: though Irish ministers falsely denied five times to Ireland's parliament that this was Ireland's initiative.
- The Irish government's negotiating strategy disregarded warnings from colleagues in the Department of Foreign Affairs that driving down Ghanaian withholding tax rates was *"a practise which would clearly not be encouraged in relation to developing nations"*, and could encourage multinational taxpayers to use the treaty to "*channel money between jurisdictions to minimise tax payable*", instead making it one of their central objectives;
- Irish diplomats sought to circumvent the Ghanaian expert negotiators' resistance to this element of the proposed treaty by going around the negotiating teams to lobby Ghana's deputy finance minister;
- Despite being signed nearly three years after the international agreement of the OECD's 'BEPS' measures against tax avoidance and abuse, the new treaty is entirely non-compliant with these measures, and contains none of the "minimum standards" against tax avoidance that the Irish government committed at the OECD to introduce in full;
- A protocol which would introduce such protections into the treaty is still not agreed between Ghana and Ireland, yet the Irish government has nonetheless pushed to ratify the existing, unprotected treaty and bring it into force.

Though the Oireachtas, Ireland's parliament, ratified the treaty after some debate in October 2018, it will not come into force until ratified by Ghana's parliament too. The protocol to the treaty currently under negotiation could provide an opportunity for the Ghanaian and Irish governments to rebalance the treaty, and to ensure that it does not leave Ghana open to profit-shifting and the erosion of its revenue base.[1]

[1] Michael D'Arcy, Minister of State (Ireland), statement to Dáil Eireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

INTRODUCTION: BEHIND CLOSED DOORS

Unlike many international law-making processes, tax treaties are almost always negotiated in complete secrecy. By convention, their texts are never published in draft, and are only released to parliamentarians or publicly after both parties have signed, and further amendments cannot be made. Sometimes (though not in this case)[2] even the existence of a negotiation is unannounced until after its completion.

This secrecy means that the *realpolitik* of tax treaties -- the commercial and political pressures leading to treaty negotiations and shaping their outcome – often go entirely unstated, and are poorly understood. The released documents on which this paper draws are, to our knowledge, the first published documentary record of a recent tax treaty negotiation.[3] Even these suffer from significant redaction which limits our understanding of the negotiation's details.

This is not a story of conspiracy or impropriety. Though ministers' public statements about the Ghana-Ireland tax treaty have been profoundly at variance with -- and sometimes directly contradicted by -- the facts revealed in the documents we publish below, there is no suggestion that the negotiations involved officials or ministers negotiating dishonestly or in bad faith. Rather, this case-study shows the role of commercial and political motivations, selectivity over evidence and advice, and imbalances of negotiating power, which the historical record of tax treaties with developing countries suggest are all too common. This case, indeed, probably presents comparatively moderate examples of these problems.

Nonetheless the fact that government ministers have felt the need to present a public narrative about this treaty so entirely at odds with the private facts, suggests that such *realpolitik* may no longer be palatable to the public either in Ireland or in Ghana. The global tide is turning for tax treaties between wealthy and poorer countries. Public anger over both tax avoidance and unnecessary tax breaks for multinational companies extends to the Global South. In 2012, Argentina and Mongolia unilaterally withdrew from tax treaties with Switzerland, Luxembourg and the Netherlands, citing unacceptable fiscal haemorrhages through these jurisdictions.[4] Other countries including Malawi, Rwanda, South Africa and Zambia followed suit with demands to renegotiate older treaties with Mauritius, Ireland

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[2] Substantive negotiations for the Ghana-Ireland treaty began in Dublin in November 2014. In February 2015, the Revenue Department updated its Tax Treaties webpage to include a mention of the negotiations. See https://web.archive.org/web/20150219155235/http://www.revenue.ie:80/en/practitioner/law/tax-treaties.html (cached 19 February 2015).

[3] Of necessity, documentary research on bilateral tax treaty negotiations has generally used documents released to publicly-accessible archives several decades after their production. M. Evers, 'Tracing the Origins of the Netherlands' Tax Treaty Network', *Intertax*, Vol. 41, Issue 6/7 (24 May 2013), https://repub.eur.nl/pub/40513/Metis_189168.pdf; M. Hearson, 'The UK's tax treaties with developing countries during the 1970s' in P. Harris and D. de Cogan (eds.), *Studies in the History of Tax Law, Volume 8* (Oxford: 2017), http://eprints.lse.ac.uk/74104/1/Hearson_UK%27s%20tax%20treaties%20with.pdf; M. Hearson, 'The UK-Colombia Tax Treaty: 80 years in the making', *British Tax Review*, Issue 4 (2017), pp. 375-384. Martin Hearson's pathbreaking work has also produced rich interview-based case studies of tax treaty negotiations up to 2012 in Zambia, Vietnam and Cambodia: M. Hearson, *Bargaining Away the Tax Base: the North-South politics of tax treaty diffusion* (PhD Thesis: London School of Economics, 2016), http://etheses.lse.ac.uk/3529/1/Hearson_Bargaining_away_the_tax_base.pdf.

[4] Camil Driessen, 'Mongolië pikt het niet meer en zegt belastingverdrag met Nederland op', *NRC,* 27 February 2013, https://www.nrc.nl/nieuws/2013/02/27/mongolie-pikt-het-niet-meer-en-zegt-belastingverdrag-met-nederland-op-a1436887;

and the Netherlands, or face withdrawal.[5] In 2014 an IMF paper, though naturally supportive of the cross-border investment that tax treaties' advocates say they promote, advised starkly that "*developing countries…would be well advised to sign [tax] treaties only with considerable caution*."[6]

Ireland too has in the past acted to improve tax treaties shown to be undermining developing countries' tax bases. In 2013, UK and Zambian campaigners showed that the imbalanced 1971 tax treaty between Ireland and Zambia was facilitating serious tax avoidance, including nearly US$2 million a year in foregone Zambian tax revenues from the activities of just one multinational company.[7] In response, the Irish government agreed to renegotiate this treaty, and a similarly outdated treaty with Pakistan, to include stronger protections against such abuse. In late 2018 Ireland negotiated a new agreement under the Ireland-Malta tax treaty in order to close down the 'Single Malt', a tax structure that research by Christian Aid Ireland had showed US-headed multinationals were preparing to use to replace the famous 'Double Irish' structure, artificially depriving countries in Europe, the Middle East and Africa of taxable profits from sales revenues.[8] And since 2015, both Ireland and Ghana have joined over 40 other countries and organisations in signing the Addis Tax Initiative, a declaration backed by the UN General Assembly to support "*improvements in domestic resource mobilisation [tax revenues] in partner [developing] countries*" as a means of replacing aid and sustaining international development.[9] Negotiating to limit a developing country's ability to tax multinationals and investors seems to be pursuing the opposite objective.

[5] M. Hearson and J. Kangave, *A Review of Uganda's Tax Treaties and Recommendations for Action*, ICTD Working Paper No. 50 (International Centre for Tax and Development: March 2016), p.29.

[6] International Monetary Fund, *IMF Policy Paper: Spillovers in International Corporate Taxation* (9 May 2014), Appendix VI, https://www.imf.org/external/np/pp/eng/2014/050914.pdf

[7] ActionAid UK and ActionAid Zambia, *Sweet Nothings: The human cost of a British sugar giant avoiding taxes in southern Africa* (February 2013), https://www.actionaid.org.uk/sites/default/files/doc_lib/sweet_nothings.pdf

[8] Christian Aid Ireland, '*Impossible' Structures: Tax Outcomes overlooked by the 2015 Spillover Analysis* (2017), https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf; Peter Hamilton, 'Ireland's 'single malt' still aiding tax avoidance', *Irish Times*, 25 September 2018, https://www.irishtimes.com/business/economy/ireland-s-single-malt-still-aiding-tax-avoidance-1.3640062; Competent Authority Agreement between Ireland and Malta (27 November 2018), https://cfr.gov.mt/en/inlandrevenue/itu/Documents/Malta-Ireland%20Competent%20Authority%20Agreement.pdf

[9] Addis Tax Initiative, *Financing for Development Conference. The Addis Tax Initiative – Declaration*, n.d., https://www.addistaxinitiative.net/documents/Addis-Tax-Initiative_Declaration_EN.pdf

1. WHAT ARE TAX TREATIES, AND WHY DO THEY MATTER?

Tax treaties are the wiring of the international tax system. A global web of over three thousand bilateral treaties, largely unremarked by legislators and the public, has developed between countries since the early twentieth century. Perhaps half of these treaties involve a developing country.[10]

Their original rationale is innocuous. International tax rules may be designed and promoted by international bodies like the Organisation for Economic Cooperation and Development (OECD) or the European Union (EU), but can only be implemented through countries' national laws. Where income and capital are mobile, and individuals or companies are operating across borders, these national tax laws may come into conflict, generating competing claims by two or more countries to tax the same income, profits or gains. Businesses argue – justifiably – that such 'double taxation' may discourage international investment and create unfair tax burdens on certain taxpayers. Bilateral tax treaties, which override domestic tax laws, were originally intended to avoid 'double taxation': limiting each signatory country's taxing rights over forms of income or capital flowing between each other; and determining when a country may tax a business or individual which is operating in their country, but resident in the other country.

Though it is a near-universal mantra of tax policymakers, the scale of the problem of true double taxation, however, is unclear. Many countries, including Ireland, now unilaterally relieve double taxation on many kinds of income through their national tax laws. They do this either by exempting certain forms of overseas income from tax altogether, or by allowing taxpayers to credit foreign taxes paid against their domestic tax bills regardless of whether a tax treaty exists with the foreign country in question.[11] There are of course instances when these mechanisms do not fully relieve foreign tax: when a taxpayer's domestic taxable profits are smaller than the tax it has paid overseas, for instance (although many countries allow taxpayers to carry foreign tax credits over from year to year until they are used up). Nonetheless for many taxpayers the effect of a new double tax treaty is not to relieve more double taxation, but simply to lower the overall amount of (single) taxation they incur in the 'source' country: effectively providing a tax incentive for investment from the tax treaty partner.

If tax treaties may not always have a significant impact on double taxation, they nonetheless have two other more fundamental effects:

- **They tend to shift taxing rights from poorer to richer countries.** Tax treaties divide up taxing rights between source and residence: between the source country of income and gains, and the residence country of the taxpayer. Tax treaties, following standard models established by the OECD and the UN, restrict the level or scope of source country tax, reserving taxing rights for residence countries. This is equitable when the treaty's signatories are two countries on a

[10] There is no centralised, complete, public database of bilateral tax treaties. The International Monetary Fund (IMF) estimated in 2014 that there were then around 3000 bilateral tax treaties in force, and more will have been signed since then: International Monetary Fund, *Spillovers in International Corporate Taxation* (IMF Policy Paper), 9 May 2014, p.25 https://www.imf.org/external/np/pp/eng/2014/050914.pdf. Dr Martin Hearson estimates that between 1000 and 2000 of these involve at least one low-income or lower-middle income country: M. Hearson, *Measuring Tax Treaty Negotiation Outcomes: the ActionAid tax treaties dataset* (International Centre for Tax and Development, Working Paper No. 47), February 2016, p. 10, http://eprints.lse.ac.uk/67869/1/Hearson_measuring_tax_treaty_negotiation.pdf.

[11] Ireland, for instance, provides foreign tax credits for taxes paid by foreign branches of Irish companies regardless of whether they are in a treaty-partner country or not. Likewise Irish companies receiving dividends or royalties from countries without a tax treaty with Ireland may nonetheless claim foreign tax credits against the Irish taxation of their dividend or royalties income, up to the value of the Irish tax on the profits attributable to those royalties or dividends.

relatively equal economic footing, since each fulfil a 'source' or 'residence' role in different instances. When a developed and a developing country sign a tax treaty, however, the flow of investment and resulting income is heavily skewed in one direction: there is much more investment from Ireland to Ghana than there is from Ghana to Ireland. Without a tax treaty, Ghana (usually the source country) is free under its domestic laws to tax income arising in its jurisdiction going to Irish-linked businesses and taxpayers. Ireland (usually the residence country) may tax this income too, generally after crediting the tax already paid in Ghana. With a tax treaty, Ghana's (source) taxing rights are curtailed and more taxing rights fall to Ireland, since the Irish tax credit for foreign taxes will be smaller. Eric Mensah, the chief tax treaty negotiator at the Ghana Revenue Authority and co-chair of the UN Committee of Experts on International Cooperation in Tax Matters, has put the problem starkly: "*for developing countries the balance between source and residence taxation is very crucial. International tax rules with preferences for residence-based taxation [are] not in [the] interest of developing countries.*"[12]

- **They can provide avenues for tax avoidance or evasion, particularly where one treaty partner either fails to tax certain forms of income, or otherwise acts as a conduit for untaxed income into tax havens.** By reducing one country's right to tax income domestically at source, if the other country makes it possible not to be taxed, then a tax treaty can allow income effectively to be taxed nowhere. Multinational taxpayers can manipulate this effect through structures and strategies called 'treaty shopping'. For instance, a single clause in the 1983 tax treaty between India and Mauritius prevented India from taxing capital gains made on many Indian assets by investors routing their investment through Mauritius.[13] Coupled with Mauritian domestic tax law that exempted such capital gains from Mauritian tax altogether, this clause led to the tiny island economy becoming, on paper, by far the largest source of foreign investment in India: investment in fact originating either in other countries or in India itself, secretly 'round-tripped' through Mauritius to allow Indian investors to qualify improperly for tax breaks designed for foreign investors, or simply to launder capital-gains tax-free, a technique that the Indian government estimated cost the Indian exchequer around US$600m a year until the loophole was closed by an amended treaty in 2016.[14] For these kinds of reasons, many tax treaties increasingly include a range of anti-avoidance measures to close down such tax-avoidance avenues. As explained below, the new Ireland-Ghana treaty does not include many of these anti-avoidance protections.

[12] Eric Mensah (Ghana Revenue Authority), 'Mobilising Domestic Resources for Development & International Cooperation: Ghana's perspective', presentation to G24 Technical Working Group meeting, Addis Ababa, 27-28 February 2017, https://www.g24.org/wp-content/uploads/2017/04/3.-Ghana-Mobilizing-Domestic-Resources-for-Development-International-cooperation.pdf

[13] Double Taxation Agreement between India and Mauritius (signed 6 December 1983), Article 13(4).

[14] Dilek Aykut, Apurva Sanghi, Gina Cosmidou, *What to do when foreign investment is not direct or foreign: FDI round tripping* (World Bank Policy Research Working Paper 8046, April 2017), pp. 11-12.

2. ARE TAX TREATIES GOOD FOR DEVELOPING ECONOMIES?

The risks to countries' tax revenues from incautious double tax treaties are significant, though rarely mentioned by governments when announcing new treaties. A recent study by World Bank and IMF economists, reviewing the impacts of treaties signed by 41 African countries, suggests dramatically that such countries may lose from 15 to 25 percent of their entire corporate income tax revenues due to treaty shopping when they sign tax treaties with investment hubs like Mauritius, Ireland or Switzerland.[15] Simple calculations by IMF tax specialists suggest that tax treaties between the USA and non-OECD member states may cost those non-OECD countries some US$1.6bn in lost tax revenues in a single year, just through two of the many revenue-reducing mechanisms of tax treaties (reductions in dividend and interest withholding taxes).[16]

Why, then, would countries with vulnerable public revenues sign such treaties? Proponents of double tax treaties argue that they increase bilateral investment between treaty signatories, boosting valuable foreign direct investment (FDI) for capital-scarce developing countries. As Minister of State Michael D'Arcy claimed when introducing the treaty in the Irish parliament:

> "*Double tax agreements provide tax certainty for taxpayers and tax administrators and they reduce tax barriers to cross-border trade and investment. This ensures that the best conditions with respect to eliminating double taxation are eliminated* [sic] *to enable trade and investment to occur*."[17]

The problem with such claims is that economic studies provide no clear-cut evidence for them. Most research on the effects of tax treaties on cross-border investment has concentrated on developed countries' treaties, for which more data is available. Studies encompassing developing countries have found variously that tax treaties have positive, neutral and negative effects on investment flows. Where studies have found increased investment from treaties' lowering of withholding taxes on cross-border investment income, they have generally been unable to distinguish between genuinely new investments incentivised by the treaty, and 'treaty shopping' which simply re-routes investments through treaty partners.[18] The most recent econometric research on this topic published by the IMF, focussing on sub-Saharan African countries' treaties, finds no statistically significant boost to inward

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[15] S. Beer and J. Loeprick, *The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa*, IMF Working Paper WP/18/227 (September 2018), https://www.imf.org/en/Publications/WP/Issues/2018/10/24/The-Cost-and-Benefits-of-Tax-Treaties-with-Investment-Hubs-Findings-from-Sub-Saharan-Africa-46264 . The paper classifies investment hubs as those economies where the sum of FDI in-stocks and out-stocks is more than double its GDP.

[16] International Monetary Fund, *IMF Policy Paper: Spillovers in International Corporate Taxation* (9 May 2014), p.27, https://www.imf.org/external/np/pp/eng/2014/050914.pdf

[17] Michael D'Arcy, Minister of State, Department of Finance, introducing Dáil debate on the Ireland-Ghana double tax agreement, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

[18] A. Lejour, 'The Foreign Investment Effects of Tax Treaties', *Oxford Centre for Business Taxation Working Paper 14/03* (February 2014), https://www.eesc.europa.eu/resources/docs/2014-the-foreign-investment-effects-of-tax-treaties_oxford-univ-centre-for-business-taxation.pdf. For a summary of the literature, see M. Hearson, *Measuring Tax Treaty Negotiation Outcomes: the ActionAid tax treaties dataset* (International Centre for Tax and Development, Working Paper No. 47), February 2016, pp.12-13, http://eprints.lse.ac.uk/67869/1/Hearson_measuring_tax_treaty_negotiation.pdf.

investment from signing tax treaties, but significant revenue costs.[19] Tax treaties which significantly restrict developing countries' taxing rights may be unambiguously good for multinational businesses' tax bills, therefore, but their economic benefits for developing countries remain unclear.

[19] S. Beer and J. Loeprick, *The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa*, IMF Working Paper WP/18/227 (September 2018), https://www.imf.org/en/Publications/WP/Issues/2018/10/24/The-Cost-and-Benefits-of-Tax-Treaties-with-Investment-Hubs-Findings-from-Sub-Saharan-Africa-46264 .

3. AN OUTSIZE IMPACT: WHY THIS TREATY MATTERS

Any tax treaty has the potential to act as a conduit for tax avoidance, or to seriously undermine the taxing rights of a developing country. This is because foreign taxpayers in a given country, no matter where they are based, can take advantage of any other treaty with low withholding tax thresholds, weak defences against treaty shopping, or connecting to a low- or no-tax jurisdiction, simply by re-routing their investments or transactions through the country with which the treaty has been signed. Professor Stephen Shay, a former U.S. tax treaty negotiator, notes that any one bilateral tax treaty should therefore be considered "*a potential treaty with the world*". If a country has ten tax treaties, Shay says, investors will take advantage of the 'worst' one.[20] In the words of Michael Keen of the IMF's Fiscal Affairs Division: "*Tax treaties are like a bathtub; a single leaky one is a drain on a country's revenues*."[21]

Ireland's large network of seventy-three tax treaties, its low corporate tax rate, and the facilities that Irish and EU tax rules offer for income to flow tax-free into even lower-tax jurisdictions,[22] mean that any tax treaty with Ireland has the propensity to serve as such a 'leaky bathtub'. Recent econometric work has shown that Ireland is the world's largest destination for shifted corporate profits. [23]

Even without these particular features of Ireland's tax regime, however, for Ghana more may be at stake in a tax treaty with Ireland than with any other jurisdiction. According to statistics Ghana has reported to the IMF, since 2012 Ireland has become Ghana's largest source of foreign direct investment. By 2016 (the latest year for which figures are available) these figures show Ireland as the origin of over a third of all such cross-border investment in Ghana:

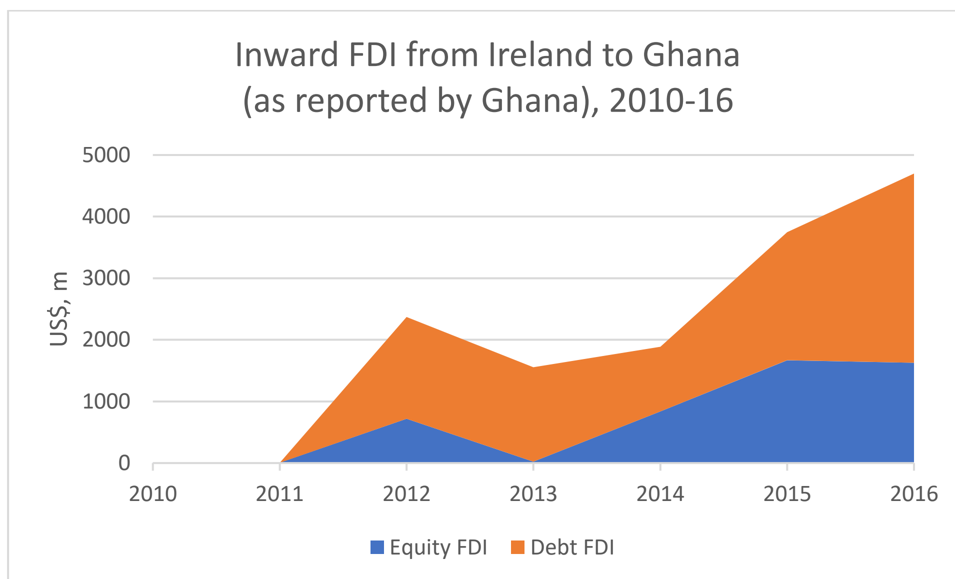
[20] Statements to side event at IMF-World Bank annual meetings, 9 October 2016, reported in Jim Brumby and Michael Keen, 'Tax Treaties: Boost or Bane for Development?', *IMF Blog,* 16 November 2016, https://blogs.imf.org/2016/11/16/tax-treaties-boost-or-bane-for-development/

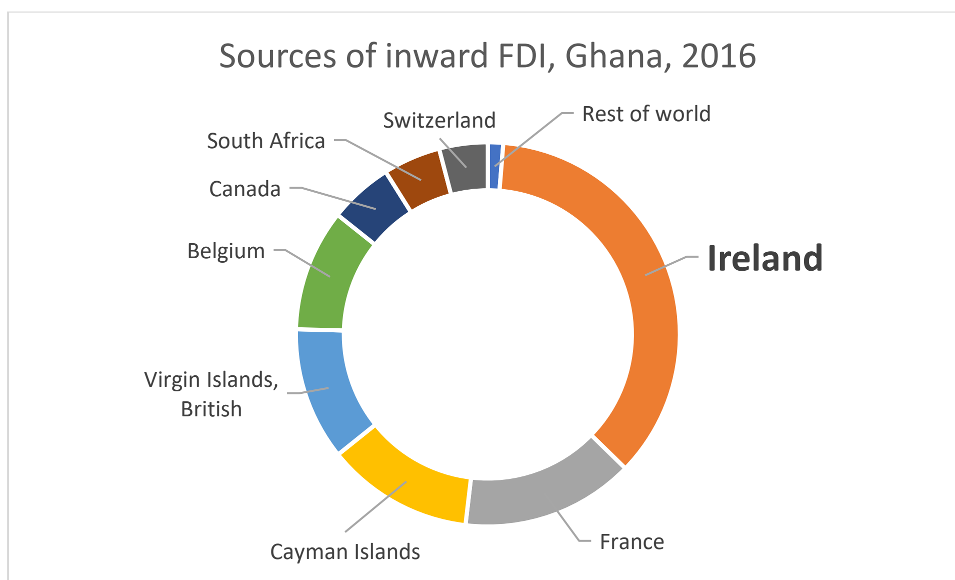
[21] Jim Brumby and Michael Keen, 'Tax Treaties: Boost or Bane for Development?', *IMF Blog,* 16 November 2016, https://blogs.imf.org/2016/11/16/tax-treaties-boost-or-bane-for-development/

[22] Christian Aid Ireland, '*Impossible' Structures: Tax Outcomes overlooked by the 2015 Spillover Analysis* (2017), p. 3-17, https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf

[23] T.R. Tørsløv, L.S. Weir, G. Zucman, 'The Missing Profits of Nations', *National Bureau of Economic Research Working Paper 24701* (June 2018), https://gabriel-zucman.eu/files/TWZ2018.pdf

***Figure 1:** Inward FDI from Ireland to Ghana (as reported by Ghana)*





Source: IMF CDIS database (figures reported by Ghana). [24]

[24] http://data.imf.org/regular.aspx?key=60564261

Puzzlingly, corresponding Irish-reported statistics for stocks of outward FDI to Ghana (which should match) show almost no such FDI at all. We have been unable to reconcile this discrepancy.[25] If Ghana really is receiving anywhere near as much FDI from or via Irish companies as Ghana's own figures suggest, however, then any tax treaty with Ireland could have major consequences for Ghana's corporate tax base. 'Getting it wrong' likely carries more revenue risks for Ghana, based on these statistics, than a treaty with any other country.

The new Ghana-Ireland treaty does make some concessions to Ghana's source taxing rights. It nonetheless continues a historical trend of ever-increasing restrictions to those rights -- a trend at which Ireland has been at the forefront, signing tax treaties with developing countries that are on average more restrictive of those countries' taxing rights than those of almost any other European member state (Figure 2):

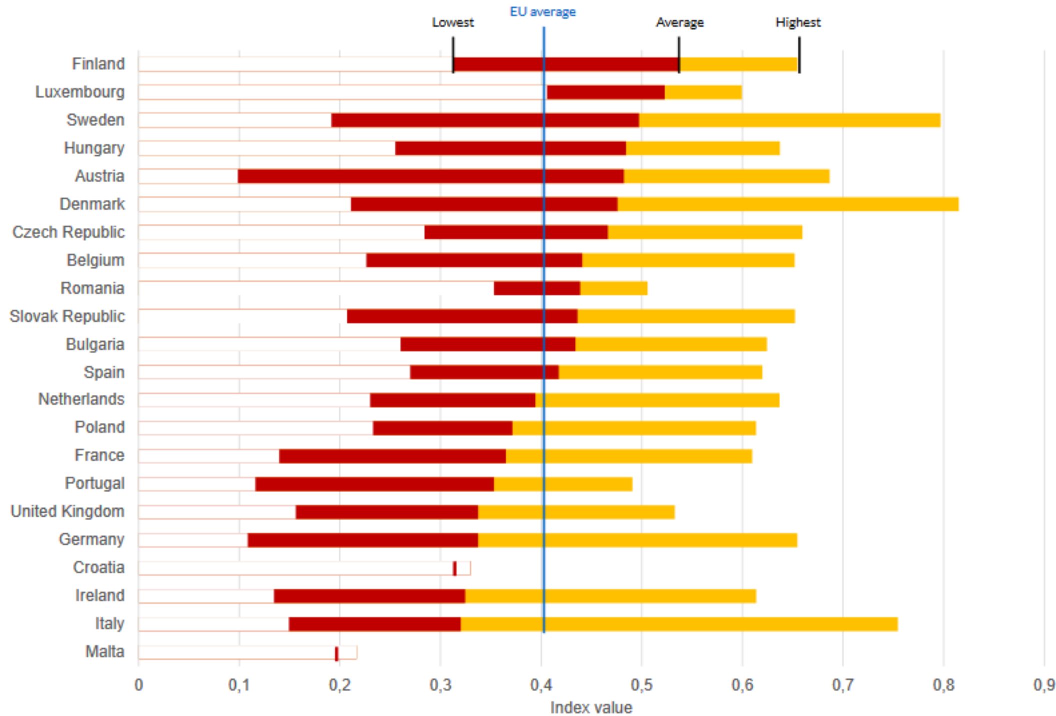
- **The new treaty halves Ghanaian withholding taxes (WHT) on royalties from the domestic 15% rate to 8%, and (closely related) technical services fees from 20% to 10%.** Though this is not the largest reduction in royalty or technical services WHT of Ghana's bilateral tax treaties to date, it is amongst the largest for royalties (Figure 3). It also carries a particular risk, since as the European Commission has recently noted, Ireland is amongst Europe's primary conduits for "aggressive tax planning" using royalty payments to shift profits, both due to its onshore tax environment for intellectual property, and through the absence of an outbound Irish withholding tax on royalties in most cases.[26]
- **Against recommendations by the IMF and the UN Tax Committee, the new tax treaty denies Ghana the right to tax any of the capital gains from the sale of assets in its territory (other than immovable property), if the sale is executed through the offshore sale of shares in an Irish holding company.** Since Irish holding companies are the largest single source of direct investment in Ghana's economy, this provision could potentially deprive Ghana of significant tax revenues when valuable Ghanaian assets change hands. The IMF has noted that single transactions of this kind have individually deprived some developing countries of several billions of dollars of potential tax revenues.[27]
- **Critically, the new treaty lacks any of the anti-avoidance provisions which OECD member states, including Ireland, agreed in 2015 were necessary to provide "*the minimum level of protection against treaty abuse*".** It is therefore fully non-compliant with the OECD's 'BEPS' against tax avoidance and profit-shifting that Ireland has repeatedly pledged to implement in full.

[25] To check these figures, Christian Aid Ireland requested clarification from Ghana's Ministry of Finance. They kindly provided statistics on inward FDI collated by the Ghanaian Investment Promotion Centre (GIPC). However, these are not directly comparable with the figures reported to the IMF, since they only reflect annual new inflows of greenfield FDI projects registered for investment incentives with the GIPC. They are therefore less complete than those reported to the IMF, and are flows rather than stocks. Christian Aid Ireland is nonetheless grateful to the GIPC for sharing these statistics.

[26] European Commission, *Country Report Ireland 2019* (SWD(2019) 1006, 27 February 2019), p.26, https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-ireland_en.pdf

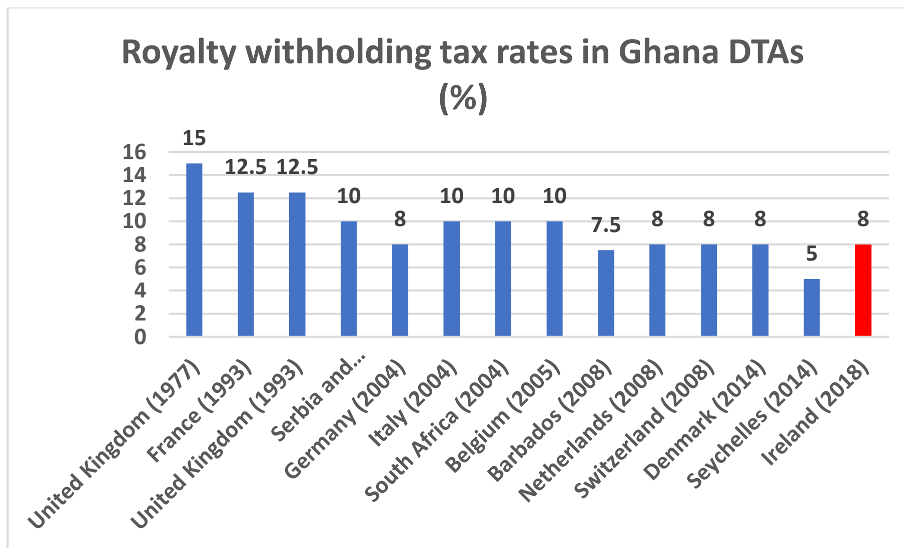
[27] International Monetary Fund, *IMF Policy Paper: Spillovers in International Corporate Taxation* (9 May 2014), Appendix VI, https://www.imf.org/external/np/pp/eng/2014/050914.pdf. 27. Article 24(5) of the treaty does allow Ghana specifically to tax capital gains from indirect sales of offshore oil/gas exploration rights. This is positive, though may not compensate for the denial of taxing rights over capital gains from indirect sales of other kinds of assets in Ghana.

Figure 2: *Distribution of 'source/residence' balance in EU member states' tax treaties with developing countries (a lower index value indicates more source taxation restrictions, a higher index value indicates less source taxation restrictions).* [28]



N.B. The graph above was calculated prior to the renegotiation of Ireland's (very source-tax-restrictive) 1971 treaty with Zambia, which constitutes the lower bound of its distribution. Nonetheless its 2014 treaty with Ethiopia and its 2018 treaty with Ghana are also very restrictive of source withholding tax rates.

Figure 3: *Royalty withholding tax rates in Ghana's Double Taxation Conventions*



Source: ActionAid/ICTD tax treaty dataset

[28] M. Hearson, *The European Union's Tax Treaties with Developing Countries: Leading by Example?* (report for the European United Left/Nordic Green Left (GUE/NGL) in European Parliament, September 2018), Figure 8, https://martinhearson.files.wordpress.com/2018/10/hearson-2018-ep.pdf

NEGOTIATING IN THE DARK

The Irish government has publicly dismissed concerns about the treaty's negative impacts on profit-shifting or on Ghana's tax base by arguing that in 2015 they conducted a 'Spillover Analysis' of Ireland's tax treaties with developing countries, which showed no negative impacts on those countries. [29]

This argument is difficult to understand, since the Spillover Analysis the government is relying upon to dismiss concerns about the Ghana-Ireland treaty, did not include any analysis of the Ghana-Ireland treaty. Ireland and Ghana were still in the midst of negotiations in 2015 when the Spillover Analysis was conducted. The government itself admitted this during parliamentary questioning:

> ""*A specific spillover analysis was not carried out before entering negotiations with Ghana. However, the results of the broad spillover exercise carried out in 2015 did not find evidence of negative effects from Ireland's modern tax treaties. We would expect that the same result would apply to the treaty with Ghana*."[30]

The Spillover Analysis' conclusions that Irish tax treaties had limited negative impacts on poorer countries, moreover, was based explicitly on the fact that there was very little cross-border trade and investment from Ireland to the treaty partner countries analysed, and thus little chance of impacts, either positive or negative.[31] No tax treaty partner in this analysis received more than 0.34% of its FDI from Ireland. Its findings cannot reasonably be extrapolated to Ghana, which according to Ghanaian government figures is receiving over 100 times more Irish FDI as a proportion of its total FDI.

There is likewise no evidence in the documents obtained through FOI that the Irish government undertook any kind of quantitative analysis of the likely revenue or economic impacts of the new treaty, at any stage in its negotiation. The teams negotiated off model legal templates rather than empirical information about Ghana and Ireland's actual economic relations. Ghanaian and Irish parliamentarians, therefore, are being asked to vote on a major piece of tax legislation without either government conducting any serious, quantitative impact assessment of the treaty's likely effects either on economic development or on tax revenues: something that would never be countenanced for purely domestic tax legislation.[32]

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[29] Michael D'Arcy, Minister of State, Department of Finance, comments in Dáil Eireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

[30] Michael D'Arcy, Minister of State, Department of Finance, comments in Dáil Eireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

[31] Department of Finance, *IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies* (July 2015), http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf

[32] See, for example, annual revenue costings for Budget tax legislation changes (https://assets.gov.ie/163/091018145205-3.%20Summary%20of%20Budget%202019%20Taxation%20Measures%20-%20Policy%20Changes.pdf).

4. THE TREATY'S INCEPTION: GHANA'S ECONOMIC GOALS OR IRISH COMMERCIAL INTERESTS?

As part of a narrative to present the treaty as an element of Ghana's economic development agenda, the Irish government has repeatedly claimed, in public and to parliament, that the treaty was Ghana's initiative, not Ireland's. Introducing the treaty to the Oireachtas Finance Select Committee in September 2018, Minister of State Michael D'Arcy told Irish parliamentarians four times that:

> "*In 2012, officials from the Ministry of Foreign Affairs of the Republic of Ghana raised with DFAT the possibility of negotiating a double tax agreement with Ireland….*
>
> *"Nobody forces a country into doing a tax treaty with Ireland. As I said in my speech, it was Ghana who came to Ireland in relation to this. They approached us….*
>
> *"Ghana approached Ireland in 2014* [sic]. *We finished the negotiations in 2016….*
>
> *"The Deputies can only ask us to do so much. Ghana…approached us."*[33]

During the subsequent debate over the treaty's ratification on 3 October 2018, the Minister again responded to criticism by stating that the treaty had been Ghana's initiative, not Ireland's:

> "*In 2012, officials from the Republic of Ghana raised with the Department of Foreign Affairs and Trade the possibility of negotiating a double tax agreement with Ireland….Ghana requested that Ireland enter into negotiations for this agreement. The Ghanaian authorities have decided that double taxation agreements are good for their country's economic development and this is the 17th treaty that they have signed*."[34]

The Irish government documents we have obtained show that these statements are untrue. There is no suggestion that the Ghanaian government did not enter willingly into treaty negotiations once proposed. Nonetheless the documents make it clear that Irish officials and businesses unilaterally targeted Ghana for treaty negotiations as part of a wider commercial strategy to support Irish businesses in Africa. They asked the Ghanaian government to agree a treaty, not vice versa.

In September 2011, the Irish government launched a new "Africa Strategy", which included commitments to support Irish trade and Irish businesses operating on the continent. As part of this strategy, in March 2012 Ireland's Department for Foreign Affairs and Trade (DFAT) brought together, in Johannesburg, trade representatives from Irish embassies on the continent, officials from Ireland's business support body Enterprise Ireland, and representatives of Irish businesses active in Africa. They discussed opportunities and constraints for expanding Irish trade and investment in Africa, including priorities for supporting Irish businesses active in agribusiness, oil and gas, and private education. This meeting identified as "deliverables" that Ireland would seek double-tax conventions with Nigeria, Ghana, Mozambique and Botswana.

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[33] Deputy Michael D'Arcy, statements to Oireachtas Select Committee on Finance, Public Expenditure and Reform, 20 September 2018, https://www.oireachtas.ie/ga/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/

[34] Deputy Michael D'Arcy, statements to Dáil Eireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

Figure 4: *'Report on Africa Strategy Trade Consultations 21-23 March 2012', 5 April 2012*[35]

Report on Africa Strategy Trade Consultations 21 -23 March 2012

The Africa Strategy calls for increased trade with Africa. This will broadly follow two paths, within the existing network of Embassies managing ODA, as part of the "beyond aid" mandate and in other markets where there is no ODA programme but significant trade and investment potential. The latter will form the bulk of increased trade and present the best opportunities for collaboration with Enterprise Ireland. Honorary Consuls representing the countries with greater market potential were invited to participate. The innovative Africa Agri-Food Development Fund which involve s a programme in an existing ODA programme country (Tanzania) and a country with significant market potential (Kenya) may offer a model for replication elsewhere.

A list of key Action Points for rolling out the Africa Strategy were agreed

Detail

1. Consultations on the trade dimension of the Africa Strategy were held in Johannesburg from 21 to 23 March, as follow up to meetings in Cape Town in November 2011 and Lilongwe in February 2012 at official level. The consultations involved nominated trade focal persons from ten Embassies in Africa as well as honorary consuls from Botswana, Nigeria (Lagos), Kenya, Zimbabwe and Malawi (Blantyre). The Honorary Consuls from Ghana and Sierra Leone were unable to participate. Representatives from Irish business active in the local market participated in a round table discussion on how DFAT could better support business across Africa. Seven guest speakers presented on various aspects of business and trade in Africa. Participants attended a Business Ireland South Africa St Patrick's Day reception on Friday 23 March in Johannesburg co-hosted by the Embassy and Enterprise Ireland.

[35] Released by DFAT under FOI.

11. Consultations with Irish Business, Embassy officials and Honorary Consuls identified a number of points

   a. Honorary Consuls see different opportunities in local markets. They welcome their inclusion in the DFAT consultation process and their future role through email networks on business opportunities.
   b. Many Irish Embassies throughout Africa are still considered "aid only" offices and as a result many Irish businesses do not call on Embassies.
   c. While many African countries openly welcome investment and trade, there are still significant transaction costs in processing licensing documents and work permits.
   d. African countries do not have access to basic vocational training necessary to take up employment opportunities. There are significant needs for basic skills in the oil and gas industries in Uganda and Mozambique which cannot be filled locally. These skills are available in Ireland and could be supplied on a commercial (non aid) basis. The issue of certification of skills may also present a short term business opportunity.
   e. There is a current demand for privately paid education in Africa estimated between $6 -8 billion annually. Honorary Consuls can play a more proactive role in some markets by marketing Irish colleges. The issue of visas for African students is improving.

3

   f. The potential to follow the IDEAS programme in Vietnam by targeting young African business entrepreneurs to undertake MBA's in Dublin was supported.
   g. Double Taxation Agreements will be prioritised in four African markets in 2012/13, Nigeria, Ghana, Mozambique and Botswana.

13. Agreed Action Points

- Focal points have been identified and their names will appear on Embassy websites. HoMs to agree lines of communication on follow-up to business queries with Honorary Consuls.
- Importance of information flows between Enterprise Ireland and Embassies and *vice versa* was underlined. An email network will be set up immediately connecting focal persons, Honorary Consuls, DFAT Dublin and Enterprise Ireland.
- DFAT to copy Fred Klinkenberg, EI South Africa when contacted by Irish businesses for assistance/guidance. This could include 'reference checks' where possible.
- DFAT Librarian to contact EI Librarian to see how background information might be shared more effectively between both organisations.
- EI's focus will remain in the South African market. However, on a case by case basis, its client companies could be assisted in accessing other opportunities in Africa.
- E conferences may be arranged using DFAT videolinks. These must be well prepared with an agreed agenda.
- Four Double Taxation Agreements identified as deliverables – Nigeria, Ghana, Mozambique, Botswana
- Where practicable, DFAT will encourage contacts in programme countries to attend Irish stands at trade fairs, i.e. in the distance education space
- Agribusiness provided particular areas of opportunity, with Africa Agri-Fund Development Fund presenting a new point of entry involving Embassy and secondary accreditation countries.

DFAT then consulted the Irish tax authority (the Revenue) about initiating negotiations with these four countries. Again, this meeting's notes indicate that, far from these countries beating down Ireland's door for a treaty, the Irish government did not know at this stage whether there was interest from them or not:

Figure 5: *Note on meeting with Revenue, Africa section, Development Cooperation Division, DFAT, 4 May 2012.*[36]

HQ-DCD

From: HQ-DCD
Sent: 04 May 2012 17:04
To: HQ-DCD; HOM MAPUTO EM; ABUJA EM
Cc: #HQ-DCD Africa
Subject: Double Taxation Agreements
Attachments: Note DTA meeting 040512.docx

Colleagues,

Today I met with in Revenue to discuss expanding DTAs with the four countries identified during our Trade focal point training in SA; Botswana, Mozambique, Nigeria and Ghana.

While felt Botswana would probably be the most straightforward, they are open to looking at all four, depending on the level of interest from said countries.

See note attached. Grateful for any feedback. Feel free to contact me if you require any further info.

Regards,

Note on meeting with Revenue) and (Africa Section) re: Double Taxation Agreements, May 4th, 2012.

In Sub-Saharan Africa, we have only two signed DTA's with South Africa and Zambia. There is a willingness from both Revenue and DFAT to expand this base.

Following discussions in South Africa, at the Trade Focal Point Consultations, four countries were identified as potential opportunities in Africa. These were Botswana, Ghana, Nigeria and Mozambique.

There are two main models of DTA's, the OECD and the UN model. Ireland is strongly aligned with the OECD model. Some of the factors that Revenue look favourably on when selecting countries to enter into negotiations with is which model the country adapts. For this reason, Botswana would be of particular interest to Revenue. Botswana is currently in negotiations with Portugal and Germany, two OECD countries. Botswana also has quite an extensive treaty list to date with many of these recently signed. With a planned Botswana Ministerial Visit in mid-May, there is an opportunity to move this forward.

However, stressed that while some countries might offer easier 'quick wins' than others in terms of negotiations etc., Revenue are still willing to follow up with any interested country. In the case of Nigeria she noted that while they have quite a number of signed treaties which is positive, many of these are not yet in force or were signed in the late 80s/early 90s. However, they do have a signed DTA with Spain which Revenue would look favourably on. In the case of Mozambique, their most recent DTA was with Vietnam which follows the UN model, potentially making negotiations a little more complicated.

Next Steps

1. If there is interest from both countries a Third Party Note is exchanged.
2. The next step would be for both countries to exchange their Treaty Models
3. Ireland would then propose to host or visit the interested party for first round negotiations
4. A second round of negotiations might be held (if necessary)

This process varies in length. Sometimes negotiations can be completed in a couple of days. Others can take much longer. A lot depends on the capacity of the Revenue departments and delays can occur.

Revenue has had similar meetings with the Latin American Unit who are also keen to expand their treaty base. The department prioritises opportunities based on a number of factors including a countries willingness to pursue matters, the country's tax system and strategic importance.

[36] Released by DFAT under FOI.

The Irish Ambassador to Ghana then met with the Ghanaian Ministry of Foreign Affairs (MFA) in July 2012 to propose a treaty.[37] The Ghanaian MFA agreed, and after some delay in exchanging diplomatic notes and model treaties, face-to-face negotiations began in 2014.

After Christian Aid Ireland brought these documents to the attention of Irish parliamentarians in late 2018, Minister D'Arcy issued a correction and apologised for unintentionally misleading the House.[38] The Irish government's repeated misrepresentations of the treaty's genesis are nonetheless revealing. It has sought to suggest that Ireland was primarily acquiescing to Ghana's pursuit of economic development goals in agreeing to a treaty, rather than simply pursuing the commercial and fiscal interests of Irish businesses. Such diffidence is odd: promoting Irish businesses is an entirely legitimate objective for an Irish government. But these misrepresentations suggest a concern that this objective might be seen to come at the expense of poorer countries' tax revenues. Indeed, investor surveys suggest that when deciding where to invest, what investors prioritise over low tax rates is political security and stability, a skilled workforce, good physical infrastructure: all public goods that cannot be provided if government tax revenues are undermined.[39] As we shall see, Irish officials appear to have ignored their own colleagues' warnings about adverse revenue impacts, and pursued precisely the revenue-threatening negotiating strategy that DFAT officials suggested should not be pursued with developing countries like Ghana.

[37] Email from Ambassador, Irish Embassy in Abuja, 11 July 2012, released by DFAT under FOI.

[38] Deputy Michael D'Arcy, Personal Explanation by Minister of State to Dáil Eireann, 7 November 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-11-07/28/?highlight%5B0%5D=ghana&highlight%5B1%5D=ghana

[39] World Bank, *Global Investment Competitiveness Report 2017-18: Foreign Investor Perspectives and Policy Implications* (n.d.), http://pubdocs.worldbank.org/en/668331510247574768/Global-Investment-Competitiveness-Report-Infographic-Overview-FINAL.pdf

5. THE NEGOTIATIONS: DEVELOPMENT WARNINGS IGNORED

As work on Ireland's "Africa Strategy" progressed in 2011 and 2012, and Ireland began to pursue tax treaty negotiations with its 'hit-list' of four African countries, ministerial briefing notes and meeting minutes indicate that DFAT civil servants warned that tax treaties could have uncertain economic effects and negative revenue effects for developing countries. In contrast to ministers' confident public rhetoric, a ministerial briefing note on tax treaties, prepared by the Africa Section of the Department of Foreign Affairs and Trade in November 2012 for the implementation committee of the Africa Strategy, noted starkly that:

> *"[T]he effect of many [Double Taxation Agreements] is that capital flows from developing to developed nations. Countries with these treaties can also be used to channel money between jurisdictions to minimise tax payable"*

and conversely that

> *"[r]ecent empirical literature has been inconclusive in estimating the effect of [Double Taxation Agreements] on [Foreign Direct Investment] in developing countries*."

(DFAT redacted a larger further section of text following this warning, which may have contained further critical comments on tax treaties' development impact).

Figure 6: *Extract from Africa Strategy Implementation Committee – 3 December 2012. Double Taxation Agreements. Note prepared by Africa Section, Department of Foreign Affairs and Trade, 28 November 2012.*[40]

Issues of Concern with DTAs in Developing Countries

Double Taxation Convention Models are generally used by countries as a basis for the negotiation of their bilateral treaties; there are two main Convention Models - the OECD and the UN model. Ireland follows the OECD model. This model generally favours residence based rather than source-based taxation, meaning that the effect of many DTAs is that capital flows from developing to developed nations.

Countries with these treaties can also be used to channel money between jurisdictions to minimise tax payable, particularly if withholding taxes are minimised to encourage investment – a practise which would clearly not be encouraged in relation to developing nations.

Recent empirical literature has been inconclusive in estimating the effect of DTAs on FDI in developing countries, with conclusions ranging from a positive, to a negative, to no effect. However, it is worth highlighting the potential impact of such agreements on developing countries and the section advises further examination of individual cases in cooperation with the Revenue Commissioners.

Africa Section
28 November 2012

The subsequent Africa Strategy Implementation Committee (ASIC) in December 2012, chaired by the Trade and Development Minister and the DFAT Secretary General, considered progress on the tax

[40] Released by DFAT under FOI.

treaties with Botswana and Ghana. The meeting minutes noted that "*[t]he full implications of signing [Double Tax] Agreements which could be interpreted as facilitating tax transfers away from developing countries will require further attention*."[41]

There is no mention in any of the subsequent documents or correspondence that DFAT have released about what, if any, "further attention" such concerns received in the treaty negotiation itself. (The FOI request to DFAT asked for all documents relevant to the Ghana-Ireland treaty).

Two rounds of face-to-face negotiations between Irish and Ghanaian negotiating teams took place in Dublin in late November 2014 and Accra in late May 2015 respectively. Though the resulting treaty largely follows the standard residence-favouring 'OECD model', the negotiations did secure some important concessions to this model in favour of Ghana's source taxation rights:

- An article allowing Ghana to levy a withholding tax on 'technical service fees' paid to Irish companies: these can be an important revenue flow, and also in some cases a way in which multinationals' taxable profits may be eroded and shifted offshore in the absence of such withholding tax;[42]
- Provisions for taxing in Ghana the profits of offshore oil/gas exploration activities carried out by Irish-resident companies in Ghana, by increasing the 'permanent establishment' threshold for such activities.[43]

The treaty also provides that Irish professors and researchers working in Ghanaian higher education institutions and research institutes will enjoy two years of income tax-free in Ghana, a measure presented by Irish ministers as "*encourag[ing] the development of education in Ghana*", and which they claimed was included for Ghana's benefit.[44] However, tax-free income for foreign educational professionals/consultants, like tax-free income for aid workers, is a drain on developing countries' tax base; there is little evidence that it promotes aid or development; and in general it simply means a tax break for comparatively wealthy foreign professionals working in poorer countries, many of whom are not tax-resident elsewhere and thus can enjoy their salaries entirely tax-free. A May 2018 paper by ATAF, the federation of African revenue authorities, called for tax breaks on foreign consultants and professionals working in international development to be reviewed and some phased out, suggesting that they are inconsistent with the Addis Tax Initiative, of which Ireland is a member.[45]

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[41] Minutes of 2nd Meeting of the Africa Strategy Implementation Committee, 3 December 2012, partially redacted document released by DFAT under FOI.

[42] The treaty does not include a measure making profits from such technical services directly taxable in Ghana (a technical services 'permanent establishment' rule), as Ghana's domestic tax law allows in the absence of tax treaties (Ghanaian Income Tax Act 2015, Act 896, Article 110, http://www.gra.gov.gh/docs/info/dtrd/INCOME%20TAX%20ACT%202015%20(ACT%20896).pdf), and as included in the UN model tax treaty (United Nations (2011), *Model Double Taxation Convention between Developed and Developing Countries*, Article 5(3)(b). According to interviews with an individual directly involved in the negotiations, this was not because Ghana's wishes were ignored on this point, but because the Ghanaian team preferred the more administrable withholding tax on technical services fees to a technical services permanent establishment (interview, October 2018).

[43] *Convention Between Ireland and Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and capital gains*, Article 24.

[44] The same applies to Ghanaian researchers or professors working in Irish HE institutions, though these are likely to be less numerous, at least initially.

[45] ATAF and the Overseas Development Institute (ODI), *The taxation of foreign aid: don't ask, don't tell, don't know* (May 2018), https://www.odi.org/sites/odi.org.uk/files/resource-documents/12191.pdf

One major disagreement remained after the face-to-face negotiations. The Irish government has heavily redacted all correspondence relating to it, but clues in the documents, and interviews with individuals directly involved in the negotiations, indicate that the sticking-point was the Irish negotiators' attempt to drive down withholding tax rates on passive income (dividends, interest and royalty fees).[46]

Such taxes are key defences against treaty shopping, and amongst the most high-profile elements of any tax treaty. By seeking to drive down the new treaty's withholding taxes to near or below those in previous treaties that Ghana had signed, Irish negotiators would effectively be inviting multinationals operating in Ghana to route Ghanaian income through Ireland, with the Ghana-Ireland treaty operating as the "leaky bathtub" discussed in Section 3.

Significantly, DFAT had explicitly warned ministers and officials prior to the start of the negotiations that driving down withholding tax rates would be an inappropriate strategy for negotiations with developing economies (see Figure 6). "*Countries with [tax] treaties can also be used to channel money between jurisdictions to minimise tax payable*", DFAT's Africa Section wrote, "*particularly if withholding taxes are minimised to encourage investment – **a practise which would clearly not be encouraged in relation to developing nations***" (emphasis added).[47] Yet this is exactly what Ireland's negotiating team sought to do: thereby explicitly disregarding well-understood development advice from within its own government.

International tax bodies often claim that Majority World countries get poor outcomes from tax treaty negotiations simply because their negotiators are inexperienced, poorly trained, and don't realise the impact of the measures to which they agree.[48] The answer, they argue, is not fairer rules but better training. Capacity issues are undoubtedly often significant,[49] but in this instance Ghana's negotiating team was experienced and internationally distinguished. It was led by Eric Mensah, co-chair of the UN Committee of Experts on International Cooperation in Tax Matters, and also included a member of the Steering Group of the OECD Global Forum on Transparency and Exchange of Information for Tax. Eric Mensah in particular has raised serious concerns about the effects of incautious tax treaties, telling the European Parliament last year that "*Resident taxpayers exploit the provisions of [EU tax treaties] to their advantage in order to avoid or evade the payment of taxes to both contracting States*".[50] More fundamentally, Mensah has argued publicly that international tax rules "*with its preferences for residence based taxation [are] not in [the] interest of developing countries*",[51] and that

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[46] Interview with individual directly involved in the negotiations, October 2018; redacted DFAT email correspondence June-October 2015 entitled "re negotiation, rates and trade mission", released in response to FOI request.

[47] *Extract from Africa Strategy Implementation Committee – 3 December 2012. Double Taxation Agreements. Note prepared by Africa Section, Department of Foreign Affairs and Trade, 28 November 2012.*

[48] See e.g. the OECD/UNDP initiative Tax Inspectors Without Borders (TIWB), www.tiwb.org, and the Addis Tax Initiative declaration (n.d.), https://www.addistaxinitiative.net/documents/Addis-Tax-Initiative_Declaration_EN.pdf

[49] There is some evidence that tax treaty negotiation outcomes improve over time as officials become more experienced: M. Hearson, 'When do developing countries negotiate away their tax base', *Journal of International Development*, Vol. 30, Issue 2 (March 2018), pp. 233-255, https://onlinelibrary.wiley.com/doi/epdf/10.1002/jid.3351

[50] Eric Mensah, replies to questionnaire from Tax3 Committee, European Parliament, Brussels, 26 September 2018, http://www.europarl.europa.eu/cmsdata/155360/6%20-%2005%20EU%20-%20ERIC%20replies%20to%20questionnaire.pdf

[51] Eric Mensah, 'Mobilising domestic resources for development & international cooperation: Ghana's perspective', presentation to G24 Technical Group Meeting, Addis Ababa, 27-28 September 2017, https://www.g24.org/wp-content/uploads/2017/04/3.-Ghana-Mobilizing-Domestic-Resources-for-Development-International-cooperation.pdf

changes in recent years to model tax treaties to prevent tax avoidance have done nothing to fundamentally address this source/residence imbalance.[52]

Unsurprisingly therefore, the Ghanaian delegation stood their ground over the withholding tax rates. The Ghanaian delegation had already agreed to drop withholding taxes to well below the rates that currently apply, in the absence of a treaty, under domestic Ghanaian law (Figure 7). "*As communicated during the negotiations our position on the remaining issues are based on our current treaty policy and draft model*", they wrote to the Irish team. "*There has been no change in that*".[53] The ball was in Ireland's court, their message cordially suggested, to make "*any new proposals that might help us achieve a compromise*".[54]

Figure 7: *withholding tax rates in domestic Ghanaian law (no treaty) and the final IE-GH treaty*

Income type	Withholding tax rate (domestic), %[55]	Withholding tax rate (IE-GH treaty), %
Interest	8	7
FDI dividends	8	7
Royalties	15	8
Technical service fees	20	10

Ireland's 'compromise' proposal, submitted several weeks later,[56] was a risky one for Ghana. In exchange for not lowering withholding tax rates even further, Ireland proposed inserting a 'most favoured nation' (MFN) clause into the treaty.[57] Under this clause, if Ghana agrees any treaty with another country in the future which concedes lower withholding tax rates than those in the Ghana-Ireland treaty, Ghana must automatically accord these lower rates to Ireland too.

This adds permanent risk and constraints to Ghana's future tax treaty negotiations. If it wishes to sign a treaty, for instance, with a neighbouring economy in West Africa with which it has relatively equitable trade and investment flows, then low withholding tax rates in this treaty may carry limited revenue risk and be mutually beneficial. But if it does so, the MFN clause will lower its withholding-tax defences against profit-shifting into Ireland, one of the world's largest centres for profit-shifting.

[52] Eric Mensah, Presentation to Tax3 Committee, European Parliament, Brussels 26 September 2018, http://www.europarl.europa.eu/cmsdata/155386/5%20-%2005%20ERIC%20NII%20YARBOI%20MENSAH%20statement.pdf

[53] Email from Ghana Revenue Authority to Irish Revenue Department, 21 October 2015, released by DFAT under FOI.

[54] Email from Ghana Revenue Authority to Irish Revenue Department, 21 October 2015, released by DFAT under FOI.

[55] Income Tax Act 2015, Act 896, Schedule 1, https://gra.gov.gh/wp-content/uploads/2018/11/INCOME-TAX-ACT-2015-ACT-896.pdf

[56] Email from Irish Revenue Department to Ghana Revenue Authority, 9 November 2015, released by DFAT under FOI. DFAT have redacted all substantive information relating to the discussion itself, but the context makes the sequence of negotiation clear. Interviews with individuals directly involved in the negotiations have indicated what the substance of the proposal was (see note 57).

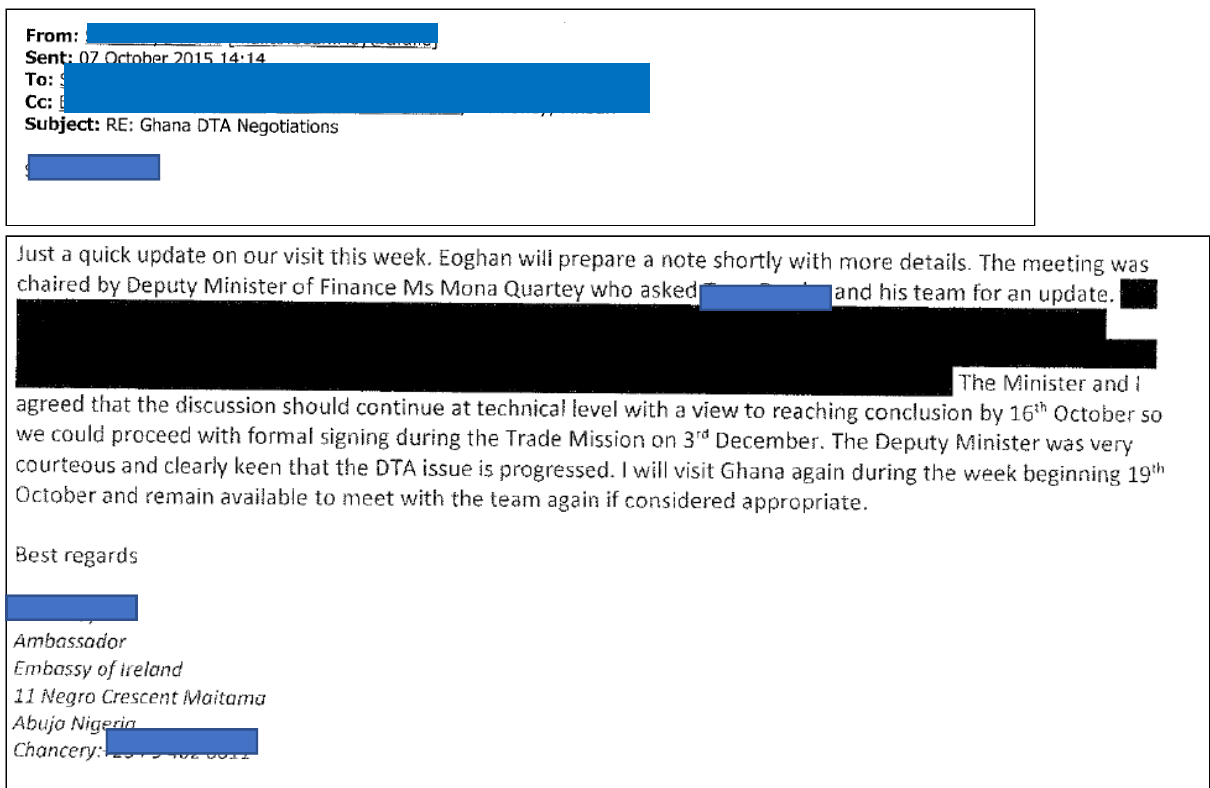
[57] Interview with individual directly involved in negotiations (October 2018); *Protocol to the Convention between Ireland and the Republic of Ghana for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains*.

We have been unable to find any other tax treaty that Ghana has signed which includes such a most-favoured nation clause.[58]

POLITICAL PRESSURE

The Ghanaian delegation deliberated for a further four months, before finally acquiescing in March 2016.[59] During this time, Irish diplomats sought to place additional political pressure. The Irish Ambassador to Ghana, who appears from internal documents to have been driving much of the pressure to conclude the treaty, went over the heads of the Revenue Authority and Finance Ministry experts negotiating the treaty, raising the impasse in a meeting with the Ghanaian Deputy Minister of Finance in early October 2015.[60] We cannot know from the available documents what effect this political intervention had, and the Irish government has redacted details of the meeting (Figure 7). Nonetheless these documents make it clear how hard the Irish government pursued advantageous WHT rates in the treaty, against the reservations of Ghana's negotiating team: the opposite of the story that Irish ministers have told in public about Ghana's purported initiative to pursue a treaty.

Figure 7*: Email from Irish Ambassador to Ghana and Nigeria, 7 October 2015.*[61]



From:
Sent: 07 October 2015 14:14
To:
Cc:
Subject: RE: Ghana DTA Negotiations

Just a quick update on our visit this week. Eoghan will prepare a note shortly with more details. The meeting was chaired by Deputy Minister of Finance Ms Mona Quartey who asked and his team for an update. The Minister and I agreed that the discussion should continue at technical level with a view to reaching conclusion by 16th October so we could proceed with formal signing during the Trade Mission on 3rd December. The Deputy Minister was very courteous and clearly keen that the DTA issue is progressed. I will visit Ghana again during the week beginning 19th October and remain available to meet with the team again if considered appropriate.

Best regards

Ambassador
Embassy of Ireland
11 Negro Crescent Maitama
Abuja Nigeria
Chancery:

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[58] The author has reviewed the texts of Ghana's DTA's with Barbados, Denmark, France, Germany, Italy, Liberia, Mauritius, the Netherlands, Singapore, South Africa, Switzerland and the UK. We were unable to locate copies of treaties with Belgium, Montenegro, the Czech Republic, Liberia, Morocco, Serbia and the Seychelles.

[59] Email from Ghana Revenue Authority to Revenue Department, 22 March 2016, released by DFAT under FOI.

[60] Email from Ambassador, Irish Embassy in Abuja, 7 October 2015, released by DFAT under FOI.

[61] Released by DFAT under FOI.

INADEQUATE PROTECTION

Ireland's push to drive down withholding tax rates in the treaty -- thereby undermining Ghana's protections against profit-shifting through treaty shopping – is particularly serious because, as discussed above, the treaty also includes absolutely no anti-abuse provisions to protect against treaty shopping directly. All OECD member states, including Ireland, have agreed that such provisions are "minimum standards" required in tax treaties under the BEPS programme against tax avoidance.

The Irish government made no offer of such measures during the negotiation.[62] Nonetheless at the time of the negotiations in 2014-16, Ghana had not yet clarified its own position on these BEPS measures: the head of the negotiating team, Eric Mensah, has indeed raised concerns that the BEPS measures, designed exclusively by developed countries while excluding others from the process, may be difficult for some Majority World countries to implement, and may not tackle more fundamental problems like source/residence imbalance:

> *"I do not believe that third countries not originally part of the development of the new [BEPS] rules would have their problems with the old tax rules sufficiently addressed…[D]eveloping countries are primarily (though not exclusively) concerned with the reduction in source-based income taxation rather than the shifting of domestic income of locally owned companies to low or no tax jurisdictions….[We should] avoid measures that would complicate tax collection and result in raising costs for the source country residents. This might end up making tax avoidance and evasion more lucrative and worth the risk of engaging in it."*[63]

Nonetheless since the negotiations concluded in 2016, Ghana has sought to include BEPS anti-abuse measures in its own tax treaty policy.[64] It has renegotiated its treaty with the Netherlands, for instance, to incorporate them.[65] Ireland has since offered to negotiate a similar protocol to insert anti-abuse measures into the Ghana-Ireland treaty, and is awaiting Ghana's response.[66]

This is to be welcomed. It is unclear, therefore, why in spite of its ostensible commitments to these anti-abuse standards in the framework of the BEPS process, the Irish government did not wait for Ghana's response before pushing for the treaty – without an) ti-abuse protections – to be signed in February 2018, and ratified by the Irish parliament in October 2018. If the Irish government truly supports such protections, it surely shouldn't be pressing for a treaty without such protections to enter into force, leaving Ghana's tax base open to profit-shifting, before agreeing the protocol that would introduce such protections.

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[62] Interview with individual with direct involvement in the negotiations, October 2018.

[63] Eric Mensah, Presentation to Tax3 Committee, European Parliament, Brussels 26 September 2018, http://www.europarl.europa.eu/cmsdata/155386/5%20-%2005%20ERIC%20NII%20YARBOI%20MENSAH%20statement.pdf

[64] Interview with Ghanaian tax official, October 2018.

[65] Protocol amending the Convention between the Kingdom of the Netherlands and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, 10 March 2017.

[66] Deputy Michael D'Arcy, statements to Oireachtas Select Committee on Finance, Public Expenditure and Reform, 20 September 2018, https://www.oireachtas.ie/ga/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/.

More profoundly, as the Ghana Revenue Authority's leading international tax expert Eric Mensah has pointed out, such protections have been designed without any consultation with the Majority World countries now expected to implement them. They may be useful, but they cannot replace more straightforwardly administrable measures against treaty shopping such as withholding taxes; nor more fundamental imbalances between Ghana and Ireland's respective taxing rights under the new treaty.

CONCLUSION: MAKING THE TREATY WORK

Ultimately both the Irish and the Ghanaian governments have responsibilities for the new treaty and its impact. Ireland's negotiators, as we have seen, ignored their own colleagues' warnings about the adverse development impacts of their negotiating positions, and have narrowly pursued the interests of Irish businesses operating in West Africa over the international commitments that Ireland has made to support revenue mobilisation by countries like Ghana. Equally, though Ghana's negotiators were operating under political, commercial and diplomatic pressures revealed by this paper, the Ghanaian government have nonetheless approved the treaty in its current form.

The treaty, meanwhile, remains:

- Non-compliant with the 'minimum standards' of the OECD's BEPS standards against corporate tax avoidance, which Ireland has agreed to implement in full;
- Prejudicial to Ghana's ability to tax foreign investors' capital gains from the sale of valuable companies and assets in Ghana, against the recommendations of IMF and UN tax experts;
- Open to profit-shifting from Ghana to Irish conduit companies, particularly via royalty payments.

Given Ireland's role as a global royalties conduit, and the fact that it is ostensibly Ghana's largest proximate source of foreign direct investment, the stakes could scarcely be higher for Ghana's tax base.

In late 2018, Irish parliamentarians raised serious concerns about the treaty's development impact, with the Irish parliament's Finance Select Committee demanding a full debate: the first time in recent years that a tax treaty's ratification has been debated in the full House.[67] Parliamentarians' subsequent attempts to delay the ratification until anti-abuse protections were added, have failed.[68] Nonetheless the draft protocol to the treaty currently under consideration, and the remaining need for Ghana's parliament to ratify the treaty, provide two opportunities to close some of the treaty's major loopholes, and to rebalance it towards a fairer division of taxing rights between the two countries.

Four steps could do this:

- **The Parliament of Ghana, thus far excluded from information or deliberation during the treaty's negotiation, could require a full debate on the new treaty prior to its ratification.**
- **Parliamentarians could decline to ratify the treaty or allow it to enter into force, before satisfactory anti-abuse provisions have been introduced**: either the 'minimum standards' defined under Action 6 of the OECD's base erosion and profit shifting process; or comparable,

[67] Agreement by members of the Select Committee on Finance, Public Expenditure and Reform, and Taoiseach, 20 September 2018, https://www.oireachtas.ie/en/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/

[68] Amendment by Green Party TD Deputy Eamon Ryan, Dáil Eireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/

more straightforwardly administrable protections such as higher withholding taxes, especially in instances of double non-taxation.

- **The Irish government could live up to its international commitments to protect the revenue bases of Majority World economies like Ghana, by allowing the draft protocol currently under consideration to include measures that rebalance source taxing rights**: including that furnishing services may constitute a taxable permanent establishment (in accordance with Ghanaian domestic law and Article 5(3) of the United Nations Model Taxation Convention between Developed and Developing Countries); that withholding taxes on royalties may approach the rates currently established in Ghanaian domestic law; and that the source country may tax capital gains on indirect transfers of moveable assets, in accordance with Article 13(5) of the United Nations Model Taxation Convention.

- **The negotiation of tax treaties – which have critical implications for revenue mobilisation, development and the provision of public services -- could no longer take place entirely behind closed doors.** Negotiations, of course, require some periods away from the public eye. Nonetheless the documentation obtained for this paper shows how governments are not fully open with their own public and parliamentarians about their negotiating goals or strategies. To ensure that negotiations adequately reflect the needs and preoccupations of all stakeholders, and reflect governments' international commitments, governments should brief parliamentarians on the detailed progress of negotiations, and should include opportunities at the start and mid-way through negotiations for businesses and civil society to input their needs and views.