IGF-OECD PROGRAM TO ADDRESS BEPS IN MINING

LIMITING THE IMPACT OF EXCESSIVE INTEREST DEDUCTIONS ON MINING REVENUES

PUBLIC COMMENTS
## Limiting the Impact of Excessive Interest Deductions on Mining Revenues
### Feedback from Consultations
#### May 2018

<table>
<thead>
<tr>
<th></th>
<th>Country/Organisation</th>
<th>Main Points Raised</th>
<th>Response</th>
<th>Finished</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Myanmar Ministry of Natural Resources and Environmental Conservation</td>
<td>Will be a good reference. Very useful for Myanmar as they consider issues around interest.</td>
<td>Noted.</td>
<td>Yes</td>
</tr>
<tr>
<td>2</td>
<td>ICMM</td>
<td>General comments</td>
<td>General comments</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Needs to emphasise the contribution MNEs make</td>
<td>General review of tone.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>MLI could be alternative to the risks in the paper</td>
<td>Emphasise paper is just for capacity constrained dev countries.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Too overly broad, needs to consider country context</td>
<td>Will review fixed ratio with other years.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Entities may be performing different functions</td>
<td>There is no evidence exploration companies can borrow – could ask ICMM to provide evidence.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>20-25% proposal not supported. Relies on a high commodity price timing.</td>
<td>More commercial factors added.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Deductions connected to exploration should be allowed, too punitive.</td>
<td>Specific comments</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Lots of commercial factors driving financing structures, not just tax. Paper should also emphasise risks of investing.</td>
<td>More factors added.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Specific comments</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>There are commercial factors in where group treasury is located.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Disagree that tax drives investment, first it’s the resource.</strong></td>
<td>Distinction between an investment (yes, agree) and debt. Debt is the focus of this text. Consistent with Action 4 paper. No action.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Want grandfathering of existing projects.</td>
<td>Paper emphasises transition period. Consistent with action 4 paper. No action.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Case studies</strong></td>
<td>Noted the cases are not open/shut profit shifting.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Tax concerns overly simplistic. New projects can’t borrow on their own, but mining entities in the group must “bear their fair share of an MNEs debt”. Aligning debt with capital requirement and the generation of profit ensures the burden is spread in the most commercial way. A Co would never mismanage the asset, because it owns it.</td>
<td>Does this suggest external debt is a cap if internal is about sharing the burden around? Seems overly pure. Ignores instances of adding risk, changing accounting treatment etc that may make asset look good in near term.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. one sided view, may be legitimate. Capital investment won’t match the profitability of the mine. Measures to smooth the impact of those fluctuations should be allowed. Otherwise could make project unviable. If B Co has to pay interest in a loss year, would just carry forward, which is worse for the developing country.</td>
<td>Reconsider text to not present as fait accompli.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. elevated local interest rate isn’t proof of mischief.</td>
<td>Make example bit more extreme. Mischief is clearly there.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. hybrids are very complex, as are mismatch rules.</td>
<td>Noted.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. agree its complex, should replace with a more basic and more broadly applicable example.</td>
<td>Noted. These are relevant case studies illustrating what countries have to deal with.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>3 Chile Internal Revenue</strong> Toolkit needs to consider the quantity of debt in a</td>
<td>Not possible to set a ratio that would be appropriate</td>
<td><strong>Yes</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>mining project, even if interest rate is a low rate, because could lead to high level of interest deductions. How could the “correct” ratio of debt to equity be established? in all circumstances.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>It’s a policy choice - countries can set their own expectation on capital structure. Clarify text to note that Debt/Equity ratios and a consideration of the quantity of debt that arm’s length parties could have borrowed are most direct defences. (It’s plausible that a group entity could borrow large sums if parent stands behind it though?)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4</th>
<th>Kenya mining engineer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toolkit captures the important issues, and notes the capacity constraints in many countries. There is an industry driving BEPS, always ahead of governments. BEPS opportunities are built into tax laws (e.g. incentives). Suggests governments need to work more closely together. Prioritise royalties.</td>
<td></td>
</tr>
<tr>
<td>Noted.</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5</th>
<th>Niger</th>
</tr>
</thead>
<tbody>
<tr>
<td>Toolkit covers issue of utmost importance to Niger. Comments on situation in Niger. Limitations on interest may see companies use complex arrangements to recharacterise interest as something else.</td>
<td></td>
</tr>
<tr>
<td>Add note in conclusion that countries should look out for recharacterisation of income.</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6</th>
<th>Oxfam</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Comments Political statements on applying BEPS Actions in developing countries.</td>
<td></td>
</tr>
<tr>
<td>Overall Comments Most points are political, outside scope of consultation.</td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td></td>
<td>Want more specific country case studies.</td>
</tr>
<tr>
<td></td>
<td>Paper not critical enough of MNE practices.</td>
</tr>
<tr>
<td></td>
<td>Specific Comments</td>
</tr>
<tr>
<td></td>
<td>Mostly requests for clarification, further explanation of points.</td>
</tr>
<tr>
<td></td>
<td>Should make stronger stand on naming unwanted MNE practices, and identifying purely base eroding structures.</td>
</tr>
<tr>
<td>7</td>
<td>Suriname</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>BIAC</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
doesn’t. And there’s more risk in developing countries, so rate should be higher.

Don’t support use of interest withholding tax.

Don’t support special rules for just mining sector, can increase complexity.

Slight concern on the tone as anti-business.

Section 2

Add in other commercial factors in group treasury location.

Subsidiaries will have different commercial profile relative to the parent, so can’t just use group lending as the indicator.

MNEs have to pay back financiers first before governments.

Section 3

If there’s mischief, have a targeted rule not a general limitation.

Debt push down is encouraged under Action 4 report.

Case study 2 might be completely virtuous. If there are commercial reasons for the structure, then should just price them under the ALP.

<table>
<thead>
<tr>
<th>Changed as per above.</th>
</tr>
</thead>
</table>

Noted only. Countries with MDAs already have special regimes.

Draft reviewed for balance. Oxfam says too gentle on business.

Section 2

Other commercial factors added.

[issue as above]

Not accepted. Additional research needed on carried interests.

Section 3

Noted only. Revisits Action 4 policy rationale.

Not what Action 4 says.

Case studies are based on real cases, but softened to note they are not open/shut profit shifting.
Case study 3 – there are reasons for the discrepancy in rate (see ** above).

Hybrid mismatch rules are needed, but don’t focus on complexity as being bad. Business and govs should work together to understand them.

**Section 4**

The box analysing debt ratios is too over simplified, because of the different risk factors discussed earlier.

Pay higher rates in developing countries.

Action 4 limit below 30% might harm investment. Want 30% plus an uplift.

Using debt to finance investment where government has carried interest is completely normal business practice.

Want carry forward and back.

Agree, reword case to note that a margin of itself is not the problem.

Complexity is a real problem for low-capacity developing countries, so point is retained.

**Section 4**

[under review. Will redo table with longer time series.] Methodology in the box is the same analysis that was used in Action 4 Report to set the corridor.

Dealt with in paper.

Noted. Analysis has to start somewhere. Giving 30%+ with no analysis risks inflating debt levels.

Added text on further analysis needed. Disagree with the premise.

Carry back needs careful integrity rules to accompany them – and not encouraged for low-capacity developing countries as a result.

<table>
<thead>
<tr>
<th>9</th>
<th>South Sudan (confidential)</th>
<th>Significant needs for assistance. Welcome the study.</th>
<th>Noted.</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>Madagascar</td>
<td>Prior to considering BEPS Action 4 developing countries firstly need to ensure an effective tax system (tax laws and administrative capacity) that is compliant to international standard and norms.</td>
<td>Noted.</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>NRCAN</td>
<td>General Comments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>-------</td>
<td>------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Considered an excellent document.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Specific Comments</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Emphasise the high risk nature of the business, especially exploration (and its difference).</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Should mention cost/risk of environmental assessment processes, and need for social licence.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Companies take substantial financial risk, this is understated. MNEs must be able to recoup their costs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Where there are price falls and royalties are used, can be big cash flow squeeze on the company.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Suggest the ratio be not a bright line but a range. Concerned about companies at the edge of the line.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Canada has a thin cap ratio now of 1.5:1 (was 3:1).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

|   | Bolivia | Bolivia has specific tax regulations for the payment of interest applicable to all economic sectors and independently if the financial transaction was agreed between third parties or related parties. |
|   |         | This regulation indicates that the interest on debts and their respective updates and related expenses |
|   |         | **Noted** |
|   |         | **Yes** |
will be deductible only if the contracted debt corresponds to producing taxable income or maintaining the source of production, on the level of interests a margin comparable to the average active rate of commercial banks when it comes to domestic loans and the Libor rate plus 3% for loans abroad.

Don’t have information on the contracts of such loans to determine the established conditions (rates, update, object of the loan), so this situation could be mitigated with the use of pre-established contracts that include sufficient and homogeneous information to monitor these expenses and that the Tax Administration has access to them without the requirement and can be established as a formal duty from a relevant amount.

<table>
<thead>
<tr>
<th>13</th>
<th>Angola</th>
<th>[approximate translation]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>In the processes of mining discourse, the AGT has not observed this figure of loans with excessive interest. Companies do not carry high financial costs in their accounts. however, this administration is attentive to the appearance of evidences of this technique of escape to the fiscal</td>
</tr>
</tbody>
</table>
LIMITING THE IMPACT OF EXCESSIVE INTEREST DEDUCTIONS ON MINING REVENUES

Dear Members of the IGF-OECD Program to Address BEPS in Mining,

Business at OECD (BIAC) is pleased to have the opportunity to comment on the Consultation Draft: Limiting the Impact of Excessive Interest Deductions on Mining Revenues (the “Consultation Draft”) issued 18 April 2018. As shown by Action 4 of the OECD’s Base Erosion and Profit Shifting (BEPS) project, interest limitation rules are an important and difficult area, and we thank the IGF and OECD for the time and effort put into this Consultation Draft.

We welcome the IGF working with the OECD on these difficult issues and fully support the UN Sustainable Development Goals (SDGs) and agree that tax can be a key driver in countries’ success in meeting many of the SDGs. Business at OECD has been supportive of the OECD’s BEPS project since its inception, as well as the OECD’s Tax and Development work, and leads constructive and detailed input from the international business community to these initiatives.

Further, we support the recommendations that are consistent with OECD Standards that are included in the Consultation Draft, notably, Action 4 (Interest Deductions), the OECD Transfer Pricing Guidelines (TPG) and arm’s length principle, and the OECD’s efforts on Tax and Development. To this end, we continue to engage with developing countries and, back in 2013, developed the Best Practices for Engaging with Tax Authorities in Developing Countries. Business at OECD continues to believe these best practices will support responsible business tax management and enhance cooperation, trust, and confidence between tax authorities in developing countries and international business.

Business at OECD does have specific concerns and comments about certain aspects of the Consultation Draft described in our detailed attachment, which we’ve briefly summarized below:

- Mining is already a heavily regulated industry and ring-fencing, especially in a tax context, will result in negative economic effects;
- The ultimate conclusions of the Consultation Draft need to ensure that the principles behind Action 4 are taken into account without a simplified, blanket restriction (e.g., need to address commercial realities and also ensure that the set percentage of interest cost is allowed across the lifecycle rather than in just one year);
The 20-25 percent fixed ratio limit on deductibility may be overly simplified for many investments and projects because it disregards underlying economic factors. Entities of an affiliated group are going to have different borrowing risk factors (as acknowledged by the Consultation Draft in external borrowing), which should result in differing interest rates. With the blanket approach, these real economic factors are not taken into account and will likely impact investment decisions when MNEs are assessing respective business opportunities;

The case studies as outlined in the Consultation Draft are not relevant for many businesses (and not more relevant for mining than any other businesses). Businesses have commercial requirements at the heart of their (funding) structures and even where debt is pushed down for tax reasons, this is often to ensure that it is equitably spread in line with objectives of Action 4 of the BEPS project, rather than to try and avoid local taxes (although this may not, in practice, result on consistent gearing in every year of each project due to their long lives, differing risk profiles, and local ownership conditions);

Mining companies make significant contributions through tax and other means to local economies (illustrated by country-by-country reporting, public contribution reporting, etc.), which should be viewed holistically when considering corporate tax measures, especially when seeking to ring-fence them;

The nature of the mining business requires risky, long-term investment and, as a result, is more sensitive to uncertainty and its potential impact to investment than other sectors;

We do not support withholding taxes as a preferred alternative as they have the potential to lead to double taxation; but we do encourage treaties to ensure that countries get a fair share of tax base without double taxation; and

A balance must be struck between simplicity and business operating realities. The best approach for this balance should be alignment with international standards, including application of the OECD’s TPG, transparency of operations, and education of tax administrations of traditional mining operating models.

Again, we thank you for the opportunity to comment on this subject, and look forward to working with you further. To that end, as the various papers are being developed for the subsequent nine (9) items, Business at OECD is fully prepared to engage in any capacity. Specifically, we would welcome the opportunity to be involved in dialog before papers are presented, during the working process, similar to our involvement in other OECD lead measures (e.g., the Technical Advisory Group on VAT/GST).

Sincerely,

Will Morris
Chair BIAC Tax Committee
General Comments

1. *Business at OECD* continues to endorse pro-growth tax systems that facilitate cross-border trade and investment, enhancing economic growth and efficiencies in the international market place. We believe the Consultation Draft appropriately identifies the policy questions of how countries strike a balance between tax base protection and encouraging inward investment. We agree that some measures would negatively impact investment, unless such measures are appropriately implemented, providing certainty and stability for taxpayers.

2. Generally, the mining industry is a sector that is already highly regulated, including special legal regimes and disclosure requirements. We encourage local governments to utilize this information to quantify, in totality, the contribution made by local mining companies. This contribution expands outside of corporate income tax into other taxes, permits and licensing, local ownership/return, and significant direct investment (wages, etc.). Further, once a mine is opened, it cannot be moved, and, as a result, currently results in high levels of tax when compared to other industries.

3. Further, ring-fencing certain industries with different rules is traditionally cautioned against, as fragmentation of the rules across sector adds additional complexity and economic abnormalities. Accordingly, *Business at OECD* would generally suggest a comprehensive approach locally to interest deductibility, without certain focuses on industry sectors. As the economy develops, the traditional lines between sectors begin to blur, thus providing additional complexity of determining what rules may or may not apply.

4. The objective of simple and clearly designed measures is welcomed as it should reduce time and costs for both businesses and local tax administrations. Also, to further this goal, risk assessment tools should be developed to most efficiently utilise local, limited resources.

5. However, the Consultation Draft is generally focused on complication of arrangements and resulting misuse. We acknowledge that simplification is a noble aim. However, a balance must be struck between simplicity and business operating realities. The best approach for this balance should be alignment with international standards, including application of the OECD’s TPG and transparency and education of tax administrations of traditional operating models.

6. Nearly 5 years ago *Business at OECD* developed the Best Practices for Engaging with Tax Authorities in Developing Countries. Business at OECD continues to believe these best practices will support responsible business tax management and enhance co-operation, trust, and confidence between tax authorities in developing countries and international business.

7. The Consultation Draft acknowledges several factors impact the use of external debt and the interest rate at which a company can borrow (e.g., company size, credit rating, security, level of risk, etc.). These factors are then disregarded when determining its suggestion of a 20-25 percent fixed ratio limit on interest deductibility. The Consultation Draft simply reviews external group debt levels of certain publicly traded mining MNEs in order to determine a proper threshold for the industry as a whole. However, we believe such an analysis grossly oversimplifies the economic realities. A MNE’s affiliate group will likely have a broad range of mining investments – with varying degrees of profitability, risk profit, credit rating and collateral/asset security – that should, on an arm’s length basis, borrow at differing interest rates. By setting a general group level standard, which is then pushed down to the local affiliate, these real economic factors are not taken into account and may negatively impact investment decisions of MNEs when assessing the business opportunity.
8. Investments in developing countries have greater risk than in developing mining countries (e.g., Australia, Canada, etc.). The increased investment risk in developing countries includes taxation risk, sovereign risk, and infrastructure challenges. As such, these issues should be included within any consideration related to this sector, and without, any provided guidance will be build on inaccurate economics.

Specific Commentary

Section 1 - Introduction

9. We agree that raising revenue is especially important for capacity-constrained, developing countries. Strong tax systems are central to financing development and achieve the SDGs to secure robust and stable future growth.

10. The Consultation Draft is focused on two specific questions:

   How do MNEs legitimately use debt finance within a corporate group; and

   How can countries protect themselves against base erosion that has little or no commercial justification?

11. Business at OECD strongly believes that a better understanding of the first question will facilitate answers and solutions to the second. However, on this point, the Consultation Draft uses very subjective language – “what is ‘reasonable’ and necessary for mining to occur.” Generally, both of these aims are proper in this context. However, there is slight concern regarding the tone as it seems to divert from what is a sound commercial (non-tax) justification to what is arbitrarily reasonable. As discussed in more detail below, Business at OECD is of a strong opinion that existing metrics and guidelines should be followed, in lieu of creating additional, new rules that may impact investment.

Section 2 – Mining Businesses and the Use of Debt Financing

12. In the introduction to the capital intensive nature of mining, many of the comments are appropriate regarding the high level of capital required for building and constructing the mine. Further, the comments regarding the uncertainty of the investment are also proper. However, in this context it’s worthwhile noting that these market conditions are constantly subject to change. For example, the note that “future market conditions for the products may change unexpectedly” – is somewhat misleading as this is all but a certainty per global markets and should appropriately say “will change.”

13. The Consultation Draft outlines certain reasons why companies looking to use loans as part of their financing mix chose certain jurisdictions for their Group Treasury function – including extensive treaty networks, the ability to take advantage of hybrid mismatches, and low tax rates. However, we believe the emphasis is overly focused on certain tax considerations. In reality, there are significant other factors considered by companies during this evaluation, including, but not limited to, the potential finance talent locally, cost of operations, legal framework, and banking infrastructure. We strongly suggest that these additional factors, among others, be added to illustrate the entire story.

14. As acknowledged, financing decisions by MNEs are made for many reasons and regularly the internal and external financing decisions don’t mirror each other. However, the Consultation draft appears more focused on the tax factors impacting this decision versus the actual commercial reasons. The minimal commercial factors addressed relate to “how much” and
“when” expenditures are needed. However, there is not a thorough analysis of the specific factors noted earlier in the Consultation Draft (i.e., company size, credit rating, security, level of risk, etc.). Traditionally, a mining company will hold significant mining operating subsidiaries with different lending profiles. As such, these local operating entities will have differing loan profiles as well as different profiles from the parent entity or group financing entity. Consequently, there will be differing rates across the various profiles to reflect the economic circumstances of each respective party.

15. Lastly, another strong commercial reality for mining companies is that they often need to pay off the financiers first before the company or governments start seeing returns. This structure is not a choice; it’s a commercial reality that exists in the industry.

Section 3 – Challenges Faced by Developing Countries

16. Generally, if the case study issues raise specific concerns, we believe those concerns should be addressed through targeted rule making. For example, through statutory changes targeted at hybrid mismatch arrangements, versus a separate, specific interest limitation regime for the mining industry.

17. An underlying assumption in Case Study 1 is that a “debt push-down,” on its face, represents some manipulation of the local tax system. However, the final Action 4 Report encourages debt push-downs to underlying affiliates to equalize the debt levels across entities in the MNE as to not “trap” interest in an entity that is unable to pay. While there may be circumstances in which debt is overly “pushed” into an underlying subsidiary for tax purposes, we must distinguish such behavior from arm’s length pricing and allocation of debt within the global group in accordance with Action 4 guidelines.

18. In Case Study 2, the loan terms between A Co (in country A) and B Co (in country B) are contingent on the tax deductibility (i.e., annual profitability) of B Co. Case Study 2 suggests the arrangement is pure financial engineering to reduce tax payments in Country B. However, even though such arrangement may be viewed as “structured,” such may be the case for perfectly virtuous reasons (e.g., to increase the chance of success of the local mining company). By deferring interest payments if not profitable, the company is providing additional liquidity to invest in the success of the business of B Co. Further, the additional upside received by the lender on the foregone interest is purely an arm’s length substitute for what it conceded in the earlier interest payments. As such, there should be a concerted effort to recognize where such arrangements may be driven by a commercial purpose versus pure tax engineering. If there are bona fide commercial reasons for the arrangement, the next question should be whether the arrangement is arm’s length per the OECD TPG, not an immediate conclusion that the arrangement is improper.

19. Case Study 3 is focused on a discrepancy in interest rates charged between A Co and its related party, B Co. We acknowledge such an arrangement may be executed to “divert” income from B Co to A Co as a result of the interest rate charged, provided the structure is artificial. However, the Case Study completely disregards any economic factors that may be relevant for determining B Co’s borrowing rate. In Table 2.1 of Section 2, the Consultation Draft outlines certain economic factors that impact the use of external debt (e.g., company size, credit rating, level of risk, security offered, etc.). These factors are similarly important in an affiliated group borrowing context and should be reviewed before instantly determining a difference in rates charged is abusive. For example, A Co may hold several, diverse investments, allowing it to
borrow at a more friendly rate, whereas B Co may operate a single, risky business without much collateral. Consequently, these economics may fully support the interest rate charged.

20. We recognize the need to enact hybrid mismatch rules, as outlined in the Action 2 reports. However, one cautionary note regarding Case Study 4 is the tone regarding the general complexity and such being “more complex than what is needed.” Alternatively, we believe the focus should first be on whether the arrangement gives rise to a hybrid mismatch, and if such is the case, domestic legislation as outlined in Action 2 could target such arrangement. From there, if the arrangement is not a hybrid arrangement, the focus should then be on whether or not the interest rate and arrangement meets the arm’s length standard or is otherwise abusive.

21. Case Study 5 implies the additional complexity makes it difficult for local countries to audit asset sales with embedded financing. However, similar to our prior comments, we believe the focus should be on educating capacity-constrained countries to traditional arrangements, so they have the knowledge and capacity to identify the potential issues raised (e.g., base erosion and withholding tax avoidance). The goal should be to identify misuse, while also providing an environment for normal and common business transactions.

22. In sum, there are noble aims regarding all the characteristics identified. Regarding non-arm’s length rates, we fully support a consensus transfer pricing standard outlined by the OECD in their TPG. However, regarding the second two characteristics, we are concerned that the Consultation Draft’s approach may be over simplified. High-debt levels should raise concern, but only when they aren’t supportable by the underlying economics. Similarly, regarding complex structures, the fact an arrangement is complex should not provide prima facie evidence that there’s misuse by the taxpayer. Business and governments should work together, on a transparent basis, to break-down common structures that may otherwise appear complicated.

Section 4 – Interest Limitation Rules Including BEPS Action 4

23. Our main concern with the Consultation Draft is the conclusion of the need for a 20-25 percent fixed ratio limit on deductibility of interest. The Consultation Draft reviews external group debt levels of certain publicly traded mining MNEs to determine this threshold. However, we have significant concerns that this approach dramatically oversimplifies the economic realities. A MNE’s affiliate group likely has a broad range of mining investments. These investments have different risk factors as outlined in Table 2.1 (i.e., varying degrees of profitability, risk profit, credit rating and collateral/asset security, etc.) and should, on an arm’s length basis, borrow at different interest rates.

24. Interestingly, even though the Consultation Draft acknowledges that developing countries have relatively higher interest rates, it does not then take it a step further that it is then reasonable that different subsidiaries (depending on the underlying economics) may need to pay a higher interest rates as a result.

25. Alternatively, by setting a general group level standard below the upper limit of the OECD Action 4 report (and without uplift mechanics built-in for highly leveraged global groups), a distortion in the economics may result. If these real economic factors are not taken into account, we would expect an impact to investment decisions when MNEs are assessing the business opportunity, as it may reduce the attractiveness of the investment.

26. For example, in a large-scale greenfield project in a developing country, there will always be a considerable time period where the project incurs interest charges but has no earnings (so no EBITDA). Further, very often the local jurisdiction has an unfunded equity stake in the project.
As such, the need to charge interest on debt funding is required to ensure a fair outcome and such is completely in line with the standard commercial operations. Unfortunately, the Consultation Draft glosses over this issue by stating that the disallowed interest deductions might be able to be carried forward, subject to protections around quantum. Unless the interest deductions are available to be used when earnings flow, the after tax cost of the project will significantly increase to the detriment of it being viable. It will potentially build in a bias towards investment in developing countries where other income streams exist to shelter the interest deduction and reduce the risk and after tax cost.

27. We would alternatively suggest that the final report recommend a 30% threshold with some degree of group uplift. This approach would remain consistent with the final Action 4 guidance. Further, miners have portfolios of investment at different stages of their lifecycle and differing risk profiles. As such, we further endorse flexibility in carrying forward and back the interest capacity.

28. We are encouraged by the mention of the Mutual Agreement Procedure (MAP) being used to avoid conflict between jurisdictions. We also agree that anti-abuse provisions are traditionally difficult to design without resulting in significant uncertainty in the tax regime, and we would recommend against their introduction in this context. Similarly, we also caution against the use of interest rate caps. These caps have no connection to the underlying economics and are simply an arbitrary threshold, likely deterring investment by manipulating the underlying economics.

Section 5 – Conclusions and Best Practices

29. As noted above, we fully support the objective of simple and clearly designed measures, as such rules should reduce time and costs for both businesses and local tax administrations. Further, clear rules with additional transparency will strengthen relationships between government and taxpayer.

30. However, we strongly disagree with setting an arbitrary 20-25 percent fixed ratio limit as it oversimplifies and disregards underlying economics, while also creating a separate regime solely targeted at one business sector. Ring-fencing certain industries with different rules has been cautioned against for years, as the fragmentation of rules across sectors creates additional complexities and results in economic abnormities.
Estimada Sofía, en relación al punto:

“2. **Limitar el Impacto de las Deducciones Excesivas de Intereses sobre los Ingresos de la Minería**

Este conjunto de herramientas responde a la preocupación de muchos países en desarrollo de que las empresas multinacionales en los países productores de minerales hacen uso "excesivo" de las deudas como mecanismo para trasladar beneficios al exterior. [Access the practice note.](#)"

Tenemos el siguiente comentario...

En el documento se aborda el efecto del gasto de intereses, pero no desde la perspectiva de la estructura de capital, donde un monto estratosférico de deuda tiene un impacto indirecto en el monto de la deducción de intereses. Consideramos que también debería abordar las condiciones de financiamiento que, implícitamente, también afectan la deducción de intereses. Por ejemplo, si un proyecto minero recibe 10 mil millones de dólares a una tasa del 1%, probablemente esa tasa cumple el principio arm's length, sin embargo, aplicar esa tasa en ese monto de financiamiento implica tener un gasto de interés altísimo.

Incluso partes relacionadas podrían acordar plazos bien amplios con tasas pequeñas, donde no se pueda cuestionar ni el monto de gasto financiero, ni la tasa de interés, pero donde es evidente que el monto de la deuda completa no corresponde para una empresa del rubro con esas condiciones. Nuevamente, si un proyecto minero necesita 100 para financiarse completamente, es correcto que estos 100 provengan de deuda? debería ser capital? Cómo se debería establecer el ratio correcto? Tener presente que en muchos países, es menos gravoso enviar flujos como pago de intereses que como dividendos.

Quedamos atentos a comentarios,

Saludos.

Felipe Flores
Jefe Área Precios de Transferencia y Valoración
Servicio de Impuestos Internos
COMMENTS ON ‘LIMITING IMPACT OF EXCESSIVE INTEREST DEDUCTIONS ON MINING REVENUE’

The consultation draft has done well to capture important issues to address base erosion and profit shifting by MNE’s and also highlighted the very significant point that most developing countries are capacity constrained to tackle BEPS.

My views, as a mining engineer and a regulator, are that developing countries are not in a position to adequately manage BEPS practises for two main reasons;

1. BEPS is an industry driven by highly qualified professionals who will keep developing complex schemes to keep ahead of governments that are more often than not plagued by capacity constraints and challenged governance.
2. Developing countries have inbuilt base erosion in some of their tax codes for example accelerated depreciation, perpetual losses carrying forward, waivers on taxes, lack of ring fencing and harmful mineral development agreements.

For governments to get a fair share of mining revenues, the following are my suggestions;

1. Tax authorities and mining regulators to work together to analyse the full impacts of fiscal impositions and fiscal waivers on mining industry. This will enable governments to make informed decisions.
2. Since governments cannot match the expertise of BEPS industry, in order to claim a fair share of the mineral revenues, they should concentrate on optimising collections from royalties. Minerals production and sales are readily verifiable unlike complex financial arrangements.
Les deux programmes : « surveillance de la valeur des exportations minérales » et « la limitation de l'impact des déductions d'intérêts excessifs sur les revenus miniers » couvrent des questions d'importance capitale pour notre pays qui est très riche en ressources minérales. L'intérêt de réalisation de cette étude serait d'une grande ampleur pour le Niger dès lors que sa politique minière est basée sur la transparence, la bonne gouvernance, l’optimisation des recettes minières, l’inclusion sociale, le respect des accords préétablis avec les investisseurs, etc.

De manière exhaustive, les éléments constitutifs de ces programmes méritent très particulièrement notre attention, à savoir :

1. Les déductions d'intérêts excessives ;

2. Le prix de transfert abusif ;

3. La sous-évaluation des exportations de minéraux ;

4. Les incitations fiscales dommageables ;

5. La stabilisation de l’impôt ;

6. Les Conventions fiscales Internationales ;

7. Le streaming de métaux ;

8. La couverture abusive et ;

9. La clôture inadéquate.

**Programme I : Surveillance de la valeur des exportations minérales.**

Sur ce point malheureusement, l’administration des mines du Niger présente toutes les défaillances sur les cinq sections définies :

1) Faible ou inexistant niveau du processus d'évaluation des minéraux:
- méthodes d'échantillonnage dépendent des sociétés minières (géochimie, géophysique, géologie, etc.) i.e., sans associer l’administration des mines ;
- méthodes d’évaluation non précisées dans les contrats ;
- contrôle des échantillons à exporter pour analyse, effectué par l’administration des mines, est visuelle sans aucun appareil et ne se fait qu’au bureau peu avant l’exportation ;
• absence de laboratoire national d’analyse des échantillons ce qui fait que la préparation et l’analyse pour les échantillons et produits courants sont faites à l’étranger.

Il est à noter que deux des trois étapes d’évaluation des échantillons sont faites à l’extérieur, d’où le faible niveau de vigilance administrative. En plus, tous produits miniers destinés à l’exportation sous forme d’échantillons sont exonérés de tous droits et taxes à la sortie. Aussi, les résultats d’analyse et de test effectués ne sont pas communiqués au gouvernement (restent pour usage exclusif des sociétés minières).

2) Absence de guide pour le choix d'option politique appropriée pour l'évaluation minérale :
• Aucune stratégie de surveillance de la qualité et de la qualité des exportations de minéraux ;
• Aucun moyen pour faire des tests directs sur les exportations de minéraux ;
• Complexité dans les déclarations des sociétés minières ;
• Préférence aux analyses extérieures.

3) Mauvais cadre de contrôle administratif :
• inspections minières irrégulières ou quasiment inexistantes pour apprécier le comportement des sociétés minières afin d’en tirer les avantages et réduire les inconvénients à chaque étape ;
• exposition au risque de prix de transfert car les transactions de vente peuvent s’effectuées entre entreprises d’une même filiale à un prix négocié.

4) Absence de moyens pour financer les activités d'évaluation des minéraux et

5) Absence des normes de déclaration des essais pouvant fournir une base de référence claire sur laquelle les actionnaires et les gouvernements peuvent évaluer les processus d'évaluation interne des sociétés minières.
Programme II : la limitation de l'impact des déductions d'intérêts excessifs sur les revenus miniers.

Cette étude, destinée à éclaircir les points ci-dessous énumérés, vise à augmenter les revenus du secteur minier en complétant les actions menées par la Plateforme pour la collaboration en matière de fiscalité et d'autres pour la production de boîtes à outils sur les problèmes fiscaux prioritaires auxquels sont confrontés les pays en développement. Il s’agit :

1) De la mobilisation des ressources intérieures dans les pays en développement ;
2) Des entreprises minières et l'utilisation du financement par emprunt ;
3) Des défis auxquels sont confrontés les pays en développement ;
4) Des règles de limitation des intérêts, y compris l'action BEPS 4 ;
5) Des meilleures pratiques.

I. mobilisation des ressources intérieures dans les pays en développement

L’augmentation des recettes fiscales étant particulièrement très importante pour le développement, le système fiscal nigérien est solidement conçu afin de servir au financement du développement, et aider à atténuer l'impact de l'aide extérieure. Il vise à mobiliser plus de recettes fiscales qui ont toujours été inférieures aux niveaux requis pour atteindre les objectifs de développement durable et assurer une croissance robuste et stable.

Cela n’exclut pas les risques d'érosion de la base d'imposition dans le secteur minier qui peuvent entraver la mobilisation des ressources intérieures, en particulier :

- les opérations des entreprises multinationales (EMN) et
- les dispositions dérogatoires aux activités minières.

Ce qui incite à utiliser la dette, c’est que notre système fiscal prévoit des déductions d'impôt sur le revenu pour les intérêts, sans réelle provision similaire pour les capitaux propres. Il y a donc des risques d'érosion de base particuliers découlant de l'utilisation
de la dette par les multinationales minières. Or, l’utilisation excessive des dettes dans un pays producteur de minéraux peut apparaître comme un mécanisme de transfert des bénéfices à l'étranger.

Au niveau étatique où, il faut équilibrer la protection de la base fiscale et l'encouragement des investissements étrangers, une analyse plus approfondie des questions particulières sur la déductibilité des intérêts serait obligatoire dans la mesure du possible. Ceci non seulement pour comprendre comment les EMN utilisent légitimement le financement par emprunt au sein d'un groupe de sociétés, mais aussi comment pouvons-nous nous protéger contre l'érosion de la base qui a peu ou pas de justification commerciale.

II. Les entreprises minières et l'utilisation du financement par emprunt

Les mines exigent des dépenses en capital importantes au cours de leur vie, de l’exploration à la mise en valeur des ressources, avant d'augmenter considérablement. Si ces dépenses sont faites avant que l'entreprise ne tire des revenus de la vente de la production minière, cela signifie qu'il existe une incertitude considérable lorsque l'investissement est fait que cela se passera comme prévu.

A ce niveau, l’Etat n’a aucun contrôle :

- du rendement du minerai ;
- des coûts réels de construction et d'exploitation ;
- des conditions futures du marché, les prix des produits peuvent changer de façon inattendue ;
- de l’achat des actifs minières à une entité qui possède ces actifs ;
- etc.

Si les propositions de dépenses sont préparées et pesées par les décideurs, la branche de financement de l'entreprise chargée d'obtenir les fonds nécessaires doit aviser l’État des conditions des prêts bancaires. Il est préférable que ce processus soit itératif, puisque les informations provenant de l'entreprise et de l'extérieur sont rassemblées pour les décideurs qui devraient avoir le même plan d’utilisation des fonds disponibles.
**III. Les défis auxquels sont confrontés les pays en développement**
Les prêts aux entités dans les pays d'accueil présentent un intérêt crucial pour les autorités fiscales qui sont tenues d'être attentives à l'allocation disproportionnée de la dette aux opérations minières et aux conditions auxquelles les prêts sont accordés aux entités locales. Il existe un risque élevé que les entreprises attribuent des niveaux d'endettement plus élevés. Il faut alors envisager des dispositions fiscales suffisamment complètes (ou ciblées) pour traiter les techniques d'érosion de base utilisées par les multinationales.

Pour nos administrations fiscale et minière, il reste beaucoup à comprendre les structures des EMN et les façons légitimes dont elles organisent leurs activités (pour identifier les risques) et favoriser les mesures fiscales encourageant la simplicité dans les structures d'entreprise et les transactions financières entre parties liées.

**IV. Règles de limitation des intérêts, y compris l'action BEPS 4**
En général, les règles fiscales permettent des déductions aux sociétés pour des considérations souvent politiques ou même économiques sans prendre en compte les règles de limitation des intérêts. Il faut qu’il y ait donc des :
- Question de déductibilité des intérêts
- Questions politiques sur la manière dont les pays parviennent à trouver un équilibre entre la protection de la base fiscale et l’encouragement des investissements étrangers.

**V. Conclusions et meilleures pratiques**
Le financement par emprunt demeure une source importante de fonds pour la construction de mines et le financement de leur exploitation et de leur expansion. Les mines coûtent des centaines de millions de dollars à construire, et la dette est une partie nécessaire de la combinaison de financement.
Malgré cela, il y a des mauvaises pratiques entretenues au Niger :
- Les déductions d'intérêt (souvent excessives);
• Les choix politiques affectent le niveau d'investissement étranger ;
• Limitation de la croissance économique ;
• Mauvaise évaluation par les décideurs de l'arbitrage entre la protection de la base d'imposition et les niveaux de financement de la dette acceptables pour l'exploitation minière ;
• les limitations sur les déductions d'intérêts font que les entreprises optent plutôt pour des arrangements complexes qui caractérisent l'intérêt dans d'autres formes de paiement qui ne sont pas visées par les règles de limitation des intérêts.
The two programs, "Monitoring the Value of Mineral Exports" and "Limiting the Impact of Excessive Interest Deductions on Mineral Revenues," cover issues of utmost importance to our country, which is very rich in mineral resources. The interest of carrying out this study would be of great importance for Niger since its mining policy is based on transparency, good governance, optimization of mining revenues, social inclusion, respect of pre-established agreements with investors, etc.

In an exhaustive manner, the constituent elements of these programs deserve our particular attention, namely:
1. Excessive interest deductions;
2. The abusive transfer price;
3. Undervaluation of mineral exports;
4. Harmful tax incentives;
5. Stabilization of the tax;
6. International Tax Conventions;
7. The streaming of metals;
8. The abusive cover and;
9. Inadequate fence.
Program II: limiting the impact of excessive interest deductions on mining revenues. This study, intended to clarify the points listed below, aims to increase mining sector revenues by complementing the Platform's work on tax collaboration and others for the production of toolkits on problems. priority tax issues facing developing countries. It's about:

1) Domestic resource mobilization in developing countries;
2) Mining companies and the use of debt financing;
3) Challenges facing developing countries;
4) Interest limitation rules, including BEPS 4;
5) Best practices.

I. domestic resource mobilization in developing countries

The increase in tax revenues being particularly important for development, the Nigerian tax system is solidly designed to serve development finance, and help mitigate the impact of external assistance. It aims to mobilize more tax revenue that has historically been below the levels required to meet sustainable development goals and to ensure robust and stable growth.

This does not exclude the risk of erosion of the tax base in the mining sector, which can hamper the mobilization of domestic resources, in particular:

• the operations of multinational enterprises (MNEs) and
• provisions derogating from mining activities.

The incentive to use the debt is that our tax system provides for income tax deductions for interest, with no real similar provision for equity. There are therefore particular base erosion risks arising from the use of debt by the multinational mining companies. However, the excessive use of debt in a mineral-producing country may appear as a mechanism for transferring profits abroad.

At the state level, where there is a need to balance the protection of the tax base and the encouragement of foreign investment, a more in-depth analysis of the specific issues of interest deductibility would be mandatory to the extent possible. This not only to understand how MNEs legitimately use debt financing within a group of
companies, but also how can we protect ourselves against base erosion that has little or no commercial justification.

II. Mining companies and the use of debt financing
Mines require significant capital expenditures over the course of their lives, from exploration to resource development, before increasing significantly. If these expenditures are made before the business derives revenue from the sale of mining production, this means that there is considerable uncertainty when the investment is made that it will happen as planned.

At this level, the state has no control:
• ore yield;
• actual construction and operating costs;
• future market conditions, product prices may change unexpectedly;
• the purchase of mining assets from an entity that owns these assets;
• etc.

If the spending proposals are prepared and weighed by the decision-makers, the financing branch of the company responsible for obtaining the necessary funds must notify the State of the terms of the bank loans. It is preferable that this process is iterative, as information from within and outside the organization is collected for decision makers who should have the same plan for using available funds.

III. Challenges facing developing countries
Entity loans in host countries are of crucial interest to the tax authorities, who are required to pay attention to the disproportionate allocation of debt to mining operations and the conditions under which loans are granted to local entities. There is a high risk that companies will allocate higher levels of debt. It is then necessary to consider sufficiently comprehensive (or targeted) tax provisions to deal with the basic erosion techniques used by multinationals.

For our tax and mining administrations, much remains to be understood about the structures of MNEs and the legitimate ways in which they organize their activities (to
identify risks) and to promote tax measures that promote simplicity in business structures and financial transactions between related parties.

IV. Interest limitation rules, including BEPS 4
In general, tax rules allow deductions to companies for often political or even economic considerations without taking into account the rules limiting interests. There must therefore be:
- Question of deductibility of interest
- Political questions on how countries manage to strike a balance between protecting the tax base and encouraging foreign investment.

V. Conclusions and best practices
Debt financing remains a major source of funds for mine construction and the financing of their operation and expansion. Mines cost hundreds of millions of dollars to build, and debt is a necessary part of the financing mix. Despite this, there are bad practices in Niger:
• interest deductions (often excessive);
• Political choices affect the level of foreign investment;
• Limitation of economic growth;
• Misjudgment by policymakers of the trade-off between the protection of the tax base and acceptable levels of debt financing for mining;
• the limitations on interest deductions mean that companies tend to opt for complex arrangements that characterize interest in other forms of payment that are not covered by the interest limitation rules.
Comments on IGF-OECD Program to Address BEPS in Mining’s
Limiting the Impact of Excessive Interest Deductions on Mining Revenues (Consultation Draft)

May 18, 2018

Overall comments:
A. We remain particularly skeptical of the effort to use the BEPS Actions in developing country contexts, given that they represent the OECD approach of being primarily a political compromise amongst developed countries, which are largely residence companies for the purposes of taxes, in a context of substantial lobbying efforts from MNEs, tax advisors, and other corporate interests. Accordingly, we also remain skeptical of the recommendation that developing countries join the BEPS inclusive framework and indeed this recent GIZ/IBFD report on the BEPS minimum standards in a developing country context is instructive in this regard.
B. Similarly, we suggest greater emphasis on solutions to profit shifting that allow for better compromises with stronger participation from countries in the Global South.
C. The note discusses base erosion practices and potential policy responses, but does not discuss (m)any practical experiences of countries where mining takes place and policy solutions that address the issue particularly for the mining sector. The mining case studies are really more examples of possible mining MNEs’ corporate tax practices with respect to interest deductions that countries likely wish to avoid/constrain, rather than true case studies of particular experiences. Indeed, Sections 4 and 5 that discuss tools and best practices seem largely removed from any discussion particular countries’ experience with policymaking to address excessive interest in mining. As a result, this consultation draft seems to draw much less on countries’ practical experiences than other OECD-IGF consultation drafts, which is unfortunate as this has been a unique contribution of the OECD-IGF collaboration. More importantly, the lack of specific country examples may impede both its uptake and utility by policymakers.
D. Much of the draft (particularly Sections 4 and 5) seem to generalize beyond the mining sector. This is not necessarily a problem, but it seems that the question asked in the second subsection of Section 4.2 (p26) “Is mining-specific rule needed” is implicitly answered in the negative by the fact that the policy guidance in Sections 4 and 5 do not really offer mining-specific rules or much in the way of consideration of the policies proposed in mining countries (e.g Section 4.3 seems largely to reiterate BEPS Action 4, without a strong connection to the mining sector; only one of the Conclusions and Best Practices mentions mining; Annex A does not). This may also limit the value to those who may be at the heart of the audience for this piece: government tax policy and tax administration professionals in the Global South whose portfolio covers mining.
E. In several places, but particularly in Table 4.2, the analysis seems insufficiently critical of the justifications of mining (or other) MNEs’ for their use of excessive interest deductions. This is important, because tax administrations and regulators will use the document for guidance about what is and is not reasonable.

Specific comments:
1. P8 Figure 2.1: A more detailed walkthrough of the financing needs at each stage in the mining life cycle beyond the diagram would be helpful, to make this more accessible to government audiences who don’t have a strong appreciation of the mining sector. This would also provide
an opportunity to clarify certain comments (e.g. “cash pooling between entities” which is also ) and perhaps distinguish between financing needs for juniors / exploration companies and MNEs.

2. P10 Section 2.2: Would be helpful to clarify that section focuses on Financing sources at the group level, in contrast with Section 2.4.

3. P10 “Loan-to-own” agreements: would be good to use the term “convertible loans” here too as this is what is often used in company reporting

4. P12 Table 2.1 “Level of risk taking”: is there a direct relationship here that was meant to be highlighted? Is it that higher risk tolerance implies greater company reliance (desire to rely) on external debt, or that greater risk-taking makes external debt harder to find (or more costly)?

5. P12 Table 2.1 “Investor access to financial products”: the relationship between this factor and the use of external debt is not clear.

6. P13 Box 2.1: “low tax rates”: if referring specifically to CIT, it would be good to be precise here

7. P14 Section 2.4: “these commercial considerations also extend to whether loans to host country entities are secured” – could this be unpacked slightly? It’s unclear if you’re talking about external financing to the host country entity (a term which might merit being defined) or the question of using collateral (like the mine) as security for the loan being provided (which is discussed later in the context of external financing)

8. P14 Section 2.4 “This means deductions are more “valuable” ... and in entities that are in a tax paying position”: Assuming this is referring again to CIT, doesn’t loss carryforward help to make this criterion less important?

9. P17 Section 3.1 “only 510 tax auditors” – is this meant to be 5 or 10?

10. P19 Case Study / Example 1:
    - Is there an intro missing here, as in the other case studies, which would explain what company holds the mining rights and what the titular concept of “Push Down” means? What seems distinct about this example relative to the others is that the loan financing is for the acquisition of the mining company itself rather than investment in the mine, and that same mining company is responsible for the cost of the loan; it’s an. However, this was not immediately clear.
    - Also the first point could be made more explicit for readers (probably without the use of the colloquialism “footing the bill”) by explaining the presumed position of why interest deductions in Country B make less sense than in Country A for this acquisition.

11. P22 Case Study / Example 4:
    - In the first paragraph explaining “What is the concern”, it’s not evident from the text how this is related to the hybrid debt-equity nature of the financing instrument. A more specific example here might help to clarify what selective inclusion of terms that are typically associated with higher interest charges looks like.
    - More generally, to make this guidance document practicable, it needs to orient tax authorities and regulators to identify key issues; on this particular one, it would be helpful to provide more information that would help these audiences to identify this type of financing and question why it might not be justified.

12. P23 Case Study/Example 5: It would be helpful to better explain what the embedding of a financing cost in the cost of an asset sale means and looks like. In the example, B is paying a markup for the asset due to cost of financing what – its acquisition itself? Does this mean we
would expect to see multiple tranches of (elevated) payments being made from B to A as part of the “sale price”? How else might this occur, and how might authorities identify this?

13. **P19-23 Case Studies/Examples:** each of these seem to be examples of companies taking advantage of gaps in tax policy or tax administration rules. Stronger language that places some responsibility on the companies involved, by clearly identifying these practices not just as something that companies do (which risks accepting the practice), but as something that companies do that unjustifiably erodes the tax base of resource rich countries. By clearly identifying these examples as elements of bad company practices, IGF-OECD will better prepare users of this guidance document in government and civil society to hold companies accountable for their profit shifting practices.

14. **P26 Section 4.2:** the discussion of mining-specific rules is helpful, but remains largely theoretical here and under-addressed later in the paper.

15. **P27** the discussion of commodity price changes:

- “but if rates are linked in some way to an international financing index... payments may increase quickly.” This merits unpacking a bit, as it sounds as if the paper is suggesting that LIBOR follows mineral prices. Could this be explained?
- It’s worth considering the impact of shifts in index rates too here.
- Action 4 is referenced here but it hasn’t yet been introduced in the paper
- “looser limits on interest”—could you be more precise here?

16. **P28** “The carryforward of excess interest capacity... may be too generous, encouraging higher interest deductions”:

- This would be another place where concrete examples of practice would improve the readers’ understanding.
- It also is worthwhile to stress that taking advantage of carryforward is yet another bad practice of profit shifting by mining companies.

17. **P29** “To ensure that countries apply a fixed ratio low enough to tackle BEPS, while recognising that not all countries are in the same position, the approach includes a range of possible ratios of between 10 and 30 percent.” Greater discussion here is needed. This range is presented as a technical solutions based on analysis rather than representing a political compromise among mainly residence countries. Why should this be the preferred approach for developing countries relying on mining revenues? This is not at all clear; the paper seems to rely primarily on the fact that the OECD says so.

18. **P33 Box 4.1** then builds an evidence basis for the 20-25% suggested fixed ratio not adversely impacting too many companies, but it does not seem to support the conclusion in the box that “a fixed ratio of 20- a fixed ratio of 20-25 percent may be sufficient for most mining MNEs to accommodate their legitimate financing activities and avoid double taxation.” Nothing in the table gives any indication about the question of legitimate financing activities. And the additional focus on the avoidance of double taxation seems to be respond to the wrong question. We should instead be asking: is there evidence that this range benefits developing countries relying on mining revenues?

19. **P34 Table 4.2:** The table of company concerns is helpful to see, but some of the proposed responses seem too accommodating.

- “Allowing the grouping of local entities...” : While you’ve noted the “risks of undermining local ringfencing provisions” this provision still does not seem
recommendable. If the project is not viable on its own, it shouldn’t proceed. A stronger position on this point is particularly important for government audiences.

- On loss carry forward greater discussion of specific limits would be good.
- Very wary of encouraging greater discretionary actions, e.g. in setting the interest/EBITDA limit, which might increase bilateral deal making for a specific company.
- “Use of shareholder debt to prioritise private investors where the host government has been afforded an equity stake in the mine without having to pay the MNE to finance that acquisition.” “No response proposed.”: The response to this comment should be stronger. This issue is not a valid concern. Inflated debt financing is not a justifiable way of compensating the investor! If the deal is not good enough without this sort of creative compensation (through financing that violates the ALP), the deal should not proceed. The equity stake (even if uncompensated) is part of the package; gaming the system is not. This should be made exceedingly clear for government audiences.

20. P36-38 Section 4.5: Is there guidance that IGF-OECD can provide on implementing thin cap rules for mining or on the benefit of including IWT reductions in tax treaties? The example in the TP/ALP section is helpful. On interest rate caps, it’s worth noting the typical construction of an index rate plus some amount (e.g. LIBOR + 5)

- The draft also skims over impact of DTAs/ tax treaties here. It’s critical to add a stronger warning to developing countries relying on mining revenues about the dangers of agreeing to double tax agreements that limit the source country’s taxing rights (and relatedly that developing countries for that reason should not rely on the OECD Model convention when negotiating DTAs), esp. given the upcoming work on this issue.

21. P39: Further Reading: Limiting Interest Deductions: specific section of the IMF sourcebook?
22. P40 Section 4.6 Supporting Anti-Abuse Provisions: Can more detail be provided here?
23. P41: “participation in international forums”: would be good to cite regional tax forums, etc.
Comments on draft toolkits:

**Monitoring the Value of Mineral Exports**

**Limiting the Impact of Excessive Interest Deductions on Mining Revenues**

Both toolkits are excellent guidance for developing countries. However developing countries are often faced with such a degree of lack of capacity that even applying the solution models that are provided with the toolkits is already a heavy task.

The scarcity of technical and managerial skills combined with lack of capital, which are needed to develop and exploit natural resources, makes it necessary to attract foreign investors.

Taxation of the resource sector is very important for developing countries but also challenging. We have read in the toolkit that tax provisions in developing countries aren’t sufficiently comprehensive enough to deal with the base erosion techniques. Governments must take the appropriate measures to combat base erosion. However it is sometimes the case that developing countries that need to attract foreign capital to develop the mineral sector, provide special fiscal provisions in Mineral Agreements that override the Tax code. These agreements can make it difficult to impose new measures.

Therefore it is necessary that developing countries who implement one or more of the proposed measures as indicated in the toolkits receive the necessary technical support to make the right choice.

The domestic situation must be taken into account because it is often **not** “one size fits all”.