

**Comments to the OECD Revised Discussion Draft BEPS Action 6 “Prevent Treaty Abuse”**

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to provide comments on the Revised Discussion Draft (RDD) regarding BEPS Action 6: Prevent Treaty Abuse. ICC is fully supportive of the aim of preventing the abuse of tax treaties through both treaty provisions and domestic law anti-abuse rules. However, ICC has already highlighted its serious concerns that Action 6 is focusing only on combating treaty abuse without due regard for the fact that the vast majority of potential beneficiaries of income tax treaties do not engage in abusive practices and, in many cases could be deprived of the certainty and predictability that is the fundamental goal of tax treaties and which is essential to facilitate cross-border investment. This misfocus is compounded in the RDD, by introducing new rules (such as the “special tax regime”), which is better addressed under the Harmful Tax Practices workstream. Introducing these late proposals and by allowing tax authorities a route to deny treaty benefits in circumstances where the benefits should apply – rather than addressing the underlying concerns through domestic legislation – there is a risk of creating further uncertainty and undermining the valuable work the OECD has achieved,

ICC notes that there are many complex issues in the BEPS action plan which require time and due diligence to fully consider the holistic implications of all the proposed changes. The OECD has made substantial progress and has the opportunity to make significant changes to the international tax scene. However, as ICC has previously underlined, failure to take the time necessary to consider the integration of all the actions, will result in faulty rules which will create difficulties for businesses – significantly hampering cross border trade and economic growth – and which would take years for governments to correct. The impact on the global economy and the prospect of developing countries is not to be underestimated.

ICC is aware that it is very challenging to reach full consensus in the given timeframe of the OECD/BEPS project. However, the lack of time for appropriate consideration is apparent from the RDD. Other than some further examples in relation to the Principal Purpose Test (PPT), and some progress in relation to Funds, the RDD offers very limited new guidance on the important issues that should be resolved. Many of the fundamental concerns raised by business have regrettably not been adequately addressed. Furthermore, ICC notes the introduction of new rules into Action 6 (such as the “special tax regime” referred to above) at the last breath of Action 6, while no Public Consultation is available to raise concerns adequately. ICC strongly believes that Working Party 1 should take more time to consider – and address – business concerns more rigorously, as well as ensuring an outcome that is coherent with BEPS actions overall.

Given the relatively little progress since the January 2015 Discussion Draft, it seems appropriate to reference prior comments provided by ICC<sup>1</sup> (April 2014 and January 2015). ICC notes that there may be merit in returning to Action 6 discussions towards the conclusion of the OECD/BEPS project when other deliverables will be in a more final state.

As previously noted, paragraph 6 of the 2014 Deliverable states: “When examining the model treaty provisions included in this report, it is also important to note that these are model provisions that need to be adapted to the specificities of individual States and the circumstances

<sup>1</sup> Submitted by ICC in April 2014 and January 2015. Available here: <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/taxation/g20-mandated-oecd-beps-project/>



of the negotiation of bilateral conventions.” ICC strongly agrees with this statement. However, ICC understands that the OECD intends to implement the guidance through the negotiation and adoption of a multilateral instrument. This is inconsistent with the OECD’s own recognition of the need to adapt approaches to account for different circumstances. This conflict may prove difficult to resolve. The drive to create a multilateral instrument may lead to trying to resolve on a multilateral basis issues that can only effectively be resolved on a bilateral basis. ICC believes that much of the complexity and the unresolved issues in the RDD reflect this tension. It would be constructive if the OECD could comment on how it expects to deliver Action 6 through a multilateral instrument. In the absence of such comment, it remains ICC’s view, that given the constraints of the process, it will be impossible to resolve all of these issues, and the model provisions should focus on outlining the key elements without prescribing the details that will need to be worked through in bilateral negotiations between States.

- ICC recommends that the OECD provides a clear mandate for countries to adhere to when seeking to deny treaty benefits. The fundamental aim of tax treaties must remain promoting international trade and investment through establishing rules that provide the greatest degree of certainty and predictability for bona fide beneficiaries of tax treaties. Rules that create subjectivity and uncertainty are to be avoided;
- In order to increase certainty and coherence with other BEPS activities, ICC recommends Working Party 1 takes time to consider the deep concerns expressed already by business, and form a consistent and aligned international approach;
- To enhance certainty, ICC suggests that the OECD would consider a pre-clearance process under which treaty benefits are granted if the Competent Authority does not affirmatively deny them within a given (relatively short) time frame.
- ICC recommends reducing and simplifying the overly restrictive prescriptive requirements in the proposed Limitation on Benefits (LOB) clauses – a good starting point is the simplified LOB in paragraph 3 of the RDD. This provides a clear minimum standard and the details will be worked bilaterally using guidance from the existing Model;
- In line with such simplification, with providing clarity, certainty and with ensuring the various Actions under BEPS address concerns appropriately, ICC recommends removal of the new “special tax regime” and treaty response to certain future changes in a country’s domestic law clauses. These have been introduced with insufficient time for either business or OECD members to consider their implications adequately, including the ramifications of permitting unilateral disapplication of treaty benefits.
- ICC continues to recommend focusing on substance and is concerned that the current principal purpose test (PPT) remains widely framed. Therefore, even with the additional examples in the Commentary, there is a risk of misinterpretation or misapplication by tax authorities.
- The clearest possible guidance, with further examples, ought to be provided in order to create as much clarity and certainty as possible in what is a highly subjective area. While ICC supports the proposal for countries to set up a form of advisory panel, any conclusion to disapply treaty benefits should be bilateral, and in the case of disagreement a mandatory arbitration process should follow.
- ICC recommends to make clear that the application of the PPT test – particularly if it applies in combination with a LOB test – is not intended to undercut the LOB provisions, but directed towards conduit financing or clearly artificial and tax abusive arrangements.



## **The International Chamber of Commerce (ICC) Commission on Taxation**

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.