



Comments to the OECD Discussion Draft on Follow up Work on BEPS Action 6: Preventing Treaty Abuse

The International Chamber of Commerce (ICC) welcomes the opportunity to provide comments on the Discussion Draft regarding the follow-up work on BEPS Action Point 6 on preventing the granting of treaty benefits in inappropriate circumstances. The aim of preventing the abuse of tax treaties through both treaty provisions and domestic law anti-abuse rules is fully supported by ICC. As stated in our prior comments on this topic (dated April 2014), ICC has serious concerns that the Discussion Draft 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.

ICC is aware that it is very challenging to reach full consensus in the given timeframe of the OECD/BEPS project. However, complex issues require the time and care to work through the analysis and study the repercussions of any changes. Failure to take the time necessary to do this will result in faulty rules which will create difficulties for businesses – significantly hampering cross border trade and economic growth – and take years for governments to correct. The impact on the global economy and the prospect of developing countries is not to be underestimated.

The lack of time for appropriate consideration is apparent from the follow-up OECD Discussion Draft itself. There is essentially no new guidance on the important issues that remain to be resolved. Rather the Discussion Draft is simply a solicitation of comments on the various open issues. Therefore it is hard not to repeat prior comments made in the earlier Discussion Draft. ICC notes that there may be merit in returning to this topic towards the conclusion of the OECD/BEPS project when other deliverables will be in a more final state.

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 of the negotiation of bilateral conventions.” ICC strongly agrees with this statement. Presumably, the OECD intends to implement the guidance through the negotiation and adoption of a multilateral instrument. While a laudable goal, 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 of the 2014 Deliverable and the unresolved issues in the Discussion Draft reflect this tension. In ICC’s view, 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 necessary elements without providing the detail that will need to be worked out in the context of bilateral negotiations between States.



With regard to the issues raised in the Discussion Draft:

- In the course of endorsing effective anti-abuse measures, ICC recommends to provide a clear mandate for countries to adhere to the fundamental precept already recognised in the Commentaries that – consistent with the goal of promoting bi-lateral 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, or that rely on cumbersome pre-clearance procedures straining the resources of tax administrators are to be avoided;
- ICC advises to abstain from the overly restrictive standards in the proposed Entitlement to Benefits article that is patterned after the current U.S. Limitation on Benefits article and adhere more closely to the version that already appears in the Commentaries;
- ICC agrees with BIAC that the current principal purpose test (PPT) (“one of the main purposes”) is widely framed. Even with the examples in the Commentary, there is a risk of misinterpretation, or misapplication by tax authorities. ICC, like BIAC, would recommend focusing on substance. The clearest possible guidance, with examples, ought to be provided in order to create as much clarity and certainty as possible in what is a highly subjective area.
- In applying the PPT test, particularly if it applies in combination with a Limitation of Benefits (LOB) test, ICC recommends to make clear that it is not intended to undercut the LOB provisions, but rather is directed towards conduit financing or clearly artificial and tax abusive arrangements.
- ICC advises the OECD to 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.



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. ICC also provides essential dispute resolution services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution, and through its International Center for ADR.

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.