



**Comments to the OECD Discussion Draft on BEPS Action 10  
On the Use of Profit Splits in the Context of Global Value Chains**

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 Discussion Draft on BEPS Action 10 on the Use of Profit Splits in the Context of Global Value Chains which sets out scenarios to facilitate modifications to Chapter II of the OECD Transfer Pricing Guidelines (the “Guidelines”) and to clarify circumstances in which the application of a transactional profit split method may better align profits and value creation.

ICC commends the efforts of the OECD in providing further guidance on the application of profit split methodologies. The alignment of value creation and profits, if truly representative of arm’s length outcomes, may be an important step in eliminating BEPS and enhancing certainty for tax administrations and taxpayers alike by reducing the likelihood of tax disputes and double taxation. Such outcomes, in turn, advance the fundamental principles of enhancing cross-border trade, foreign direct investment and economic growth.

ICC would equally note that the increased application of the transactional profit split method introduces additional subjectivity and complexity for taxpayers and tax administrations alike. Its inappropriate application may result in a departure from the arm’s length principle, an increase in uncertainty and the compliance burden, and contribute to an increased incidence of double taxation and disputes; ultimately undermining the fundamental principles noted above.

In certain circumstances, the application of a transactional profit split method over a one-sided method does not result in improvements or additional certainty but only in the substitution of the specific matters under dispute. Often, in the case of one sided methods, such as the transactional net margin method, disputes center around whether a selection of imperfect comparable transactions results in an arm’s length determination of the transfer price. In relation to profit split methodologies, disputes focus on whether a subjective and complex determination of, and measurement of, value creating activities gives rise to an arm’s length distribution of profits. The risk is that the substitution of one area of difficulty for another may not produce a significant improvement in the reliability of the results. Where governments may differ on the presence of value drivers and their measurement, the use of the transactional profit split method, especially with limited, or no, reference to direct evidence from third party transactions, may only exacerbate the risk of tax disputes and incidence of double taxation.

In many cases, Multinational Enterprises (MNEs) strive for consistency in the application of the transfer pricing methods over multiple years and in their dealings with similar related parties in multiple jurisdictions. This consistency is an important factor in achieving predictability, efficiency and certainty in terms of compliance efforts and financial statement reporting. The higher propensity of any one jurisdiction to require a transactional profit split method could result in significant increases in compliance requirements and reduction in financial statement certainty for MNEs.

In transactions, involving multiple related parties, in multiple jurisdictions, where a significant difference exists between the parties in respect of intensity of value creation (and magnitude of risk bearing), the over-utilization of the transactional profit split method may result in a



cumulative attribution of profit to the incremental creators of value (and bearers of risk) that significantly understates the final residual profit attributable to key value creating and risk taking activities. Such an outcome would not be consistent with the arm's length principle and its ultimate resolution may require the collective concurrence of multiple tax authorities.

To safeguard the fundamental principles of enhancing cross-border trade, foreign direct investment and economic growth, ICC strongly believes additional emphasis on the selection of the 'most appropriate method' is imperative. Such emphasis should additionally require the consideration of the potential for improved reliability and be tempered against factors such as the additional compliance burden placed on MNEs and the potential increase in the disputes and incidence of double taxation.

Further, an expressly stated preference that every effort be made to establish transfer prices with direct reference to arm's length transactions, with the use of appropriate adjustments and judgment, may help to ensure the transactional profit split method is applied in extreme cases and, in a manner which acknowledges the facts and circumstances, as opposed to a more formulary approach.

Where imperfect comparables impede the determination of an acceptable transfer price, the development of practical solutions would help to protect against the arbitrary and excessive application of profit splits. Practical guidance on the manner in which the results under a one-sided approach may be varied or applied would reduce the potential for disputes and simplify compliance for all parties.

Where transactional profit split methods are to be applied, the use of a residual profit split approach, by virtue of its first reference to the arm's length transaction, may reduce the degree of subjectivity and uncertainty and protect against gross mismatches in the alignment of value creation and profits.

The requirement that transactional profit splits be first considered in the context of the multilateral instrument, may help to prevent double taxation and strengthen principles of enhancing cross-border trade, foreign direct investment and economic growth.



## **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.