Comments to the OECD Discussion Draft on BEPS Action 11 “Improving the Analysis of BEPS”

General Comment

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, appreciates the time and effort invested in improving the availability and analysis of data on Base Erosion and Profit Shifting (BEPS) to help facilitate proper monitoring of the implementation of the Action Plan. However, it would have been highly desirable if there had been an appropriate analysis of the magnitudes involved prior to the discussions and proposals being presented within this project. Furthermore, ICC would like to underline that there is a need for an ongoing analysis and discussion of the magnitude of BEPS and the effects of measures taken. ICC therefore very much welcomes Action 11 “Improving the Analysis of BEPS”.

ICC agrees that one of the key challenges with available data sources is that it is difficult to disentangle real economic effects from the effects of BEPS related behaviors. Estimating the effects of BEPS requires a need to establish a counterfactual; i.e. what the outcome would have been without BEPS. There is a need to exclude the effects of real economic activities across countries independent of taxes as well as the effects of real economic activity across countries by differences in non BEPS affected tax rates (e.g. a change in the effective tax rate in the country/countries, introduction of investment incentives etc.).

As stated in the Draft, macroeconomic aggregates, such as foreign direct investment (FDI) include both real and BEPS related investment and returns, which are difficult or impossible to separate. It is also impossible to isolate BEPS related changes in the financing structure from non BEPS related changes. Changes in tax rates may indeed affect the financing mix and leverage of a business. Businesses may thus, cet. par., use more debt financing if the corporate tax rate is higher and more equity financing if the corporate tax rate is lower. ICC notes that this is not a BEPS issue as the financing mix is also influenced by changes in the business risks involved in the investment, government changes in investment incentive schemes and changes in regulations of financial markets and banks.

Despite the recognition that it is impossible to separate BEPS related changes from other changes, the Draft ambitiously attempts to do precisely that. ICC appreciates the OECD’s open and frank recognition of the difficulties and concurs with the need to try to quantify BEPS.

When assessing and monitoring BEPS, ICC believes that it is important to keep in mind, as stated in the Draft, that BEPS behavior is likely to be limited to a relatively small number of cases and concentrated in a limited number of countries. There is scope for governments to take unilateral action to eliminate, or at least diminish, the effects of tax rules that create “bright lines”, opportunities for businesses to engage in BEPS-related activities. One such area is

Submitted to the OECD on 5 May 2015

Document No. 180-549

arbitrary rules for consolidation and loss-offsets – violating the principle of net taxation of profits. BEPS could therefore partly be addressed outside any of the 15 Action points. The Draft does not address how such progress should be monitored or assessed.

ICC strongly believes that analysis of BEPS must not increase the administrative burden of businesses. Although it may seem appealing to try to create very large data bases, to facilitate advanced econometric research, the quality of the data base may suffer if businesses have to provide frequent detailed information. It is vital that tax rules and reporting for tax purposes do not become an obstacle to trade and cross-border investment which would hamper economic growth. Furthermore, ICC urges all tax authorities to take necessary steps to ensure that business sensitive information is confidential and protected.

Specific Comments

Indicator of concentration of foreign direct investment
ICC is concerned that such an indicator cannot distinguish between BEPS and other transactions related to real economic activity. The FDI indicator more than doubled between 2005 and 2012, indicating a disproportionate increase in FDI in countries with a low GDP. ICC questions if such a development should be seen as a problem. Large FDI in low income countries should be welcomed, as well as any cross-border investments. The fact that some of these countries had low corporate taxes should not be an issue – as the Draft states, no or low taxation is not as such a cause for concern.

Indicator 6: Concentration of royalty payments relative to R&D expenditures
ICC notes that research and development include current plus capital expenditures on both public and private research and development (R&D) activities performed within a country. Royalty receipts are payments for the use of intellectual property that may not be directly related to the measure of R&D spending. Furthermore there is a time lag which is not accounted for, and the number of countries included varies over time (ranging from 32 to 69). In addition, it may be questioned whether the cluster effect is due to real activities or BEPS and whether clusters are undesirable. Therefore, the information content in this indicator is likely to be challenged.

ICC believes that the indicators presented in the Draft suffer from a lack of separation of real effects from BEPS related effects. Consequently, it is crucial that the OECD and the media continue to recognise this as the indicators are presented.

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.