Introduction:
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 comment on the Platform for Collaboration on Tax Revised Report on the Taxation of Offshore Indirect Transfers (OITs) of Assets.

ICC commends the work of the International Monetary Fund (IMF), Organisation for Economic Co-operation and Development (OECD), United Nations (UN) and World Bank – under the auspices of the Platform for Collaboration on Tax ("the Platform") to collectively produce "toolkits" for developing countries for appropriate implementation of responses to international tax issues under the G20/OECD Base Erosion and Profit Shifting (BEPS) project.

ICC seeks to provide a comprehensive business perspective on these issues to assist the Platform in establishing an effective and global solution. ICC submitted comments to the Platform's initial consultation in September 2017 seeking feedback on the draft toolkit designed to help developing countries tackle the complexities of taxing offshore indirect transfers of assets.

ICC welcomes the new draft of the Platform Report on the Taxation of Offshore Indirect Transfers (OITs) of Assets, which attempts to clarify a number of issues. ICC notes that the revised draft contains improvements over the prior draft and highlights these improvements below:

- The draft more clearly establishes the status of the document: "this report and toolkit does not purport to provide binding rules or authoritative provisions of any kind nor does it aim to establish an international policy standard of any kind". The aim of the document is to provide more perspective and practical guidance to developing countries to allow informed decisions on whether or not to tax capital gains and OITs. (p.11)

- It reduces any perceived emphasis of OITs as constituting tax avoidance as far as it admits that such a transfer may be undertaken for commercial reasons.

- It highlights the possibility that not all transfers will necessarily involve a financial gain, confirming the possibility of producing losses.

- It states that not all transfers of ownership result in taxable gains or losses, for example, transfers through mergers or acquisitions. (p.12)

- It recognises that countries might decide not to tax direct or indirect transfers of assets at national level.

- The revised draft recognised a number of relevant design issues for capital gains taxation that consider the need for reciprocity and the concern of innate double

taxation. For example, if capital gains are exempt, capital losses will often be considered non-deductible. When capital gains are taxed, capital losses will in principle be deductible and the tax base will be stepped up. Deferral for capital gains taxation can be considered, often in cases where the production capability is not moved offshore.

- Whether the taxation of OITs is in place or not, it recommends that any new rules only apply prospectively and with appropriate transition provisions (e.g. a step up in basis to the effective date of any new rules). (p.40)

- It highlights that a "more uniform, coordinated and coherent approach to the taxation of OITs, where countries choose to tax them, can make a substantial contribution to coherence in international tax arrangements and enhance tax certainty". (p.55)

Notwithstanding the improvements noted above, ICC believes that the revised Platform report can be further enriched in order to more effectively benefit developing countries:

- The revised draft often implies (direct) capital gains taxation as a given. More consideration could be helpful for developing countries regarding why certain countries choose not to tax capital gains or defer taxation of capital gains in the first place.

- The report notes that it does not deal with corporate reorganisations, minority shareholders, joint ventures, treatment of losses or treatment of listed securities. ICC considers these issues to be relevant enough in practice for taxpayers as well as tax authorities that they should be considered in the analysis and elaborated upon.

- Although the revised draft includes more indications for the need to consider reciprocity in the design (e.g. consider deductibility for tax losses in case the capital gains are taxable), some of these features are underdeveloped in analysis. They should at least form an integral part of the analysis of both models.

- The report does not deal adequately with economic double taxation. It states that it is possible that the "same gains are being taxed multiple times in the hands of different taxpayers through realisations of gains on intermediate shareholdings through multiple tiers of indirect ownership". (p.41)

- Despite the statement that the document does not indicate general preference between the two models of taxation - "the appropriate choice will depend on the countries' circumstances and preferences" (p. 8) - it still appears to favour the Model 1 approach given the statement that "The merits of Model 1 - relative ease of enforcement and simplicity of the necessary basis adjustment – can be especially appealing for lower capacity countries. (p.45)

- Besides the implied preference, the analysis of Model 2 is underdeveloped. Although hinted at, the practical analysis of features such as dealing with internal reorganisations, general mergers, losses and double taxation is very limited. ICC would like to offer assistance in further analysis of these important design features.

- The document is unclear regarding the distinction between an asset and a gain or a loss. The valuation of the asset is not taken into account in the analysis, although the determination of the capital gain or loss is generally the first and often biggest hurdle that foreign investors encounter in developing countries.

- ICC recommends a clearer balance between taxation and deduction (if the gain is taxable in the country of operations, the loss must be equally recovered or deductible).

- The document should consider well-defined limits (or safe harbours) to the taxation of OITs.

- It highlights that "countries shall not use the strategy of assessing and obliging taxpayers to satisfy a quota + interest + penalties and be subject to lengthy court proceedings. This disincentivises the investment and removes legal certainty". (p.28)

Conclusion:
ICC welcomes the Platform's decision to revisit the provisions within the Report on the Taxation of Offshore Indirect Transfers of Assets. For practical relevance, to increase tax certainty for tax authorities as well as taxpayers, ICC hopes that further improvements can be made to the Report along the lines of the considerations noted above. While considerable improvements have been made to the document over the prior draft, the Platform may consider opportunities to further develop the report in the areas noted above. Such enhancements would benefit developing economies in their international taxation policy implementation efforts.

ICC remains available to provide further input and expertise to support the future steps of the process. ICC welcomes and encourages the Platform's continued engagement with the business community in order to address pragmatic and effective approaches.

The International Chamber of Commerce (ICC)

Commission on Taxation

The International Chamber of Commerce (ICC) is the world's largest business organisation with a network of over 6 million members in more than 100 countries. We work to promote international trade, responsible business conduct and a global approach to regulation through a unique mix of advocacy and standard setting activities—together with market-leading dispute resolution services. Our members include many of the world's largest companies, SMEs, business associations and local chambers of commerce.

ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments. 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.

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