Trade and Investment

Commission on Taxation

ICC Comments on the Platform for Collaboration on Tax Draft Toolkit on Tax Treaty Negotiations

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 (PCT) Draft Toolkit on Tax Treaty Negotiations (Toolkit) designed to help developing countries build capacity in tax treaty negotiations, and which serves as a joint effort to provide capacity-building support to developing countries on tax treaty negotiations, building on existing guidance, particularly from the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the "UN Manual").

ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment.

GENERAL COMMENTS

ICC commends the work done by the PCT on the Toolkit which provides a comprehensive overview of the nature and negotiation process of tax treaties with useful references to existing work such as the UN Manual and the OECD/UN model tax conventions.

ICC believes that the PCT consultation is a useful opportunity for stakeholders to make the case for the existing benefits of tax treaties, including the business community as well as developing countries who would welcome and benefit from additional guidance and capacity building in this respect.

It is ICC's view that guidance from international organizations to developing countries on this topic has not previously received particular focus or attention, perhaps due to the wrong premise or understanding that treaty concessions provide unnecessary give-aways to business with no benefit to the country in terms of investment, employment levels, etc. However, greater clarity and certainty, as provided by this Toolkit, would not necessarily imply additional costs or burden and would benefit all interested parties. In fact, tax treaty provisions that may provide concessions on an amount of domestic tax could be outweighed by other benefits to the treaty country, including a greater investment base on which to impose tax.

ICC encourages the PCT to continue to pursue this work, with a view to producing practical and useful guidance for developing countries in order to better equip them to participate on an equal footing in tax treaty negotiations. To this end, capacity building is key; sufficient resources, adequate training and skilled teams are essential to achieve a broader international network of tax treaties which, particularly in the current troubled times, could be an additional incentive for the economic recovery of developing countries. ICC considers that this Toolkit is a great opportunity to promote the negotiation of tax treaties as a tool for both countries and taxpayers to achieve greater tax certainty.

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As a general comment, ICC notes that the overall tone of the document appears to be inclined towards the drawbacks of tax treaties rather than potential positive implications. In light of this, ICC would recommend addressing these issues with a more balanced perspective.

A few examples are highlighted below:

- The discussion draft from Section C onward provides a helpful step-by-step guide, covering many of the practical aspects of treaty negotiation. The initial discussion in sections A (Why negotiate tax treaties?) and B (Tax treaty policy framework and country's model tax treaty), however, is presented in a way that focuses heavily on the potential downsides of ill-advised tax treaties, and only briefly mentions the potential beneficial effects of a strong tax treaty network. Without a more balanced approach, countries may have the impression that tax treaties are to be avoided unless absolutely necessary, rather than that treaties are an important part of maintaining a tax system in a way that can provide stability and tax certainty that can encourage cross-border trade and investment, while also helping prevent tax avoidance and evasion.

- In particular, the discussion on pages 6-11 of the discussion draft initially lists a variety of reasons (both tax- and non-tax related) that countries may enter into tax treaties. After this brief acknowledgment that there may be reasons to pursue tax treaty negotiation, however, the discussion that follows is focused almost exclusively on reasons why a country might wish to avoid a tax treaty. While it appears that some of the discussion on page 8 is intended to present a more balanced view of the issues to be assessed in deciding whether to negotiate a treaty, it appears to gloss over the positive impact that a treaty can have in addressing double taxation and promoting tax certainty, and the role that those features can play in attracting meaningful investment.

- The Toolkit points out that countries have entered into tax treaties in furtherance of non-tax objectives and appears to take for granted that this would always be inappropriate. The text in section A.1 in particular implies strongly that tax policy priorities should be given precedence over other national interests, without explaining why that would be the case. It is not clear, however, why tax treaties should never be used in pursuit of other non-tax objectives, if a country chooses to do so. While it is true that a country should carefully consider the tax policy implications of tax treaties when evaluating whether a tax treaty will be in their overall national interest, expecting countries to focus solely on those tax policy implications appears unrealistic. It also ignores the fact that in many countries, tax policy is used as a vehicle for achieving non tax objectives. It is ICC's view that it would be relevant instead to accurately evaluate the tax policy and broader economic implications of tax treaties so that the country is able to correctly evaluate the treaty in its overall domestic policy context.

- It is also concerning that the draft mentions on page 6 the addition of anti-treaty shopping rules in the OECD and UN Models as a reason to be wary of entering into tax treaties. Presenting the existence of anti-treaty shopping rules as evidence that treaties are risky appears to be backwards. These provisions, which were arrived at through an inclusive negotiation process under the BEPS project (in which developing countries also took part), were developed to minimize treaty-shopping risks and address other treaty provisions that had raised concerns among developed and developing countries alike. ICC holds that it would be more appropriate to provide information about how concerned countries can adopt anti-treaty shopping rules in their treaty policy in order to ensure that treaty benefits go to the intended persons, rather than focusing solely on the underlying risk of treaty abuse. In other words, it is possible to realise the benefits of treaties while mitigating risk of abuse.

- Similarly, the Toolkit mentions on page 7 the fact that treaties may be difficult to modify, replace, or terminate, which may limit flexibility to change domestic law. While the document notes briefly that there is potential value to such stability in attracting foreign investment, it goes into a much more lengthy discussion in the following pages of alternatives to tax treaties, so in effect the overall thrust is that tax treaties are something to be regarded with apprehension.

- Finally, as indicated above, many developing countries would like to be competitive in the treaty space but lack the experience and resources to get there. In this context, ICC supports the idea of creating a support/learning structure for developing countries to feel more comfortable with gaining experience in treaties. For example, the equivalent of a "tax inspectors without borders" function for treaty negotiation or providing a framework for expert advice and mediation in the dispute resolution function (a major benefit of treaties), would be useful options to consider.

SPECIFIC COMMENTS

Some additional comments regarding specific sections are provided below:

- Page 8, footnote 3 and accompanying text: in the case of dividends, it could be added that the residence State may grant a participation exemption in order to alleviate multiple layers of corporate taxation: this is not the equivalent of an exemption and should not be grounds for refusing to reduce source State taxation.

- Page 10: in addition to preventing double taxation, the source State may wish to prevent disincentives to foreign investment caused by high statutory withholding rates, which can approach or exceed a taxpayer's total profit from engaging in transactions with source State payors. Also, a treaty may provide a way to trade a reduced withholding tax rate in the source State for better double taxation relief in the residence State.

- Page 14: preparation should include a thorough review of the other country's treaties (particularly its recent ones and its ones with countries whose policies are likely to resemble those of the source State) to see to what extent they have agreed to the source State's preferred provisions. [This is referenced on page 16 in the section related to preparing a comparison of the respective models.]

- Page 18: in the course of discussions, countries should be willing to indicate whether their interpretation or application of a provision that aligns with the OECD or UN Model differs in any respect from the relevant OECD or UN Commentary on that provision.

- Page 18: negotiators should consider whether to develop a Memorandum of Understanding or Exchange of Notes to address particular issues of interpretation or application of individual treaty provisions, particularly if the agreed provisions differ from prior established practice and/or from the OECD or UN Model.

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In conclusion, it is ICC's view that the Toolkit could be improved by taking a more balanced approach, as the enhancement and promotion of this process and its outcome is viewed as a win-win for all stakeholders.

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