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By Electronic Delivery

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Marlies de Ruiter
Head of Division
Tax Treaties, Transfer Pricing and Financial Transactions
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal - 75775 Paris Cedex 16

RE: *The CIV Industry and BEPS Action 14*

Dear Ms. de Ruiter:

ICI Global,[1] on behalf of our collective investment vehicle (CIV)[2] industry members, supports fully the OECD's effort to make dispute resolution mechanisms more effective. Accelerating globalization, increasingly aggressive assertions of tax liability by certain governments, and the increasing difficulties (including extensive delays) in resolving tax disputes and eliminating double taxation are among the factors necessitating the extensive work required on Base Erosion and Profit Shifting (BEPS) Action 14.

For BEPS Action 14 to truly succeed, the final Report must call upon all governments to adopt mandatory binding arbitration for resolving tax disputes. The other currently available dispute resolution mechanisms (as enhanced by the options included in the discussion draft) will be even more effective if all parties know that mandatory binding arbitration always is available as a last

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[1] The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.2 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

[2] A CIV is defined for this purpose consistently with the OECD's Report entitled "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" (the "CIV Report"). Specifically, paragraph 4, page 3 of the CIV Report defines CIVs as "funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established." Funds that are not treated as CIVs in the CIV Report (and are not addressed in our comments) include "investments through private equity funds, hedge funds or trust or other entities that do not fall within the [Report's] definition of CIV." *Id.*

resort for resolving issues. Importantly, governments and business both will benefit greatly from dispute resolution efficiencies – including those arising from mandatory binding arbitration.

Cross-Border Tax Controversies are Becoming More Common and More Difficult to Resolve Efficiently

The frequency and complexity of cross-border tax controversies has increased as globalization has accelerated. These controversies become more difficult to resolve if issues are selected for audit with increased emphasis on the amount potentially at issue and less concern for a position's merits. Overly aggressive interpretations of relevant legal standards are particularly difficult to resolve when little, if any, attention is given to the relative costs and benefits of continuing to pursue an issue.

Tax certainty is critical for CIVs[3] and important for CIV managers. Our comments on BEPS Action 14 are designed to promote tax certainty. The many benefits that tax certainty provides include cost savings for governments and business, improved investor confidence, additional cross-border investment, and enhanced economic growth.

Essential components of tax certainty include: well-reasoned, published interpretations of law; opportunities to resolve issues through advance ruling processes and advance pricing agreements; clear audit rules and procedures that are disseminated to, and understood by, assessing officers; adherence by assessing officers to those rules and to judicial precedent; audit resources that are sufficient to allow assessing officers to understand issues fully and settle them fairly; and effective mechanisms for resolving issues expeditiously.

Comments on BEPS Action 14 Options

We generally support the options included in this discussion draft for improving dispute resolution processes such as those provided in mutual agreement procedure (MAP) cases. For the dispute resolution process to become truly effective, however, governments must commit to adopting the options. Moreover, as noted above, these options will be much more effective if countries also commit to adopting mandatory binding arbitration.

We recommend that the final BEPS Action 14 Report support mandatory binding arbitration and explain clearly the many benefits that broadly-applicable mandatory binding arbitration will provide to taxpayers and governments.

<u>Ensuring that treaty obligations related to the MAP are fully implemented in good faith</u>

MAP can be a very important mechanism for resolving tax disputes. Clarifying the obligation created by the phrase "shall endeavor" will remind certain governments of the importance of bringing MAP cases to successful conclusion.

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[3] This certainty is necessary because CIVs generally price each day the per-unit value of their interests (taking into account all assets and liabilities, including tax liabilities).

Addressing effectively the economic double taxation that can arise with associated enterprises is becoming increasingly important. Paragraph 2 of Article 9 provides an effective mechanism for addressing economic double taxation.

Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

The competent authority process will be more effective if, among other things, the independence of the competent authority is ensured, if sufficient resources are made available to the competent authority for resolving issues, and if the best practices for evaluating performance are adopted.

The other options presented in this section, including providing MAP access following audit settlements, using MAP to resolve recurring (multi-year) issues, and adopting advance pricing agreement (APA) procedures, also will help prevent and/or resolve treaty-related disputes.

Ensuring that taxpayers can access the MAP when eligible

The options presented in this section are sensible approaches for clarifying generally-applicable MAP procedures, for improving access to (and the effectiveness of) MAP, and for clarifying the relationship between different remedies. We must stress, based upon our members' experiences, that taxpayer involvement in MAP can improve significantly governmental access to, and appreciation of, relevant facts and positions and shorten the resolution process.

Ensuring that cases are resolved once they are in the MAP

MAP can be such an effective mechanism for resolving treaty disputes, and yet so often fails to yield the expected results, that we welcome the discussion draft devoting almost half of its options to ensuring that cases that are in MAP get resolved. The only option that we submit should be added to this list – and adopted widely – is mandatory binding arbitration.

We understand and appreciate the objections and/or obstacles to mandatory binding arbitration. Overcoming these objections/obstacles, however, is necessary to ensuring that MAP achieves its issue-resolution objective. Importantly, the simple presence of mandatory binding arbitration as a "final option" will encourage taxpayers and governments to resolve issues more expeditiously.

Mandatory binding arbitration will be most useful, obviously, if it is available in all cases. While we would not embrace enthusiastically approaches that limit arbitration, such as to specific treaty articles, we would expect governments to seek to expand arbitration coverage once they experience arbitration's many issue-resolution benefits (including net cost savings).

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We appreciate greatly the OECD's strong leadership on this critically important initiative. Double taxation is both an increasingly-important concern for the CIV industry and a potentially significant detriment to cross-border investment and economic growth.

Consequently, we recommend that the Final BEPS Action 14 Report urge governments to commit to adopting both the options advanced in the discussion draft and broadly-applicable mandatory binding arbitration. The substantial dispute resolution costs that are imposed today on both governments and taxpayers will be reduced considerably if these recommended approaches are adopted.

Please feel free to contact me (at lawson@ici.org or 001-202-326-5832) at your convenience if you would like to discuss this issue further, or if we can provide you with any additional information, in advance of or following the Public Consultation on 23 January. My colleagues Karen Gibian (at kgibian@ici.org or 001-202-371-5432) and Ryan Lovin (at ryan.lovin@ici.org or 001-202-326-5826) also may be called upon for assistance.

Sincerely,

/s/ Keith Lawson

Keith Lawson
Senior Counsel – Tax Law

cc: taxtreaties@oecd.org