



ICC comments in response to OECD public consultation document: Tax Certainty for issues related to Amount A under Pillar One

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 opportunity to provide input on the OECD [public consultation document](#) on Tax Certainty for issues related to Amount A of Pillar One. 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. ICC is also an established arbitral institution through its International Court of Arbitration and provides other dispute resolution mechanisms through its International Centre for Alternative Dispute Resolution.

ICC recognises the work done so far to develop draft provisions on tax certainty for issues “related to Amount A” and that these provisions set out a mandatory and binding mechanism that will be used to resolve transfer pricing and permanent establishment profit attribution disputes that Competent Authorities are unable to resolve through the mutual agreement procedure (MAP) within two years of the presentation of the MAP case to the Competent Authorities.

ICC welcomes the opportunity to contribute input on the current document, and to this end provides the following general comments:

General comments

- ICC members note that the document appears to be drafted from a tax administration perspective and hold that the document should also reflect the taxpayer perspective, for example, the inclusion of taxpayer protections should countries act inappropriately.
- It would appear that the current provisions give opportunity for governments to not agree and extend the process unnecessarily.
- The tax certainty drafts do not appear to meet the promise of the agreement; with no due process and the footnotes do not provide sufficient clarity/certainty.
- With respect to the panel composition, use of experts and independent panelists – it would seem that this will create significant bureaucracy without any oversight. In addition, clarity is lacking regarding how they will be paid, how to remove from their 5-year term (even if 1/3 less one wants to remove), etc. It is unclear what happens if the Lead Tax Administration (LTA) objects and other panelists agree.
- Panelists should be limited to government officials who are subject to oversight from their governments/legislatures. The current draft does not provide sufficient oversight or due process.

Specific comments:

1. Page 6 Para 1
“Member of a Covered Group may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present its case to the Competent Authority of either Contracting Jurisdiction.” ICC members agree, this should be either contracting jurisdiction.

2. Page 7 Para 1
The scope of the Amount A MLC and the resolution of disagreements by the determination panel is multilateral in nature. However, the proposed dispute resolution mechanism for issues related to Amount A is bilateral in nature and restricted to existing bilateral treaties.

ICC members recommend considering an approach that deals with i) the tax certainty framework for Amount A and ii) tax certainty for issues related to amount A in a similar streamlined multilateral manner to ensure consistent outcomes in terms of scope, timing, and to further reduce MNEs' compliance burden.

3. Page 7 Para 1 and 2(a)(i) of Article 19
Considering that the scope of the Amount A MLC is multilateral in nature, and broader than the existing networks of bilateral tax treaties, it's equally important that the proposed (bilateral) dispute resolution mechanism for issues related to Amount A should (in any case) apply in circumstances where there is not an existing bilateral tax treaty between the two jurisdictions in place

ICC members recommend including the language of paragraph 2(a)(i) in square brackets to ensure that scope of the mandatory and binding dispute resolution mechanism for issues related to Amount A is not limited to parties that are linked by way of existing bilateral Tax Agreements but can be operated in respect of any party to the Multilateral Convention.

4. Page 7 Footnote 3 &4
“These issues include whether other types of disputes should be considered “Related Issues”; whether the definition should require a direct or indirect connection with Amount A; whether the definition should include a quantitative materiality threshold; whether reservations with respect to scope should be permitted; and whether the mechanism should apply in circumstances where there is not a bilateral tax treaty between the relevant jurisdictions.”

ICC members believe that related issues should be broad, and that the mechanism should apply in circumstances where there is not a bilateral tax treaty (no other remedy would be provided for relief).

5. Page 10 5) B) ii) and page 33 para 26
“If a final decision of the courts of one of the Contracting Jurisdictions referred to in paragraph 2(a) holds that the dispute resolution panel decision is invalid. In such a case, the request for a dispute resolution panel

under paragraph 2 shall be considered not to have been made, and the dispute resolution panel process shall be considered not to have taken place (except for the purposes of paragraphs 17, 18, 19 and 30).”

ICC members recommend that exceptional circumstances need to be very clearly defined as the current language risks invalidating the entire mechanism.

6. Page 11 Par 7 of Article 19, footnote 5

Footnote 5 clarifies that some IF members consider that the provision should include an express definition of specific items of information, with a view to avoiding possible blockages in circumstances where a jurisdiction’s published MAP guidance does not address this issue.

ICC members recommend including an express definition of specific items of information (such as the list of information and documentation contained in the BEPS Action 14 Peer Review Documents).

7. Page 13 Para 14 &15 Footnote 6

Footnote 6 (page 13) clarifies that some IF members consider that these provisions should not use a “legally bound” standard but should also apply where a Competent Authority will not depart from the court decision as a matter of administrative policy or practice.

“In some jurisdictions a mutual agreement concluded by the Competent Authority cannot override the decision of a court or administrative tribunal of that jurisdiction as a matter of law. In these jurisdictions, the Competent Authority would be unable to implement a mutual agreement reflecting a dispute resolution panel decision to the extent of any conflict+ or inconsistency between the decision of the court or administrative tribunal and the dispute resolution panel decision.”

“Some members of the Inclusive Framework consider that these provisions should not use a “legally bound” standard but should also apply where a Competent Authority will not depart from the court decision as a matter of administrative policy or practice”

ICC members believe that this language risks invalidating the entire mechanisms and recommend using a “legally bound” standard, in order to ensure resolution of any unresolved issue to the widest possible extent, with a view to securing the objective of avoiding the double taxation of Amount A that would otherwise result from unresolved TP and PE profit attribution disputes.

8. Page 14 Para 16

Footnote 7 (page 14) clarifies that there are divergent views among jurisdictions as regards the composition of the dispute resolution panel. One group of jurisdictions are of the view that the panel should comprise of independent experts only to allow an independent decision on issues that remained unresolved between the governments in MAP. Another group of jurisdictions feel that the panel should comprise of government experts only on the basis that mandatory, binding dispute resolution through

independent experts would raise sovereignty concerns for them. Although several of these jurisdictions may be able to accept a mixed panel as in the public consultation document as a compromise, some jurisdictions continue to retain their original positions.

“The dispute resolution panel shall consist of five individual panel members.

b) Within 60 days of the request for a dispute resolution panel under paragraph 2, each Competent Authority shall appoint:

i) one panel member from the staff of that Competent Authority; and
ii) one panel member chosen from the list of experts referred to in paragraph 16(g).

The two dispute resolution panel members appointed pursuant to paragraph 16(b)(ii) shall, within 60 days of the latest of their appointments, appoint a Chair from the persons on the list of experts referred to in paragraph 16(g)”

There are divergent views amongst ICC members. Some ICC members recommend using a mixed panel as a compromise, and in line with the preferred approach towards the Tax Certainty Framework for Amount A.

9. Page 20 Para 28 and Page 47 Footnote 12

“Members of the Inclusive Framework have divergent views as regards the usefulness of a presentation of the Covered Group’s analysis and views of the case to the dispute resolution panel process. Some jurisdictions are of the view that such a presentation would provide a dispute resolution panel with a more informed basis to choose between the Competent Authorities’ proposed resolutions and that the operative text should directly provide this possibility to Covered Groups. Other jurisdictions oppose such a presentation of a Covered Group’s position, which they consider to be inappropriate in the context of a government-to-government dispute resolution mechanism that uses last-best offer decision-making.”

ICC members suggest that the covered group should have an opportunity to submit a paper setting forth its analysis and views. The covered group will have the most accurate and complete view of the facts involved and should be able to present its position.

10. Page 24 Para 30(b) footnote 8

Para 30(b), footnote 8 clarifies that Members of the Inclusive Framework have divergent views on when it would be appropriate for a Covered Group to bear the costs related to a dispute resolution panel proceeding. Some jurisdictions consider that an obligation for the Covered Group to bear these costs in the circumstances described in paragraphs 30(b)(i) and 30(b)(iv) would compromise the voluntary nature of both the dispute resolution panel mechanism and the mutual agreement procedure.

ICC members recommend reconsidering/refraining from an obligation for the Covered Group to bear these costs in the circumstances described in paragraphs 30(b)(i) and 30(b)(iv), on the basis that this would compromise the voluntary nature of both the dispute resolution panel mechanism and the mutual agreement procedure.

11. Page 49 Footnote 14

“Some jurisdictions are of the view that roll-forward would facilitate the resolution of recurring issues and that it should be expressly authorised in the operative text. Other jurisdictions are opposed to the roll-forward of dispute resolution panel outcomes, which they consider inconsistent with a mechanism that is not intended to establish precedents for other cases.”

ICC members believe that roll forward is practical, logical, time and cost saving.

ICC remains committed to providing knowledge and expertise on behalf of the global business community.

ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.