

*By Electronic Delivery*

8 April 2014

Pascal Saint-Amans  
Director, Centre for Tax Policy and Administration  
Organisation for Economic Co-operation and Development

RE : BEPS Action 6 and Treaty Benefits for  
Collective Investment Vehicles

Dear Pascal,

The Investment Company Institute (ICI)<sup>1</sup> and ICI Global<sup>2</sup> are concerned that the Base Erosion and Profit Shifting (BEPS) Action 6 Public Discussion Draft (hereafter the Action 6 draft)<sup>3</sup> does not reflect expressly the OECD's extensive multi-year consideration of treaty eligibility for investors in collective investment vehicles (CIVs). The CIVs at issue are widely-held, diversified, and subject to investor-protection regulation in the country in which the CIV is established.

The OECD's consideration of CIVs involved a Government-business consultation established in 2006 by the OECD's Committee on Fiscal Affairs (CFA) as the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-Border Investors (ICG).<sup>4</sup> The CIV Report that resulted from the ICG's work was endorsed by the CFA in April 2010.<sup>5</sup>

---

<sup>1</sup> ICI is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds ("ETFs"), and unit investment trusts ("UITs"). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$16.8 trillion and serve over 90 million shareholders.

<sup>2</sup> ICI Global is a global fund trade organization based in London; members include regulated U.S. and non-U.S. based funds publicly offered to investors in jurisdictions worldwide. ICI Global seeks to advance the common interests and to promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets of \$1.4 trillion in non-U.S. funds.

<sup>3</sup> <http://www.oecd.org/ctp/treaties/treaty-abuse-discussion-draft-march-2014.pdf>.

<sup>4</sup> The ICG included representatives from 15 Governments, as well as the European Commission. The National Government representatives were from Austria, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Spain, Switzerland, the United Kingdom, the United States, and the People's Republic of China.

<sup>5</sup> The CIV Report more precisely is entitled "The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles" and is available on the OECD's website at [www.oecd.org/tax/treaties/45359261.pdf](http://www.oecd.org/tax/treaties/45359261.pdf).

The 2010 Update to the OECD Model Tax Convention Article 1 Commentary,<sup>6</sup> which adopts the Report's conclusions, addresses expressly governments' concerns about treaty shopping opportunities through CIVs. While the Action 6 draft makes no mention of CIVs or the conclusions endorsed by the CFA, the draft presumably is not intended to reverse the OECD's considered conclusions regarding CIV treaty benefits.

Consequently, we recommend that a specific reference to the CIV Report approved by the CFA, and the relevant paragraphs added to the Article 1 Commentary, be provided in the final Action 6 Report. This reference would state that paragraphs 6.8 through 6.34 of the Article 1 Commentary provide the relevant Action 6 guidance for CIVs; such a reference would eliminate any confusion that otherwise might arise regarding the application to CIVs of a limitation on benefits (LOB) clause or a general anti-abuse rule. As paragraph 8 of the Article 6 draft discusses already various contexts in which the OECD has examined treaty shopping issues, this paragraph would be an appropriate place to provide the recommended clarity.

Our recommendation – which is fully consistent with sound tax policy – effectively would preserve the 2010 CFA-approved procedures for determining treaty eligibility for CIVs and their investors.

### ***Support for OECD's BEPS Initiative***

The compelling need to address on a coordinated basis various important tax concerns is obvious. The OECD's considerable expertise in tax matters, its ability to reach out beyond its membership for input, and its long-standing practice of consulting with business make it the logical choice for addressing BEPS issues.

Treaty shopping can be a serious problem. The CIV Report recognized this problem and provided practical and reliable approaches for applying an LOB clause to CIVs. Importantly, the CIV Report, and the changes to the OECD Commentary, were crafted *after* the LOB clause (that has been incorporated in the Action 6 draft) was included in the US Model. Thus, the CIV Report properly is viewed as clarifying the application to CIVs of the LOB clause included in the Action 6 draft.

We recognize that the OECD has been given a mandate by the G20 to address all BEPS issues within an extraordinarily short time frame. We also recognize that this short time frame provides limited opportunity for business input and for the Secretariat to respond to every business comment received. Despite the short time frames, it nevertheless is imperative that the final product balance appropriately all competing considerations.

---

<sup>6</sup> <http://www.oecd.org/tax/treaties/45689328.pdf>.

### *The CIV Report*

We submit that the CIV Report and the changes made to the Article 1 Commentary balance appropriately all relevant considerations of Governments and business. This thoughtful approach for applying an LOB clause to CIVs should be reflected expressly in the Final Report on BEPS Action 6.

The CIV Report was developed with strong support from the global CIV community. During the first consultation with business, at a Working Party 1 meeting on 17 February 2005, industry representatives from ten leading CIV jurisdictions<sup>7</sup> participated. When the next meeting to discuss CIV issues with business was held at the OECD on 1-2 February 2006, over 115 individuals representing 29 countries' tax authorities and numerous CIV industries participated. The ICG subsequently established to consider these issues included 28 business representatives from eleven countries.<sup>8</sup>

The ICG that was established in 2006 analyzed treaty eligibility issues and potential treaty shopping concerns. The business delegates worked closely with the OECD and Governments to craft appropriate responses to these issues and concerns. The consensus report prepared by the ICG<sup>9</sup> was released in January 2009 for extensive public consultation before being endorsed by the CFA, in final form, in April 2010. The consultation was extensive. The conclusions are sound.

The CIVs that are the subject of the CIV Report, as noted above, are widely-held, diversified, and subject to investor-protection regulation in the country in which the CIV is established.<sup>10</sup> In general, these CIVs have many thousands, sometimes hundreds of thousands, of investors; most of these investors have relatively small accounts. These investors, as the CIV Report explains, lack the financial incentive individually to incur the substantial costs to claim the treaty benefits attributable to the small amounts they have invested. For the CIV, however, it typically is cost effective to make appropriate claims for investor treaty relief.

Special consideration was given by the OECD to CIV treaty eligibility issues for several reasons. First, some source-country Governments were concerned that clear rules were needed to determine when

---

<sup>7</sup> These jurisdictions were Belgium, Canada, France, Germany, Ireland, Italy, Luxembourg, Switzerland, the United Kingdom, and the United States. An observer from a pan-European industry association attended as well.

<sup>8</sup> Several representatives from Japan, as well as the ten countries represented at the 2005 meeting, participated in the ICG's business delegation.

<sup>9</sup> [www.oecd.org/tax/treaties/41974553.pdf](http://www.oecd.org/tax/treaties/41974553.pdf).

<sup>10</sup> The CIV Report, in paragraph 4, stated specifically that the ICG did not address private equity funds, hedge funds or trusts or other entities that are not widely held, diversified and subject to investor-protection regulation in the country in which the entity is established.

CIVs could claim treaty relief (either in their own right or on behalf of their investors); potential treaty shopping considerations were an element of this concern. Second, some CIVs that are treaty entitled in their own right were concerned that they effectively could not receive treaty relief. Third, CIVs that are not treaty entitled in their own right were concerned that they could not satisfy requirements for proving the treaty eligibility of their investors given the highly intermediated nature of most CIVs' distribution networks. Finally, some residence-country Governments were concerned that, if CIV investors were not receiving treaty relief to which they are entitled, these investors would claim credits against their residence-country tax for both the foreign taxes that should have been withheld as well as those that should have been recovered; the effect of claiming credits for these excess foreign taxes would be to transfer tax revenues from the investors' residence countries to a source country. All of these potentially-competing concerns were addressed, to everyone's satisfaction, by the CIV Report.<sup>11</sup>

The CIV Report effectively acknowledges that Governments may take different approaches to CIV treaty eligibility, and the procedures for establishing the tax residence of a CIV's investors, depending on the structure of the CIV and the manner in which it is distributed. Some CIVs can be treated as treaty eligible in their own right, the CIV Report states, because – under the relevant long-standing legal standard – they are persons, residents, and the beneficial owners of their income. The only constraint on treaty eligibility for these CIVs might be the need to satisfy an LOB clause. Other CIVs, the CIV Report states, can be treated as treaty eligible only to the extent that their underlying investors are treaty eligible – either directly or as equivalent beneficiaries under a treaty between the investor's residence country (which is not the residence country of the CIV itself) and the source country. Finally, other CIVs can be treated as transparent, the CIV Report states, so that their investors (such as pension funds) can claim treaty relief (including treaty exemptions) in their own right.

Importantly, as noted above, the CIV Report also acknowledges that CIVs typically do not know their investors; the majority of CIV interests typically will be held by many securities brokers or other intermediaries holding the interests in a nominee (or "street name") account for their customers. Because intermediaries consider the identities of their customers (the fund's underlying investors) to be a valuable commercial (proprietary) asset, detailed information about these investors' identities typically is not shared with potential competitors. Consequently, the CIV Report states, "it would be impractical for the CIV to collect such information from the relevant intermediaries on a daily basis. Accordingly, Contracting States should be willing to accept *practical and reliable* approaches that do not require such daily testing."<sup>12</sup>

The CIV Report then describes various approaches that Governments can take to satisfy themselves that a CIV is owned by treaty-eligible investors. In many countries, the CIV Report notes, the CIV industry is largely domestic, with an overwhelming percentage of investors resident in the country in

---

<sup>11</sup> See, e.g., paragraph 6.27 of the Commentary to Article 1 which explains that "the purely proportionate approach set out in paragraphs 6.21 through 6.26 protects against treaty shopping."

<sup>12</sup> Paragraph 6.29 of the Commentary to Article 1 (emphasis added).

which the CIV is established. In this situation, “it may be appropriate . . . to assume that a CIV is owned by the residents of the State in which it is established if the CIV has limited distribution of its shares or units to the State in which the CIV is established or to other States that provide for similar benefits in their treaties with the source State.”<sup>13</sup> In other situations, the CIV Report states, CIVs generally should be required to determine the treaty eligibility of their investors only once per year. If particular circumstances cause a Government to conclude that annual determinations are inadequate, the CIV Report concludes, more frequent testing (but no more frequently than quarterly) could be required.<sup>14</sup>

### ***The Consequences to CIVs of a Strict Application of BEPS Action 6 Public Discussion Draft***

Strict application to CIVs of the Action 6 draft (and, in particular, the LOB clause of the 2006 Model US Tax Convention) effectively could reverse the carefully considered and appropriately balanced approach of the CIV Report. This report, as noted above, was published *after* the US Model and was endorsed unanimously by the Government officials who were members of the ICG.

For a CIV to determine whether more than 50% of its interests are held by persons who are resident in a treaty-partner country for more than 183 days, the CIV *strictly speaking* could be required to *prove* the tax residence of *every* underlying investor *every* day. Because this information is not commercially available, no CIV – and no investor in a CIV – *ever* could receive treaty benefits.

The net effect of applying strictly the Action 6 draft to CIVs, therefore, would *not* be elimination of treaty *shopping*; instead, the effect would be elimination of treaty *relief* negotiated previously, and intentionally, by the investors’ residence countries.

We assume, as noted above, that the absence of an express reference in the Article 6 draft to the CIV Report is an unfortunate result of the time pressures imposed on the OECD by the G20. Regardless of the reason for the uncertainty, clarifying guidance should be provided immediately.

Perhaps the easiest way to resolve this matter is to note, in the introduction to the BEPS Action 6 Final Report,<sup>15</sup> that it is not intended to address situations – such as the treaty eligibility of CIVs and their investors – that already have been considered fully by the OECD. A specific reference to the CIV Report approved by the CFA, and the relevant paragraphs (6.8 through 6.34) added to the Article 1 Commentary, should be provided. This reference would state that paragraphs 6.8 through 6.34 provide the relevant Action 6 guidance for CIVs; such a reference would eliminate any confusion that otherwise might arise regarding the application to CIVs of an LOB clause or a general anti-abuse rule.

---

<sup>13</sup> Paragraph 6.30 of the Commentary to Article 1.

<sup>14</sup> Paragraph 6.31 of the Commentary to Article 1.

<sup>15</sup> Paragraph 8 of the Action 6 draft, as noted above, would be an appropriate place for this discussion.

\* \* \*

This issue is critically important to the global CIV industry – which invests over US\$ 30 trillion<sup>16</sup> for CIV investors. Our recommendation – which is fully consistent with sound tax policy – also is critically important to ensuring that the many years of dedicated effort by the OECD, Government officials, and industry experts is not reversed – unintentionally or otherwise – for the sake of meeting a G20-imposed deadline.

Please feel free to contact me (at [lawson@ici.org](mailto: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.

Sincerely,

*/s/ Keith Lawson*

Keith Lawson  
Senior Counsel – Tax Law

cc: Grace Perez-Navarro  
Deputy Director  
CTPA, OECD

Marlies de Ruiters  
Head of Division  
CTPA/OECD

[taxtreaties@oecd.org](mailto:taxtreaties@oecd.org)

---

<sup>16</sup> [http://www.ici.org/research/stats/worldwide/ww\\_12\\_13](http://www.ici.org/research/stats/worldwide/ww_12_13).