ICC comments in response to OECD public consultation document: Draft Multilateral Convention provisions on digital services taxes and other relevant similar measures under Amount A of 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 the draft Multilateral Convention provisions on digital services taxes and other relevant similar measures under 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 appreciates the work undertaken to develop MLC provisions that reflects the commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of such future measures.
Given the fact that the document is still in draft form, it is challenging for ICC members to provide detailed comments on the rules at this stage. However, based on the current version of the document, ICC members still appreciate the opportunity to share their views on the proposed rules. Furthermore, ICC members remain available to further engagement as the rules continue to be developed.

General comments on the MLC draft provisions on digital services taxes and other relevant similar measures under Amount A Pillar One

Regarding the content of the provisions, from what emerges in the current version of the document, **the scope of the definition of a DST is too narrow**, rendering ineffective the ultimate goal of this proposal.

- The general definition of what constitutes a “digital services tax or relevant similar measures” is based on three cumulative conditions referring to market-based criteria, ring-fencing to foreign and foreign-owned businesses and measures placed outside the income tax system and therefore outside the scope of treaty obligations.
- Being the definition a conjunctive “and” test, all conditions will need to be met for a measure to be considered under the scope of the definition and thus, the application threshold results to be too high.
- Moreover, with regard to the first condition, ICC members are of the opinion that the wording "or other similar market-based criteria" is too undefined.

- Existing DST legislations and proposals apply to foreign or foreign-owned groups as well as to domestic ones. Thus, according to the proposed text contained in the public consultation document, it is unclear whether DST applicable also to domestic-based groups will be considered as in scope.
- One area of particular concern is the proliferation of new nexus standards for corporate income tax (e.g., significant economic presence tests "SEPs") that are inconsistent with the OECD model treaty. The draft document would not deter this proliferation because article 38(2)(c) exempts measures that are treated as an income tax under domestic law. Compliance with SEPs require significant resources and their destabilizing effect is similar to DSTs. The draft document should be updated to include SEPs as digital services tax or relevant similar measure by removing article 38(2)(c) as a requirement for digital services tax or relevant similar measure definition and by including SEPs in Annex A as described in Article 37.
- In order to get a more balanced approach, ICC members would recommend excluding the condition that "measures are ring-fenced to foreign and foreign-owned businesses" from the conjunctive "and"- test, and formulate it as a general exception.
- Additionally, ICC members would recommend that the exception should be (further) limited to situations where the rules apply across business models and not attempt to ring-fence the digital economy, something that – at the moment – is not covered in the definition contained in the draft document for public consultation.

- To this end, ICC members would suggest amending Art. 38 (2) providing **a general definition of a "digital services tax or relevant similar measure" based on two cumulative conditions** and include measures that:

  (1) impose taxation based on market-based criteria;

  (2) are placed outside the income tax system (and therefore outside the scope of treaty obligations), unless

  (i) the measure applies across business models and does not attempt to ring-fence the digital economy (or any other specific sectors/ business models); and

  (ii) it will apply equally in all respects to both foreign-owned companies as well as residents.

- Besides this possible solution, ICC members would recommend in any case to change the wording of Art. 38 (2)(b) (ii). In the opinion of ICC members, the words "exclusively or almost exclusively" should be changed into "materially" and the words "variable rates of tax" should be included in the text in order to avoid that DST and similar measures which discriminate against non-residents via higher rates of tax applied to the non-resident would remain out of scope according to the proposed rules. Hence, the text of Art. 38 (2) (b) (ii) should be amended as follows:

  "is applicable in practice ***materially*** *~~(exclusively or almost exclusively)~~ to non-residents or foreign-owned businesses as a result of the application of revenue thresholds,* ***variable rates of tax****, exemptions for taxpayers subject to domestic corporate income tax in that Party, or restrictions of scope that ensure that substantially all residents (other than foreign-owned businesses) supplying comparable goods or services are exempt from its application;"*

- When examining whether a "digital service tax or a relevant similar measure" exists, a qualified overall assessment should also be made, which does not depend on the formal

design of the respective measure, but on the effect or the impact of the measure (effect-based approach).

- Moreover, in relation to the condition referring to measures placed outside the income tax systems (and therefore outside the scope of treaty obligations) Art. 38 (2) (c) states that "such tax is not treated as an income tax under the domestic law of the Party, or is otherwise treated by that Party as outside the scope of any agreements (other than this Convention) that are in force between that Party and one or more other jurisdictions for the avoidance of double taxation with respect to taxes on income." Including this as a requirement would bless measures with the same policy issues as DSTs, such as the SEPs described above. Footnote 10 further clarifies that "Consideration will be given to whether and under what circumstances the definition of digital services taxes or other relevant similar measures should cover certain measures even if they are within the scope of existing tax treaties.". As noted, SEPs and certain novel withholding taxes such as on digital services should be included in the definition of digital services taxes or relevant similar measures.
- ICC members recommend **expanding the scope of this provision to cover measures that are (potentially) within the scope of existing tax treaties**, such as article 12B UN Model Tax Convention (whether included in a (multilateral) tax treaty or in a non-treaty situation-incorporated in a jurisdiction's domestic legislation). For the same reason, the exemption for withholding taxes must be modified so the definition captures abusive, novel withholding taxes (including specifically taxes on digital services).
- In order to provide more detailed comments and fully appreciate the intent of the proposed measure, ICC members would appreciate the **possibility to review and be consulted also on the content of the so-called "Appendix A".** Furthermore, as already considered in Footnote 1, the ICC would also recommend that measures which qualify as a digital services tax or a similar measure and which are introduced after the entry into force of the Convention (future DST) should be included in Annex A. Hence, ICC members would recommend Annex A to be updated on an ad-hoc basis.
- Consideration should be given to partial denial of Amount A reallocation as discussed in Footnote 4.
- Subnational DST and similar unilateral measures should be captured in the definition of DSTs and similar unilateral measures, as indicated in Footnote 3.
- Finally, ICC believes that taxes which are listed as exempted, such as certain withholding taxes, DPT, or Maal, should be taken into account for the purposes of the Marketing and Distribution Safe Harbor to ensure residual profit is not subject to double tax. The definition of the exemption should be narrowly tailored to ensure the exception does not swallow the rule.

ICC appreciates the work undertaken to develop MLC provisions that reflect the OECD commitments with respect to the removal of all existing DSTs and other relevant similar measures and the standstill of such future measures. However, ICC members would also like to underscore the importance of fully taking into account the overall objective of the MLC Provisions on Digital Services Taxes and other relevant similar measures: the removal of DSTs and similar measures should also lead to the prevention and removal of any reactionary measures to DSTs, such as trade or any other types of commercial sanctions. This is indeed a fundamental political goal towards the stabilisation of the worldwide economic environment. Hence, ICC members would strongly welcome a statement clearly expressing this objective to be included in the text (or at the very least in the recitals) of the Multilateral Convention.