ICC comments Workstream B – UN Subcommittee on the Digitalized and Globalized Economy

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 written comment on the published proposal on the replacement of Articles 5(3)(b), 12A, 14 of the UN Model Convention with a single new provision dealing with cross-border business services.

We appreciate the international tax challenges brought about by the digitalized economy and we welcome the possibility to constructively engage with the subcommittee and the UN Committee of Experts on this very important workstream. In the comments below we would like to outline industry concerns and comments in relation to this proposal and we stay available to answer any related questions and provided further information as needed.

General Comments

- We understand that the proposed change contained in Annex 3 of the "Digitalized and Globalized Economy" Co-Coordinators' Report (E/C.18/2023/CRP40) would allow a contracting state to impose tax on the gross amount of payments made by residents of that state (or non-residents with a permanent establishment (PE) in that state that bears those payments) to service providers resident in the other state. Under the new provision, a contracting state would be entitled to tax fees or payments for services arising in that state. However, where the recipient of the fees is a resident of the other contracting state and the beneficial owner of the fees, the tax would be limited to a percentage of the gross amount of the fees, with the percentage to be determined through the negotiations of the treaty partners (as is customary under the provisions of the United Nations Model Convention with respect to rates of tax).

- The ICC business community would like to express its **deep concerns on such proposal and recommendations as included in Annex 3.** We appreciate the international tax challenges brought about by the digitalized economy, however, **physical presence remains a key factor for the direct taxation of business profits**. Hence, taxing businesses that provide any service in a state where that business lacks any form of physical presence in that state would not be a successful approach.

- Changes to physical presence tests and the proposed amendments to taxation of cross border business services will have **unintended consequences to developing countries economies, in particular those that are exporters of services**. Assumptions have been made that developing countries are net importers of services; however, international trade data shows that large amount of service exports is now from developing countries, and the amount is increasing quickly.[1] Services exports from middle-income countries increased three-fold between 2005 and 2019, compared with a two-fold increase for high-income countries. Several developing countries were among the top 25 exporters of services in the world by 2019 including India and Thailand.

- While transportation and tourism have historically been the primary service export-led sector in developing countries, exports of other business services have grown discernibly fast for developing countries over the past 15 years. **Exports of telecommunications, computer, and information services quadrupled between 2005 and 2019, while those of other business services, such as legal, accounting, consulting, and engineering services more than doubled.** About one quarter of the global growth in the export of business services over the past 15 years was accounted for by developing economies. For example, ICT, finance, and other business services—which are all typically offshored and delivered remotely— accounted for more than 20 percent of the total exports of goods and services in Lebanon, Costa Rica, the Philippines, Ghana, and India.[2]

- **Our global business community has concerns that such changes to physical presence tests or the expansion of taxation of cross-border business services will only stifle the growth of export-led services in developing economies.** The World Bank argues that export opportunities for developing countries will widen, but *due to fewer restrictions on services trade, technology diffusion from digital platforms, and* an expanding list of MNCs from developing countries that are exploiting export opportunities through outward foreign direct investment (which is the most dominant mode of services trade).

- The proposed approach would also lead to trade distortions as the taxation of goods and services would operate on a different basis. The profits of an exporter of goods are taxable only in its State of residence, whereas the proposed approach would in effect apply an import tariff to services.

- While the fundamental goal to combine Articles 5(3)(b), 12A and 14 into one new provision is to "simplify the provisions of the UN Model Convention dealing with business services", we find the new provision would **actually increase administrative complexity for taxpayers and only bring about more tax uncertainty in an already increasingly complex international tax system.** Annex 3 notes that this would simplify the Model Convention significantly and that taxpayers would no longer need to distinguish between fees for different services.

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[1] World integrated Trade Solutions (WITS) and OECD-WTO Balanced Trade in Services dataset (BaTIS). See https://blogs.worldbank.org/psd/promise-export-led-services-growth-real

[2] OECD-WTO Balanced Trade in Services dataset (BaTIS)

However, we believe the proposed amendment will actually make it more complicated for service providers and for customers of service providers. Under the new proposal, **all service fees will come within scope of taxation (which will mean a much wider payment base to review from a withholding tax perspective), and depending on the source country, could attract different rates**. In addition, there will different interpretations taken by different countries in relation to what 'fees for services' encompasses and therefore we do not foresee an immediate simplification for businesses or customers but can foresee potential for tax disputes. If the Subcommittee moves forward regardless, we would welcome further engagement and strongly suggest that 'fees for services' is better and more narrowly defined to focus on the area of concern if this approach is taken; payments by individuals for services for their personal use should be excluded, as proposed, for the same reasons they are excluded under Article 12A. The interaction with, and need for a separate, Article 12B should also be considered.

- Moreover, from a tax cost perspective, there is **a risk of over taxation, including double and multilayer taxation, if withholding tax is applied to each and every service payment made to service providers**. Businesses may have no other choice but to pass on the cost to (assuming they are in a position to do so) who will bear the increased cost through higher service fees.

- Another key concern of ours in relation to the proposed amendment is that **no distinction is made between low and high value services or low margin and high margin services**. If all types of services attract withholding taxes on gross receipts, without taking into account the costs or expenses incurred by a business in generating those receipts, this will have varying levels of impact to business' profitability and the global economy. A seemingly low withholding tax rate can translate into high effective tax burdens. The corresponding effective tax rates will vary by profitability—the less profitable a company is, the higher their effective tax rate. This puts immense pressure on businesses, particularly those that are not yet profitable or with low profit margins, and, as mentioned, could require them to pass on the cost of the tax onto ultimate consumers. Businesses that cannot do so could suffer serious financial distress or may be left with no choice but to exit the market or not to enter the market in the first place, to the detriment of consumer choice and investment in local ecosystems. If discussions on this topic do move forward, we ask that you seriously consider the taxation applying to net rather than gross receipts.

- Additionally and in connection with workstream C of the same report, ICC members are concerned that extending a country's taxing rights to tax almost all cross border services without any requirement for the services to be performed in a country or even potentially reducing the 183-day rule to zero, 90, or 120 days, **risks discouraging businesses from allowing employees to spend any time in a country (including exploring investment opportunities) unless there is already a PE in that country.**

- Workstream B represents a fundamental shift from the location of service consumption to performance, and such a change in taxing rights would pose challenges for both service providers and service recipients who sign global services contracts. This **model introduces complexity in cases with single contracts and dispersed resources and consumers – questions arise about who should withhold, how to withhold, and how to allocate income**.

- ICC members are also concerned with the business reaction to a proposed approach to revise the threshold requirement by considering both the number of employees and other personnel working in a country, along with the number of days each one works in the country, which appears complicated (as also recognized by the Author of the report). We would like to emphasize that such an approach will increase compliance challenges for businesses, especially for multinational enterprises with a large employee base that cannot have full oversight of each employee's location and movements.

We note that many of the above points have also been raised by committee members during UN meetings taking place in October.

We thank you for the opportunity to provide written comments and ICC remains committed to providing knowledge and expertise on behalf of the global business community as further needed.

About the International Chamber of Commerce

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 170 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.

ICC

33-43 avenue du Président Wilson, 75116 Paris, France
T +33 (0)1 49 53 28 28   E icc@iccwbo.org
www.iccwbo.org @iccwbo