ICC submission to U.S. Department of the Treasury to input into the draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One (“Pillar One MLC” or “MLC”)

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, 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.

As the Global Tax Commission of the International Chamber of Commerce (ICC), we have actively engaged in the OECD consultation processes on the Two-Pillar solution, including Pillar One which presents a valuable opportunity to restore stability within the global tax framework.

We are grateful to be provided with the opportunity by the U.S. Department of the Treasury to input into the draft OECD/G20 Inclusive Framework Multilateral Convention to Implement Amount A of Pillar One (“Pillar One MLC” or “MLC”). We take this opportunity to reiterate the important need for a solution that is agreed multilaterally and widely implemented by Inclusive Framework jurisdictions. We remain supportive of an international tax framework that brings certainty and stability and agree with U.S. Treasury that the release of the Pillar One MLC is a key step forward in progressing the Pillar One solution. This is the only way to ensure the accomplishment of this fundamental objective.

We would like to take this opportunity to highlight some elements of concern with the Pillar One MLC as currently drafted. In light of the relatively short consultation period, we limited our comments to those topics which were most immediate and common to our committee members on the basis of their feedback.

*Unilateral Measures*

* We very much appreciate the work undertaken to date to ensure the standstill of Digital Services Taxes (“DSTs”) until December 31, 2023 to help prevent harmful trade disputes and that the Pillar One MLC includes a list of existing DST measures that the MLC parties commit to withdraw with respect to any person when Amount A starts applying.
* We ask that there is an immediate extension of the DST standstill agreement relating to and other unilateral measures, to maximize the chances of a successful outcome of the Pillar One MLC.
* We appreciate that the Inclusive Framework recognizes that the effect and objective of Significan Economic Presence (SEP) concepts and similar types of nexus rules overlap with Amount A, and as such the Pillar One MLC would not apply them to in-scope MNEs once Amount A comes into effect. However, the draft MLC considers that SEPs could continue to apply even after the Pillar One MLC takes effect, to taxpayers that are not within the scope of Amount A. As such, we remain concerned that the term DSTs and relevant similar measures has been too narrowly defined to achieve the goal of bringing stability to the international tax framework. This is both because of the conjunctive nature of the three-prong test and how some of the tests are drafted and/or proposed to be interpreted. The proliferation of unilateral, uncoordinated SEP concepts would lead to double and even multiple taxation (where no treaty or unilateral relief is available), inordinately high compliance burdens, and significant uncertainty for those taxpayers.
* We strongly suggest the Pillar One MLC (or related documents) make clear that SEPs are not supported by the Inclusive Framework and we recommend that SEP rules be withdrawn for all taxpayers, regardless of whether they are in scope of Amount A, in the same way as DSTs. This would be more consistent with the overarching goal of Pillar One.
* We note that under the Pillar One MLC, countries that impose a DST or other relevant similar measure will not receive Amount A tax allocations of taxable profit, even where they are market countries and would otherwise be entitled to them. This is welcomed, however, we are of the view that the Pillar One MLC should incorporate a tax credit with respect to DSTs, against Amount A tax suffered. This approach would be similar to the standstill agreement whereby it was agreed that certain countries would give credit for any excess tax suffered (during an interim period before Pillar One takes effect) for those countries’ unilateral measures over and above the Pillar One tax in the first year Pillar One takes effect. This credit would go against the portion of the corporate income tax liability associated with Amount A as computed under Pillar 1 in these countries. We would like to see this approach apply for unilateral taxes incurred after Pillar One is in effect.

*Adjustment for withholding taxes*

* A key concern in relation to the adjustment for withholding taxes as proposed in the current consensus is that it does not entirely resolve double taxation scenarios. In particular, the withholding tax adjustment which recognizes tax already allocated to market countries through withholding tax mechanisms, only applies after an initial grace period. In addition, following that period, the withholding tax adjustment will only be between 25%-85% of the withholding tax suffered, thereby creating double tax leakage. This seems unfair, particularly as the stated purpose of the withholding tax adjustment is to prevent ‘double counting’ and double counting could be further mitigating through the removal of the grace period and/or not having a threshold for the withholding tax adjustment.
* We also note that there are various open items in relation to the withholding tax adjustment and Inclusive Framework members have noted their reservations in relation to the proposed treatment. We remain concerned with regards to how these reservations/open items will be resolved.

*Marketing Distribution Safe Harbor (“MDSH”)*

* Overall, we are pleased to see safe harbor rules incorporated into the Pillar One MLC. However, we are concerned that at this time there is no consensus amongst the Inclusive Framework members on some of the particulars of the MDSH design. This is demonstrated through number of objections from various jurisdictions, as noted in the footnotes of Pillar One MLC.
* Furthermore, the MDSH has a relatively narrow scope as currently drafted – for example, the Covered Group must have profits in the jurisdiction of at least EUR 50M for the MDSH to apply. Moreover, there is a low nexus threshold of locally sourced revenue of EUR 1M for a market jurisdiction to be entitled to tax Amount A profit (EUR 250K for developing countries). When these thresholds are taken together, there will be many businesses within the scope of Amount A that will be unable to qualify for the MDSH. We would at least expect for the nexus threshold and the MDSH profits threshold to be more closely aligned, or ideally, remove the MDSH thresholds altogether.

*Sourcing rules*

* We appreciate the efforts in simplifying the sourcing rules based on the feedback received from the business community regarding the initial draft. Nevertheless, we still find the rules to be excessively onerous.
* For instance, in relation to services (cloud) sourcing, in order to comply with the ‘large specified customer’ rules, businesses will need to exert additional efforts to obtain the data necessary to meet the compliance obligations. This may not be accessible information and obtaining the relevant information may not be a simple task. For example – understanding which category a customer sits within (reseller, large customer or small customer for the various allocation methods), or understanding where a customer’s headquarters are located for the headcount allocation to be used for large customers. Obtaining these types of data points will hugely add to the administrative burden that businesses will face ensuring compliance with these rules. Along with the upfront cost of updates to systems to ensure efficient extraction of this data, these are factors that will need to be continuously monitored as the data could continue to change.
* Another concern is around the complexity of imposing different sourcing rules for resellers, large customers and small customers. Where customers are also resellers, there would need to be an extra step involved to segregate specific revenues related to those of the resale. This could take a significant amount of time and is overly cumbersome, particularly where this segregation would need to take place for many customers.

*Autonomous domestic business exemption*

* We welcome this exemption which applies to domestic centered business operations and enables certain financial results from a country to be disregarded. It should, in theory, lead to reduced double taxation, which we are in favor of, however we question the practical benefits it will bring given the restrictive thresholds and quantitative tests that need to be met for the exemption to apply. We are also not aware of many multinational businesses that undertake activities that are purely contained within a single jurisdiction, and therefore question its practical application.

*Segmentation rule*

* We question the rationale for this unfavorable rule, which would apply where a group overall is not within scope of Amount A due to not meeting revenue and profitability tests, but one of the business segments alone does meet the tests. We do not follow the policy reasoning of introducing this rule which effectively extends the Pillar One – Amount A scope to businesses that would otherwise not be within scope. We would like to see this rule removed, consistent with earlier versions of the Amount A proposals, or else a provision that allows for the reduction of the Amount A profit for the year following that in which the group falls out of the scope of the rules.

*Mandatory binding dispute resolution*

* In relation to mandatory binding dispute resolution mechanisms, we very much welcome the expansion of “matters related to Amount A” to include Transfer Pricing, Permanent Establishment and Withholding tax disputes. This helpful change will increase certainty for businesses and bolster the stability of the Amount A regime overall.
* We would encourage that thought goes into the level of the tax certainty user fee to ensure it is not excessive.