# 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. Whilst recognizing that there is no consensus among ICC members on the current version of the MLC text, we remain supportive of a prinicples-based international tax framework that brings certainty and stability.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.
- Turning to the definition of the terms "DSTs and relevant similar measures" in the MLC, we remain concerned that this 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. We suggest the following drafting improvements
    - On Article 39.2(b)(ii)(A), we note that according to the Explanatory Statement, a measure will be considered to apply almost exclusively to non-residents or foreign-owned businesses if "only a few percent of the taxpayers were both resident and domestic-owned". Such a restrictive interpretation would make the test ineffective for addressing measures clearly targeted at non-resident taxpayers that do not have a significant physical presence in the jurisdiction. Should this test be kept, we propose applying it on the basis of a percentage of tax revenue.
    - On Article 39.2(b)(ii)(B), we note that the determination of whether a measure has the effect of insulating domestic businesses from the application of the tax would take into account "the policy objectives" of the tax. This introduces subjectivity which may effectively enable countries to introduce the types of measures Pillar One is seeking to put an end to. We recommend either removing this test entirely or implementing clear guardrails around the consideration of "policy objectives" to prevent the broad interpretation of "policy objectives" from becoming a "loophole".
    - On Article 39(2)(c), we remain of the view that excluding measures that do not apply if a tax treaty applies would be inconsistent with the overarching objective of Pillar One. Measures that would otherwise meet the criteria in the definition and could be equally discriminatory and destabilizing (such as significant economic presence or SEP concepts and withholding taxes on digital services) should not be allowed to remain in place simply because they do not apply in a treaty context. Jurisdictions imposing such measures may not have an expansive treaty network and treaty protection may therefore not be available in many cases.
- 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. The proliferation of unilateral, uncoordinated SEP concepts would lead to double and even multiple taxation ( in the absence of treaty or unilateral relief),, 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 recommend that the carve-out for SEP rules be expanded to 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.
- In addition, to effectively address withholding taxes that target non-resident digital service providers, we suggest that an exception be added to Article 39(2)(c) disapplying the third prong if the measure is intended to apply exclusively or principally to the business sector of digital service suppliers.
- 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 require full repayment of any taxes collected under a measure found to constitute a "DST or relevant similar measure" from the date such a measure took effect. As a minimum, the 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. In addition, all benefits of the MLC should be revoked for countries that maintain DSTs or ORSMs except for the obligation to provide relief where applicable (e.g., no participation in determination panels).
- We support that DSTs and relevant similar measures imposed by subnational jurisdictions would be subject to the review process described in the MLC. However, the fact that there would be no denial of an Amount A allocation and only a best efforts commitment by the Party in which the imposing subnational entity is located to achieve the removal of the measure would undermine the effectiveness of the MLC in preventing the proliferation of subnational DSTs and relevant similar measures. Absent a denial of Amount A allocation, the tax collected under subnational measures should be taken into account (and reduce) the Amount A allocation to the country of the imposing subnational entity. Moreover, to benefit taxpayers that are not within the scope of Amount A, a Party should be required to provide a credit for taxes paid under a subnational measure.

*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. In instances where the scope rules aren't met (e.g., profits below 50M EUR), there is no application of the MDSH at all, including for WHT, which will prevent the MDSH providing any relief in a substantial number of jurisdictions in which MNEs operate. 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, as mentioned above, 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*

- ICC members welcome the new Autonomous Domestic Business Exemption provision foreseen in the MLC. This provision allows to switch off Amount A's mechanism (both for profit allocation and relieving purposes) for each country where an MNE does not exceed certain thresholds in terms of percentage of intercompany cross-border transactions and imports or exports of products compared to external sales generated by the entities established in the country. Moreover, if a critical mass of countries or revenues meet the thresholds, the whole group may be out of the scope of Amount A under some conditions.
- This provision is very welcome for groups having a highly decentralized and local business model, for which the application of Amount A would lead to unintended consequences without any economic rationale.
- However, ICC members would like to point out that the thresholds which are set as a cap for the Autonomous Domestic Business to be characterized are extremely low. In particular, the maximum deviation between revenues which are sourced to a jurisdiction per Amount A sourcing rules and the external revenues recognized by the group entities in that jurisdiction is limited to 5%: this is very low even for highly local businesses. ICC members would like to suggest that the Inclusive Framework raise this threshold to 10%, which would be more realistic. Otherwise the groups which benefit from these tests may face a "cliff effect" as soon as they cease to meet these restrictive thresholds, immediately entering in the extreme complexity of Amount A's mechanism.

*Relief Mechanism*

- There are multiple components of the relief mechanism that may result in double taxation. First, where a sufficient number of relieving jurisdictions aren't members of the MLC, the relief tiering waterfall may not exhaust all the relief that needs to be provided resulting in taxation of the same income in multiple jurisdictions in a given year. Provided those jurisdictions continue not to sign on, this problem could become more than timing. We encourage the critical mass calculation to be revisited to ensure that sufficient likely relieving jurisdictions are signatories before the application of the MLC. Further, the carryforward mechanism being limited, at least optionally, to only three years could result in relief expiring prior to being

utilized in these jurisdictions. We recommend requiring an unlimited carryforward of unrelieved amounts until utilization occurs in the relieving jurisdiction.

*Segmentation rule*

- We would appreciate further simplification of the segmentation rules. The MLC segmentation rules remain complex because a single disclosed segment can often reflect expenses incurred by all group entities, resulting in a number of mixed segment entities. The MLC also requires entity-level calculations of pre-tax income, which are determined only after intercompany flows, on a segment-by-segment basis even though the standards for determining disclosed segments differ from established transfer pricing rules. As a result, MNEs will need to reconstruct transfer pricing at the segment level which is a large administrative burden.
- We question the rationale for the new transitional segmentation rule, and would like to see Annex C Section 4(2) removed, consistent with earlier versions of the Amount A proposals. This unfavorable rule puts an additional burden on MNEs with disclosed segments to run two parallel calculations (at the Group level and disclosed segment level). This increases compliance costs significantly when compared to MNEs with consolidated financials (which only have to run one consolidated calculation at the Group level).
- In any case, it is vital that the segmentation rules should not result in competitive distortions in the marketplace.

*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.