UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

April 28, 2022

VIA EMAIL

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
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Re: USCIB comments on the OECD Public Consultation Document "Pillar One – Amount A: Extractives Exclusion"

Dear Sir or Madam,

The Tax Committee of USCIB submits the comments in this letter in response to the OECD Public Consultation Document "Pillar One – Amount A: Extractives Exclusion" (the "draft rules" or the "Document"). USCIB is a multi-industry sector US trade association that promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility. Its members comprise of leading U.S.-based global companies from every sector of the US economy and professional advisory firms, both groups of which typically have operations in every region of the world. We are pleased to provide comments on this Document and the further Pillar One Consultation Documents as they are published. The comments herein generally reflect the consensus position of USCIB, unless otherwise provided.

We recognize the work that the OECD Secretariat, the members of the Inclusive Framework on BEPS (the "IF"), the Task Force for the Digital Economy ("TFDE"), and the OECD technical working parties have invested in designing the rules for the implementation of Pillar One (collectively, the "drafters").

The various provisions (or building blocks) of Pillar One are highly interrelated, and design choices made in one area of the Model Rules may have significant impacts on another area. As a result, comments such as these that are made without visibility to all other sections of the Pillar One Model Rules are necessarily incomplete. Our comments in this letter must be considered conditional pending the publication of all the draft model rules related to Pillar One. In providing comments, we are also mindful of the significant expansion of the scope of Amount A scope scheduled eight years from the effective date when the global revenue threshold for groups is reduced EUR 20 billion to EUR 10 billion.

As a general comment, the IF made the policy decision early on that "extractives and regulated financial services are excluded" from the scope of Pillar One. In implementation of this policy decision, the extractives exclusion would limit the exception to a narrow portion of the extractives value chain, namely the upstream segment. Midstream and downstream operations are imperative to the overall process of extracting natural resources. Requiring extractive MNEs to divide their revenue and profits between excluded "upstream" operations and in-scope "midstream and downstream" operations will create a significant compliance burden on both the MNEs and tax authorities that will be administering the exclusion mechanics and auditing the results. We do not see why this is necessary to achieve the policy goals of Amount A—i.e., to address misallocations of profit between jurisdictions.

Notwithstanding our comments herein to the more restrictive draft rules, we continue to advocate for a broad exception for extractives that would exclude the entire value chain.

Specific Comments

A. Consultation Request Background

The drafters acknowledge at the outset that these rules do not "reflect consensus within the TFDE regarding the substance of the document." It is hoped that the comments and suggestions expressed in this letter will be seriously considered for the next version of the rules. We also have not had the benefit of reviewing these draft rules on the Extractives Exclusion in the total context of the other Pillar One rules which have yet to be published (the so-called building blocks and the multilateral convention (MLC)). For these reasons we believe that further consultation will be necessary when the first comprehensive version of all the draft Pillar One rules and the MLC are available.

B. Schedule [F]: Extractives Exclusion

Overview

Application of the Extractives Exclusion (Steps 1 to 7)

We do not believe the "exceptional segmentation rules" should apply in addition to or after the Extractives Exclusion. This would be an additional administrative burden that for extractive groups will not produce an outcome more aligned with the policy objectives for the exclusion. It is not clear how these rules would work in practice but as the Extractives Exclusion requires detailed segmentation in any event, we consider the policy objectives are best met through using these rules for the Extractives Exclusion to look at the whole results of in-scope extractives groups and bifurcating revenues/profits accordingly as per these Steps 2 and 3 to ensure that the right revenues/profits are in-scope."

Step 2: Identify Extractive Activities and apply the Revenue Threshold to In-scope revenue

The draft rules provide that the exclusion is applied by subtracting the third-party revenue from Extractives Activities from the consolidated Group revenue figure under the general scoping rule. To determine what are Extractive Activities, a dual test is applied: a product test and an activities test. On the activities part of the test, the drafters should confirm that the Group need not own the natural resources when performing the Extractive Activities. There are common arrangements in sectors of the extractives industry (e.g., production sharing contracts or PSC regimes) in which the relevant national government owns the natural resources prior to extraction, and the extractives Group has the right to extract those resources without having legal ownership of those resources until extraction. We believe the intent of the Extractives Exclusion is to include these arrangements within the definition of Extractive Activities and would like confirmation to that effect in the draft rules. There are also common extractive arrangements in which several extractive companies are operating through an unincorporated joint venture. One company acts as the designated operator of the extractive activity while all of the companies in the joint venture share the costs of the extraction and benefit from the resources extracted. In such a case, all the companies in that joint venture should be considered as engaging in the Extractive Activities and not just the company serving as the operator of the unincorporated joint venture. The drafters should confirm that this is the case. These arrangements are

fundamentally different from a situation where a company is solely providing services as noted in paragraph 12 of Schedule [F] of the document.

The distilled definition of Extractive Activities and Delineation Point in the draft rules may result in activities that the extractive industry generally views as essential to extraction being treated as in-scope of Pillar One for purposes of determining the Amount A thresholds. Based on our interpretation of these draft rules, there will be instances where "Extraction" reaches all the way from the source country to the market jurisdiction and some instances where "Extraction" ends in the extractive source country. For clarity and ease of the tax administrative and compliance burdens, we propose that the Delineation Point be changed to include all the profit associated with sales of crude/natural gas from the source country to the market jurisdiction, i.e., the jurisdiction where the crude/natural gas will either be sold for consumption or refined into other products. This change would draw the same Delineation Point for both intercompany and third-party sales. There is no policy reason to treat third party and intercompany sales differently.

It would also be helpful for the drafters to clarify what "producer" means in the first sentence in Footnote 9 in order to determine whether transportation revenues could meet the definition of extractives and thus be excluded from Amount A. We believe that the term "producer" should mean not only the legal entity that conducts the extractive activity, but all members of the relevant Group, if one of the members of the Group is conducting Extractive Activities. The producer should not be limited to only those specific legal entities in the Group that are conducting the Extractive Activities.

The definition of Extractive Activities should include those activities that reduce carbon emissions associated with extractives, specifically carbon capture and sequestration, and other activities undertaken to extract clean energy. In addition, we believe "Extractive Product" should be expanded to include blue hydrogen.

Step 3: Identifying excluded and in-scope profits

Identifying profits using the Disclosed Operating Segment Approach

It is going to be very costly and burdensome for an extractives Group to separate out mixed segments and test each segment for the extractive delineation lines. Given the complexity of the mixed segments rules, it likely will be administratively burdensome for the relevant taxing authorities to audit and review the separation out of mixed segments for any companies that do not satisfy the predominance test. Thus, we believe the predominance test for a segment, under the Disclosed Operating Segment approach, should be 75% of revenues, the bottom of the range proposed by the drafters. Furthermore, we do not believe there should be a second part to this test (in-scope revenues no more than EUR 1 billion) as the compliance burden of combing through the Upstream segment in companies' financials will be very high, and we do not believe the extractives industry should have any specific Euro thresholds or rules requiring sub-segmentation to which other industries or Groups are not subject. To reduce what could be a very significant administrative burden for companies and for taxing authorities, we recommend that the predominance test under the Disclosed Operating Segment approach have only a single threshold: 75% of revenues, with no additional Euro threshold in the threshold test.

Reapplication of the profitability threshold

The profitability threshold should apply to the remaining in scope revenues as a whole. No further segmentation should be required.

We are available to the TFDE to discuss any aspects of our comments in this letter.

Best regards,

Timothy McDonald
Chair, Taxation Committee
United States Council for International Business

Rick Minor
Vice President & International Tax Counsel
United States Council for International Business