

April 29, 2022

Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
By email to tfde@oecd.org

**Re: Business Roundtable comments on OECD public consultation on Pillar One—Amount A:
Extractives Exclusion**

Dear Sir/Madam,

Business Roundtable welcomes the OECD's commitment to working multilaterally and with the private sector to ensure sound tax policies and straightforward tax administration, which are essential to protecting investment and economic growth.

On behalf of more than 200 chief executive officers of America's leading companies, Business Roundtable is pleased to submit comments in response to the OECD's public consultation of April 14, 2022 on the Extractives Exclusion from the Pillar One, Amount A rules.

Scope of Extractives Exclusion

We are disappointed that the draft Model Rules do not provide for an exclusion for the entirety of the revenue and profits of an MNE engaged solely in the business of extracting natural resources and selling products derived from the processing of the extracted resources. Requiring extractive MNEs to divide their revenue and profits between excluded "upstream" operations and in-scope "downstream" operations will create a significant compliance burden for the affected groups. We do not see why this is necessary to achieve the policy goals of Pillar One, Amount A—i.e., to address misallocations of profit between jurisdictions caused by new business models that are based on intangible assets, data collection and analysis, and the ability to create scale without mass. The extractive industries' value chains do not have this character, in the "upstream," "midstream," or "downstream" segments of the value chain.

In our view, the Inclusive Framework should reconsider the scope of the Extractives Exclusion in light of the fact that there is not a compelling policy argument for limiting it to upstream operations, and also in light of the many complex issues that need to be dealt with in other areas of the Pillar One, Amount A rules. Creating unnecessary complexity and administrative burden is simply not appropriate. It should be noted also that the Inclusive Framework said, in its October 8, 2021 Statement on the Two-Pillar Solution, that extractives would be excluded, without limiting the scope of the exclusion in any way.

If, however, the Inclusive Framework decides to adhere to the limited scope of the Extractives Exclusion as reflected in the public consultation document, we request that the following comments be taken into account in further work on the relevant Model Rules.

Segmentation

We would like to confirm that segmentation is only required in Step 1 and not again, or differently, in any other step. This preserves the intent that segmentation is only in exceptional circumstances and ensures that MNEs in the extractive industries are not subject to any different rules than other industries with respect to segmentation.

Definitions of Extractive Activities and Extractive Product

Production sharing contracts, licenses/concessions, and the like

We would appreciate confirmation in the final Model Rules that an MNE performing extractive activities need not own the in-ground natural resources in order to be considered as performing Extractive Activities as defined in the draft Model Rules. There are very common arrangements in the extractive industries (e.g., Production Sharing Contract arrangements) in which the government owns the in-ground natural resources and an MNE has the right to extract those resources and to sell the resources after extraction. We believe the intent of the Extractives Exclusion is to include these common arrangements within the definition of Extractive Activities but would like confirmation of this.

Extractive joint ventures

There are also common arrangements in which a number of companies form an unincorporated joint venture to extract certain natural resources, with one co-venturer being designated as the operator while all of the co-venturers in the joint venture share the costs and the resulting Extractive Products. We believe that all of the co-venturers should be considered as performing Extractive Activities in these cases, and would like to see this clarified in the final Model Rules. It should be noted that these joint venture arrangements are fundamentally different from cases in which a company is just providing services as noted in the last sentence of paragraph 12 of the public consultation document.

Reduction of carbon emissions, production of clean energy

We believe the definition of Extractive Activities should expressly include activities to reduce carbon emissions associated with extractive activities, specifically carbon capture and sequestration, as well as other activities undertaken to extract clean energy. Along with this, we believe that the definition of “Extractive Product” should be expanded to include blue hydrogen.

Definition of Delineation Point

The definitions of Extractive Activities and Delineation Point in the draft rules may result in activities the industry generally views as essential to extraction as being in-scope of Pillar One. Based on our interpretation, there will be instances where “Extractive Activities” reach all the way to the market jurisdiction and other instances where “Extractive Activities” end in the extractive source country. For clarity, ease of administration, and avoidance of unnecessary compliance burden, we propose that the definition of Delineation Point be changed so that the Extractives Exclusion covers all revenues from sales of Extractive Products outside the market jurisdiction (i.e., the jurisdiction where the Extractive Products are either sold for consumption or refined into other products). This change would make the Delineation Point the same for both intercompany and unrelated party sales, which should not be treated differently as a policy matter.

Definition of Transportation

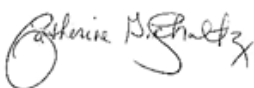
We would appreciate clarification in the final Model Rules that the reference to “producer” in footnote 9 of the public consultation document includes any member entity of the MNE group that extracted the products in question, as opposed to only the entity that performed the relevant Extractive Activities.

Predominance test for Disclosed Operating Segment Approach

It will be very costly and burdensome for large extractive MNEs to separate out mixed segments and test each segment for the purposes of Step 3. Thus, we believe the predominance test for a segment, under the Disclosed Operating Segment approach, should be 75% of revenues rather than 85%. Moreover, we do not believe there should be a second part to the predominance test (i.e., in-scope revenues of no more than Euro 1 billion) as this is merely an arbitrary fixed amount that, as a requirement of the predominance test, would discriminate unfairly against large extractive MNEs that would otherwise satisfy the test.

Business Roundtable urges the Inclusive Framework to take the above comments into account in its work on the Extractives Exclusion, in the interest of ensuring that the exclusion will apply as intended. We appreciate your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



Catherine Schultz
Vice President, Tax and Fiscal Policy
Business Roundtable
cschultz@brt.org
+ 1 202-467-5266