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To:
State Secretary for Tax Affairs and the Tax Administration
Mr. M.L.A. (Marnix) van Rij

December 2, 2022

Director-General Tax Matters at Ministry of Finance
Drs. J.K. (Jasper) Wesseling

Tax Policy Advisor at Ministry of Finance
Mr. M. (Mohamed) Maâtoug

Subject: **AmCham Netherlands – Pillar Two Consultation**

Dear Mr. van Rij, Mr. Wesseling and Mr. Maâtoug,

AmCham Netherlands[1] supports your objective and efforts to create a global minimum tax on corporate profits based on a uniform set of rules and welcomes the opportunity to provide input with respect to the consultation document '*Conceptwetsvoorstel Wet minimumbelasting 2024 (Pijler 2)*'.

<u>**Executive Summary**</u>

- In 2021, the Organisation for Economic Development and Co-operation ("OECD") reached a political agreement to adopt Pillar 2 within the Inclusive Framework based on a uniform set of rules. As a result of subsequent developments, however, it is unlikely that Pillar 2 will be adopted globally based on the same set of rules, as: (i) the US has adopted a different system for global minimum taxation; (ii) it is uncertain if and when agreement can be reached within the European Union; and (iii) little progress has been made in certain other significant jurisdictions;

- The Pillar 2 system was designed for global adoption and does not function properly if it is not aligned with other comprehensive systems for global minimum taxation. Misalignment between the US system and the proposed Pillar 2 rules gives rise to significant issues, particularly for US companies, including: (i) double taxation; (ii) jurisdictional disputes; and (iii) the undoing of tax incentives that are intended to address global environmental, health, and social challenges and to foster research and innovation;

- Furthermore, in its proposed form, the Undertaxed Profits Rule ("UTPR") presents a number of legal issues under international law, European Union ("EU") law and bilateral tax treaties, including the Dutch income tax treaty with the US, and should be reconsidered;

- We strongly encourage the Netherlands as a frontrunner on Pillar 2 to work within the OECD to procure (i) clear guidance on the alignment between the US system and the Pillar 2 rules, (ii) a reconsideration of the UTPR, (iii) the development of safe harbor rules for qualifying jurisdictions and operations, and (iv) the adoption of an effective dispute resolution mechanism, and to make sure that these issues are resolved prior to the adoption of Pillar 2 rules in the EU and/or the Netherlands.

[1] The American Chamber of Commerce in the Netherlands ("AmCham Netherlands") is a non-profit member organization. Our members include (amongst others) United States ("US") companies that are active in the Netherlands as employers, innovators, promotors of sustainability, taxpayers and investors. We see it as a joint interest of the Netherlands, these companies and their employees that the Netherlands is an attractive country for (new) investments that can serve as a catalyst for employment, diversity, innovation and sustainability.

1. Interaction with the US Tax System

The US has done more than most other jurisdictions to ensure that its multinationals are subject to a minimum level of taxation over their global profits:

(a) in 2018, the US introduced the Global Intangible Low-Taxed Income ("GILTI") regime. GILTI is a comprehensive controlled foreign corporation ("CFC") regime that subjects US multinationals to a minimum tax ranging between 10.5% and 13.125% with respect to certain categories of foreign income.[2] In practice, the actual effective tax rate ("ETR") is often higher due to limitations with respect to the deduction of costs and the use of tax credits;[3] and

(b) as of 2023, large US multinationals will also be subject to the 15% Corporate Alternative Minimum Tax ("CAMT"), a minimum tax on adjusted financial statement income.

As a result of GILTI and CAMT, the US system is substantively aligned with Pillar 2, but there are differences. A notable difference between the GILTI and CAMT rules, on the one hand, and the proposed Pillar 2 rules, on the other hand, is that GILTI and CAMT use a global blending approach to assess whether the ETR is sufficient, as opposed to the country-by-country approach under Pillar 2.

Absent clear guidance on the interaction between GILTI, CAMT and Pillar 2, the interaction of the OECD and US systems will give rise to double taxation and jurisdictional disputes with the EU's largest trading partner. In order to avoid these problematic consequences, the following issues should be resolved prior to the adoption of Pillar 2 by the Netherlands and, more broadly, the EU:

(a) Do GILTI or CAMT constitute a qualifying income inclusion rule ("IIR")?

(b) Do GILTI or CAMT constitute a covered CFC tax and, if so, how should one or both be allocated between CFCs for purposes of determining their global ETRs? There will need to be an accepted methodology to allocate GILTI and CAMT to the relevant countries so it can be accounted for in the GloBE calculation. In the Annex to this submission, we offer certain views regarding how to apportion GILTI;

(c) Do countries have to reduce their QDMTT with the GILTI, CAMT and Subpart F taxes in accordance with Section 4.2.3(c) of the OECD Model Rules?

Currently, there is no clear guidance available with respect to these issues in either the Dutch draft legislation or in the OECD and EU proposals. We urge you to ensure that these issues are addressed prior to adopting Pillar 2 rules.

2. UTPR under International Law

Several academics and tax policy professionals have expressed concerns of a potential conflict between the UTPR and customary international law, EU law, and bilateral income

[2] We note that, in general, although most of a US CFC's revenue is taxed under the GILTI regime, certain passive-type revenue is taxed under a separate regime referred to as Subpart F and other, albeit typically little, CFC revenue is either exempt (e.g., certain foreign oil and gas-related income) or reduced based on that CFC's basis in its tangible assets.

[3] We note that the US only allows a credit against GILTI of 80% of the foreign taxes incurred, resulting in double taxation for the remaining 20%.

tax treaties.[4] As such potential conflicts cause significant legal uncertainty and may give rise to jurisdictional disputes, particularly for US companies, AmCham requested two expert tax research firms, namely, the Dutch firm of Lubbers, Boer & Douma and the Austrian firm of Bräumann Kofler Tumpel Tax Research GmbH, to review these issues. Unfortunately, they confirm these concerns, which may be summarized as follows:

(a) The UTPR, as currently proposed, is at odds with customary international law;

(b) It is uncertain if treaties that are based on the OECD Model Convention, with which virtually all Dutch income tax treaties are consistent, allow for a UTPR as currently proposed. The Dutch consultation document does not address this issue. Currently, the only 'guidance' on this issue is from the OECD in relation to the earlier report '*Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint*'. However, this earlier report referred to a very different rule; that is, an undertaxed *payments* rule, rather than an undertaxed *profits* rule;[5] and

(c) The UTPR leads to unequal treatment of companies active within the same market, depending on whether or not they are part of a multinational group. This unequal treatment raises concerns under the EU freedoms.

The introduction of a UTPR that gives rise to these legal uncertainties and disputes will affect both businesses and governments. Thus, the Netherlands and the EU should consider a delay in the introduction of the UTPR, as currently proposed, until the relevant income tax treaties have been amended (such as through a new multilateral instrument) or, alternatively, provide for a UTPR safe harbor for treaty countries. Without amendment of the treaties or a safe harbor, the UTPR's design should be reconsidered.

3. Clarity on Safe Harbors

The introduction of the Pillar 2 rules will give rise to significant incremental administrative burdens for companies that are in scope. If, as proposed, the IIR and QDMTT become effective January 1, 2024, companies will need to be prepared by early 2023 to determine the new rules' impact on their financial statements under applicable financial accounting rules and to timely report that impact as required under local law (*e.g.*, pursuant to US Securities and Exchange rules). This affords them little time to build the organization and enterprise resource planning-systems required to ensure timely access to a significant amount of new data[6] that will be required to comply with Pillar 2 (in addition to the separate and distinct systems for GAAP, corporate income tax, Country-by-Country Reporting ("CbCR"), GILTI and CAMT that either already exist or are in the process of being built).

In view hereof, it is important to obtain clarity on safe harbors as soon as possible - particular, with respect to jurisdictions or operations that will be presumed to have a sufficient level of tax – as this will allow companies and governments to focus their compliance framework and avoid unnecessary compliance and administrative burdens. Unfortunately, while we understand that the OECD is working on such efforts, there is currently no guidance available with respect to these issues, which raises an immediate concern given the timeline of the Dutch proposal.

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[4] See, *inter alia*, (i) 'De Wilde (2022), Why Pillar Two Top-Up Taxation Requires Tax Treaty Modification', (ii) 'Debelva & De Broe (2022), Pillar 2: An analysis of the IIR and UTPR from an international customary law, tax treaty law and European Union law perspective', (iii) 'VanderWolk (2022), The UTPR is Inconsistent with the Nexus Requirement of Tax Treaties', (iv) 'Hongler (2021), Is the Pillar 2 Agreement Infringing International Law Obligations?', (v) 'Kallergis (2022), L'imposition mondiale minimale effective à l'épreuve du droit international fiscal conventionnel', (vi) 'VanderWolk (2022), The UTPR is Far From Becoming Part of Customary International Law', (vii) 'Lebovitz et al (2022), If Pillar 1 Needs an MLI, Why Doesn't Pillar 2?', and (viii) 'Noren (2022), Modifying Bilateral Income Tax Treaties to Accommodate Pillar Two UTPR Rules'.

[5] For instance, under the UTPR, the Netherlands would tax business profits of a US affiliate that has no nexus with the Netherlands. Although US companies are often subject to a ETR well in excess of 15%, the US government has introduced a number of tax incentives to address global environmental, health, and social challenges and to foster research and innovation. Such incentives may cause US companies to have a lower ETR. The application of the UTPR would undo such incentives.

[6] Please note that this may involve up to 150 data points per legal entity.

With respect to the design of the safe harbors, we note that the existing CbCR data may be a valuable tool in determining safe harbors, as they would allow businesses to rely on an already existent administrative and reporting framework. More concretely, a 'safe harbor ETR' could be determined by permitting the use of unadjusted commercial income data and current taxes under CbCR until more detailed compliance rules are introduced and become effective. Finally, we note that it will be important to structure the safe harbors so that they are aligned with the US system.

4. Dispute Resolution

The current Pillar 2 proposals do not include a comprehensive dispute resolution mechanism yet it entails a major overhaul of international standards and, as set forth above, presents a number of legal issues. We strongly encourage the Netherlands to work with the OECD to ensure that a uniform dispute resolution mechanism is adopted prior to introducing Pillar 2.

5. EU Agreement

We support the desire of the Dutch government to implement Pillar 2 under an EU Directive as the rules only function properly if adopted on a global basis as intended by the OECD. Furthermore, we have requested the aforementioned expert tax research firms of Lubbers, Boer & Douma and Bräumann Kofler Tumpel Tax Research GmbH to review the EU law impact of a possible *alleingang* and they conclude that this would likely lead to a distortion of the EU market, which is not allowed under primary EU law.

Concluding Remarks

We encourage the Netherlands, as a frontrunner on Pillar 2 reforms, to work within the OECD to procure:

(a) clear guidance on the alignment between the US system and the Pillar 2 rules;
(b) a reconsideration of the UTPR;
(c) the development of safe harbor rules for qualifying jurisdictions and operations, and
(d) to adopt an effective dispute resolution mechanism,

and to ensure that these issues are resolved prior to adoption of Pillar 2 rules in the Netherlands, and more broadly, the EU.

We would welcome an opportunity to elaborate on our observations and the research on the legal issues conducted by Lubbers, Boer & Douma and Bräumann Kofler Tumpel Tax Research GmbH at your earliest convenience.

On behalf of AmCham Netherlands,

Sincerely yours,

Marc ter Haar,
Executive Director

Lodewijk Berger,
Chair Tax Committee

Annex: **GILTI ALLOCATION**

Section 4.3.2(c) of the Pillar 2 Model Rules state that, "in the case of a Constituent Entity whose Constituent Entity-owners are subject to a Controlled Foreign Company ("CFC") Tax Regime, the amount of any Covered Taxes included in the financial accounts of its direct or indirect Constituent Entity-owners under a CFC Tax Regime on their share of the CFC's income are allocated to the Constituent Entity." We understand that the Dutch government generally views the US GILTI regime as a CFC Tax Regime. While the Dutch consultation document does not specifically reference Section 4.3.2(c) of the Pillar 2 Model rules, we understand generally that the Dutch government desires to closely follow those rules. Further, we understand that there is ambiguity (and the Dutch government has requested comments) regarding how to determine the portion of the GILTI tax accrued on a Constituent Entity's share of its income.

Below, we offer our views regarding how to apportion the GILTI tax under Section 4.3.2(c) and under the future Dutch rules. Specifically, we offer three different allocation methodologies and comment on each method. We also note that the amount of US tax incurred by a US UPE as a result of the GILTI regime is not specifically disclosed on a US filing or in its financial accounts. Accordingly, it is first necessary to determine the amount of the "GILTI Tax" incurred before it can be allocated. We offer our views on a method to identify the amount of the GILTI Tax.

Determination of the GILTI Tax:
We would propose that the amount of the GILTI Tax of a US UPE be determined by subtracting the actual cash taxes paid from the hypothetical tax that would have been paid if the US UPE did not include GILTI (as determined under Sec. 951A) in taxable income- a so called "with and without" calculation. The hypothetical tax calculation may include differences in the allowed foreign tax credits, differences in the allowable expenses after considering applicable taxable income limitation calculations, and any other potential differences caused by the elimination of the GILTI inclusion. We would note that in some cases, the hypothetical calculation may result in the generation or utilization of a different amount of tax attributes than generated or utilized in the actual tax calculations. For example, in Exhibit I below, a US UPE generates GILTI inclusions that would have resulted in 50 of GILTI Tax in both years 1 & 2, however, applicable attribute limitation rules when imposed on the hypothetical calculation would have reduced the amount of allowable attributes in year 1 by 20 and allowed the unused portion to reduce taxes by 20 in year 2. We would propose that the GILTI Tax be reduced to 30 in year 1 to account for the attribute limitation rule and the GILTI Tax be increased to 70 in year 2 to account for the hypothetical utilization of the attribute. Failure to make these adjustments may result in a material understatement of the allocation of GILTI Tax across multiple tax years. We think it also could be possible to determine the GILTI Tax before the impact of attributes, and we would be happy to discuss possible policy concerns where GILTI Tax is determined in a year preceding when the actual US cash tax is paid.

Exhibit I

Year 1	Actual Tax	Hypothetical	GILTI Tax
Tax	100	50	50
Attributes	-70	-70	0
Adjustment	0	20	-20
Adjusted Tax	30	0	30

Year 2	Actual Tax	Hypothetical	GILTI Tax
Tax	100	50	50
Attributes	-20	-20	0
Adjustment	0	-20	20
Adjusted Tax	80	10	70

Allocation of the GILTI Tax- Income Allocation Method:
Under this Income Allocation Method, GILTI Tax is allocated to a Constituent Entity based on the proportionate share of its GILTI. The GILTI Tax is 10.25 as determined using the "with and without" method as described above. See Exhibit II.

Under this method, the taxpayer is likely double taxed on a portion of the income earned by Entity B and Entity C as 4.1 of the GILTI tax is mechanically and inappropriately allocated to Entity A. We would view any allocation to Entity A as inappropriate because the jurisdiction in which it operates imposes a high rate of tax and the GILTI Tax was clearly not assessed on Entity A's share of income. Accordingly, we believe this method would be a poor choice to select.

Exhibit II

Constituent Entity	Income	Local Rate	Local Tax
Entity A	100	30%	30
Entity B	100	10%	10
Entity C	100	0%	0
	300		40

GILTI Tax Allocation	GILTI	Allocation of GILTI Tax based on GILTI	Adjusted Covered Taxes
Entity A	100	4.1	34.1
Entity B	100	4.1	14.1
Entity C	50	2.1	2.1
	250	10.25	50.25

Allocation of the GILTI Tax- Entity-by-Entity ("EbE") Method:
Under this EbE Method, GILTI Tax is allocated to a Constituent Entity based on its proportionate share of GILTI Tax computed on a constituent entity by constituent entity basis. Under this method, the GILTI Tax is 10.25 as determined using the "with and without" method as described above. The GILTI Tax for a given Constituent Entity is also determined using the "with and without" method for each Constituent Entity. See Exhibit III.

We believe this method removes most of the risk of double taxation and achieves the most faithful allocation of the GILTI Tax to the applicable Constituent Entity, however; we do not believe this is a practical method to apply. The example in Exhibit III is a relatively simple example and does not consider loss entities, disregarded entities, fiscal group allocations, and other nuances that can make this method very challenging for a taxpayer to compute and even more challenging for a tax administrator to review. Further, this method would likely require uniform guidance to restate the various features of GILTI (and each other CFC regime) on an EbE basis. Accordingly, we believe this method would also be a poor choice to select.

Exhibit III

Constituent Entity	Income	Local Rate	Local Tax
Entity A	100	30%	30
Entity B	100	10%	10
Entity C	100	0%	0
	300		40

GILTI Tax Calculation	Actual GILTI	Entity A	Entity B	Entity C	Total
Net tested income	300	100	100	100	300
Sec. 951A- QBAI deduction	-50	0	0	-50	-50
GILTI	250	100	100	50	250
Sec. 250- 50% deduction	-125	-50	-50	-25	-125
Taxable Income	125	50	50	25	125
US Rate	21%	21%	21%	21%	21%
Tax	26.25	10.5	10.5	5.25	26.25
FTC	-16.0	-10.5	-4.8	0.0	-15.3
GILTI Tax on EbE basis	10.25	0.0	5.7	5.3	11.0
FTC					
Foreign Taxes	40	30	10	0	
Sec. 960(d) 80% haircut	80%	80%	80%	80%	
Sec. 960(d) Inclusion %	83%	100%	100%	50%	
Sec. 904 limitations	60%	60%	60%	60%	
FTC	16.0	14.4	4.8	0	

GILTI Tax Allocation	GILTI Tax on EbE basis	Allocation of GILTI based on EbE Method	Adjusted Covered Taxes
Entity A	0.0	0.0	30.0
Entity B	5.7	5.3	15.3
Entity C	5.3	4.9	4.9
	11.0	10.25	50.25

Allocation of the GILTI Tax- Effective CFC Regime Rate Method:

Under this method, GILTI Tax is allocated to a Constituent Entity at the Effective CFC Regime Rate- which is the rate when applied to the GILTI of each respective Constituent Entity and reduced by the Covered Taxes (measured before the allocation of the GILTI Tax) yields the amount of the GILTI Tax. Under this method, the GILTI Tax is 10.25 as determined using the "with and without" method as described above. The Effective CFC Regime Minimum Rate of 13.5% was very easily determined using a goal-seek function in Excel. In this Exhibit IV, 13.5% is the rate that when applied against each entity's GILTI and reduced by the local tax yields the GILTI Tax. See Exhibit IV.

This method reduces the risk that a taxpayer is taxed twice on the same income. The method may not precisely allocate the GILTI Tax to the most appropriate jurisdiction, however the guidance for this method can be written broadly for all CFC regimes and easily audited by taxing authorities. Accordingly, we believe this method may represent a practical mid-point between the first two methods.

We would also note that many taxpayers pay GILTI Tax because of nuances in the US FTC rules and not because they earn income in jurisdictions with low tax rates. In those cases, we think it may be most appropriate to impose a cap on the Effective CFC Regime Minimum Rate. Specifically, we might suggest that the CFC Regime Minimum Rate be capped at 15% and any unallocated GILTI Tax be considered a Covered Tax of the US UPE. We would acknowledge that there are likely many other flavors of methods that also (or perhaps better) viably balance complexity and precision of allocation.

Exhibit IV

Constituent Entity	Income	Local Rate	Local Tax
Entity A	100	30%	30
Entity B	100	10%	10
Entity C	100	0%	0
	300		40

GILTI Tax Allocation	GILTI	Effective CFC Regime Minimum Rate	Effective CFC Regime Minimum Tax	Less: Covered Taxes before CFC Regime Tax	GILTI Tax
Entity A	100	13.5%	13.5	30	0
Entity B	100	13.5%	13.5	10	3.5
Entity C	50	13.5%	6.75	0	6.75
	250				10.25