To:	Dutch Ministry of Finance
From:	American Tower Corporation
Date:	December 5, 2022

Subject: Consultation Minimum Tax Act 2024

1. Introduction

We have taken note of the draft Minimum Tax Act 2024 ("**MTA 2024**") that aims to implement a minimum tax in the Netherlands based on OECD's Pillar 2 rules. While we welcome this initiative, we are concerned about the additional compliance burden that taxpayers may face to comply with these new rules. We are therefore pleased that the MTA 2024 does not apply to certain entities that serve a public interest. This is materialized in article 2.1 of the MTA 2024, which states that the MTA 2024 rules should not apply to excluded entities. While we appreciate this exclusion, we are concerned that it leaves room for multiple interpretations as article 2.2 MTA 2024 includes terms and requirements that are not clearly defined or elaborated. In our view, both taxpayers and tax authorities should benefit from clear rules that leave no room for different interpretations. In this reaction to the MTA 2024 consultation, we address the uncertainties caused by the current draft article 2.2 MTA 2024 for Real Estate Investment Vehicles ("**REIVs**") and more specifically, United States Real Estate Investment Trusts ("**REITs**").

2. Real Estate Investment Vehicles

2.1. Relevance of the exclusion of REIVs

REIVs serve an important public policy objective by providing a means for individuals to invest in real estate by acquiring shares of a REIV. These investments assist REIVs to invest on a long-term basis. Most countries implemented regimes that aim to avoid an additional layer of taxation for investors that want to pool their investment using a REIV (e.g., the FBI regime in the Netherlands). These preferential regimes are often only available to REIVs if strict requirements are met. This is to ensure that tax cannot be avoided or deferred using the local REIV regime. In most countries, these requirements include asset/income tests and a distribution requirement.

2.2. United States Real Estate Investment Trust

The U.S. REIT rules require that their assets must mostly consist of real estate and their income must be rental real estate income. Since they must distribute substantially all of their taxable income, many REITs are more dependent on capital markets to raise money. Also, in order to conduct non-real estate activities, REITs must conduct these activities in Taxable REIT subsidiaries ("**TRS**") and REITs cannot invest more than 20% of their overall value in TRSs. To the extent the TRS limit is exceeded, the activities and assets of the TRS must be brought into the REIT, subjecting those activities to REIT testing. While U.S. TRSs are already subject to U.S. taxation, foreign TRSs are not. As such, when the assets and activities of foreign TRSs are brought into the REIT, the taxable income generated thereby is subject to immediate taxation in the U.S. As such, under current rules, in the case of a U.S. REIT with international operations, much of its worldwide income is subject to immediate taxation in the

U.S. either through the CFC or GILTI rules or because the TRSs' assets are distributed to the REIT. This U.S. tax is in addition to taxes incurred and currently paid in the real estate's country of residence. While Qualified REIT subsidiaries ("**QRS**") are part of the REIT, TRS entities operate within the same group and line of business but are separate legal entities and are not considered part of the REIT.

3. Review of relevant MTA 2024 Articles

3.1. REIVs as an excluded entity

Article 2.1 MTA 2024 states that the minimum tax does not apply to "excluded entities". According to Article 2.2 (1)(a) MTA 2024, a REIV should qualify as an excluded entity. A REIV refers to a widely held entity that predominantly holds immovable property. The definition of real estate investment vehicle is based on the "special tax regime" provision included in paragraph 86 of the Commentary on Article 1 of the OECD Model Convention 2017.

Although the object and purpose of the exclusion of REIVs from the MTA 2024 indicates that REITs should be considered excluded entities, the proposed rules do not define "immovable property" or "predominantly," making the standard inherently vague. It is not clear whether the term "immovable property" is intended to refer to local legislation (and if so, of which jurisdiction) or to a standardized definition (which is not included in MTA 2024). The inherent lack of clarity in the term "immovable property" is evidenced by the many different ways "immovable property" is defined in the domestic laws of different jurisdictions around the world.

A second requirement is that the entity has an asset profile that "predominantly" consists of immovable property. We note that the term predominant is undefined and the standard is unclear. For example, it is unclear whether the relevant value is fair value, book value, or tax written down value, and it is unclear what threshold represents "predominant." Further, even if the threshold to meet the "predominant" standard was to be clarified, the methodologies for determining and allocating values to various classes of assets vary across jurisdictions. The result is that differing rules applied to the same facts may result in different conclusions.

3.2. An entity that is owned by an excluded entity

In addition to the possibility of excluding a REIV from the application of MTA 2024, it is possible to exclude an entity that is not considered a REIV itself but is owned by one. The importance of this addition is evident, considering the fact that in general, REIVs operate internationally, and their general line of business requires setting up entities in different jurisdictions, with their own operations supporting the REIV as a whole.

As currently drafted, Article 2.2 (1)(b) includes a requirement that an excluded entity is also "an entity that is owned at a minimum of 95 % by one or more entities referred to in point (a), directly or through several such entities, except pension services entities, and that:

(i) operates exclusively, or almost exclusively, to hold assets or invest funds for the benefit of the entity or entities referred to in point (a); or

(ii) exclusively carries out activities ancillary to those performed by the entity or entities referred to in point (a)."

Consideration should be given to the potential that this language may be problematic with respect to foreign operating entities in a REIT structure. As summarized under paragraph 2.2, a REIT can have domestic and foreign QRS or TRS entities. Depending on their qualification, these entities may for example operate as rental companies that do not merely "hold" or "invest" assets. While it is our expectations that such operations could still qualify as ancillary, it would be helpful if examples can be included in legislative history of ancillary activities of REIVs that confirm this.

4. Proposed amendments

4.1. Article 2.2 (1) (a) MTA 2024

To resolve the uncertainties around the definition and interpretation of the terms "immovable property" and "predominantly", as referred to in Article 2.2 MTA 2024, we propose adding the following wording to Article 2.2(1)(a) MTA 2024: *"…, including the real estate investment vehicles listed in Annex 1"*. By adding a list of REIVs that, based on the object and purpose of MTA 2024, are clearly meant to be considered excluded entities, the currently lacking clarification is provided for different REIVs around the world. This is similar to what is done in Annex 1, Part A to the Parent Subsidiary Directive[1], which includes a list of companies that are referred to in Article 2(a)(i) of the Directive. Another example is the Dutch list of qualified foreign partnerships, which the Decree on the qualification of foreign partnerships[2] refers to.

4.2. Article 2.2 (1) (b) MTA 2024

To resolve the uncertainties around the interpretation of the requirement to operate "exclusively, or almost exclusively, to hold assets or invest funds for the benefit of" an excluded entity, we propose adding the following to Article 2.2. (1)(b): *"..or (iii) carries out operations in the same line of business as the excluded entity or entities"*.

Alternatively, the proposed amendments could be incorporated and clarified in the memorandum of explanation to the MTA 2024.

[1] Council Directive 2011/96/EU.
[2] Besluit kwalificatie buitenlandse samenwerkingsverbanden, Nr. CPP2009/519M.