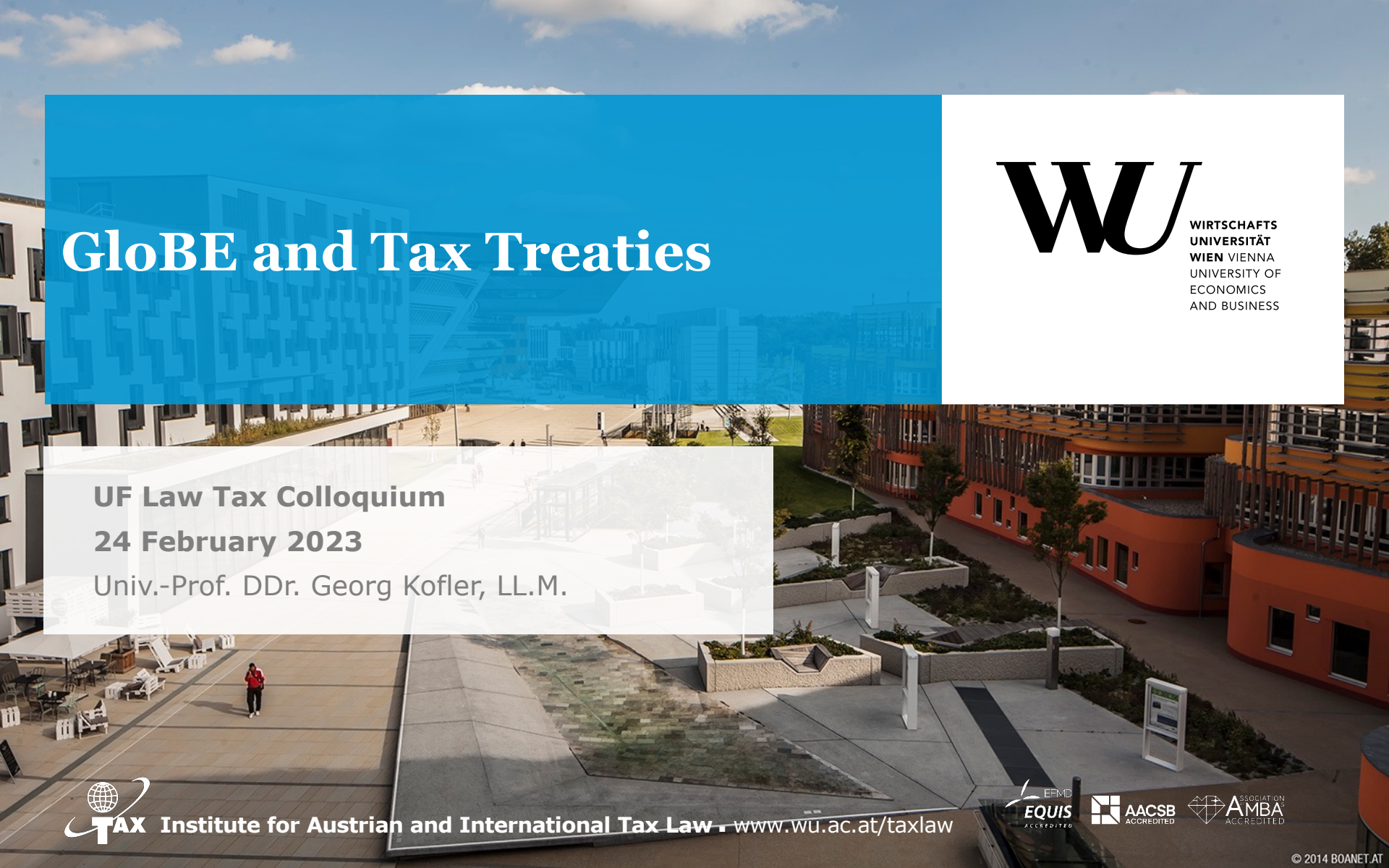
GloBE and Tax Treaties



WIRTSCHAFTS UNIVERSITÄT WIEN VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS

UF Law Tax Colloquium

24 February 2023

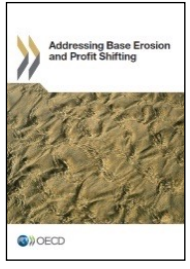
Univ.-Prof. DDr. Georg Kofler, LL.M.

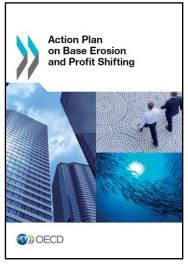
OECD | *Two Pillar Solution*

Digital Economy

Digitalized Economy

Digitalized Economy + BEPS 2.0





OECD: Interim Report

EU: Proposals (DST, SDP)

Consultation Paper on Pillar 1 and Pillar 2 (GloBE)

2013

Implementation

2018

Early 2019

Before 2013

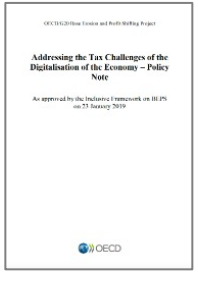
2015

ACTION 1

Address the tax challenges of the digital economy

Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation. Issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterisation of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services. Such work will require a thorough analysis of the various business models in this sector.

January 2019



Inclusive Frame-work → 2 Pillars: Nexus and allocation and „BEPS 2.0" (GloBE)

OECD | *Two Pillar Solution*

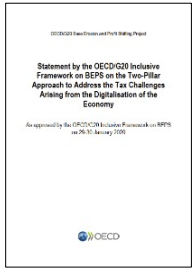
Digitalized economy + BEPS 2.0 → Digitalized (and consumer-facing) economy + BEPS 2.0

Since 2019

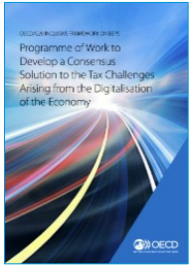
Full G20 support for a consensus-based two-pillar solution and since then various progress reports by the OECD (e.g., Oct. 2019, Feb. 2021, April 2021, July 2021, Oct. 2021) and ongoing committment by the G20 to the Two Pillar Approach (e.g., June 2019, Nov. 2020, July 2021, Oct. 2021, July 2022)

January 2020

Outlines for Pillar 1 and 2 – „[M]embers of the Inclusive Framework affirm their commitment to reach an agreement on a consensus-based solution by the end of 2020"



May 2019



Program for technical work on both pillars

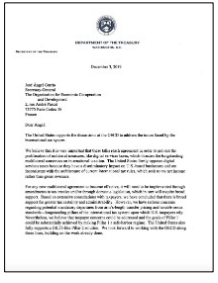
October 2019

Consulation Paper on the "Unified Approach" for Pillar 1

November 2019

Consultation Paper on Pillar 2

December 2019



„Safe harbor"-approach of the US for Pillar 1

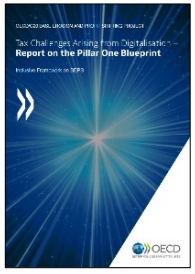
OECD | *Two Pillar Solution*

Digitalized (and consumer-facing) economy + BEPS 2.0

Large, profitable MNEs + BEPS 2.0

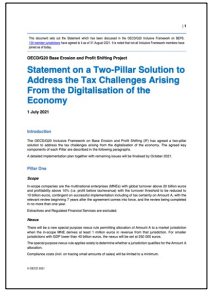
October 2020

Blueprints for Pillars 1 and 2, report on economic impact and Public Consultation



July 2021

OECD, Statement on a Two-Pillar Solution (1 July 2021)



October 2021

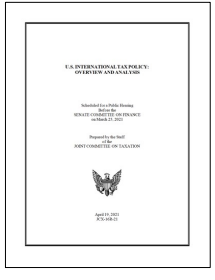
PRESS RELEASES

Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect

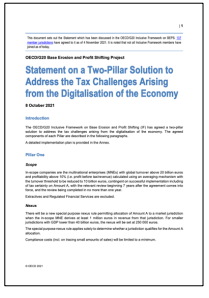
Juni 2020

US find themselves "at an impasse" regarding Pillar 1

April 2021



US Joint Committee on Taxation, U.S. International Tax Policy: Overview And Analysis, JCX-16R-21 (April 2021)

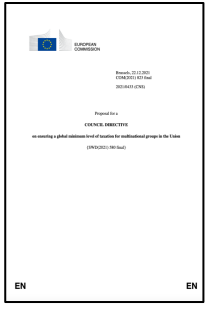


October 2021

OECD, Statement on a Two-Pillar Solution (8 October 2021) → *As of Dec. 2022, 138 Members of the OECD/G20 Inclusive Framework on BEPS joining the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (including Brazil, China, USA)*

OECD (and EU) | *Pillar Two*

Proposal for a ***Directive*** implementing Pillar Two, COM(2021)823 (Dec. 22, 2021)



- ***EU MS*** → Estonia, Hungary and Ireland have eventually joined the October Statement, Cyprus supportive, but not member of the IF/OECD
- Some MS's concerns addressed in the ***compromise texts*** in Doc. 10497/22 (21 June 2022) and Doc. 6975/22 (Mar. 12, 2022), e.g., further options, delay of implementation, penalties
- Joint Statement by France, Germany, Italy, Netherlands and Spain (9 September 2022) ("G5")
- Council Directive (EU) 2022/2523, [2022] OJ L 328/1 (***"Pillar Two Directive"***)

Entry into force

- ***OECD*** → October Statement: „Pillar Two should be brought into law in 2022, to be effective in 2023, with the UTPR coming into effect in 2024".
- ***EU*** → Fiscal years beginning from ***Dec. 31, 2023*** (for IIR) and ***Dec. 31, 2024*** (for UTPR) (Art. 56 Directive)

Dec. 2021 | **2022/2023** | **2023**

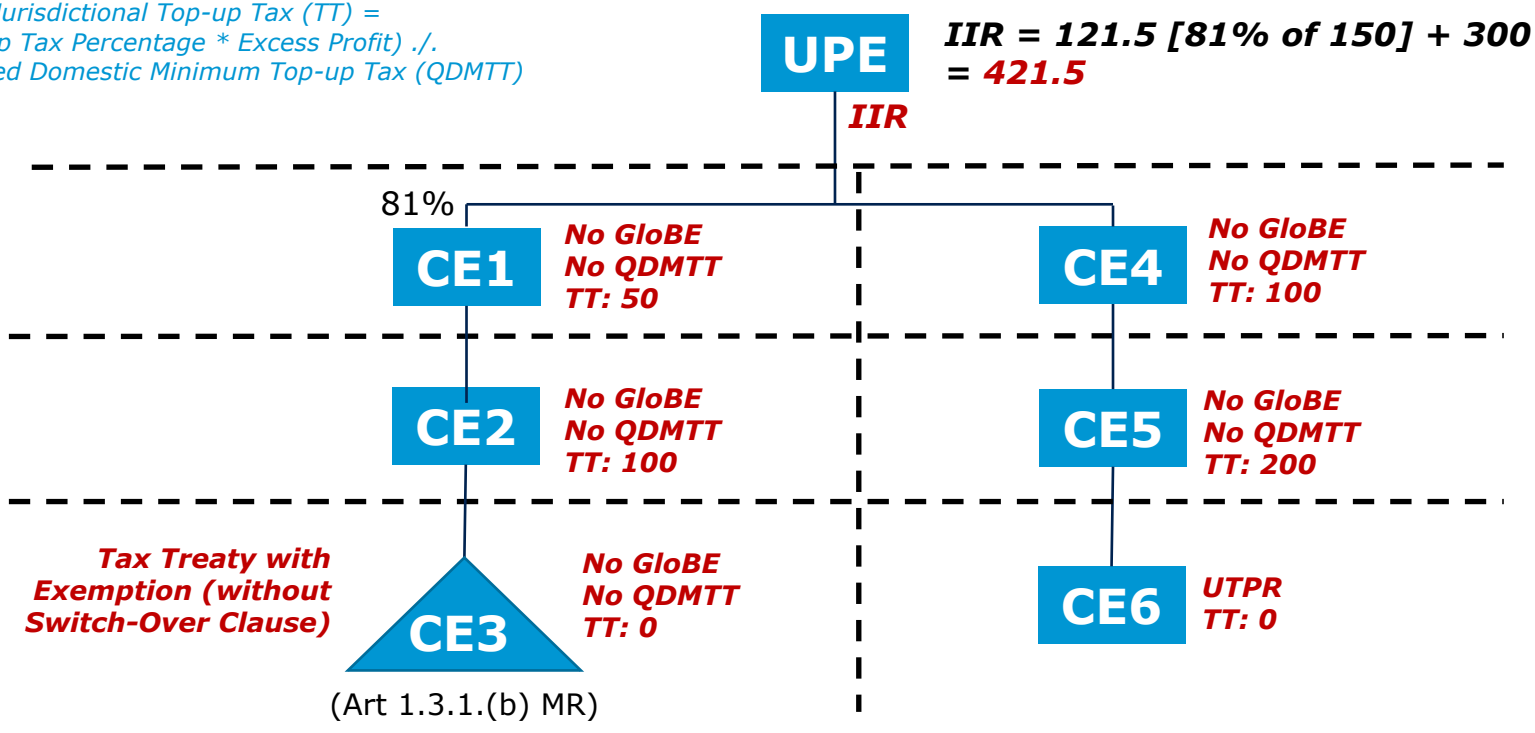
Model Rules for GloBE (Dec. 20, 2021), ***Commentary*** (Mar. 14, 2022), ***Examples*** (Mar. 14, 2022) and Factsheet – Announced Model Treaty Rule for STTR

- Draft legislation and consultations in numerous countries, e.g., Australia, Canada, Ireland, Jersey, Korea, Malaysia, Mauritius, Netherlands, New Zealand, Switzerland, UK, (US)
- Consultation on Implementation Framework (Mar. 2022)
- OECD Report on "Tax Incentives and the Global Minimum Corporate Tax" (Oct. 2022)

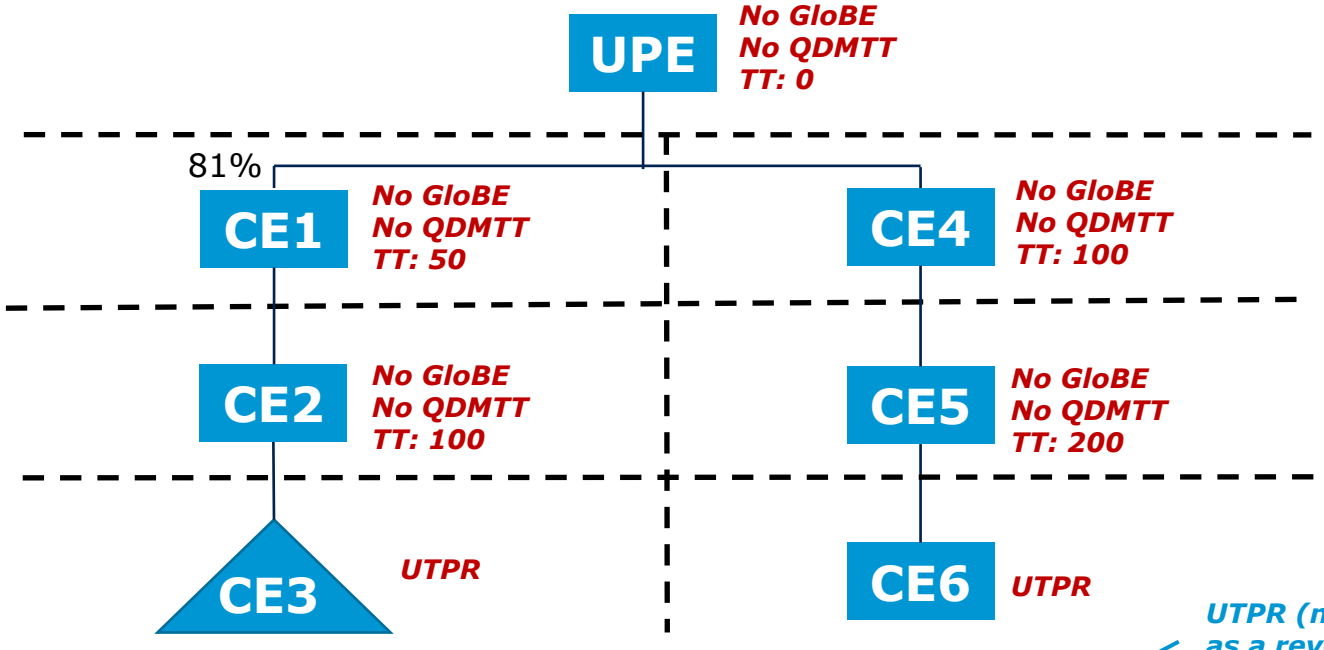
- ***Implementation Framework*** for GloBE on safe harbors and penaliy relief (Dec. 2022) and administrative guidance (Feb. 2023)
- Consultations on the GloBE Information Return (Dec. 2022) and on tax certainty (Dec. 2022)
- Implementation of the Two-Pillar Solution: TIWB support for ***developing countries***
- ***Multilateral Instrument*** for implementation of the ***STTR*** in existing tax treaties

Issues | *Income Inclusion Rule*

Note: *Jurisdictional Top-up Tax (TT) = (Top-up Tax Percentage * Excess Profit) ./. Qualified Domestic Minimum Top-up Tax (QDMTT)*



Issues | *Undertaxed Profits Rule*



Total UTPR = 150 (100% of 150) + 300 = 450

(shared between UTPR jurisdictions based on substance, Art. 2.6. MR and Art. 14 Directive)

GloBE and Treaties | *OECD Position*

- OECD, ***Report on Pillar Two Blueprint*** (2020)
  - ***Switch-over Rule (SOR)*** requires ***changes to existing bilateral tax treaties*** (Blueprint, paras. 21 and 677. – See also OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy [2019] para. 72):

> 21. While the IIR and the UTPR do not require changes to bilateral treaties and can be implemented by way of changes to domestic law,[4] both the STTR and the SOR can only be implemented through changes to existing bilateral tax treaties. These could be implemented through bilateral negotiations and amendments to individual treaties or as part of a multilateral convention. Alternatively the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) (OECD, 2016[6]), emerging from BEPS Action 15, may offer a model for a coordinated and efficient approach to introducing these changes.

  - ***Income Inclusion Rule (IIR) and UTPR*** can be implemented by way of changes to domestic law (Blueprint, paras. 678 and 705) and are also ***compatible with tax treaties*** (Blueprint, paras. 679-696)
    - Implicit: IIR and UTPR are ***covered taxes*** (Art. 2 OECD MC), although GloBE is about allocation of the top-up tax (and not of a tax base)
    - ***IIR*** → Covered "Saving Clause" (Art. 1(3) OECD MC) and/or underlying "longstanding principle" as well as comparability with CFC rules (Art. 7 no. 14 and Art. 10 no. 37 OECD MC)
    - ***UTPR*** (then: Undertaxed *Payments* Rule, now: Undertaxed *Profits* Rule) → Again, covered by the "Saving Clause" (Art. 1(3) OECD MC) and/or underlying "longstanding principle", and detailed discussion of compatibility of non-deductibility rules with Art. 7(2), Art. 9 and Art. 24(3) and (4) OECD MC

GloBE and Treaties | *OECD Position*

- Treaty-based ***switch-over rule (SOR)*** required (?) to apply the IIR in the context of treaty-exempt PEs (Art 2 no. 2 OECD Model Rules Comm.):

> 2. Taken together, the IIR and UTPR provide a systematic solution to ensure all in scope MNE Groups pay a minimum level of tax on their profits in excess of a routine return in the jurisdictions in which they operate. However, concerns about the intended application of these rules can arise where a Parent Entity jurisdiction, which would otherwise apply the IIR in accordance with the provisions of Article 2, has entered into bilateral Tax Treaties in which it has adopted the exemption method (instead of a credit method) to eliminate double taxation of income arising in the other jurisdiction. In this case, a switch-over rule in a Tax Treaty could facilitate the application of the IIR by the jurisdiction of residence of the Parent Entity to tax the income of the PE in those cases where the IIR applies as a matter of domestic law. The switch-over rule could safeguard the application of the IIR by the residence state with respect to a PE. The rule would, by virtue of its domestic law trigger, only apply when and to the extent that a resident of a Contracting State was required to apply the IIR with respect to a PE in the other Contracting State.

Why MLI/tax treaty only for the SOR? → Art. 23A(1) OECD MC (= an exception from the Saving Clause)

- IIR and UTPR ***"designed" to be compatible with tax treaties*** (OECD, Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) (2023) para. 2, as statement by 142 IF members):

> 2. The GloBE Rules were approved and released by the Inclusive Framework on 20 December 2021. The GloBE Rules consist of an interlocking and coordinated system of rules which are designed to be implemented into the domestic law of each jurisdiction and operate together to ensure large MNE Groups are subject to a minimum effective tax rate of 15% on any excess profits arising in each jurisdiction where they operate. Consistent with the intention of the Inclusive Framework, the GloBE Rules (including the IIR and UTPR) are designed so that the imposition of top-up tax in accordance with those rules will be compatible with the provisions of the United Nations Model Double Taxation Convention between Developed and Developing Countries (the "UN Model Double Tax Convention") (UN, 2021[3]) and the *Model Tax Convention on Income and on Capital: Condensed Version 2017*, (the "OECD Model Tax Convention") (OECD, 2017[3]).

- ***Statement, not reasoning***
- ***OECD/IF = executive, not legislature!***

IIR and UTPR | *The Issues*

ARTICLE 1

PERSONS COVERED

3. This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 [A] [B], 24, 25 and 28.

ARTICLE 7

BUSINESS PROFITS

1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.

ARTICLE 10

DIVIDENDS

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

- ***"Saving Clause"*** (Art. 1(3) OECD MC)
  - Introduced in the OECD MC Update 2017, but expresses longstanding principle that treaties do not restrict residence-based taxation unless intended (Art. 1 no. 18 OECD MC Comm.), such as, e.g., Art. 23 and 24 OECD MC
  - Also part of the Multilateral Instrument (Art. 11 MLI), but not widely adopted in treaty practice
- ***Business Profits*** (Art. 7(1) OECD MC) → Exclusive taxing right for the residence State of an enterprise (e.g., the subsidiary), unless there is a PE in the other Contracting State.
- ***Dividends*** (Art. 10(5) OECD MC) → Prohibition of (certain) extraterritorial taxation of undistributed profits.
- Also: ***Other Income*** (Art. 21 OECD MC)
- Note:
  - ***Associated Enterprises*** (Art. 9 OECD MC) → Mere income quantification, with GloBE applying ex post
  - ***Non-Discrimination*** (Art. 24 OECD MC) → Discussion with regard to non-deductibility and Art. 24(3) and (4) OECD in the Blueprint, paras. 690-696 → *What about Art. 24(5) OECD MC?*

Starting Point | *Treaties and CFCs*

OECD	Discussion of CFC Rules	Additional Notes
OECD MC 1977	—	
1986 Base Companies Report	Discussion of, *inter alia*, the various views of the relationship between CFC regimes and tax treaties	
2002 Update	Addition of Art. 1 no. 23 MC Comm. as part of the discussion on "Improper use of the Convention" → CFC rules not barred by Art. 7(1) (Art. 7 no. 10.1 OECD MC) or Art. 10(5) (Art. 10 no. 37).	(Changes in cross-references in Art. 1 no. 23. in the 2008 and 2010 Updates.)
2017 Update	Introduction of a "Saving Clause" (as Art. 1(3) OECD MC, viewed as mere clarification), amendment and renumbering of Art. 1 no. 23 OECD MC Comm. to new Art. 1 no. 81 (with cross-references to Art. 7 no. 14 and Art. 10 no. 37 OECD MC)	Preceded by Action 6 Final Report (2015) (especially para. 59 regarding changes to the OECD MC Comm. and rejection of the argument that "Article 7 and/or Article 10(5) prevent the application of CFC rules" in para. 54)

Starting Point | *Treaties and CFCs*

Art. 1 no. 81 OECD MC Comm. 2017

Controlled foreign company provisions

81. A significant number of countries have adopted controlled foreign company provisions to address issues related to the use of foreign base companies. Whilst the design of this type of legislation varies considerably among countries, a common feature of these rules, which are now internationally recognised as a legitimate instrument to protect the domestic tax base, is that they result in a Contracting State taxing its residents on income attributable to their participation in certain foreign entities. It has sometimes been argued, based on a certain interpretation of provisions of the Convention such as paragraph 1 of Article 7 and paragraph 5 of Article 10, that this common feature of controlled foreign company legislation conflicted with these provisions. Since such legislation results in a State taxing its own residents, paragraph 3 of Article 1 confirms that it does not conflict with tax conventions. The same conclusion must be reached in the case of conventions that do not include a provision similar to paragraph 3 of Article 1; for the reasons explained in paragraphs 14 of the Commentary on Article 7 and 37 of the Commentary on Article 10, the interpretation according to which these Articles would prevent the application of controlled foreign company provisions does not accord with the text of paragraph 1 of Article 7 and paragraph 5 of Article 10. It also does not hold when these provisions are read in their context. Thus, whilst some countries have felt it useful to expressly clarify, in their conventions, that controlled foreign company legislation did not conflict with the Convention, such clarification is not necessary. It is recognised that controlled foreign company legislation structured in this way is not contrary to the provisions of the Convention.

Art. 7 no. 14 OECD MC Comm. 2017

14. The purpose of paragraph 1 is to limit the right of one Contracting State to tax the business profits of enterprises of the other Contracting State. As confirmed by paragraph 3 of Article 1, the paragraph does not limit the right of a Contracting State to tax its own residents under controlled foreign companies provisions found in its domestic law even though such tax imposed on these residents may be computed by reference to the part of the profits of an enterprise that is resident of the other Contracting State that is attributable to these residents' participation in that enterprise. Tax so levied by a State on its own residents does not reduce the profits of the enterprise of the other State and may not, therefore, be said to have been levied on such profits (see also paragraph 81 of the Commentary on Article 1).

Art. 10 no. 37 OECD MC Comm. 2017

37. As confirmed by paragraph 3 of Article 1, paragraph 5 cannot be interpreted as preventing the State of residence of a taxpayer from taxing that taxpayer, pursuant to its controlled foreign companies legislation or other rules with similar effect, on profits which have not been distributed by a foreign company. Moreover, it should be noted that the paragraph is confined to taxation at source and, thus, has no bearing on the taxation at residence under such legislation or rules. In addition, the paragraph concerns only the taxation of the company and not that of the shareholder.

IIR | *Debate*

- Is the ***"Saving Clause"*** (Art. 1(3) OECD MC) and/or the longstanding principle that treaties do not restrict residence-based taxation unless intended (Art. 1 no. 18 OECD MC Comm.) "protecting" the IIR (→ Blueprint, paras. 679-681) → *Note: OECD's view (outside of an explicit "Saving Clause") is not undisputed. Also, the OECD acknowledges that the application of the IIR to treaty-exempt PEs would require an explicit switch-over rule (SOR), as Art. 23A OECD MC is carved out from the "Saving Clause" (Blueprint, paras. 21 and 677)*
- Is the ***OECD's position on CFC regimes*** really transferable to the IIR? (→ Blueprint, paras. 681-683)
  - ***Conceptual:*** Income (= tax base) inclusion ("look through") under CFC rules versus tax allocation (= tax amount) under the IIR, but both – in effect – create an exception to the separate entity treatment (e.g., Art. 5(7) OECD MC).
  - ***But:*** CFC regimes are based on control and/or indirect economic entitlement ("direct tax on indirect income"), whereas the IIR is based on accounting consolidation. Also, the IIR is not an anti-avoidance provision (at least in the traditional sense) but rather deals with tax competition.

UTPR | *Debate*

- ***General International Law***
  - Broad general discussion about jurisdiction to tax under international law in ***light of (lack of) nexus*** (e.g., control over parent or sister entities), especially with regard to the UTPR, as there is ***no connection between the underlying undertaxed income and the UTPR jurisdiction***
  - Recognition of the UTPR (then: still an Undertaxed *Payments* Rule) by 138 Members of the OECD/G20 Inclusive Framework in the ***October 2021 Statement***:

> ***Rule status***
>
> The GloBE rules will have the status of a common approach.
>
> This means that IF members:
>
> - are not required to adopt the GloBE rules, but, if they choose to do so, they will implement and administer the rules in a way that is consistent with the outcomes provided for under Pillar Two, including in light of model rules and guidance agreed to by the IF;
> - accept the application of the GloBE rules applied by other IF members including agreement as to rule order and the application of any agreed safe harbours.

  - Intense discussion, if ***new customary international law*** has been created.

UTPR | *Debate*

- Is the ***"Saving Clause"*** (Art. 1(3) OECD MC) and/or the longstanding principle that treaties do not restrict residence-based taxation unless intended (Art. 1 no. 18 OECD MC Comm.) really "protecting" the UTPR? (→ Blueprint, paras. 679-681) *→ Does certainly not apply if CE is a PE!*
- Tax treaty discussion in the ***Blueprint*** had focused on Art 9 and Art 24 OECD MC in light of restrictions on deductibility (UTPR was "undertaxed *payments* rule" before it became a reverse-IIR, i.e., an "undertaxed *profits* rule", Art. 2.4.1. MR and Art. 12-14 Directive)
- Fierce academic debate between ***"UTPR Skeptics"*** and ***"UTPR Supporters"*** ("Treaty Problem Deniers"), also with a ***political dimension*** (Letter by Members of Congress to Treasury Secretary Yellen of Dec. 14, 2022):

> Under the 2020 Pillar Two Blueprint, the UTPR, formerly known as the undertaxed payments rule, targeted base erosion by disallowing deductions on payments made by an entity to a low-taxed affiliate. There was a clear connection between the jurisdiction asserting tax and the business activities of the taxpayer. As we have previously highlighted, the UTPR negotiated by this Administration – and sprung on the world when the Model Rules were released in December 2021 – is far more expansive. Now commonly known as the undertaxed profits rule, the UTPR would allow a jurisdiction to reallocate income and collect tax from entities that have no nexus to that jurisdiction. Foreign countries could collect tax from U.S. activities with which there is no economic or transactional connection. This type of extraterritorial taxation is not permitted under Article 7 (or any other Article) of U.S. bilateral tax treaties.

Note that all US tax treaties contain a "saving clause".

UTPR | *Debate*

"UTPR Supporters"	"UTPR Sceptics"
UTPR charge is ***not even a covered tax*** (but rather has the nature of "an excise tax")	Broad scope of ***taxes on income in Art. 2(2), (4) OECD MC*** (Blueprint, paras. 679-696), although GloBE is about allocation of the top-up tax (and not of a tax base)
UTPR is in line with ***taxing a single economic unit*** (MNE) under the common control of the UPE just as in domestic consolidation ("tax veil" piercing by "pushing down income" that should have been taxed in the hands "of the upstream company")	Non-issues if within a single jurisdiction and ***no reflection of the argument in tax treaty law***
UTPR is following nexus and sufficient economic connection through ***formulary apportionment*** (among UTPR jurisdictions, Art. 2.6. MR and Art. 14 Directive)	UTPR apportionment is about shifting the taxing right, not about the ***scope of a taxing right***

UTPR | *Debate*

"UTPR Supporters"	"UTPR Sceptics"
Analogy to CFC is possible for the UTPR	***Different concepts*** (e.g., "top-down", "control", "indirect economic entitlement" = "direct tax on indirect income"), UTPR is not about (traditional) ***anti-avoidance*** nor about ***base erosion*** (as could have been argued for an Undertaxed *Payments* Rule), UTPR's ***economic burden*** might also be borne by minority shareholders (e.g., in the UTPR CE) – Also: UTPR amount ***not limited by income/revenues of UTPR CE***!
UTPR is "protected" by the ***"Saving Clause"*** (UTPR CE = resident of the UTPR jurisdiction)	***Teleological interpretation*** of the "Saving Clause" in Art. 1(3) OECD MC in light of the spirit of Art. 7(1) and Art. 21 OECD MC, as ***otherwise treaties could be rendered meaningless***. – Also: Does certainly not apply ***if CE is a PE*** (= PE is not a resident of the UTPR jurisdiction)!

UTPR | *Debate*

ARTICLE 24

NON-DISCRIMINATION

3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

- What about ***Art. 24(3) and (5) OECD*** and the Undertaxed Profits Rule? *(For a discussion of an Undertaxed Payments Rule in light of Art. 24(3) and (4) OECD MC see the Blueprint, paras. 690-696).*
  - ***All taxes*** → Art. 24 OECD MC applies also to ***non-covered taxes*** (Art. 24(6) OECD MC), i.e.., also if UTPR would not be covered by Art. 2 OECD MC
  - ***PE Non-Discrimination (Art. 24(3) OECD MC)*** → Equal treatment of PE and subsidiary with regard to the UTPR in light of Art. 24(3) OECD (?)
  - ***Shareholder Non-Discrimination (Art. 24(3) OECD MC)***
    - ***Discrimination?*** → Foreign-parented subsidiary would be subject to the UTPR (if parent State(s) are not GloBE jurisdictions), while domestically-owned subsidiary would not. – Multi-country cases.
    - ***Core question*** → Is a CE of an MNE group parented from a non-GloBE country in the same circumstances as a constituent entity of an MNE group parented from a non-GloBE country.

UTPR | *Debate*

- But an infringement of tax treaty law is ***hard to conceptualize*** dogmatically …
  - Unclear ***which entity*** could rely on ***which tax treaty*** (and perhaps on which exact provision), as the UTPR might dip into a ***multijurisdictional pool of top-up taxes***.
  - If there are more than one UTPR jurisdiction, the ***non-taxing UTPR jurisdiction will not receive any UTPR allocation*** (Art. 2.6.3. MR and Art. 14(8) Directive), i.e., the ***"UTPR pie"*** would be divided amont the other UPTR jurisdictions (e.g., because they can override tax treaties in their constitutional frameworks)
  - Solution: ***Multilateral Instrument or Multilateral Convention***

GloBE | *A Final EU Point …*

Article 351
(ex Article 307 TEC)

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

- The ***EU Pillar Two Directive*** ((EU) 2022/2523, [2022] OJ L 328/1) explicitly creates an obligation for Member States to introduce the IIR and the UTPR (main exceptions: Arts. 49, 50) → Potential ***conflicts with (pre-)existing tax treaties of the Member States*** (Art. 351 TFEU) → ***EU-mandated "Treaty Override"***
- General framework regarding ***primary EU law*** (e.g., fundamental freedoms)
  - *Inter-se* tax treaties (Art. 351 TFEU *e contrario*)
  - Tax treaties with third countries
    - Pre-accession (Art. 351(1) and (2) TFEU)
    - Post-accession (Art. 351 TFEU *e contrario*)
- ***Remaining Open Issues regarding GloBE***
  - Does Art. 351 TFEU also protect tax treaties that are ***incompatible with a Directive***? (Yes: Jean-Claude Levy)
  - *Mutatis mutandis* application regarding third-country tax treaties with regard to incompatibilities with ***post-accession Directives***?

Thank you!

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