EDITORIAL

Waiver of Retaliatory Sec. 899 IRC*: All's Well That Ends Well?

1 US Retaliation Against Extraterritorial Taxation

US President Donald Trump divides the world into good and evil, acts with reward and retaliation, and builds up menacing posture to subsequently assert US interests as part of a deal. He is not only using this dialectic with the threat of draconian tariffs in the area of international trade but also against the 'Global Tax Deal' achieved by the G20 and OECD in the Inclusive Framework (IF). One of Donald Trump's first acts was to withdraw from participation in Pillar II in which the United States had been involved in developing within the IF.[1] It has also been made abundantly clear that the country will not implement the global minimum tax.[2] However, the Trump administration's concerns extended beyond this specifically to defending against applying the top-up tax to the profits of US corporations under the Undertaxed Payment Rule (UTPR). It was sharply criticized as an attack on US tax sovereignty and the competitiveness of US companies. In an attempt to prevent applying the top-up tax, UTPR-adopting jurisdictions were threatened with retaliatory measures for the extraterritorial and discriminatory taxation of US profits.[3] Section 891 Internal Revenue Code (IRC) was initially invoked for this purpose and allowed doubling tax rates for taxpayers from the jurisdictions in question. The draft of a section 899 IRC in the Defending American Jobs and Investment Act[4] as part of the so-called One Big Beautiful Bill (OBBB) was more specifically targeted at the UTPR,[5] though it was not limited to addressing that measure alone.

The threat has borne fruit. Before section 899 IRC could enter into force, the G7 Member States agreed to exempt the United States from the global minimum tax in exchange for it refraining from adopting the proposed retaliatory tax provision.[6] However, the G7 statement does not make it entirely clear how applying the UTPR will be avoided, i.e., whether through an extension of the Transitional Country by Country Reporting (CbCR) Safe-Harbour or by treating the tax credits granted under the Inflation Reduction Act[7] as qualified refundable tax credits.[8] The Global Intangible Low-Taxed Income (GILTI) that are now referred to as the 'net CFC tested income' (NCTI)[9] rules following the introduction of the OBBB are apparently supposed to be recognized as functionally equivalent to the Income Inclusion Rule (IIR)[10] This thereby obviates the need for full implementation of the Pillar II model rules although the GILTI, unlike the

Notes

* This author extends gratitude to Leon Duvinage, Til Teitscheid, Saner Deniz Eliacik, and Oliver Gabriel for the thorough editorial revision of this editorial.
In the version of the enrolled bill: https://www.congress.gov/bi.ll/119th-congress/house-bill/1/text (accessed 9 Jul. 2025).

1 The White House, *The Organization for Economic Co-operation and Development (OECD) Global Tax Deal (Global Tax Deal)* (20 Jan. 2025), https://www.whitehouse.gov/presidential-actions/2025/01/the-organization-for-economic-co-operation-and-development-oecd-global-tax-deal-global-tax-deal/ (accessed 9 Jul. 2025).

2 *Ibid.*, und White House: *America First Trade Policy* (20 Jan. 2025), https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy/.

3 https://www.taxnotes.com/research/federal/usc26/891.

4 US Congress, *H.R.591, Defending American Jobs and Investment Act, introduced 21 Jan. 2025* https://www.congress.gov/bill/119th-congress/house-bill/591/text?s=1&r=3 (accessed 9 Jul. 2025).

5 Rep. R. Estes, *OECD Pillar 2 Is a Bad Deal for America*, 179 Tax Notes Federal 1031, 1032 (8 May 2023), doi: 10.1787/91a49ec3-en; D. Rolfes, C. Caldwell & A. Pepper, *Evaluating Possible U.S. Retaliatory Tax Measures*, 187 Tax Notes Federal 493, 499 (21 Apr. 2025), doi: 10.2139/ssrn.5233133, s. II.C; R. S. Avi-Yonah, *Is the UTPR Extraterritorial or Discriminatory?*, 117 Tax Notes Int'l 1777, 1779 (17 Mar. 2025), doi: 10.2139/ssrn.5214657.

6 *G7 Statement on Global Minimum Tax* (28 Jun. 2025), https://home.treasury.gov/news/press-releases/sb0181 (accessed 9 Jul. 2025).

7 Section 6418 IRC, can be carried forward in accordance with s. 39 IRC 22, *see* https://www.federalregister.gov/d/2024-08926/p-120 (accessed 9 Jul. 2025).

8 *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti Base Erosion Model Rules (Pillar Two)*, Ch. 2, paras 1 et seq. (2020), https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/administrative-guidance-global-anti-base-erosion-rules-pillar-two-july-2023.pdf; *see also* S. Benz & B. Schewe, *Die Ermittlung der Bemessungsgrundlage der Mindeststeuer – der bereinigte Mindeststeuer-Gesamtgewinn*, 77 DB Supplement no. 1 14, 22 (25 Mar. 2024).

9 The GILTI has been redesigned and is now called 'net CFC tested income' (s. 70322 (a) (1) OBBB).

10 *Tax Challenges Arising from Digitalization – Report on Pillar Two Blueprint*, *Inclusive Framework on BEPS* 19 (2020), doi: 10.1787/abb4c3d1-en.

IIR, permitted global blending and applied a tax rate below the global minimum tax threshold.[11]

All is well that ends well? While it appears that the immediate confrontation between the United States and GloBE-applying jurisdictions, distinctly the European Union Member States, has been averted, uncertainty remains. Specifically, it is unclear whether a revised version of section 899 IRC will soon reemerge particularly if the debate on digital taxes continues to gain momentum[12] or if the implementation of the G7 agreement does not meet the US expectations.[13] It would therefore be too short-sighted to celebrate the defence against US punishment as a definitive diplomatic success and to return to the day-to-day business of technical adjustments of the GloBE rules. Rather, this episode should prompt a more fundamental reflection on the current trajectory of international tax policy[14] underlying the political dispute.

This applies without further ado to the taxation of the group's Reuven Avi-Yonah examined the history and context of the US retaliatory response in detail in Issue 5 of Intertax 2025[15] and opines that there is no need for the EU to take action. However, *au contraire*, this view invites objection. A *lex americana* that exempts US companies from applying the UTPR opens deep wounds not only because it undermines the integrity of the global minimum tax but also because it creates an additional locational advantage for incorporating in the United States. Rather than tempering the global tax environment, the GloBE rules may factually exacerbate tax competition among jurisdictions and reduce overall transparency in location-based tax policy.[16]

For the Pillar II community, these developments should not have been surprising. The US skepticism toward the OECD Project against Base Erosion and Profit Shifting (BEPS) has long been evident even though it has reached a new level with the threat to introduce section 899 IRC. Although that has now been averted, the question of legal classification remains. Has President Trump snubbed the international community's common interests by ruthlessly enforcing 'America First' interests? Alternatively, was this, albeit a severe measure, a fundamentally legitimate defence against Pillar II's alleged encroachments on US tax sovereignty and potentially in violation of international law? The crucial question that Pillar II jurisdictions, and especially the European Commission, must now ask themselves is whether Pillar II generally and the UTPR specifically actually effectuate extraterritorial taxation and, if so, how it can be justified.

The question of when a law exerts extraterritorial effects according to the US legal doctrine is subject to the quite inconsistent US Supreme Court case law.[17] The draft of section 899 (d) IRC – which has not yet entered into force – defines 'extraterritorial' as follows:

> (A) IN GENERAL.-The term 'extraterritorial tax' means any tax imposed by a foreign country on a corporation (including any trade or business of such corporation) which is determined by reference to any income or profits received by any person (including any trade or business of any person) by reason of such person being connected to such corporation through any chain of ownership, determined without regard to the ownership interests of any individual, and other than by reason of such corporation having a direct or indirect ownership interest in such person.

This applies without further ado to the taxation of the group's profit at the constituent entity level under the UTPR. However, the issue is not merely whether the UTPR could have been subsumed under section 891 IRC or section 899 IRC; rather, even after the introduction of the latter did not occur, a more fundamental question arises, i.e., whether levying the UTPR is compatible with international law. If this question was to be answered in the negative, the waiver of applying the GloBE rules would not be limited to the United States and its companies. Specifically, the European Commission must confront this issue. It is the sole institution empowered to initiate revisions of tax directives,[18] and it bears considerable responsibility towards the Member States that are currently legally obligated to levy the UTPR pursuant to the GloBE Directive.[19]

Notes

[11] However, in the OBBB, the base erosion and anti-abuse tax (BEAT) tax rates increase from 10.1% to 10.5% from 2026 onwards (s. 70331 (a) (1) OBBB) which will result in an effective rate on the NCTI of 12.6%.

[12] P. Saint-Amans, *The Implications of G7 Agreement on the Global Minimum Tax*, https://www.bruegel.org/first-glance/implications-g7-agreement-global-minimum-tax (accessed 9 Jul. 2025).

[13] https://www.finance.senate.gov/chairmans-news/chairman-crapo-and-chairman-smith-applaud-trump-administration-for-international-tax-agreement-protecting-american-workers-and-businesses; S. Curry, *Revenge Tax Ghost looms over G7's Pillar 2 Deal*, Tax Notes Today Federal, News Stories (10 Jul. 2025), https://www.taxnotes.com/tax-notes-today-federal/legislation-and-lawmaking/revenge-tax-ghost-looms-over-g7s-pillar-2-deal/2025/07/10/7srdm.

[14] *See* on this W. Schön, *Is There Finally an International Tax System?*, in *Thinker, Teacher, Traveler. Reimagining International Tax* 475 (G. Kofler et al. eds, IBFD 2021).

[15] R. S. Avi-Yonah, *Guest Editorial: Retaliatory Taxation: What Should the EU Do?*, 53 Intertax 494 (Jun. 2025), doi: 10.54648/taxi2025045.

[16] R. Azam, *The Global Minimum Tax and Intra Western Tax Competition*, 44 Berkely J. Int'l L., para. III.D., V. (23 May 2025), doi: 10.2139/ssrn.5266322.

[17] In general on the criterion of extraterritoriality, *see* the case law of the US Supreme Court *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (24 Jun. 2010); *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (17 Apr. 2013); on the presumption against extraterritoriality, *Abitron Austria GmbH v. Hetronic International, Inc.*, 143 S.Ct. 2522, 2525 (29 Jun. 2023): 'Applying the presumption against extraterritoriality involves a two-step framework'.

[18] Accompanied by complete mastery of the subject matter, objective, and content of the legislation, *see* ECJ, 14 Apr. 2015, Case No. C-409/13, ECLI:EU:C:2015:217, para. 70.

[19] *Council Directive (EU) 2022/2523 of 14 December. 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union*, OJ L 328, 1–58 (22 Dec. 2022).

2 Justification of Retaliatory Measures?

2.1 *Prohibition of Extraterritorial Taxation*

The threat of retaliation was based on the alleged extraterritoriality of the UTPR. More generally, regardless of the definition tailored to the UTPR in the draft of section 899 IRC, the question arises as to whether the UTPR is compatible with the prohibition of extraterritoriality under customary international law. While this law's existence in the field of taxation is occasionally disputed,[20] it remains widely accepted that the exercise of a tax jurisdiction requires that a genuine link exists. States are precluded from asserting tax claims in the absence of a substantive or personal nexus.[21] Under international law, jurisdictional limits encompass not only territorial constraints on enforcement but also the requirement of a meaningful connection between the regulation's subject matter and the regulating state[22] as discussed at the 2024 Conference of the International Fiscal Association (IFA).[23] This applies irrespective of the considerable divergence in national sourcing rules.[24] This prohibition reflects the respect for the sovereignty of other states.[25]

2.2 *UTPR: Extraterritorial Taxation?*

The characterization of the UTPR as extraterritorial primarily depends on the systematic classification of the minimum tax regime in general and the UTPR in particular. Despite its unique features, the minimum tax constitutes a net income tax. The UTPR is also a partial income tax of the minimum tax group. Unlike the Base Erosion and Anti-Abuse Tax (BEA) and the anti-hybrid rules under Article 9 ATAD,[26] it is conceptually not a ban on deducting intragroup payments from subsidiaries to the ultimate parent or other group entities. Moreover, the constituent entity is not merely a liable debtor for a tax owed by the low-taxed ultimate parent. It is rather a separate tax of the constituent entity's share of profits earned by another corporation within the GloBE group such as a sister or a parent entity.[27]

2.2.1 *Connecting Factor Constituent Entity*

Admittedly, the UTPR does not tax the man in the moon but does so for resident subsidiaries that are part of international MNE groups. This establishes a domestic connecting factor. However, on this basis, it imposes a tax on profits generated by other group entities, specifically those at the same or higher level within the group structure over which the UTPR company has neither ownership nor control. This feature distinguishes it from traditional CFC rules or the IIR. Irrespective of whether CFC taxation is justified under a deemed dividend or pass-through approach, the requirement of control ensures that the entity subject to taxation has the power to dispose of the profits. At the same time, the controlling entity retains the ability to refrain from establishing subsidiaries in low-tax jurisdictions solely for tax purposes which subsequently justifies piercing the corporate veil to prevent abuse. The UTPR subsidiary, on the other hand, has no such influence over allocating or using group profits nor over applying the UTPR itself. For this reason alone, the argument that the GILTI or CFC rules are equally extraterritorial fails to be convincing.[28] Even if the CFC rules were to be classified as such, this would not diminish the extraterritorial nature of the UTPR.

2.2.2 *The UTPR as a Component of a Global Consolidated Group Taxation?*

Contrary to the BEAT,[29] the UTPR under the OECD Model Rules[30] is no longer limited to profits generated

Notes

[20] In the affirmative with an account of the dispute, *see* in depth C. Braumann, *Customary International Law and Tax Jurisdiction*, 89 S. Int'l Tax'n (2025), doi: 10.1093/jiel/jgaa019; A. K. Singh, *Exploring the Nexus Doctrine in International Tax Law*, 77 S. Int'l Tax'n 171 (2021), doi: 10.59403/3r1d3ah001; *see also* M. E. Villinger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* 60 (Kluwer Law International, 2d ed. 1997); D. Broekhuijsen & I. J. Mosquera Valderrama, *Revisiting the Case of Customary International Tax Law*, 23 Int'l Community L. Rev. 79, 85 et seq. (31 Mar. 2021), doi: 10.1163/18719732-12341459.

[21] C. Ryngaert, *Nexus and International Tax Jurisdiction*, 108A IFA Cahiers 103, 109 et seq. (2024); H. Schaumburg, *Internationales Steuerrecht,* para. 3.13. (Verlag Dr Otto Schmidt 5th ed. 2023).

[22] Section 407, Fourth Restatement of the US Foreign Relations Law (2018); W. S. Dodge, *The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law*, Opinio Juris (3 Aug. 2018), https://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/ (accessed 9 Jul. 2025).

[23] Denied by Ryngaert, *supra* n. 21, at 111.

[24] H. D. Rosenbloom, *International Tax Arbitrage and the 'International Tax System'*, 53 Tax L. Rev. 137, 166 (2000), doi: 10.1017/cbo9780511511318.010; *see* for the different sourcing rules depending on different categories of income, Singh, *supra* n. 20, at 173–175.

[25] Lotus, Series A.-No. 10, Collection of Judgments, 18 et seq. (ICJ, 7 Sep. 1927); Ryngaert, *supra* n. 21, at 109 et seq.

[26] *Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market*, OJ L 193, 1–14 (19 Jul. 2016).

[27] Different F. Shaheen, *Is the UTPR a 100 Percent Tax on a Deemed Distribution?*, 181 Tax Notes Fed. 481, 486 (16 Oct. 2023), doi: 10.1787/747181561388, with the consequence that it is a confiscatory tax. Regarding the effects of the UTPR for minority shareholders and creditors and their possible reactions, F. Kratzlmeier, Shareholders, Creditors, and GloBE: A New Perspective, Tax Notes Int'l 116, 15 (7 Oct. 2024).

[28] Avi-Yonah, *supra* n. 5, at 1780–1782.

[29] Although the BEAT does not apply to individual payments, base erosion payments are added back to the taxable income; *see* s. 59A(c)(1) IRC.

[30] *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, Inclusive Framework on BEPS*, 30, para. 73 (2019), doi: 10.1787/87061b68-en, the undertaxed payments rule that would deny a deduction or impose source-based taxation (including withholding tax) for a payment to a related party if that payment was not subject to tax at a minimum rate.

abroad that are attributable to deductible payments made by the constituent entity to other group members. While disallowance of deductions for base-eroding payments may violate the objective net principle, the taxable object nonetheless corresponds to that of a withholding tax imposed on the recipient of the service. This is made clear by the discussion on the alternative extension of the withholding tax to services under Article 12 UN Model Tax Convention.[31] Although prohibiting deducting business expenses and withholding taxes are not fully comparable since only the latter typically allow a tax credit in the recipient jurisdiction, the connecting factor in both cases is a contribution by the company providing the service. This nexus is absent under the UTPR even though it is described as an 'aggregate, proportionate approach', i.e., a simplification relative to 'tracking through chains of intra-group deductible payments in order to connect the payment made by one Constituent Entity with the low tax outcomes of another'.[32]

Even if the group was to be treated as a single taxable entity (taxpayer)[33] and thus disregard the legal separateness of its individual members, a subordinate group company is almost always not liable for the tax on the entire group profit. In jurisdictions such as the Netherlands[34] or Denmark,[35] liability typically rests with the parent company. Although the other group entities can be held liable, their liability is usually limited to their respective share of the profit.[36] It can be assumed that, even when a subsidiary is formally designated as the taxpayer, the economic burden of the top-up tax is ultimately borne by the non-resident ultimate parent which further elucidates the extraterritorial character. Notably, consolidated group taxation usually requires a formal application and is typically confined to the domestic jurisdiction. Accordingly, interpreting Pillar II as a form of group taxation does not change the fact that the UTPR imposes a tax burden on a foreign group. This thereby raises grave concerns about its compatibility with jurisdictional limits under international law.

Moreover, Pillar II does not eliminate the legal separateness of the individual group entities. When multiple constituent entities are resident in different UTPR jurisdictions, the top-up tax is allocated among them pursuant to the allocation mechanism systematically detailed in Article 2.6.1 of the GloBE Model Rules.

2.3 *UTPR as a Legitimate Exception to the Prohibition of Extraterritoriality?*

2.3.1 *Effect of the Agreement on a Common Approach*

It must therefore be examined whether the UTPR constitutes a legitimate exception to prohibiting extraterritorial taxation and requiring a genuine link.

Such a new exception is needed since Pillar II does not merely represent an incremental refinement of an existing tax[37] but a genuine innovation and certainly an unusual[38] one. While the IIR draws conceptually from the traditional CFC regime, though extended beyond the prevention of abuse and structuring, the UTPR represents a completely new instrument as discussed above.

Irrespective of whether the UTPR can be based on new customary international law, the international community could, in principle, adopt this novel concept through a binding international treaty thereby derogating from the prohibition of extraterritorial taxation within the framework of Pillar II. However, unlike the Multilateral Instrument (MLI),[39] the IF jurisdictions have not agreed on a multilateral convention for this.

In lieu of a multilateral convention, the members of the IF, including the United States, agreed in October 2021 that the GloBE Rules would have the status of a common approach. Pursuant to it, jurisdictions are not obligated to adopt the GloBE Rules but accept their application by other members.[40] However, since the IF lacks the authority to enact binding legal norms and the 'common approach' has not been enshrined in domestic legislation or formalized in a treaty ratified by parliaments, it is not part of binding international law.[41] Nor does the detailed

Notes

31 A withholding tax on the gross receipts from the remote sale of digital goods and services to in-country customers by the same providers was also discussed in *Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report*, 276 (2015), doi: 10.1787/9789264241046-en.

32 *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, 125, para. 471 (2020), https://doi.org/10.1787/abb4c3d1-en.

33 Avi-Yonah, *supra* n. 5, at 1780–1782.

34 M. Baijer & M. Girolami, *Netherlands*, *Group Approach and Separate Entity Approach in Domestic and International Tax Law*, 106A IFA Cahiers 545, 550 (2022).

35 K. Dyppel Weber & M. Tell, *Denmark*, *Group Approach and Separate Entity Approach in Domestic and International Tax Law*, 106A IFA Cahiers 307, 315 (2022).

36 Primarily only for the share of the group's tax attributable to its profits; *see* J. Hey & A. Schnitger, *General Report, Group Approach and Separate Entity Approach in Domestic and International Tax Law*, 106A IFA Cahiers 13, 35 (2022).

37 Questionable Avi Yoah, *supra* n. 5, at 1782.

38 Shaheen, *supra* n. 27, at 482: 'unusual'.

39 The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument or BEPS MLI), https://www.oecd.org/en/topics/beps-multilateral-instrument.html (accessed 9 Jul. 2025).

40 *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (2021), https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed 9 Jul. 2025).

41 *See* A. Christians, *Hard Law, Soft Law, and International Taxation*, 25 WisInt'LJ 325, 331 (Sep. 2007).

drafting of the GloBE Model Rules elevate them to the status of hard law.[42] They remain purely political agreements and lack the requisite intention to create legally binding obligations.[43]

In its current form, the UTPR is incompatible with the written double tax treaty (DTT) law that is founded on allocating taxing rights based on the separate entity principle.[44]

2.3.2 *New Customary International Law?*

This incites the question of whether the Global Tax Deal introduced a new customary international law that, even though a multilateral agreement amending the previous DTT network was not agreed upon, can also be held against other states. It would include those that have not yet implemented Pillar II or, as in the case of the United States, have meanwhile expressly rejected the implementing and recognizing the outcome of the BEPS process.

The UTPR is based on what is referred to as the single taxation principle that aims to prevent double non-taxation.[45] On this basis, states arguably may or even must assume the role of a global tax police by imposing top-up taxes and ensuring that corporate profits are taxed at least once irrespective of the jurisdiction in which they are generated. In the academic literature, this single taxation principle has strong proponents.[46] However, the question of whether the UTPR leads to unjustified extraterritorial taxation is not determined by academic beliefs or normative advocacy but by the current state of customary international law.

Article 38(1) of the ICJ Statute recognizes customary international law as one of the sources of international law. The emergence of new customary international law requires two elements: a consistent and general practice of states (objective element) and the belief that such practice is performed with a sense of legal obligation (*opinio juris*, subjective element).[47] Together, these constitute a legitimate expectation of comparable conduct by states in the future.[48]

The breadth of state participation in the IF[49] and the consensus on the common approach may arguably support the emergence of new customary international law. This means that 147 jurisdictions[50] have committed to implementing or at least accepting the results of the OECD and G20 BEPS Project in the IF. However, political agreements are not enough to establish customary international law beyond international treaties. For a norm to crystallize as such, it must be accompanied by consistent state practice over an extended period and must be largely uncontested. This requirement is not met, at least in light of the ongoing dispute between the United States and other Pillar II jurisdictions. Given the historically influential role of the United States in shaping international tax norms, it remains doubtful whether customary international law can develop in this domain against the US' express opposition.[51] In the most favourable conditions, it could be argued that the country pioneered the idea of global single taxation by introducing the GILTI and the BEAT in 2018,[52] and that it would be contradictory if it opposed applying this principle to US companies. However, the BEAT takes the profits of the BEAT company generated in the United States as its starting point and is therefore not comparable with the UTPR.

Irrespective of the dispute with the United States, there is a striking discrepancy between the declared will and actual implementation in the other IF jurisdictions. To date, not even forty countries have fully implemented Pillar II[53] of which twenty-seven are obligated to do so as stipulated by the Minimum Tax Directive. Even if the

Notes

42 A. Verreckt, *The legal status of the GloBE Model Rules and the administrative Guidance*, in *The Global Minimum Tax. Selected Issues on Pillar Two* 3, 7 (V. Bendlinger & P. Schoueri eds, Linde Verlag 2024).

43 S. Schnorberger, M. Dust, K. Sakuth & N. Etzig, *Globale Mindestbesteuerung – Vermeidung der Doppelbesteuerung und Rechtsschutz im Rahmen von Säule 2*, 78 BB 151, 152 (23 Jan. 2023).

44 Hey & Schnitger, *supra* n. 36, at 39.

45 On this, *see* Schön, *supra* n. 14, at 481 et seq.; *Single Taxation?* (J. Wheeler ed., IBFD 2018), doi: 10.59403/cq3zwc.

46 R. S. Avi-Yonah, *International Tax as International Law*, 57 Tax L. Rev. 483 (2004), doi: 10.2139/ssrn.516382; R. S. Avi-Yonah, *Tax Competition, Tax Arbitrage and the International Tax Regime*, 61 Bull. Int'l Tax'n 130, 131 (Apr. 2007), doi: 10.2139/ssrn.955921; R. S. Avi-Yonah, *Who Invented the Single Tax Principle?: An Essay on the History of US Treaty Policy*, 59 N. Y. L. Sch. L. Rev. 305, 306 (2015), doi: 10.4337/9781781952320.00018; and R. S. Avi-Yonah, *Full circle? The Single Tax Principle, BEPS, and the New US Model*, 1 Global Tax'n 12, 13 (13 Oct. 2015), doi: 10.2139/ssrn.2673463; *see* to this authorship F. De Lillo, *In Search of Single Taxation*, in *Single Taxation?* 3, 4 (J. Wheeler, ed., IBFD 2018).

47 Singh, *supra* n. 20, at 171.

48 *Statement of Principles Applicable to the Formation of General Customary International Law*, 69 Int'l L. Ass'n Rep. Conf. 712, 719 (2000).

49 On this new participant in international tax law, *see* M. Kreienbaum & D. Fehling, *Das Inclusive Framework on BEPS – ein neuer Akteur in der internationalen Steuerpolitik*, 26 IStR 929 (16 Nov. 2017).

50 The members are available at, https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (accessed 28 May 2024).

51 W. Schön, *International Tax Rules for Unruly Times*, Working Paper of the Max Planck Institute for Tax Law and Public Finance 2023–08, doi: 10.2139/ssrn.4515974: Zur Rolle der USA: '"Robustness" means that the workability of a set of rules shall not be fundamentally questioned when one or two major players do not sign up to it or defect from the agreement at a later stage'.

52 By the Tax Cuts and Jobs Act of 22 Dec. 2017, 115th Congress Public Law 97.

53 *See Central Record of Legislation With Transitional Qualified Status*, https://www.oecd.org/en/topics/sub-issues/global-minimum-tax/central-record-of-legislation-with-transitional-qualified-status.html (accessed 9 Jul. 2025).

European Union was to be considered as a global standard-setter, this would hardly suffice since the key IF members such as China and India, in addition to the United States have not made any attempt to implement Pillar II. For a norm to gain international traction, a critical mass of states is needed either through actual implementation or, at a minimum, through abstention from undermining the regime. It could be said that the United States has opted for an overt rejection whereas other jurisdictions have sought to circumvent Pillar II by adapting Pillar II compliant tax incentives so as to neutralize top-up tax liabilities in other countries.[54] As Spengel et al., predicted, Pillar II has not eliminated (tax) competition between states but merely changed it.[55] If the ultimate objective of Pillar II was to establish a binding floor for tax competition, the mere abstract endorsement of that objective does not necessarily translate into its effective observance.

Thus, it cannot be concluded that a sufficiently large group of states either ensures itself or accepts that other states ensure that all profits generated worldwide are effectively taxed at 15%. Nor has the separate entity principle been supplanted by a principle of international group taxation according to which each state may use dependent group companies resident in its territory to tax the group's global profits.

It seems crucial to acknowledge that neither the political objective of curbing international tax competition nor the principle of single taxation possesses the character of binding legal rules. While prohibiting extraterritorial taxation and the nexus principle also require interpretation and elaboration, they are not merely political aspirations. Moreover, the political objectives of the BEPS process are ambiguous to some extent and have been subject to considerable change over time. In its initial phase, the OECD BEPS Project was directed against harmful tax competition and its aggressive exploitation. The global minimum tax, in contrast, is neither limited to harmful tax competition such as 'beggar-thy-neighbor-policies' nor to abusive tax planning but rather targets low taxation in general. Furthermore, the principle of single taxation lacks the normative quality required to crystallize into customary international law. First, the relationship between the single taxation principle and the value creation principle[56] that dominated the first phase of the BEPS debate[57] remains unclear. Second, it is not a principle of intergovernmental allocation and delimitation of tax sovereignty. Whether income may legitimately be taxed once, not at all, or twice follows from the internal coherence of non-harmonized national tax systems and, as such, is within the sovereign discretion of individual states. The requirement of single taxation could be perceived as the inversion of a ban on international double taxation. Of course, there is no rule of customary international law in this respect either. Even the European Court of Justice has been unable to derive a prohibition of double taxation from European law[58] essentially because, beyond the international law of DTTs, no general rules exist that determine which state must refrain from taxation. Additionally, it cannot be determined in the abstract whether any and which state holds a legitimate right to tax profits that remain untaxed or only lightly taxed in the jurisdiction of origin.

Under international law, the United States is not obligated to tolerate the UTPR taxation of US-based multinational groups. Whether the threatened treaty override[59] under section 899 IRC would have been a proportionate countermeasure[60] no longer needs to be clarified given that the recent G7 agreement has temporarily defused the dispute.

3 The effects of the G7 agreement: Necessary reaction of the EU legislator

This opens the debate as to what consequences the G7 agreement[61] with the United States will have for the future of the Pillar II project and what consequences this entails for the EU as a tax legislator.

The G7 agreement to release the United States from Pillar II will probably be an exception formulated in a general manner as it is difficult to imagine an exemption limited exclusively to that country. Such an exclusion could be implemented in two different ways. The first

Notes

[54] *See* e.g., C. A. Tai & T. Thuy, *Policy Adaptations and Legal Innovations: Vietnam Responses to the Pillar Two Regime*, 53 Intertax 521 (Jun. 2025), doi: 10.54648/TAXI2025048; M. A. Sullivan, *Will Singapore's Refundable Investment Credit Trigger Pillar 2 Tax?*, Tax Notes Int'l 995 (13 May 2024), doi: 10.17310/ntj.2020.4.11.

[55] C. Spengel, *Probleme einer globalen Mindeststeuer und Alternativen*, StuW 189 (2022); *see* further Azam, *supra* n. 16, at IV.A.

[56] *See* W. Haslehner & M. Lamesch (eds), *Taxation and Value Creation*, 19 EATLP International Tax Series (IBFD 2021).

[57] For example *Aligning Transfer Pricing Outcomes With Value Creation, Actions 8-10 – 2015 Final Reports* 9 et seq. (5 Oct. 2015), doi: 10.1787/9789264241244-en; *Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance, Action 5–2015 Final Report* (5 Oct. 2015), doi: 10.1787/9789264241190-en; for the rise and fall of the value creation principle, *see* W. Schön, *Value Creation, the Benefit Principle and Efficiency – Related Allocation of Taxing Rights*, in *Taxation and Value Creation* 155 et seq. (W. Haslehner & M. Lamesch eds, IBFD 2021).

[58] ECJ, 14 Nov. 2006, Case No. C-513/04, ECLI:EU:C:2006:713, para. 20; ECJ, 6 Dec. 2007, Case No. C-298/05, ECLI:EU:C:2007:754, para. 45.

[59] R. S. Avi-Yonah, *Is Section 899 A Valid Treaty Override?*, U of Michigan Law & Econ Research Paper Forthcoming (17 Jun. 2025), doi: 10.2139/ssrn.5298193, questioning the validity of the treaty override by s. 899.

[60] *See* Rolfes, Caldwell & Pepper, *supra* n. 5, at 504.

[61] Press release by the US Department of the Treasury, https://home.treasury.gov/news/press-releases/sb0181 (accessed 9 Jul. 2025).

possibility is to further extend the Transitional CbCR Safe Harbour, however, that would ultimately render the application of the UTPR largely exceptional. Alternatively, there could be a broad exclusion of certain tax benefits, such as refundable tax credits, from the calculation of the effective tax rate. In either case, it must be asked what substance, if any, would remain of Pillar II.

Recognizing the NCTI (previously known as the GILTI) and the BEAT as functionally equivalent, parallel systems could serve as a precedent if it resulted in a reassessment of the OECD's pursuit of maximum uniformity in implementing the global minimum tax. The aspiration to apply such a complex network of regulations that also encounter very different tax laws in the IF states in a uniform manner worldwide with practically no leeway was arguably flawed from the outset. Even if all 147 Member States of the IF were to implement the Model Rules 1:1, there would be no assurance of consistent interpretation or application in practice. This is especially valid in the absence of a supranational authority capable of formulating a binding interpretation. Within the European Union, the ECJ can ensure a uniform interpretation of the minimum tax directive implemented in the EU Member States, but administrative implementation will still result in considerable divergence. In this context, it would be more appropriate for the OECD to act as a standard-setter by providing guiding principles and reference frameworks rather than seeking to become a global tax legislator.

However, the core of the agreement with the G7 Member States is to prevent US profits from being subject to the UTPR. This effectively shields US tax credits that were intentionally designed to incentivize onshoring from effectuating top-up taxes abroad. It is irritating that the OECD is celebrating the agreement as a major breakthrough for the global minimum tax[62] given that the treatment of tax benefits will ultimately determine whether the core objective of curbing tax competition can be achieved. After all, competition does not operate exclusively through nominal tax rates; rather, preferential tax regimes and credit-based incentives are often a more significant factor. The weaker the minimum tax proves to be in ensuring an effective minimum taxation, the more difficult it becomes to justify the administrative burdens and compliance costs associated with the minimum tax. In the context of the EU Commission's OMNIBUS initiative,[63] the pressing question arises as to whether the competitive disadvantage of the minimum tax can still be offset by sufficient advantages.[64] Without the UTPR, Pillar II will collapse like a house of cards. The UTPR is the core enforcement mechanism designed to pressure the resident jurisdictions of the ultimate parent entity to levy a qualitative domestic top-up tax (QDTT), refrain from granting tax benefits, or significantly raise the general corporate tax rate. However, even a selective suspension for individual countries, especially such important ones as the United States, would deprive the global minimum tax of its legitimacy. Instead of creating a global equitable status, it introduces new asymmetric and competitive distortions. As a result of the suspension, the risk arises of multinationals strategically relocating their headquarters to jurisdictions that are de facto insulated from the application of the global minimum tax thereby neutralizing its intended deterrent effect.

The G7 agreement is therefore highly unlikely to represent a notable breakthrough for the global minimum tax; rather, it heralds its end. Perhaps the time is not yet ripe for Pillar II; perhaps Pillar II is also not the right instrument for curbing international tax competition. As the principal architects of Pillar II, the OECD and the European Commission would be well advised to address these questions thoroughly. There are numerous reasons to reflect on the EU's unilateral push for implementation from the daunting complexity and uncertain effectiveness of the regime to the questionable scope of the EU's legislative competence in the field of direct taxation.[65] While the decision to press ahead with Pillar II can be seen as a self-imposed competitive disadvantage, the accusation of extraterritoriality affects the EU's external relations and should therefore be taken even more seriously.

It is hardly conceivable that other countries will now be persuaded to introduce Pillar II,[66] especially when the recently published G7 agreement merely includes a vague assurance that the United States will support the strict implementation of the minimum tax rules by other OECD countries.[67] Why should any jurisdiction join the challenging and risky GloBE experiment? Even the

Notes

[62] Statement by the OECD Secretary-General on G7 Progress on International Tax Cooperation (28 Jun. 2025), https://www.oecd.org/en/about/news/speech-statements/2025/06/statement-by-the-oecd-secretary-general-on-g7-progress-on-international-tax-co-operation.html?utm_source=twitter&utm_medium=social&utm_campaign=G7&utm_content=en&utm_term=pac (accessed 9 Jul. 2025).

[63] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Simpler and Faster Europe: Communication on Implementation and Simplification* of 11 Feb. 2025, COM(2025). 47 final.

[64] *See* for the change of policy towards competitiveness, M. Draghi, *The future of European competitiveness, Part A: A Competitiveness Strategy for Europe* (European Union Sep. 2024), doi: 10.2872/9356120.

[65] For example R. A. Achleitner & V. Bendlinger, *GloBE (Pillar Two) – Kompetenzrechtliche Erwägungen zur Umsetzung eines Mindestbesteuerungssystems innerhalb der Europäischen Union*, 2 beck.digitax 2 et seq. (19 Feb. 2021).

[66] On the implications, *see also* Saint-Amans, *supra* n. 12.

[67] P. Saint-Amans, *supra* n. 12 interprets this passage as follows: 'In one sense, the minimum tax, which could have unfolded with US withdrawal, can be seen now as preserved, including by the US. "Don't tax me, and I will make sure all the others are properly taxed" could be the summary of the agreement'.

countries that have already implemented Pillar II would do well to critically re-evaluate this decision. It is becoming increasingly clear that they cannot achieve their targeted goals regardless of the deal between the United States and the G7. It may be possible to retreat incrementally by only temporarily suspending the application of the minimum tax. However, with little indication that the broader political environment will shift in favour of global tax harmonization in the foreseeable future, a more decisive step, specifically the complete repeal of Pillar II, may ultimately be the more honest and prudent course of action

Countries outside the European Union are free to consider their commitment to Pillar II autonomously while the European Commission must draw the necessary conclusion for the EU Member States. Even if it does not share the Trump administration's accusation of extraterritoriality and the concerns expressed here regarding the conformity of the UTPR with international law, it must still respect the principle of sincere cooperation in full mutual respect under Article 4 TEU. This principle demands the release of the Member States from their obligation and grants discretion to the national legislators to decide whether they wish to continue in the direction of global minimum taxation. Clinging rigidly to an immature and fragile innovation in international tax law serves neither the internal market nor the broader interests of the Union. On the contrary, imposing the burden of a poorly calibrated reform threatens to undermine both legal coherence and economic competitiveness. This author agrees with Reuven Avi-Yonah[68]: it should not be the threats from the United States that prompt a policy reconsideration. However, the sober realization is that infringing fundamental rights associated with implementing the minimum tax is disproportionate to any potential benefit. This is especially true as it neither effectively curbs tax avoidance nor yields substantial revenue. It has become nothing more than a symbolic gesture that risks weakening rather than strengthening the European Union's economic position in an increasingly competitive global landscape.

Johanna Hey
Professor of Tax Law and Public Law and Director of the Institute of Tax Law at Cologne University, Germany.
Email: johanna.hey@uni-koeln.de.

Notes

[68] R. Avi-Yonah, *supra* n. 15, at 498.