

Exempt but not Excluded: The Legal and Policy Implications of the US “Side by Side” System under the OECD Global Tax Minimum

Introduction

In 2017, the United States adopted the Global Intangible Low-Taxed Income (GILTI) regime, which imposes a minimum US tax rate of approximately 12.6 percent on certain foreign earnings of US-parented multinational enterprises (MNEs). In October 2021, the Organization for Economic Co-operation and Development (OECD) and the G20 nations agreed on a Two-Pillar solution to address the challenges posed by taxation as a result of the digitalization of their economies. The second pillar, the Global Anti-Base Erosion (GloBE) rules, was created to ensure that there is a global minimum tax rate on large MNEs to the extent of 15 percent.

On June 28, 2025, the US Treasury and G7 nations released a joint statement agreeing on a side-by-side proposal—a framework where US domestic minimum tax rules operate alongside Pillar Two rules—under which GILTI would be recognized for the purposes of Pillar Two. This “side by side” framework permits US-parented MNEs to be subject to current US GILTI minimum tax rules, thus departing from certain design features of the Pillar Two framework.¹

The United States’ decision to rely on GILTI as its domestic minimum tax, as reflected in the joint US-G7 statement, raises important legal and policy questions regarding how the United States intends to coordinate its domestic minimum tax with the OECD/G20 GloBE

framework, and whether the side-by-side proposal preserves the conceptual structure of the Two-Pillar framework as intended.

This *Insight* will examine the legal and policy implications of the US “side by side” approach and its interaction with domestic implementation of the GloBE rules.

Between Exemption and Inclusion: The Legal Framework of Pillar Two

The OECD/G20 GloBE framework under the Pillar Two agreement ensures that every large MNE pays an effective tax rate of 15 percent irrespective of its tax home jurisdiction.² These rules are implemented on a jurisdiction-by-jurisdiction basis through domestic regulation enacted by participating jurisdictions under the OECD/G20 Inclusive Framework agreement.

The GloBE framework utilizes two principal coordinated mechanisms: (1) the Income Inclusion Rule, which permits a parent jurisdiction to impose a top-up tax where a multinational enterprise (MNEs)’s income is taxed below the minimum rate, and (2) the Undertaxed Profits Rule, which operates as a backstop where that tax is not otherwise collected. Thus, where the income of an MNE is normally taxed below the 15 percent threshold, these rules empower consenting jurisdictions to impose an additional tax in order to bring the total effective tax rate to 15 percent.

Although the GloBE rules are not legally binding, the members of the framework have agreed to follow these rules through a principle referred to as the “common approach,” which focuses on achieving similar results rather than emphasizing identical wordings. This, in practice, particularly encourages participation, as it allows jurisdictions to draft their own implementation laws provided that they meet the standards set by the OECD and are subject to global review.

An additional rule introduced under Pillar Two, the Subject-to-Tax Rule (STTR), allows source countries—particularly developing economies—to levy a withholding tax on certain payments such as interest and royalties, if they are taxed below the minimum 15 percent rate in the recipient country. The STTR enhances the effectiveness of the GloBE rules by providing a mechanism to capture income which may not be fully addressed by the IIR or UTPR.³

The US Side by Side Approach: Functionally Parallel, Legally Distinct

It is within this dynamic that the coordination of the United States with the GloBE rules has become particularly distinctive.

Most OECD countries implement Pillar Two directly through the coordinated Income Inclusion Rule and Undertaxed Profits Rule. The United States, however, utilizes a domestic minimum tax system, the GILTI rules, designed to approximate the Pillar Two top-up.⁴

GILTI imposes a current minimum US tax of approximately 12.6 percent on certain foreign earnings of US-parented MNEs that would otherwise fall under Pillar Two, where those earnings are taxed abroad below the effective 15 percent minimum rate. Unlike Pillar Two, which calculates top-up taxes separately for each country, GILTI treats all foreign earnings together. It calculates a single minimum tax based on total foreign taxes paid, rather than on a country-by-country basis.

Thus, the United States does not apply the GloBE Income Inclusion Rule or the Undertaxed Profits Rule in their Pillar Two form. Instead, the United States treats GILTI as functionally equivalent to GloBE for US domestic purposes, achieving a minimum tax outcome through a different legal mechanism than the jurisdiction-by-jurisdiction top-up mechanism envisioned by Pillar Two.⁵

In practice, this also means that US-parented MNEs remain outside the OECD's formal Pillar Two recognition framework. Other jurisdictions may therefore still apply Pillar Two top-up taxes to the same income, creating a risk of additional taxation of US MNEs abroad.

While the OECD Inclusive Framework acknowledged that GILTI could exist alongside the GloBE if it achieved equivalent effects, Pillar Two has not formally recognized GILTI as equivalent to the Income Inclusion Rule because GILTI does not apply a per-jurisdiction top-up, and its effective rate has historically been lower than the Pillar Two minimum. While recent reforms have lowered that gap, GILTI does not particularly impose a fixed 15 percent. However, the side-by-side arrangement does not incorporate GILTI into the

GloBE rules; rather, it frames how other jurisdictions evaluate whether GILTI achieves outcomes proportionate to Pillar Two.

Practical and Policy Implications of the US Side-by-Side System

According to the US Treasury, the US minimum tax framework achieves the goals of Pillar Two by ensuring that MNEs domiciled in the United States pay a minimum tax rate pursuant to GILTI, even if that tax rate is something less than 15 percent.⁶

The reasoning behind the US position is both practically and legally relevant. While Pillar Two requires all large MNEs to pay an effective minimum tax of 15 percent typically through the jurisdiction-by-jurisdiction top-up, the US achieves the same outcome for its multinationals using the GILTI rules, a domestic minimum tax on low-taxed foreign earnings. By doing so, the side-by-side system allows US-parented MNEs to comply with domestic tax law while meeting the practical objectives of Pillar Two, such as ensuring a minimum effective rate and reducing the risk of double taxation, without fully adopting the Pillar Two top-up mechanism in its original form.

From a policy standpoint, the United States side-by-side framework features a careful compromise by balancing national sovereignty and global coordination. It preserves the core Pillar Two objective of a 15 percent minimum tax goal for US-parented MNEs while using the GILTI rules to allow the United States to achieve this goal. This approach ensures that US multinationals are not taxed twice on the same income and simplifies reporting and compliance across jurisdictions.

However, the legal framework of this approach has undoubtedly created tension in the world of trade. By this architecture, a differential treatment could be created between US-parented MNEs and non-US-parented MNEs. This is because US-parented MNEs can comply with the Pillar Two objectives through their domestic GILTI rules, which could lower administrative burdens and avoid double taxation. In contrast, non-US parented companies must comply directly with Pillar Two rules, potentially resulting in a higher compliance cost and differential treatment. This raises important questions with regard to bilateral and multilateral trade treaties, including the obligation of non-discrimination on the basis of nationality.⁷

Furthermore, the United States must also show that its domestic minimum tax rules are equivalent to the Pillar Two, as foreign jurisdictions which are signatories to the framework will question its true overall effect, potentially weakening its intended impact.⁸

Beyond Equivalence: Lessons from the US Approach

The GILTI rules demonstrate how the United States achieves a global minimum tax domestically while supporting the goals of Pillar Two, even without directly adopting the Pillar Two mechanisms.⁹ This further highlights why the OECD/G20 opted for a “common approach,” prioritizing shared outcomes rather than identical laws across jurisdictions.

At the same time, flexibility may lead to uncertainty and soft laws (rules that are not legally binding but rely on voluntary compliance) are most powerful when obeyed in letter and spirit across all jurisdictions. In the coming years the major question may not be whether or not the Pillar Two rules can establish a global minimum standard but whether states are willing and able to sustain it.

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¹ U.S Department of the Treasury, G7 Statement on Global Minimum Tax (June 28 2025), <https://home.treasury.gov/news/press-releases/sb018>.

² OECD, *Tax Challenges Arising From the Digitalization of the Economy* (Dec. 20,2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalization-of-the-economy>.

³ OECD, *Subject-to-Tax Rule (Pillar Two): Inclusive Framework on BEPS* (July 17,2023), <https://www.oecd.org/en/publications/tax-challenges-arising-from-the-digitalisation-of-the-economy-subject-to-tax-rule-pillar-two>.

⁴ Ernest and Young, *G7 issues statement on global minimum taxes* (July 3, 2025), https://www.ey.com/en_gl/technical/tax-alerts/g7-issues-statement-on-global-minimum-taxes.

⁵ U.S. Department of the Treasury, *supra* note 1.

⁶ Deloitte, *G7's Pillar Two Shared Understanding: why 2024 compliance still demands action* (July 17, 2025), <https://www.deloitte.com/us/en/services/tax/perspectives/pillar-two-agreement>.

⁷ Vienna Convention on the Law of Treaties, arts. 26-27, Apr. 24, 1970, 1155 U.N.T.S. 331 (May 23, 1969), https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁸ Pricewaterhousecoopers (PWC), *Pillar Two: Assessing US Tax Equivalence* (Mar. 14, 2025), <https://www.pwc.com/gx/en/services/tax/pillar-two-readiness.html>.

⁹ *Id.*