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The Single Top-Up Tax Principle: Justification, Content and Functions upon the Design of QDMTTs

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The present contribution advances the "single top-up tax principle" as a guiding principle for the design of qualified domestic minimum top-up taxes (QDMTTs) by the Inclusive Framework (IF) and by host jurisdictions. This article, which is intended as a critical assessment of the agreed administrative guidance on the QDMTT, generally addresses the justification, content and functions of the single top-up tax principle. It considers both the design of rules on the QDMTT by the IF and implementation issues for host countries, within the permissible range of features for a QDMTT.

1. Introduction

The qualified domestic minimum top-up tax (QDMTT) is a latecomer of the Pillar Two project. One does not find a single reference to it in the Programme of Work,[1] the Public Consultation Document,[2] or the Economic Impact Assessment.[3] A "domestic minimum tax" is only briefly addressed in excerpts of the Pillar Two Blueprint, in a completely different sense from what would be later known as the QDMTT and with no structural ambitions.[4] The QDMTT is not even mentioned in the 2021 Inclusive Framework (IF) Statement,[5] which only refers to the income inclusion rule (IIR), the undertaxed payment rule (UTPR)[6] and the subject-to-tax rule.[7]

In fact, the QDMTT first appeared upon the enactment of the model rules (hereinafter the GloBE Model Rules),[8] with further specification in the corresponding commentary.[9] Despite not being systematically qualified as a charging rule under the GloBE Model Rules, the QDMTT plays an important role in the chain of incentives that is intended to set a global floor to tax

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1. OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy* (28 May 2019).
2. OECD, *Public Consultation Document, Global Anti-Base Erosion Proposal (GloBE) – Pillar Two* (8 November 2019 - 2 December 2019).
3. OECD, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2020) (hereinafter *Economic Impact Assessment*).
4. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, p. 131, para. 491; p. 133, para. 502 (OECD 2020) (hereinafter *Pillar Two Blueprint*).
5. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project (Oct. 2021).
6. Some authors claim that the UTPR would now be known as the "undertaxed profits rule", considering the significant changes that are observed when the Pillar Two Blueprint and the GloBE Model Rules are compared. *See*, e.g., S. Picciotto, *Formulary Approach: The Last Best Hope for MNEs*, 108 Tax Notes International 4, p. 437 (2022); S. Picciotto, *UTPR Critics Miss the Point of Tax Treaty Principles*, 108 Tax Notes International 2, p. 153 (2022); N. Boidman, *No Rational Role for the UTPR*, 108 Tax Notes International 3, p. 287 (2022); J. VanderWolk, *The UTPR Is Flawed: A Response to Prof. Picciotto*, 108 Tax Notes International 3, p. 285 (2022). Officially, the name has not been changed. The new name does not appear in any of the IF official documents, which use the acronym without stating its meaning in the list of abbreviations and acronyms. *See also* C. Plunket, *What's in a Name? The Undertaxed Profits Rule*, 105 Tax Notes International 13, p. 1507 (2022).
7. The subject-to-tax rule is a rule to be implemented through changes to the existing bilateral treaties and is not discussed in the GloBE Model Rules, being therefore outside the scope of this contribution. On the topic, *see* H. Wardell-Burrus, *Pillar Two and Developing Countries: The STTR and GloBE Implementation*, 51 Intertax 2, pp. 118-133 (2023); V. Perry, *Pillar 2, Tax Competition, and Low Income Sub-Saharan African Countries*, 51 Intertax 2, pp. 110-111 (2023); M. Schwarz, *The OECD GloBE proposal – a decisive step towards uniform global minimum taxation?* pp. 41-56 (Nomos 2022); M. Alvarado & R. Offermanns, *The Subject-to-Tax Rule*, in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* pp. 167-98 (A. Perdelwitz & A. Turina eds., IBFD 2021), Books IBFD.
8. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (OECD 2021), Primary Sources IBFD (hereinafter *GloBE Model Rules*).
9. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)* (OECD 2022) (hereinafter *GloBE Commentary*).

competition. The jurisdiction of the low-taxed constituent entity (LTCE) is able to prevent a top-up tax from being charged under an IIR or a UTPR by enacting a QDMTT, which reduces the amount of top-up tax for the jurisdiction.[10]

The GloBE Model Rules do not say much about the design features of the QDMTT,[11] and the GloBE Commentary stressed the need for agreed administrative guidance on the topic.[12] Despite its somewhat laconic debut, the QDMTT has been perceived as an important change in the politically sensitive issue of allocation of taxing rights and has become an essential part of the Pillar Two solution.[13] The new tax has been discussed with great anticipation in academia and quickly caught the attention of developing countries. The African Tax Administration Forum (ATAF) issued a comprehensive suggested approach of domestic minimum top-up tax (DMTT),[14] even before any agreed administrative guidance was enacted.

In February 2023, the IF finally approved agreed administrative guidance on the design of a QDMTT, namely Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) (hereinafter the February 2023 AG).[15] The February 2023 AG clarifies that its content is not exhaustive and further guidance on the design and operation of the QDMTT will be issued in the future, including on a QDMTT safe harbour.[16] It also asserts that a "multilateral review process"[17] will be developed in 2023 and sets out the "guiding principles for evaluating the QDMTTs".[18] In light of these general principles, 53 paragraphs were added to the GloBE Commentary on the definition of QDMTT, and a new consolidated version of the GloBE Commentary is foreseen.[19] In July 2023, the IF approved further agreed administrative guidance, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), July 2023 (hereinafter the July 2023 AG),[20] adding more detail on specific issues related to the QDMTT,[21] and specific rules on the design of a QDMTT safe harbour.[22] The IF has also approved guidance on the GloBE information return.[23]

The present contribution advances the "single top-up tax principle"[24] as a guiding principle for the design of QDMTTs. The article generally addresses the justification, content and functions of the single top-up tax principle. It considers both the design of rules on the QDMTT by the IF and implementation issues for host countries, within the permissible range of features for a QDMTT.

This contribution is essentially intended as a critical analysis of the February 2023 AG and the July 2023 AG. Different layers of criticism on the implementation of Pillar Two are possible and some assumptions must be established, in order to ensure a methodologically consistent approach. The contribution assumes a scenario where the GloBE Model Rules will be adopted as designed, by a critical mass, and is not intended to critically examine the policy decisions behind the GloBE Model Rules or their content. In other words, it takes for granted the future implementation of the GloBE Model Rules as they have been drafted, and focuses on specific implementation and administration issues, at the level of the GloBE Commentary and agreed administrative guidance. The design of the rules on the implementation of the GloBE Model Rules is a complex ongoing debate, and the need for route adjustments is inevitable in some cases. The IF has already shown that it is willing to revise recently enacted commentary when necessary,[25] and the contribution assumes this possibility, being intended as

10. *GloBE Model Rules*, *supra* n. 8, at art. 5.2.3.
11. The only definitional reference is found in art. 10.1., upon the definition of a qualified domestic minimum top-up tax, which will be addressed in sec. 2. Other than that, the QDMTT is only referred as an element in the relevant formulas across the GloBE Model Rules.
12. *GloBE Commentary*, *supra* n. 9, at p. 212, para. 118.
13. *See* M. Herzfeld, *Do GILTI + BEAT + BMT = GloBE?* 50 Intertax 12, p. 895 (2022); M. Devereux, J. Vella, & H. Wardell-Burrus, *Pillar 2: Rule Order, Incentives, and Tax Competition*, p. 4 (Oxford University Center for Business Taxation, Policy Brief, January 2022).
14. African Tax Administration Forum, *ATAF Suggested Approach to Drafting Domestic Minimum Top-up Tax Legislation* (ATAF 2022) (hereinafter *ATAF Suggested Approach*)
15. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)* (OECD 2023), Primary Sources IBFD (hereinafter *February 2023 AG*).
16. Id., at p. 99, para. 3.
17. Id., at p. 99, para. 4.
18. Id., at pp. 99-110, paras. 5-10.
19. Id., at p. 7, para. 7.
20. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), July 2023*, OECD/G20 Inclusive Framework on BEPS (OECD 2023), Primary Sources IBFD (hereinafter *July 2023 AG*).
21. Id., at pp. 56-76.
22. Id., at pp. 77-88.
23. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – GloBE Information Return (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS (OECD 2023), Primary Sources IBFD.
24. The "single top-up tax principle" is intended to have the meaning and justification provided in this contribution, being completely unrelated to the "single tax principle" generally discussed in international tax law scholarship. For multiple perspectives on the topic, *see* R. Mason, *The Transformation of International Tax*, 114 American Journal of International Law 3, pp. 353-402 (2020); J. Wheeler, ed., *Single Taxation?* (IBFD 2018), Books IBFD; D. Shaviro, *The Two Faces of the Single Tax Principle*, 41 Brooklyn Journal of International Law 3, pp. 1293-1302 (2016/2015); R. Avi-Yonah, *Who Invented the Single Tax Principle? An Essay on the History of US Treaty Policy*, 59 New York Law School Law Review 2, pp. 305-15 (2014).
25. Removing excerpts from the GloBE Commentary; *see*, e.g., *July 2023 AG*, *supra* n. 20, at pp. 15 and 57.

a constructive endeavour. For the purposes of this analysis, the role of potential conflicts with bilateral conventions[26] and of potential incompatibilities of the charging rules with general principles of international tax law[27] is also disregarded.

The agreed Administrative Guidance is not supposed to overhaul the content of the GloBE Model Rules but should merely assist in their interpretation and administration. It should advance legal principles that can already be identified within the GloBE Model Rules. After all, administrative guidance means "guidance on the interpretation or administration of" the GloBE Model Rules.[28] Hence, even if the IF is ultimately responsible for enacting both the GloBE Model Rules and the administrative guidance, these instruments are not one and the same: the latter is supposed to guide the interpretation and administration of the former and not to contradict it. A principled understanding of the GloBE Model Rules is essential to obtain a legal framework against which administrative guidance can be critically assessed.

The single top-up tax principle is hereby advanced as a technical principle[29] for the interpretation and implementation of the GloBE Model Rules. The content and functions of the principle are analytically addressed, taking into consideration that some of the outcomes of its application are contingent, and multiple alternatives are available that comply with the content of the GloBE Model Rules. In such cases, the contribution takes a stand on permissible alternative paths for the IF and host jurisdictions, and the principle plays the role of a policy principle. In other cases, the principle is presented more clearly as a legal principle, with a stronger meaning, and actual violations to the principle are identified in the content of the agreed administrative guidance as being contrary to the GloBE Model Rules themselves.

The article examines soft law provisions as a "closed system".[30] The justification of the principle is derived from the goal of and practical reasons for Pillar Two, including the general objective of creating a floor to tax competition and the nature of the incentives it generates (deductive reasoning), in combination with a teleological reading of the fundamental elements of the GloBE Model Rules (inductive reasoning).[31] Even if the contribution does not deal with European law, the approach may be of particular interest in that context, where a directive has been approved[32] whose content is very similar to that of the GloBE Model Rules.[33] From this perspective, the single top-up tax principle could find more immediate legal grounds in European law, with a clearer judicial framework to demand its enforcement. The purported violations to the single top-up tax principle, as found in the agreed administrative guidance, could be presented as violations to the directive. The discussion of these specific European law issues would demand building a broader normative framework and is beyond the scope of the contribution.

Instead of resorting to the traditional source/residence dichotomy, the article refers to "home" and "host" jurisdictions, as a means to segregate two contrasting sets of interests and incentives with regard to the GloBE Model Rules. For the purpose of this contribution, "host jurisdiction" is meant to refer to a jurisdiction that is not expected to collect any significant revenue from the IIR or the UTPR,[34] while being impacted by them. Under the GloBE structure, the host jurisdiction is incentivized to enact a QDMTT to protect itself against tax claims over income derived by its residents.[35] The host jurisdiction is opposed to the "home jurisdiction", which designates a jurisdiction that is expected to be in most cases the jurisdiction applying the IIR and/or the UTPR. For a home jurisdiction, as intended here, the adoption of a QDMTT may be useful, but the policy considerations it will consider in multilateral negotiations are quite different from those of a host jurisdiction. Even if it may be the "host" to certain LTCEs, in most cases, the home jurisdiction will be the one applying the IIR or the UTPR, and not the QDMTT, as it is the jurisdiction of the ultimate parent entity (UPE) to other MNEs.

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26. *See*, critically on this topic, L.E. Schoueri, *Some Considerations on the Limitation of Substance-Based Carve-Out in the Income Inclusion Rule of Pillar Two*, 75 Bulletin for International Taxation 11/12, pp. 543-48 (2021); V. Chand, A. Turina, & K. Romanovska, *Tax Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges*, 14 World Tax J. 1, pp. 3-50 (2021), Journal Articles & Opinion Pieces IBFD.
27. Discussing the topic, *see* J. VanderWolk, *The UTPR Disregards the Need for Nexus*, 108 Tax Notes International 5, pp. 545-46 (2022). Kofler et al., *The UTPR and International Law: Analysis From Three Angles*, 110 Tax Notes International 7 (15 May 2023); Peter Hongler et al., *UTPR – Potential Conflicts With International Law?* 111 Tax Notes 2 (10 July 2023).
28. *GloBE Model Rules*, *supra* n. 8, at art. 10.1.1.
29. On the importance of technical principles for the consistency of a system, *see* J. Hey, in *Tipke/Lang, Steuerrecht* ch. 3, m.no. 5 (23rd ed., Otto Schmidt 2018); R. Eckhoff, *Rechtsanwendungsgleichheit im Steuerrecht* p. 311 (Otto Schmidt 1999).
30. For the expression, *see* B.J. Arnold, *An Investigation into the Interaction of CFC Rules and the OECD Pillar Two Global Minimum Tax*, 76 Bull. Intl. Taxn. 6, p. 275 (2022), Journal Articles & Opinion Pieces IBFD.
31. On the interplay between inductive and deductive reasoning for legal justification, *see* M. Rodi, *Die Rechtfertigung von Steuern als Verfassungsproblem* p. 69 (Beck 1994); C. Höpfner, *Die systemkonforme Auslegung* p. 133 (Mohr Siebeck 2008).
32. 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 (ST/8778/2022/INIT), Primary Sources IBFD.
33. *See*, comparing the GloBE Model Rules and the directive proposal, M. Dietrich & C. Golden, *Consistency versus "Gold Plating": The EU Approach to Implementing the OECD Pillar Two*, 76 Bull. Intl. Taxn. 4, pp. 183-96 (2022), Journal Articles & Opinion Pieces IBFD.
34. According to the ATAF, for instance, "[v]ery few, if any, African countries will collect the top-up tax under an IIR as most African countries have very few if any UPEs resident in their country. As the UTPR is only a backstop to the IIR, it is also unlikely the UTPR will result in significant additional tax for African countries" (*ATAF Suggested Approach*, *supra* n. 14, at p. 2). *See also* S. Picciotto et al., *For a Better GLOBE: A Minimum Effective Tax Rate for Multinationals*, 101 Tax Notes International 7, p. 864 (2021).
35. This is the reason why the use of the source/residence dichotomy would not be appropriate in relation to the GloBE Model Rules. It is not precise to refer to the host jurisdiction as the "source" jurisdiction. The host jurisdiction is the jurisdiction where the LTCE is a resident. Both the IIR and UTPR charge a top-up tax that is calculated on the income of the LTCE.

The article is structured as follows. Section 2. presents the role of the QDMTT in creating a floor to tax competition, contextualizing it in the GloBE Model Rules' framework. Section 3. describes the February 2023 AG's asymmetrical approach and presents the single top-up tax principle as a superior guiding principle. Section 4. is dedicated to the examination of specific design features of the QDMTT, taking the single top-up tax principle as a guiding principle that performs the functions of optimization guidance, supplementary guidance and creative guidance. Therefore, issues of justification, content and functions of the single top-up tax are progressively developed and discussed throughout the topics. An analytical segmentation of the justification, content and functions of the single top-up tax principle is provided in the conclusion, followed by a summary of the main practical outcomes derived from its application.

2. The Role of the QDMTT in the Creation of a Floor to Tax Competition

2.1. The mechanics of the GloBE Model Rules

The computation of the top-up tax and the application of the charging rules are two separate design features of the GloBE Model Rules. The central claim of the article is that host jurisdictions should endeavour to make all efforts to ensure that there is only one top-up tax being calculated for the purpose of applying the IIR and the QDMTT. The argument implies a basic understanding of the mechanics of the GloBE Model Rules, which is briefly presented (*see* sections 2.1.1. and 2.1.2.), before addressing the functions of the QDMTT (*see* section 2.2.).

2.1.1. The autonomous computation of the top-up tax

The GloBE Model Rules are built to provide for a strong model of minimum taxation.[36] They set forth the rules for the calculation of a top-up tax, which is intended to "top up" the insufficient taxation by the host country, ensuring that the agreed global minimum rate is reached. In doing so, they provide for a significant amount of autonomous concepts, considering that domestic definitions are tailored to the purpose of harmonization.[37]

A top-up tax is calculated for jurisdictions in which the MNE group is subject to an effective tax rate (ETR) below the 15% minimum rate. The ETR is a ratio between adjusted covered taxes and the GloBE income or loss for the jurisdiction.[38] The rules provide for the calculation of a jurisdictional top-up tax,[39] which is further allocated to the constituent entities (CEs) in the jurisdiction, in proportion to their GloBE income.[40]

In simplified terms,[41] the top-up tax, like most taxes, is calculated by multiplying a tax rate by a calculation basis. The tax rate of the jurisdictional top-up tax is the top-up tax percentage, being defined as the difference between the minimum rate and the ETR,[42] and ensuring the logic of "topping up" the insufficient ETR. The calculation basis of the top-up tax is the excess profit, which is defined as the difference between the net GloBE income for the jurisdiction and the substance-based income exclusion (SBIE).[43]

The elements to compute the top-up tax are all designed as autonomous concepts of the GloBE Model Rules, largely independent from domestic legislation. Ideally, if jurisdictions applying the IIR and the UTPR implement the GloBE Model Rules uniformly, there will be a single top-up tax being calculated for each LTCE of the MNE group.[44] All jurisdictions applying such rules should arrive at the same top-up tax for the LTCE, which is also the relevant amount for QDMTT purposes.

2.1.2. The charging rules as a separate design feature

Only after the top-up tax for the CE is determined, the charging rules come into play. The computation of the top-up tax for each CE is undertaken prior to, and independent of, the charging rules.[45] This means that the ETR computation and the mechanism for collecting the top-up tax are separate design features of the rules.[46] After calculating the top-up tax in relation to an LTCE, liability for the amount of top-up tax is further allocated either to a parent entity (IIR) or to another CE (UTPR).[47]

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36. *See*, on the importance of the uniform application of the GloBE Model Rules for their justification, M. Devereux et al., *The OECD Global Anti-Base Erosion ("GloBE") Proposal* pp. 2-3 (Oxford University Centre for Business Taxation 2020).
37. *See* Arnold, *supra* n. 30, at p. 275.
38. *GloBE Model Rules*, *supra* n. 8, at art. 5.1.
39. Id., at art. 5.2.3.
40. Id., at art. 5.2.4.
41. Id., at art. 5.2.3. The formula of the jurisdictional top-up tax also comprises adding the additional current top-up tax and deducting the QDMTT. The formula is further discussed in sec. 3.2.1.
42. *GloBE Model Rules*, *supra* n. 8, at art. 5.2.1.
43. Id., at art. 5.3.
44. The February 2023 AG contains deviations from this assertion, which are discussed in sec. 3.
45. *Pillar Two Blueprint*, *supra* n. 4, at p. 112, para. 413.
46. Id., at p. 113, para. 414.
47. Id., at p. 113, para. 415.

The application of the IIR or the UTPR may be hindered by the existence of a QDMTT being levied at the host jurisdiction of the LTCE.

The overall structure of the charging rules has already been described as an "interconnected series of on/off switches",[48] or "fiscal fail-safes"[49] that support each other in implementing the agreed ETR. The top-up tax is calculated with reference to the ETR of jurisdictionally blended income of CEs, and the respective taxing right is further allocated to a jurisdiction by means of a QDMTT, an IR or a UTPR. Following the design of the GloBE Model Rules, the main switch is the IIR, which can be "switched off" by a QDMTT. The UTPR is only "switched on" if neither a QDMTT nor an IIR applies. The switches are designed to implement the commitment of states to set a floor to tax competition, and there is a clear co-dependence in their functioning.

Without the inherent logic of the charging rules, the logic of tax competition would prevent states from establishing the floor to tax competition. Under the logic of the GloBE Model Rules, a low-tax jurisdiction is incentivized to adopt a QDMTT because otherwise the income of the LTCE will be taxed by means of an IIR or a UTPR. Home countries, on the other hand, are incentivized to adopt an IIR because otherwise the income of the LTCE will be taxed by means of the UTPR. At the same time, the UTPR protects states adopting the IIR against tax inversions.[50] The adoption of an IIR by a state would simply lead to the shifting of residence to a state that does not apply an IIR (the so-called tax inversion).[51] The logic of the UTPR is to do away with the incentive to escape an IIR, by ensuring that the same (or a higher)[52] top-up tax is also charged in case the relevant CE moves its residence elsewhere.

It is therefore implicit to the operation of the charging rules and of the QDMTT that there is only one top-up tax being calculated for all purposes. The charging rules are a separate design feature from the calculation of the top-up tax. Likewise, the design of the QDMTT is independent from the rules on the calculation of the top-up tax. Nevertheless, the IIR, the UTPR, and the QDMTT are all expected to apply to a single top-up tax amount, which is, in its turn, specifically calculated to ensure that the ETR for the jurisdiction is reached.

2.2. The functions of the QDMTT

The desirability of a single top-up tax from a host jurisdiction's perspective becomes clear when the functions of the QDMTT are considered. QDMTT means a tax that applies to excess profits of the domestic CEs and operates to increase domestic tax liability with respect to those profits to the minimum rate.[53] As a defined term, QDMTT is a minimum tax that is included in the domestic law of a jurisdiction and that:[54] (i) determines the domestic excess profits in a manner that is equivalent to the GloBE Model Rules; (ii) operates to increase domestic tax liability with respect to domestic excess profits to the minimum rate for the jurisdiction and CEs; and (iii) is implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Model Rules and the GloBE Commentary.

This definition has been the rephrased by the February 2023 AG in the form of a "functional equivalence", meaning that the QDMTT must (i) be consistent with the design of the GloBE Model Rules; and (ii) provide for outcomes that are consistent with the GloBE Model Rules.[55] Seen in the general context of the GloBE Model Rules, the QDMTT performs, from the host jurisdiction's perspective, a primary allocative function (*see* section 2.2.1.) and a secondary simplification function (*see* section 2.2.2.).

2.2.1. The allocative function as the primary function

The primary function of the QDMTT is related to the allocation of taxing rights. The preference of taxing rights given to the UPE jurisdiction was perceived as a "major flaw"[56] of the Pillar Two Blueprint. The ordering would grant superior taxing rights to MNEs' home countries, being particularly disadvantageous to low-income countries, which are, as a rule, only host to MNEs.[57] In a sense, the QDMTT "changes the politically sensitive rule order"[58] of Pillar Two. The mechanism of the GloBE Model Rules sets forth a top-up tax, which can be charged under a QDMTT, an IIR and a UTPR, *in that order.* The addition of the QDMTT to the GloBE Model Rules significantly changes the allocation of taxing rights under Pillar Two and contributes to addressing

48. A. Christians & T. Diniz Magalhães, *Undertaxed Profits and the Use-It-or-Lose-It Principle*, 108 Tax Notes International 6 (4 Nov. 2022).
49. R. Mason, *A Wrench in GLOBE's Diabolical Machinery*, 107 Tax Notes International 12 (16 Sept. 2022); Mason, *supra* n. 24, at pp. 376-80.
50. On the problem of tax inversions, *see* E. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 Virginia Law Review 6, pp. 1649-1751 (2015).
51. Plunket, *supra* n. 6, at p. 1507.
52. *See*, on the taxable amount under the UTPR, sec. 4.2.2.
53. *GloBE Commentary*, *supra* n. 9, at p. 212, para. 116.
54. *GloBE Model Rules*, *supra* n. 8, at art. 10.1.
55. *February 2023 AG*, *supra* n. 15, at p. 99, para. 5.
56. Picciotto et al., *supra* n. 34, at p. 864.
57. Id.
58. Devereux, Vella & Wardell-Burrus, *supra* n. 13, at p. 4.

concerns over the fairness of the allocation of taxing rights embedded in the preliminary discussions on its design.[59] The QDMTT mitigates the concerns according to which Pillar Two would operate to generate revenue gains for the countries where MNEs are headquartered.[60] Its priority over the IIR and the UTPR is therefore “not surprising”,[61] as the same outcome could be produced by the jurisdiction of the CE by means of reform of its tax legislation.

If the QDMTT is equal to the top-up tax rate multiplied by the excess profits, then it cancels any right of other jurisdictions to charge a top-up tax under an IIR or a UTPR,[62] provided that there is uniform implementation and application of the GloBE Model Rules. The mechanism allows a jurisdiction to collect the revenue that would otherwise have been collected by a foreign jurisdiction over income derived by an LTCE in the host jurisdiction.[63] Under this mechanism, assuming that there will be IIRs and UTPRs in force over the world, states would be strongly incentivized to enact a QDMTT, knowing that such enactment would not harm its competitive position.[64] In a scenario of uniform implementation and application of the GloBE Model Rules, the enactment of a QDMTT does not increase the total tax that would be paid by an MNE, but merely changes the jurisdiction to which the tax shall be paid. Considering that the top-up tax would be charged either way under an IIR or a UTPR, the enactment of a QDMTT merely allows the host jurisdiction to charge the tax, instead of waiving revenue to another jurisdiction.[65] From this perspective, it could be argued that the GloBE Model Rules establish a floor to tax competition by incentivizing countries to enact a QDMTT.[66] After all, in this new “policy game”,[67] it should be expected that most countries adopt a QDMTT to avoid waiving tax revenues to other states, as the same income may trigger the charge of a top-up tax under an IIR or a UTPR.[68]

Hence, from a strictly distributional perspective, it is true that, if the jurisdiction of the CE chooses not to impose the minimum tax, it can “hardly complain”[69] if another jurisdiction exercises its right under another charging rule, either the IIR or the UTPR.[70] The preference to charge a top-up tax belongs to the CE’s jurisdiction, which, assuming a uniform implementation and application of the GloBE Model Rules, is able to charge a top-up tax under the QDMTT, thus inhibiting the appearance of any taxing right under an IIR or a UTPR. This argument naturally assumes that the jurisdictions have agreed that the relevant income should be subject to the minimum tax. After all, the minimum tax is a limitation to tax competition,[71] and an expansion of the tax jurisdiction of states to tax income derived abroad by non-resident entities is implicit to the content of the GloBE Model Rules.

It is also important to mention that an alternative DMTT that is not a QDMTT will likely be treated as a covered tax for GloBE purposes[72] and also increase the ETR,[73] consequently reducing the amount of top-up tax due under the GloBE Model Rules. However, only a QDMTT will be treated as a reduction to the jurisdictional top-up tax, at a later stage of the application of the rules, after the SBIE has already been computed.[74] In practice, this means that, when compared to a QDMTT, a higher amount of DMTT will be necessary to eliminate the taxing rights arising under IIRs and UTPRs. Therefore, it is within the interest of the host jurisdiction that the domestic measure enacted is treated as a QDMTT for GloBE purposes and that any restrictive approach of the agreed administrative guidance is left behind.

2.2.2. The simplification function as a secondary function

A secondary function of the QDMTT is simplification, as it eliminates the need for the host jurisdiction to implement a major tax reform to meet the Pillar Two standards. The outcome of introducing a QDMTT cannot be easily replicated by simply raising tax rates.[75] In fact, even without the QDMTT, the initial right to impose a tax would belong to the jurisdiction in which the CE is located, since, by raising taxes, it is able to completely eliminate any charging under an IIR or a UTPR.[76] However, the QDMTT allows states to specifically design this tax increase to the minimum necessary to comply with the GloBE Model

59. Devereux, Vella & Wardell-Burrus, *supra* n. 6, at p. 4. ***See also*** B.J. Arnold, *The Ordering of Residence and Source Country Taxes and the OECD Pillar Two Global Minimum Tax*, 76 Bull. Intl. Taxn. 5, p. 224 (2022), Journal Articles & Opinion Pieces IBFD.
60. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 4.
61. Arnold, *supra* n. 59, at p. 225.
62. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 4.
63. Arnold, *supra* n. 59, at p. 224.
64. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 4. Similarly, ***see*** Perry, *supra* n. 7, at p. 107.
65. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 5.
66. Id., at p. 3.
67. A. Christians, *Let the GILTI/GLOBE Games Begin*, 106 Tax Notes International 7 (16 May 2022).
68. Arnold, *supra* n. 59, at p. 227.
69. Id., at p. 222.
70. Id.
71. *See*, on the topic, D. Shaviro, *What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?*, 40 Virginia Tax Review 2, p. 405 (2021).
72. *GloBE Model Rules*, *supra* n. 8, at art. 4.2.1.
73. Id., at art. 5.1.
74. Id., at art. 5.2.3.
75. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 8. ***See also*** Arnold, *supra* n. 59, at p. 225; Arnold, *supra* n. 30, at p. 282.
76. Similarly, ***see*** Arnold, *supra* n. 59, at p. 222.

Rules.[77] If a country presents a CIT rate below 15% and simply raises the rate, top-up taxes may still be due, considering the differences in the tax base. The definition of excess profits is very peculiar, and it is highly unlikely that any country adopts a tax base identical to the one derived from the application of the GloBE Model Rules. Hence, by simply increasing tax rates, states may end up increasing taxation over a base that is different from the one taken as reference by the GloBE Model Rules, becoming less competitive, while not necessarily eliminating the risk that another state charges an IIR or a UTPR.[78] The natural difficulties of a general reform of a domestic system, which would have to deal with existing tax incentives and the politics surrounding them, make the adoption of a QDMTT a much more viable solution, which is justified as "a practical mechanism".[79] For this reason, Devereux et. al. also conjecture that some low-tax countries could even be incentivized to substitute their own CIT for a QDMTT, at least for MNEs that would fall within the scope of the GloBE Model Rules.[80]

2.3. Summary: The QDMTT from a host state perspective

When designing a QDMTT, host jurisdictions should keep in mind the functions that such a tax is expected to perform. In summary, the QDMTT shall be designed to prevent the application of a charging rule by another state in the simplest possible way – and nothing more than that. There is no reason to believe that the QDMTT should be expanded to accomplish a broader tax collection function. If the goal of the state is to increase tax collection, there certainly are other more appropriate taxes and provisions to achieve this goal. The QDMTT is an overcomplicated tax whose efficiency and distributional impacts are unclear. The only incentives a state would have to adopt a QDMTT are the ones arising from the implementation and application of the IIR and the UTPR by other states.

A realistic view on Pillar Two is essential for host countries upon the design of the QDMTT. The GloBE Model Rules affect not only competition for artificial investments, but also legitimate tax competition.[81] They were designed as a tool against tax competition in its broadest sense and were by no means specifically tailored to capture artificial profit shifting. Enacting a QDMTT is not a measure prone to increase the integrity of a domestic regime, which is a task that is better performed by other measures actually designed to perform them. On the one hand, the GloBE Model Rules, as a measure intended to set a floor to tax competition, were designed to force host jurisdictions to increase their ETR over the CEs of MNE groups. On the other hand, tax competition will remain above this floor, and the behaviour of MNE groups will exert pressure on host countries, which will seek to remain attractive from a regulatory perspective. The incentive for host countries is therefore to only charge the top-up tax that would be otherwise charged by other jurisdictions – "and not a penny more".[82]

3. From the Asymmetrical Approach to the Single Top-Up Tax Principle

Once the functions of the QDMTT are clear, further concretization at the level of implementation is necessary. How should this functional reading translate into the implementation of the QDMTT by host countries? In fact, the February 2023 AG offers a range of permissible attributes for the QDMTT, which are supposedly derived from its "guiding principles" (*see* section 3.1.). Within this range, there is a sweet spot for which host countries should aim (the single top-up tax principle) that neutralizes the IIR and the UTPR, keeps the administration of the rules as simple as possible and limits the influence of the GloBE Model Rules over the host countries' domestic legislation to the minimum necessary level (*see* section 3.2.).

3.1. The guiding principles under the February 2023 AG: The asymmetrical approach

The February 2023 AG adopts an asymmetrical approach on the exam of whether a DMTT is a QDMTT. As a general rule, the choice for less restrictive features than that of the GloBE Model Rules harms the qualification as a QDMTT, while the adoption of features that are more restrictive do not prevent the qualification as a QDMTT.

On the one hand, the February 2023 AG is very restrictive with regard to design features that do not meet the minimum level of taxation that is expected from a top-up tax. The QDMTT is required to account for most of the specificities envisioned by the GloBE Model Rules, including the definitions of UPE, MNE group and CE.[83] The computation of the tax liability for the jurisdiction must take into account the GloBE income and the covered taxes of CEs that are located in the jurisdiction, as determined under the GloBE Model Rules.[84] The QDMTT is required to take into consideration the separate treatment applicable to investment entities,[85] joint ventures,[86] and minority-owned CEs.[87] The QDMTT shall strictly follow the rules on

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77. *See supra* n. 59, at p. 224.
78. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 8.
79. *See* Arnold, *supra* n. 59, at p. 225.
80. Devereux, Vella, & Wardell-Burrus, *supra* n. 13, at p. 10.
81. *See*, for a defense of the right of developing countries to compete for real investments, A. Titus, *Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies?*, 50 Intertax 5, p. 414-423 (2022).
82. Christians, *supra* n. 67.
83. *February 2023 AG*, *supra* n. 15, at p. 100, para. 118.4(a).
84. Id., at p. 100, para. 118.4(b).
85. Id., at p. 106, para. 118.33. *See GloBE Model Rules*, *supra* n. 8, at art. 7.4.

computation of income of permanent establishments (PEs)[88] and tax transparent entities.[89] Income and tax computations "generally need to mirror" the GloBE Model Rules.[90] The use of a broader carve-out than the SBIE is not permitted.[91]

On the other hand, the February 2023 AG is very permissive with regard to design features that go beyond what is expected from a top-up tax. The host jurisdiction is allowed to extend the QDMTT to groups that do not trigger the EUR 750 million threshold or to purely domestic groups.[92] The QDMTT does not need to allow for the carry-forward of losses or contemplate the GloBE loss election.[93] For QDMTT purposes, stricter limitations on blending of income and taxes across the CEs are also tolerated.[94] The adoption of a carve-out is not a requirement, and the adoption of a "less generous" carve-out for QDMTT purposes is also permitted.[95] The choice for a tax rate that exceeds the minimum rate is also treated as a possibility.[96] The *de minimis* exclusion[97] does not need to be adopted for QDMTT purposes.[98]

The choice for the asymmetrical approach is very clear, but the February 2023 AG is inconsistent with regard to the need for justification for deviating from the GloBE Model Rules. While the adoption of most of the more restrictive features does not refer to any sort of requisite to allow for a deviation, a different wording is adopted with regard to income and tax computations, in relation to which "customization" is only "permissible" in two situations.[99] The QDMTT can be made "more restrictive" than the GloBE Model Rules, where the restriction is consistent with local rules[100] or where the adjustments are not relevant in the context of its domestic tax system.[101] In all other cases (subjective scope, jurisdictional blending, carve-out, etc.), no reference to a requirement for deviations is found. Following the wording of the February 2023 AG, one concludes that only in the case of customization in relation to permanent differences, a justification is needed. The February 2023 AG does not discuss the reasons for such differentiation.

In fact, the asymmetrical approach as a whole cannot be justified either on purposive or on literal considerations. The approach is not necessary to achieve the goal of establishing a floor to tax competition – and cannot be justified using purposive reasoning. A more permissive approach in relation to features that fall short of the top-up tax definition would not harm the goals of the GloBE Model Rules, since excess profits not captured by the QDMTT would still be captured by an IIR or a UTPR.[102] The IF acknowledges that the fact that the QDMTT falls short of the floor to tax competition does not present a risk to the integrity of the GloBE Model Rules.[103] The approach cannot be justified on a more literal interpretation of the QDMTT definition either. If the intent was, for whatever reason, to interpret the relevant provision strictly, the interpretation should cut both ways. Following the actual wording of the relevant provision, the only allowed deviation should be with regard to the applicable generally accepted accounting principles (GAAP) – which is the only feature whose deviation is expressly mentioned in the definition of article 10.1. of the GloBE Model Rules.

3.2. The single top-up tax principle as a guiding principle

In any case, leaving problems of internal consistency aside, following the February 2023 AG, there is a range of possible designs for the QDMTT, which starts in a top-up tax strictly in line with the GloBE Model Rules,[104] and go through many levels of more restrictive designs. Within this range, what is best from the perspective of host jurisdictions? There is a sweet spot for which host countries should aim. Host countries have the incentive to strictly align their DMTTs with the top-up tax that would be charged under an IIR under the GloBE Model Rules. In the absence of such alignment, they risk either being less comprehensive than the top-up tax – and refrain from collecting revenue that will be captured by other jurisdictions, without making the host jurisdiction more attractive – or collecting more tax than the top-up tax – which may be detrimental for foreign

86. *February 2023 AG*, *supra* n. 15, at p. 101, paras. 118.7-118.8. *See GloBE Model Rules*, *supra* n. 8, at art. 6.4.
87. *February 2023 AG*, *supra* n. 15, at p. 101, para. 118.6. *See GloBE Model Rules*, *supra* n. 8, at art. 5.6.
88. *February 2023 AG*, *supra* n. 15, at p. 104, para. 118.22. *See GloBE Model Rules*, *supra* n. 8, at art. 3.4.
89. *February 2023 AG*, *supra* n. 15, at pp. 104-105, paras. 118.23-118.25. *See GloBE Model Rules*, *supra* n. 8, at art. 3.5.
90. *February 2023 AG*, *supra* n. 15, at p. 104, para. 118.20.
91. Id., at p. 107, paras. 118.36-118.37.
92. Id., at p. 100, para. 118.2.
93. Id., at p. 105, para. 118.27. *See GloBE Model Rules*, *supra* n. 8, at arts. 4.4 and 4.5.
94. *February 2023 AG*, *supra* n. 15, at p. 106, para. 118.33.
95. Id., at p. 107, paras. 118.36-118.37.
96. Id., at p. 107, para. 118.38.
97. *GloBE Model Rules*, *supra* n. 8, at art. 5.5.
98. *February 2023 AG*, *supra* n. 15, at p. 107, para. 118.39.
99. Id., at p. 104, para. 118.20-118.21.
100. Id., at p. 104, para. 118.20.
101. Id., at p. 104, para. 118.21.
102. This issue has different implications in the case of a safe harbour, as discussed in sec. 4.4.
103. This feature of the GloBE Model Rules is acknowledged in the *July 2023 AG*, *supra* n. 15, at p. 77, para. 2: "This possibility of an MNE Group paying less Top-up Tax under a QDMTT than it would have incurred under the GloBE Rules, does not, however, give rise to any integrity risks because the credit mechanism in Article 5.2 ensures that any shortfall in domestic Top-up Tax payable under the QDMTT will simply result in additional tax being payable under the GloBE Rules".
104. *See*, however, the problematic design features addressed in sec. 4.

direct investment.[105] The chain of incentives of the GloBE Model Rules in fact corner the host jurisdiction into following the single top-up tax principle, which becomes their most rational response.

On the one hand, any top-up tax not collected under the QDMTT will remain taxable under an IIR or an UTPR. Following the structure of the GloBE Model Rules, host jurisdictions are incentivized to collect the total of the top-up tax that would be otherwise collected by other jurisdictions. Not collecting such a top-up tax would equate to simply waiving revenue to the benefit of other jurisdictions, with no benefit to the attraction of investments to the host jurisdiction.

On the other hand, tax competition will not end, even if Pillar Two is implemented consistently and in full across jurisdictions. The GloBE Model Rules create a floor to tax competition, but, above this floor, the logic of tax competition will still prevail. Therefore, host jurisdictions have no incentive to enact a DMTT above the floor. The GloBE Model Rules operate as an extraneous force that limit their tax sovereignty, and they are expected to strictly react to the incentives that the GloBE Model Rules provide.

Hence there is no policy reason for host jurisdictions to enact a DMTT that is more restrictive than the top-up tax. In this context, simplification would be an elusive policy justification for a more restrictive QDMTT. Under the logic of the GloBE Model Rules, any “simplified version” of the QDMTT is in fact a complication. This statement is less intuitive and deserves further consideration.

At first glance, administrability concerns might be very appealing and elude host jurisdictions into adopting more restrictive versions of QDMTTs. For instance, host jurisdictions might be tempted to adopt a QDMTT without a carve-out or without allowing for the carry-forward of losses, considering that such version would be simpler to administer. Nonetheless, under the structure of the GloBE Model Rules, even if host jurisdictions adopted a simplified version of QDMTT, the “complicated” top-up tax will still have to be calculated for the purpose of applying an IIR or a UTPR – even if only to ensure that no amount of top-up tax remains after the QDMTT is applied. Considering the relevance of the QDMTT for applying the charging rules in the GloBE Model Rules (*see* section 3.2.1.) and the possible monitoring under the GloBE information return (*see* section 3.2.2), following the single top-up tax principle is the best way to ensure the administrability of the rules, also from the host jurisdiction’s perspective.

3.2.1. The relevance of the QDMTT for the application of the charging rules

In order to understand the superiority of the single top-up tax principle, further reference to the mechanism of the GloBE Model Rules is necessary. Under article 5.2.3. of the GloBE Model Rules, the QDMTT is subtracted from the jurisdictional top-up tax, as follows:

Jurisdictional top-up tax =

(Top-up tax percentage x excess profit) + additional current top-up tax – QDMTT

The jurisdictional top-up tax is further apportioned to the CEs in the jurisdiction in proportion to their GloBE income.[106] The top-up tax of the CE is the amount finally considered under the IIR or the UTPR.[107] This means that, in order to apply an IIR or a UTPR, a home jurisdiction will have to go through essentially the same calculations as a jurisdiction applying the QDMTT.

As a consequence, any simplification effort upon the drafting of the QDMTT is in fact jeopardized and becomes reason for additional complexity. What would apparently be a “simplification” of the QDMTT solely becomes a need for a second calculation. Designing a more restrictive tax base for the purpose of the QDMTT will in fact demand a different set of rules, with a different set of interpretative problems. The “complicated” version of the top-up tax will have to be calculated anyway, and the simplified QDMTT becomes merely a different source of controversy. Any need for a second calculation is, from the perspective of the MNE group, a source of additional complexity.

For this reason, the simplest approach upon the drafting of the QDMTT is to follow the single top-up tax principle. Efforts should be concentrated on ensuring that there is a single top-up tax being calculated, both for the purposes of the IIR and the QDMTT. This is the best approach not only from the perspective of MNEs, but also from the perspective of the host jurisdiction’s tax administration, which will be able to benefit from the work being performed by home jurisdictions on the enforcement of the GloBE Model Rules.

3.2.2. Synergistic monitoring under the GloBE information return

The single top-up tax principle also improves the ability of the host jurisdictions to enforce the QDMTT, by enabling them to benefit from the work performed by other tax authorities. Home jurisdictions are interested in the enforcement of the GloBE

105. Similarly, *see ATAF Suggested Approach*, *supra* n. 14, at p. 2.
106. *GloBE Model Rules*, *supra* n. 8, at art. 5.2.4.
107. The provision of art. 2 *GloBE Model Rules* are applicable for this purpose.

Model Rules not only because of tax revenue, but also because they are the jurisdictions that will ultimately benefit from the effectiveness of the floor to tax competition.[108] As a rule, they are also the jurisdictions that are better equipped to deal with the rules as designed. Therefore, they are expected to closely and proactively monitor the collection under the IIR and the UTPR.

From the perspective of host jurisdictions, the GloBE Model Rules are an extraneous force, and they are expected to simply react to the incentives provided. Of course, host jurisdictions shall endeavour the necessary efforts to enforce and collect the QDMTT once they decide to enact it, but their ability to do so will be in general more limited than that of home jurisdictions. For this reason, they should also seek to rely on the work being performed by home jurisdictions within the GloBE framework when monitoring and enforcing their QDMTTs. The closer the QDMTT is aligned with the GloBE Model Rules, the greater will be the possibility to rely on information from the GloBE information return to check compliance with the QDMTT legislation.

The GloBE information return follows a standardized template form and provides tax administrations with the necessary information to evaluate the correctness of a CE's tax liability under the GloBE Model Rules.[109] On the GloBE information return, MNE groups are requested to provide, among other information, the identification of the CEs, the overall corporate structure of the group, and the information necessary to compute the ETR, the top-up tax and the amount due under the IIR and the UTPR for each jurisdiction.[110] Hence, in a scenario where the single top-up tax principle is followed, host jurisdictions will be able to optimally use the GloBE information return to monitor whether any amount of IIR or UTPR is being collected in relation to the LTCEs they host.

A host country that is able to enact a QDMTT that triggers essentially the same top-up tax amount as the relevant IIRs will be able to benefit from the work being performed by the tax administrations of home countries. With the identity of top-up taxes, the charging of a tax under the IIR or the UTPR will likely mean that there are inconsistencies in the calculation of the QDMTT. In this sense, host jurisdictions' tax authorities will be able to concentrate their monitoring efforts on MNEs that are still somehow being subjected to the IIR and/or the UTPR in other jurisdictions in relation to the income of LTCEs located in the host jurisdiction. LTCEs that are paying a top-up tax under the QDMTT, not triggering any further claims from home jurisdictions, will not be a reason for further concern for host countries, unless home jurisdictions arrive at a different conclusion when monitoring the application of their charging rules. For this reason, the IF should provide for agreed administrative guidance setting rules requiring the sharing of information between tax authorities in case an audit leads to an additional top-up tax obligation. This feature would allow host jurisdictions to react in case the tax authorities from home jurisdictions conclude that there exist inconsistencies in the taxpayer's relevant calculations.

Furthermore, from the perspective of the MNE group, the single top-up tax principle will create an incentive to simply pay any amount of top-up tax under the QDMTT. Under the general structure of the GloBE Model Rules, the application of the QDMTT takes precedence over the IIR and the UTPR. Considering that the QDMTT is in fact deducted from the jurisdictional top-up tax,[111] if the single top-up tax is adopted, no amount is supposed to be due under an IIR or a UTPR.

4. Specific Design Issues Following the Single Top-Up Tax Principle

Considering the functions of the QDMTT, and the superiority of the single top-up tax principle in ensuring their performance, the present section examines specific design issues of the QDMTT. There are many features that need to be addressed, and many others are still to be identified as the process of implementation and application of the GloBE Model Rules moves forward. This section selects core issues of implementation of the QDMMT and uses them as examples for three functions that the single top-up tax principle is able to perform with regard to the QDMTT.

The single top-up tax principle is able to consistently: (i) guide host jurisdictions on the choice of optimal design features for their QDMTTs among the available options (*function of optimization guidance*); (ii) guide the IF on the revision and further development of the GloBE Commentary and agreed AG, considering the existence of gaps and inconsistencies in the current design of the QDMTT (*function of supplementary guidance*); and (iii) guide the IF on the development of additional mechanisms that promote the efficacy of the QDMTT and subsequently ensure that the GloBE Model Rules are able to achieve their goals (*function of creative guidance*).

With regard to its *function of optimization guidance* for host countries, the single top-up tax principle guides policymakers on the choice of the best design features within the frame of possible choices. Like an interpreter investigating the possible meanings of the relevant provisions to find the best interpretative alternative, policymakers will be required to make choices

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108. *See Economic Impact Assessment*, *supra* n. 3, at p. 149, para. 320. *See also* United Nations Conference on Trade and Development, *World Investment Report 2022: International Tax Reforms and Sustainable Investment*, United Nations Conference on Trade and Development (UNCTAD) World Investment Report (WIR), p. 124 (United Nations 2022).
109. *GloBE Commentary*, *supra* n. 9, at p. 179, para. 1.
110. *GloBE Model Rules*, *supra* n. 8, at art. 8.1.4.
111. *See*, however, the design challenges presented in secs. 4.2. and 4.3.

within the frame of permissible design choices. The single top-up tax principle guides them on this task and translates into a general rejection of peculiarities for the purpose of calculating the QDMTT. This feature has already been presented in general terms.[112] In this section, this aspect of the principle is discussed in detail with specific reference to the possible choice of different GAAPs for QDMTT purposes (*see* section 4.1.).

The single top-up tax principle also performs an important *function of supplementary guidance* to host jurisdictions and the IF in the design of rules related to the QDMTT. Like an interpreter that finds out that the wording of the provisions leads to an unacceptable or unclear outcome, policymakers and the IF are expected to offer correction and supplementation to the undesirable outcomes of the application of GloBE Model Rules. The single top-up tax principle helps to clarify that there are two fundamental design issues which, as addressed in the February 2023 AG, will significantly hinder the adoption of QDMTTs by host countries. The February 2023 AG forces jurisdictions with a QDMTT to go above the floor to tax competition and, as a consequence, makes them less competitive than a jurisdiction without a QDMTT. The current rules on the amount of top-up tax that shall be charged under the QDMTT (*see* section 4.2.) and on the assignment of controlled foreign company (CFC) and PE taxes for QDMTT purposes (*see* section 4.3.) are not in line with the single top-up tax principle – or even with the guiding principles enunciated in the February 2023 AG. The section demonstrates the role that may be played by the single top-up tax principle in offering supplementary guidance to correct and further develop the existing administrative guidance.

Finally, the single top-up tax principle can also perform a *function of creative guidance*. The creative powers of interpreters are limited and, as a consequence, so is their ability to improve the consistency of a system. Some improvements can only be made by a law-making body, which is also expected to act consistently and adopt a principle-oriented approach. In the case of the GloBE Model Rules, this separation is less clear: the same body concentrates the power to interpret, supplement and modify them. Considering that they are a soft law instrument, there are currently no formal limits to their amendment by the IF, other than diplomatic considerations. In any case, there are many issues that are left open in the GloBE Model Rules, and the IF is expected to present agreed administrative guidance with very little support from the GloBE Model Rules or their preliminary work. Even if one cannot draw a clear line between supplementation and innovation, what matters is that the single top-up tax principle is also able to assist the IF in playing a more creative role in relation to the rules initially enacted. This contribution does not discuss any amendments to the GloBE Model Rules but focuses on an agreed administrative guidance which is expected to be enacted soon. As an example of the function of creative guidance, section 4.4. contains a discussion of the prospects of a QDMTT safe harbour under the single top-up tax principle, addressing not only alternatives to its design (*see* section 4.4.2.) but also paths to be avoided (*see* section 4.4.1.).

4.1. The choice of a GAAP for QDMTT purposes

The GloBE Commentary acknowledges that the amount of a QDMTT may differ from the one determined under the GloBE Model Rules as a result of different applicable accounting standards.[113] As per the definition of QDMTT, the minimum tax may be computed based on a local authorized financial accounting standard that is different from the standard used in the consolidated financial statements and still be treated as a QDMTT.[114] The difference may result in an amount of QDMTT in excess of the amount of top-up tax that would otherwise be computed as a jurisdictional top-up tax. The GloBE Commentary further clarifies that the excess is not intended to reduce the top-up tax under the GloBE Model Rules below zero or result in a refund of, or credit against future top-up tax under the GloBE Model Rules. Further considerations on the topic are left open to the GloBE implementation framework.[115] The February 2023 AG dedicates two paragraphs to this issue.[116]

Following the single top-up tax principle, within its function of optimization guidance, host jurisdictions should not use their domestic GAAP in the design of a QDMTT, because this would likely lead to the calculation of a different top-up tax than the one calculated for IIR and UTPR purposes.[117] This is undesirable for three reasons.

First, because this feature will likely give rise to a QDMTT that is either above or below the agreed floor to tax competition – and, as seen, neither of these outcomes is desirable. If it is above the floor, the QDMTT will be above what is necessary to neutralize the application of the IIR or the UTPR by other states, making the host jurisdiction less competitive. If it is below the floor, the QDMTT will be below what is necessary to neutralize the application of the IIR or the UTPR by other states, and the host jurisdiction will be simply waiving tax revenue that will be captured by other jurisdictions without providing for any investment incentives.

112. *See* sec. 3.2.
113. *GloBE Model Rules*, *supra* n. 8, at art. 10.1. *GloBE Commentary*, *supra* n. 9, at p. 212, para. 117.
114. *GloBE Model Rules*, *supra* n. 8, at art. 10.1. *GloBE Commentary*, *supra* n. 9, at p. 212, para. 117.
115. *GloBE Commentary*, *supra* n. 9, at p. 212, para. 118 (replaced by the *February 2023 AG*).
116. *February 2023 AG*, *supra* n. 15, at pp. 102-103, paras. 118.14 and 118.15.
117. The *ATAF Suggested Approach* also resorts to the GAAP of the UPE as a starting point. *See ATAF Suggested Approach*, *supra* n. 14, at sec. 3.2. The use of a domestic GAAP is only admitted in cases where it is not reasonably practicable to determine the financial accounting net income or loss for a covered person based on the accounting standard used in the preparation of consolidated financial statements of the UPE (sec. 3.3.).

Second, because the need to calculate different Top-up Taxes for IIR, UTPR and QDMTT purposes will increase compliance costs for MNEs and correspondingly make the host jurisdiction less attractive from a regulatory perspective. This problem is even greater in cases where the host country applies an authorized financial accounting standard that is not an acceptable financial accounting standard. The need to check for material competitive distortions in such cases further increases the compliance challenges.[118]

Third, because the difference will also increase the enforcement costs for the host jurisdiction's tax administration. The need for different calculations will reduce the synergy arising from the complementary efforts of the home and host jurisdiction's tax authorities to enforce the floor to tax competition. With a different top-up tax being calculated for the purpose of the charging rules and of the QDMTT, discrepancies in calculation will likely increase, and the fact that another jurisdiction charges an IIR will not say much about compliance with the QDMTT rules.

Of course, the adoption of the GAAP of the UPE for the purpose of levying a tax may raise important constitutional concerns in some jurisdictions, and this may not be an alternative for all jurisdictions. Apart from dogmatic concerns, a certain dose of legal realism could be beneficial upon the design of the tax. Assuming that IIRs and UTPRs are adopted by a critical mass, taxpayers will have no incentive to litigate against a QDMTT that resorts to the GAAP of the UPE. Any benefit eventually derived from the non-application of the UPE GAAP-based QDMTT will be likely captured under the IIR or the UTPR. In the short-term, there may be some financial benefit arising from a delayed collection of the tax or from other discrepancies that a blurred litigation scenario may entail. However, assuming that a domestic GAAP-based QDMTT will further replace the UPE GAAP-based QDMTT, in the long-term, such improbable benefits will be eventually outweighed by the compliance costs. As the calculation of the top-up tax under the UPE GAAP is necessary for the purposes of applying the IIR or the UTPR, the adoption of a domestic GAAP-based QDMTT will always lead to the need for a second calculation, which is undesirable from the taxpayer's perspective. In order words, both from a taxpayer and a tax authority's perspective, the adoption of the UPE GAAP for the purpose of designing the QDMTT would be a preferable feature, which may eliminate the incentive for litigation on the topic.

The July 2023 AG brings further elements that may incentivize the host jurisdiction to enact a QDMTT, even if it is potentially unconstitutional or in breach of other domestic provisions. Accordingly, any amount of QDMTT that is challenged in a judicial or administrative proceeding by the MNE group shall not be treated as QDMTT payable under article 5.2.3. This rule applies in cases where the litigation is "based on constitutional or other legal grounds or a specific agreement with the government of the QDMTT jurisdiction limiting its tax liability, such as a tax stabilization agreement, investment agreement, or similar agreement".[119] In other words, starting litigation against a QDMTT will immediately give rise to tax claims under an IIR an UTPR, creating no foreseeable financial benefit to the MNE group, thus discouraging litigation also in case of a potential constitutional problem related to the adoption of the GAAR of the UPE.

In any case, there are practical reasons that may still lead a host jurisdiction to prefer the use of the domestic GAAP, including the capacity of local tax authorities, which are already familiar with the domestic GAAP, and language concerns related to the use of the UPE GAAP.

4.2. The taxable amount of the jurisdictional top-up tax

A curious feature of the GloBE Model Rules is that the IIR is levied only on the allocable share of the top-up tax, as determined under article 2.1.1., 2.1.2. and 2.1.4., while the UTPR is levied on the whole amount of the jurisdictional top-up tax computed under article 5.2.3. While the IIR only burdens the LTCE income that is attributable to CEs of the MNE group, the UTPR also burdens LTCE income attributable to minority shareholders that do not belong to the MNE group. The GloBE Model Rules are silent with respect to the incidence of the QDMTT, and a proper solution can only be derived from the GloBE Commentaries and the agreed AG.

The single top-up tax principle, within its function of supplementary guidance, requires that the QDMTT is levied, similarly to the IIR, on the allocable share of the top-up tax, and not on the whole amount of the jurisdictional top-up tax computed under article 5.2.3., like the UTPR. The February 2023 AG does not embrace this possibility, and the IF should consider issuing agreed AG on this topic, correcting paragraphs inserted by the February 2023 AG and further clarifying the application of some provisions by means of additional commentaries.

4.2.1. The QDMTT should be restricted to the allocable share of the top-up tax

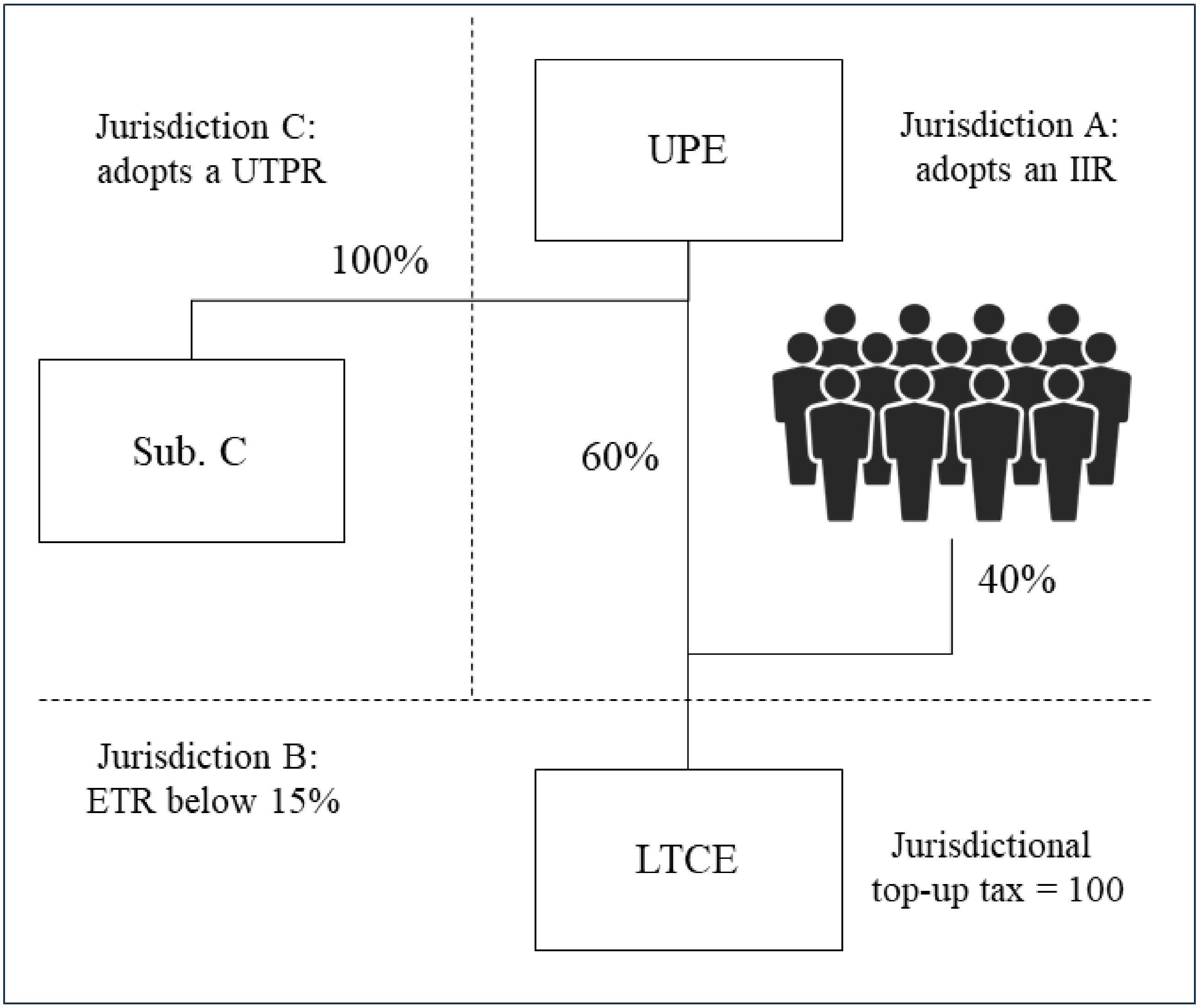
According to the February 2023 AG, a QDMTT should be imposed "on the whole amount of the Jurisdictional Top-up Tax computed under Article 5.2.3 of the GloBE Rules",[120] without consideration to the ownership interests held in the LTCE by the

118. *See February 2023 AG*, *supra* n. 15, at pp. 102-103, para. 118.15
119. *July 2023 AG*, *supra* n. 20, at p. 75, para. 75; p. 76, para. 81.
120. *February 2023 AG*, *supra* n. 15, at pp. 101-102, para. 118.10.

CEs of the MNE group. The February 2023 AG does not give further justifications for such treatment. As the February 2023 AG acknowledges, this in fact means that, in some cases, the application of the QDMTT “will result in a greater tax charge than the tax charge that would otherwise have been imposed under the GloBE Rules”.[121] The ATAF suggested approach entails a similar outcome, as the “Combined Top-Up Tax for The Covered Persons for a Fiscal Year” is defined as “Top-Up Tax Percentage x Excess Profit”.[122] The suggested rules provide for the calculation of the “Top-Up Tax of a Covered Person” with no regard to the amount that would be charged otherwise under an IIR.[123]

Example I makes the problem very clear. Consider an LTCE that is the only CE in the host jurisdiction B and is directly controlled by the UPE. The UPE holds 60% of the LTCE’s ownership interests, being subject to the IIR in its home jurisdiction A. The remaining 40% of the ownership interests on the LTCE are directly held by minority shareholders that are not part of the MNE group. The UPE also controls a CE in jurisdiction C, which has a UTPR in force.

Figure 1. Example I



121. Id., at p. 102, para. 118.10. As clarified by the *July 2023 AG*, the same trend is followed in case of joint ventures, joint venture subsidiaries and minority-owned constituent entities (*July 2023 AG*, *supra* n. 20, at pp. 56-58).
122. ATAF Suggested Approach, at art. 7.2.
123. Id., at art. 8.

In such a case, the allocable share of the top-up tax will be 60% of the jurisdictional top-up tax of 100, which will be charged by the UPE jurisdiction under the IIR.[124] The remaining 40% of the jurisdictional top-up tax will not be charged under the IIR or the UTPR, as the amount is not attributed to ownership interests of a CE. In contrast, if a QDMTT is adopted, as suggested by the February 2023 AG, the total amount of the jurisdictional top-up tax will be subject to taxation. As per the UTPR exemption mechanism, jurisdiction C is prevented from charging a top-up tax corresponding to the remaining 40%, as all of the UPE's ownership interests in the LTCE are held directly by an entity that is required to apply a qualified IIR.[125]

This means that simply equating the QDMTT to the jurisdictional top-up tax may, in certain circumstances, lead to a QDMTT charge that is higher than the amount necessary to neutralize an IIR charge. In such cases, the enactment of a QDMTT might hinder investments, because taxation in the host jurisdiction will be in effect higher than the required floor to tax competition. The LTCE will be subject to a charge related to ownership interests of parties which are unrelated to the MNE group. The UPE of an LTCE in a host jurisdiction that does not apply a QDMTT will be subject to the IIR, only on the allocable share of the top-up tax (60%, in the example). In contrast, a similar LTCE, subject to the QDMTT, will be required to pay a tax corresponding to 100% of the jurisdictional top-up tax.

The reasons for such a design choice are not specified in the February 2023 AG. Restricting the QDMTT to the allocable share of the top-up tax would not be in breach of any of the guiding principles, as such a measure would still keep the floor to tax competition within the same contours as applied under the GloBE Model Rules. Curiously, the February 2023 AG also admits that the QDMTT could apply "only to Groups where all of the Constituent Entities located in that jurisdiction are 100% owned by the UPE or a POPE for the entire Fiscal Year".[126] Such a feature would make the QDMTT less comprehensive than the IIR and in fact contradict the February 2023 AG guiding principles. The sentence allows for a QDMTT that is less restrictive than the top-up tax that would be calculated under the GloBE Model Rules, and therefore contradicts the asymmetric approach that guides the other paragraphs of the February 2023 AG.[127]

For these reasons, paragraph 118.10 of the GloBE Commentary, as included in the February 2023 AG, demands further consideration. Following the single top-up tax principle, within its function of supplementary guidance, the IF should pursue alternatives to make it possible to equate the QDMTT charge to the amount that is effectively expected to be charged under the IIR. Agreed administrative guidance and amendments to the GloBE Commentary in this regard should be considered, as important nuances shall be taken into account, such as the rules applicable to partially-owned parent entities (POPEs), which also submit to the top-up tax the portion of income that is attributable to minority shareholders of the POPE.[128]

The IF should enable host countries to enact QDMTTs that are levied only on the allocable share of the top-up tax, as determined under article 2.1.1., 2.1.2. and 2.1.4. of the GloBE Model Rules. This approach would put the QDMTT in line with the single top-up tax principle and eliminate the disadvantages a host jurisdiction would face if adopting it. Following the wording of the February 2023 AG, host jurisdictions are currently discouraged to adopt a QDMTT or encouraged to adopt the less comprehensive version,[129] due to tax competition concerns.

Besides the clarification with regard to the qualification of such a DMTT as a QDMTT, it is also necessary to ensure that no additional IIR will be charged in this situation. The problem is that the QDMTT levied only on the allocable share of the top-up tax would not completely neutralize the jurisdictional top-up tax under the formula of article 5.2.3. If the QDMTT is calculated with reference to the allocable share of the top-up tax, it will be below the necessary amount to completely eliminate the jurisdictional top-up tax that could be charged under an IIR. As a consequence, even if the IF allows the qualification of a DMTT on the allocable share of the top-up tax as a QDMTT, additional measures will be necessary to ensure that no IIR is charged in such circumstances.

A straightforward solution would be to add clarifying paragraphs to the commentary to article 2.1.1., 2.1.2. and 2.1.4. of the GloBE Model Rules. The solution does not demand any amendment to the content of the provisions. The commentary would clarify that no IIR shall be charged, under each of these provisions, in case the allocable share of the top-up tax of the LTCE, as referred therein, but calculated without deduction of the QDMTT,[130] has already been taxed under a QDMTT. The rationale of these commentaries would be to ensure that host jurisdictions are able to enact a QDMTT that is levied only on the allocable share of the top-up tax and still prevent the charging of a top-up tax under an IIR. This outcome would be in line with the single top-up tax principle and also within the range of the February 2023 AG guiding principles.

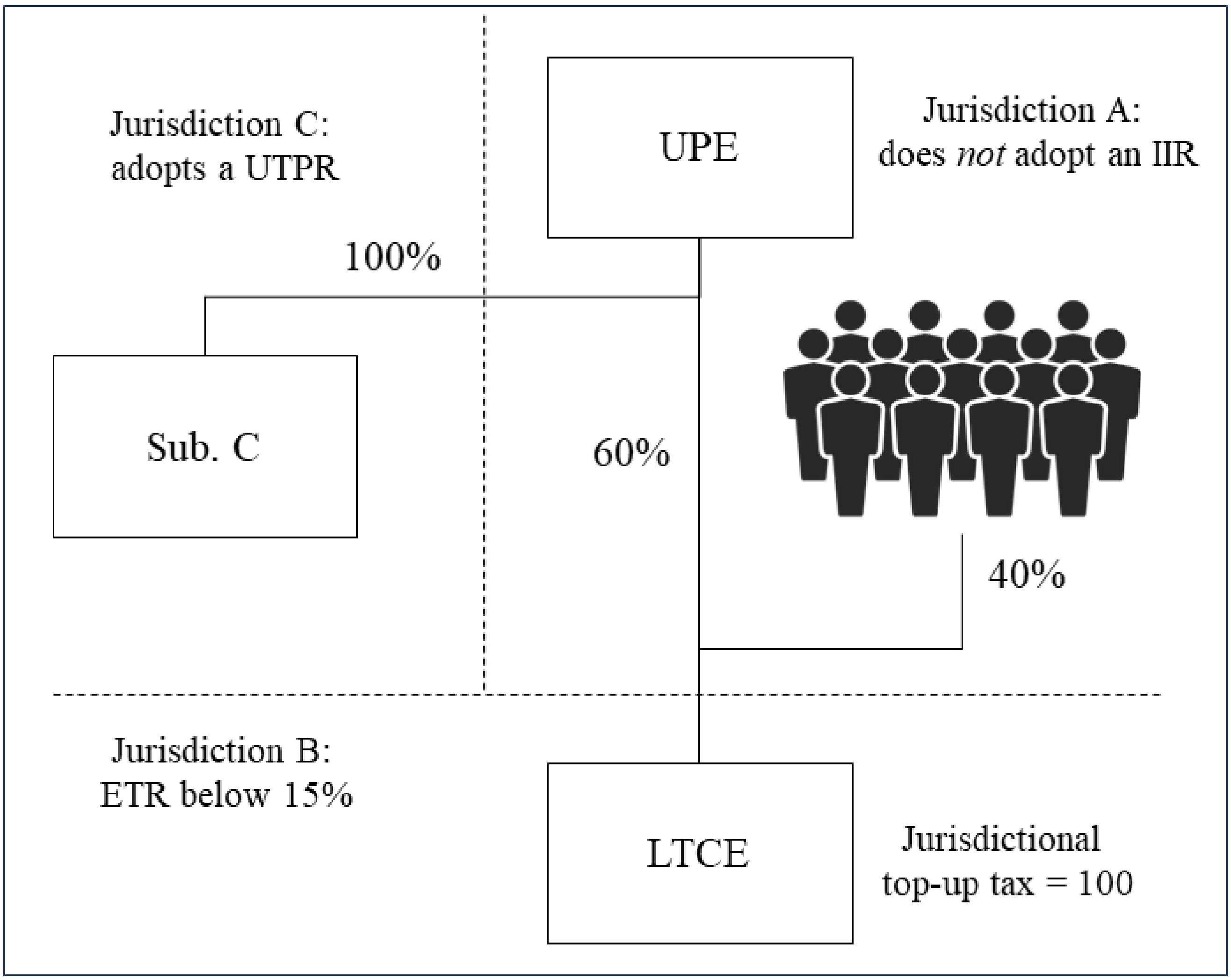
124. *GloBE Model Rules*, *supra* n. 8, at arts. 2.2.1. and 2.2.2.
125. The exemption mechanism is provided by *GloBE Model Rules*, *supra* n. 8, at art. 2.5.2.
126. *February 2023 AG*, *supra* n. 15, at p. 102, para. 118.10.
127. On the asymmetric approach, *see* sec. 3.1.
128. *GloBE Model Rules*, *supra* n. 8, at art. 2.1.4.
129. *February 2023 AG*, *supra* n. 15, at p. 102, para. 118.10.
130. Specifically, calculated under the formula of art. 5.2.3, but without deduction of the QDMTT, in order to ensure the identity of amounts.

4.2.2. The QDMTT should still prevent the application of the UTPR

One important practical effect of submitting the whole amount of the jurisdictional top-up tax to the QDMTT, and not only the allocable share of the top-up tax, is that the QDMTT will in all cases prevent the application of the UTPR. There is no reason to leave behind this feature, and a small clarification would suffice to keep this feature if a QDMTT is applied that is restricted to the allocable share of the top-up tax. Such a clarification would still keep the QDMTT in line with the February 2023 AG guiding principles.

Example II (*see* Figure 2.) helps to clarify the issue. Similar to Example I, consider that the UPE holds 60% of the LTCE's ownership interests, but, unlike Example I, it is *not* subject to the IIR in its home jurisdiction A.

Figure 2. Example II



In such a case, as the allocable share of the top-up tax is not subject to the IIR in the UPE jurisdiction A, the UTPR becomes applicable, and the whole amount of the jurisdictional top-up tax calculated for the LTCE (100) will be subject to a top-up tax under the UTPR in jurisdiction C.[131] The only difference between Example I and Example II is the adoption of the IIR by the UPE jurisdiction. This fact alone leads to a completely different charge under the GloBE Model Rules. In Example I, a top-up

131. *GloBE Model Rules*, *supra* n. 8, at arts. 2.5.1 and 2.6.1.

tax of 60 is paid, whereas in Example II a top-up tax of 100 is paid, even though the structure of the MNE group is completely identical.

In Example II, if home jurisdiction A has not adopted an IIR, but the corresponding allocable share of the top-up tax is subject to a QDMTT, the practical effect for the purpose of setting the floor to tax competition will be the same. In other words, if host jurisdiction B ensures taxation corresponding to the allocable share of the top-up tax that would be subject to the IIR, had jurisdiction A adopted an IIR, there is no reason why the right to charge a top-up tax under an UTPR should arise. The host jurisdiction has ensured that the floor to tax competition, as agreed under the GloBE Model Rules, has been respected, and no further taxation is needed. As argued, the single top-up tax principle, within its function of supplementary guidance, requires that the QDMTT is levied, similarly to the IIR, on the allocable share of the top-up tax, and not on the whole amount of the jurisdictional top-up tax computed under article 5.2.3., like the UTPR. To guarantee the effectiveness of this command, the single top-up tax principle also demands that no UTPR is charged in case the QDMTT comprises the allocable share of the top-up tax that would be subject to the IIR.

A dogmatic solution to this issue would also be straightforward and could be reached by means of a simple clarifying commentary to article 2.5.2. of the GloBE Model Rules, without any amendment to its content. The commentary would make clear that the exemption mechanism of article 2.5.2. also applies if all of the allocable share of the top-up tax corresponding to the UPE's ownership interests in the LTCE, directly or indirectly held, is taxed under the QDMTT in the host jurisdiction. In summary, the adoption of a QDMTT corresponding to all of the allocable share of the top-up tax corresponding to the UPE's ownership interests in the LTCE should also trigger the exemption mechanism of the UTPR. In Example II, if host jurisdiction B adopts a QDMTT that is levied on the allocable share of the top-up tax (60% of the jurisdictional top-up tax), the exemption mechanism of article 2.5.2. should apply.

Such a solution can be justified based on the general structure of the GloBE Model Rules. The UTPR is perhaps the most controversial feature of the GloBE Model Rules, which only plays a backstop function in cases where the jurisdictions of the relevant parent entities have not adopted an IIR. In situations where the LTCE has minority shareholders that are not part of the MNE group, taxation under the UTPR is greater than it would be under the IIR. Under the IIR, only the allocable share of the top-up tax is taxed, whereas, under the UTPR, the amount of excess profits attributable to the ownership interests of persons outside the MNE group is also taxed.

The reasons for broadening the scope of the taxable amount under the UTPR in relation to the IIR are not discussed in the relevant GloBE material. Leaving behind possible critiques to this policy choice,[132] one possible explanation could be that this feature discourages MNE groups to set their parent entities in jurisdictions that do not apply an IIR – therefore incentivizing the adoption of the IIR. In summary, the more disadvantageous treatment under the UTPR in relation to the IIR can be read as an incentive for jurisdictions to adopt the IIR. The UTPR is a measure of last resort, which allows taxation without a significant nexus between the UTPR jurisdiction and the LTCE, resorting to an unprecedented mechanism for the allocation of taxing rights. As such, its application should be as reduced as possible, only to as a last defence of the floor to tax competition.

The QDMTT, on the contrary, is a tax that the GloBE Model Rules intend to promote. Its application has preference over the charging rules. The allocation of taxing rights ensured by it promotes the traditional residence/source dichotomy, while the IIR allows for taxation of income of the LTCE by another jurisdiction. In fact, if all jurisdictions provided for taxation above the agreed floor, the measures envisaged by Pillar Two would not even be necessary. Considering the allocative function of QDMTTs, it would go against the logic of the GloBE Model Rules to create disincentives to their adoption.

For this reason, QDMTTs should *not* be imposed "on the whole amount of the Jurisdictional Top-up Tax computed under Article 5.2.3 of the GloBE Rules",[133] and further refinement to the February 2023 AG is needed. If there is a QDMTT in force, which accomplishes in full the objectives of the IIR, there is no reason why the UTPR should be applicable. The single top-up tax principle, within its function of supplementary guidance, promotes the alignment of the taxable amount of the QDMTT with that of the IIR. The QDMTT is not a backstop rule, and the disadvantageous outcomes of the definition of the taxable amount under the UTPR should not be replicated upon the design of the QDMTT.

4.2.3. The application of the QDMTT only in cases of 100% ownership

The February 2023 AG also suggests that jurisdictions that are concerned that the QDMTT will result in a greater tax charge than the one that would arise with the application of the IIR may design their QDMTT legislation to apply only where all

132. As clarified in the introduction (sec. 1.), the article is not intended to critically examine the policy decisions behind the *GloBE Model Rules* or their content. The many possible structural critiques to the UTPR are left aside, to the benefit of a clearer exposition of the possible improvements to the QDMTT design, which is the focus of the contribution. As it is the case with all the other features of the GloBE Model Rules, the description of the incentives behind the UTPR should not be equated to their endorsement by the author and should be read along with the methodological delimitation provided in the introduction.

133. *February 2023 AG*, *supra* n. 15, at pp. 101-102, para. 118.10.

the domestic CEs in the jurisdiction are 100% owned by the UPE or a POPE for the entire fiscal year.[134] This statement is repeated by the July 2023 AG with respect to joint ventures, joint venture subsidiaries and minority-owned CEs.[135] There are several reasons why host jurisdictions might not choose to adopt this. By doing so, they will waive a significant part of the QDMTT revenue because the QDMTT will be too easily avoided, as the 100% threshold is easy to manipulate.

The important part of this suggestion is its policy implications. The administrative guidance accepts as a QDMTT a tax that is charged on the whole amount of the jurisdictional top-up tax computed under article 5.2.3. of the GloBE Rules. It also accepts a much narrower version of the QDMTT, which applies only in cases where all the domestic CEs in the jurisdiction are 100% owned by the UPE or a POPE for the entire fiscal year. However, it does not acknowledge the possibility of a much more intuitive design, which is a QDMTT actually tailored as a soak-up tax, able to neutralize the relevant IIRs and UTPRs without bringing a burden that is above the floor to tax competition. There is no rational policy explanation for this impossibility. The IF should design more specific rules, which allow for the fine-tuning suggested in sections 4.2.1. and 4.2.2.

4.3. The assignment of taxes

When addressing issues involving CFC rules and assignment of taxes to PEs, the February 2023 AG created features that drive the QDMTT further away from the single top-up tax principle. In fact, these new features harm the very nature of the QDMTT as a "top-up tax", by allowing that taxation at the host jurisdiction is further "topped-up" by other taxes. As such, they are expected to operate as a disincentive for host jurisdictions to adopt a QDMTT, working against the underlying logic of the GloBE Model Rules.

As shown, the computation of the jurisdictional top-up tax and the application of the charging rules are two separate design features of the GloBE Model Rules.[136] At the stage of computation of the ETR, which precedes the calculation of the jurisdictional top-up tax, it is necessary to assign income and taxes to each of the CEs. The assignment of GloBE income and covered taxes to a jurisdiction generally follows the location of the CE,[137] giving priority to tax residence whenever possible.[138] Special rules apply to PEs,[139] flow-through entities[140] and stateless CEs.[141]

A special treatment for CFC rules is also necessary. Because the calculation of the ETR is based on individual financial statements, in the absence of a special treatment for CFC rules, the taxes charged on CFC income would be treated as covered taxes of the parent CE's residence jurisdiction, even though the CFC's GloBE income would not be included in the parent CE's profits for accounting purposes. The GloBE Model Rules deal with this mismatch at the level of covered taxes by "pushing down" the taxes of the parent CE to the CFC.[142] Accordingly, taxes paid by the parent CE on the income of the CFC due to a controlled foreign companies tax regime are allocated to the CE that earns the income for accounting purposes[143] and not to the parent CE. In other words, CFC taxes generally increase the ETR of the CFC and not of the parent CE subject to the CFC rules.

The same "general process"[144] is also applicable to PEs. The amount of any covered taxes included in the financial accounts of a CE with respect to GloBE income or loss of a PE is allocated to the PE (which is a separate CE under GloBE terminology).[145] This "general process" for CFC taxes and PEs, applicable for the purposes of the IIR and the UTPR, has been changed in relation to the QDMTT. The assignment of taxes follows a different pattern for QDMTT purposes, thus engendering the calculation of a different jurisdictional top-up tax and violating the single top-up tax principle (*see* section 4.3.1.). Furthermore, the February 2023 AG also added specific rules for "blended CFC taxes", as a temporary rule, and provided for an allocation that does not reduce the amount of top-up tax to be charged under the QDMTT, despite reducing the jurisdictional top-up tax for the purposes of the IIR and the UTPR. This outcome is also in violation of the single top-up tax principle (*see* section 4.3.2.).

134. Id., at p. 102, para. 118.10.
135. *July 2023 AG*, *supra* n. 20, at p. 56, para. 3.
136. *See* sec. 2.1.
137. The rules on the location of CEs are found in *GloBE Model Rules*, *supra* n. 8, at art. 10.3.
138. *GloBE Commentary*, *supra* n. 9, at p. 221, para. 172.
139. *GloBE Model Rules*, *supra* n. 8, at art. 10.3.3.
140. Id., at art. 10.3.2.
141. Id., at arts. 10.3.2(b); 10.3.3(d); and 10.3.4(b)(iii).
142. In fact, the *GloBE Model Rules* are more detailed than this, and distinguish between CFC taxes on passive income (which are subject to a 15% pushdown cap), and CFC taxes on income other than passive income (fully allocated to the CFC). A discussion of this feature is not important for the scope of the contribution. For a detailed analysis of the reasons behind this approach, *see* Arnold, *supra* n. 30, at pp. 270-289.
143. *GloBE Model Rules*, *supra* n. 8, at art. 4.3.2(c).
144. *GloBE Commentary*, *supra* n. 9, at p. 98, para. 58.
145. *GloBE Model Rules*, *supra* n. 8, at art. 4.3.2(a).

4.3.1. CFC tax regimes and permanent establishments

According to the February 2023 AG, a QDMTT shall exclude taxes paid or incurred by a CE owner under a CFC tax regime that is allocable to a domestic CE ("CFC taxes") and taxes paid or incurred by a main entity that are allocable to a PE located in the jurisdiction ("PE taxes").[146] In other words, the taxes of the CFC parent and of the PE's main entity are not "pushed down" for QDMTT purposes.[147] In such cases, the ETR calculated for the purposes of the IIR and the UTPR will be higher than the one calculated for the purposes of the QDMTT. As a consequence, the trigger for a top-up tax will be lower under the QDMTT than it is under the other charging rules. Furthermore, the top-up tax calculated for the purposes of the QDMTT will be higher than the jurisdictional top-up tax calculated for the purposes of the IIR and the UTPR.

Hence, an LTCE that is subject to an IIR will in some cases be better off than an LTCE that is subject to a QDMTT, which means that adopting a QDMTT will be a competitive disadvantage for the host jurisdiction. The new allocation of CFC and PE taxes for QDMTT works as a disincentive for host jurisdictions to adopt a QDMTT. The ATAF suggested approach preserves the pushdown in the case of PEs[148] but does not recommend its adoption in the case of CFC rules, despite accepting it as an "option".[149]

4.3.1.1. The shortcomings of not adopting the pushdown

The problems of restricting the pushdown are very clear if the QDMTT is not creditable against CFC taxes or PE taxes. In such cases, the QDMTT will be an additional tax, which will increase the tax burden on the MNE group in comparison to a situation in which an IIR is applicable. The IF seems to expect that the QDMTT will be creditable under CFC tax regimes, and the current design of the rules actually incentivize countries to adapt their CFC tax regimes in this sense.[150] In any case, there is no guarantee that all countries will follow this incentive, and the crediting is not an actual requirement of the GloBE Model Rules or the agreed administrative guidance.

Existing analyses on whether host jurisdictions have an incentive to adopt a QDMTT often adopt some level of crediting as an assumption.[151] Nevertheless, due to the intricate mechanisms of the GloBE Model Rules, several fact patterns may arise, in which the MNE group will be subject to a higher level of taxation under a QDMTT, as compared to instances where the IIR is applicable. Even if the jurisdiction applying the CFC rules grants a full credit for the top-up tax paid under a QDMTT, there may be cases where the MNE group is worse off, as compared to cases where no QDMTT but an IIR applies. The following examples[152] indicate some of the shortcomings of not adopting the pushdown for PE and CFC taxes, which may work as a disincentive for jurisdictions to adopt a QDMTT.

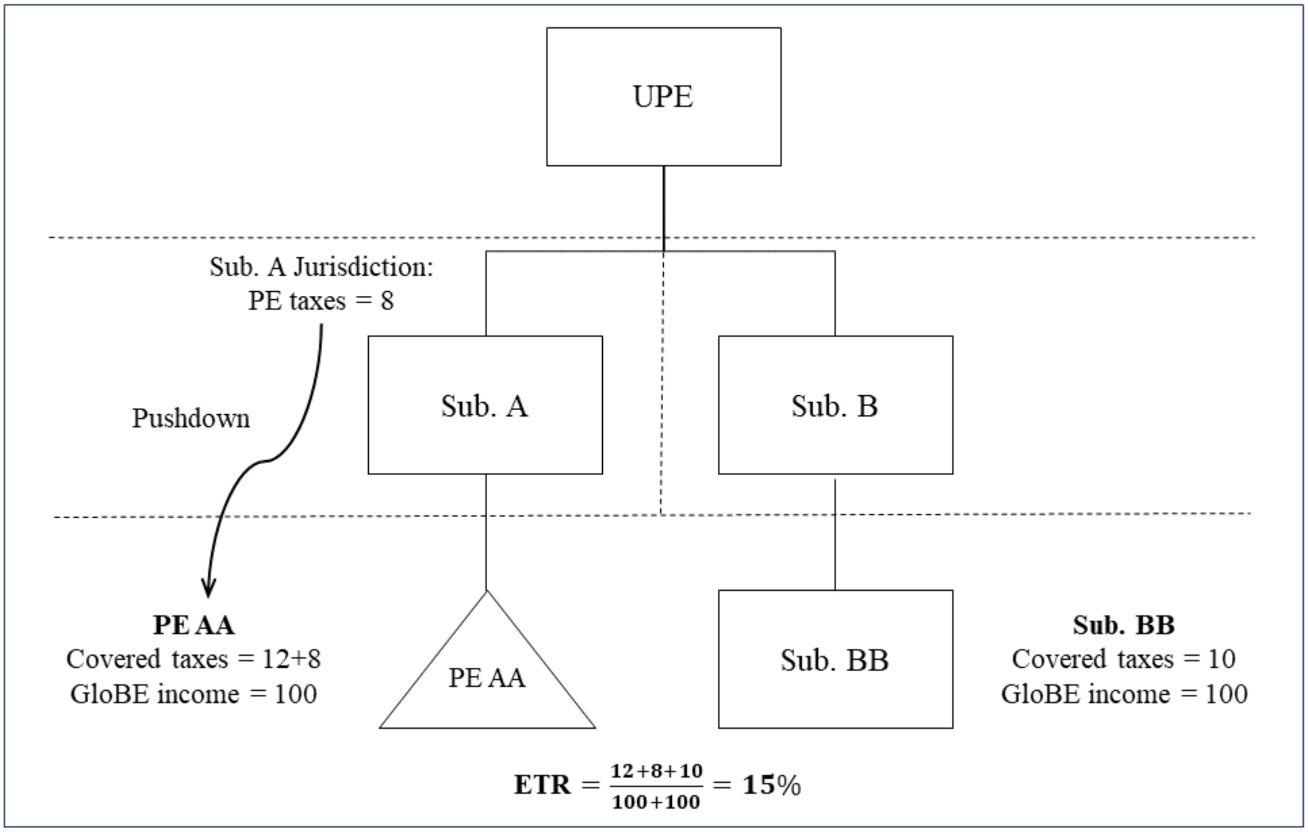
4.3.1.1.1. A PE example

In Example III (*see* Figure 3.), Sub. A is part of an MNE group and incurs tax in its residence jurisdiction on its income and the income of its PE AA at 20%. PE AA incurs tax at 12% in its jurisdiction. PE earns 100 of income and incurs 12 of tax. Sub. AA includes all 100 of PE AA income and the pre-credit tax liability in its jurisdiction is 20. However, a foreign tax credit is applied to reduce the tax charge on the PE income to 8. In this example, the 8 of tax would be excluded from Sub. A's adjusted covered taxes and pushed down, being allocated to the PE because "that is the actual liability with respect to the PE income".[153]

In the host jurisdiction, PE AA is blended for GloBE purposes with Sub. BB, which is taxed in the host jurisdiction at a 10% rate, not triggering the application of any CFC rules. Applying the GloBE Model Rules for the purpose of calculating an IIR (i.e., with the pushdown of PE taxes), the outcome could be represented as follows:

146. *February 2023 AG*, *supra* n. 15, at p. 106, para. 118.30.
147. The *July 2023 AG* amended para. 118.30 to deal also with hybrid entities and covered taxes on distributions. These topics are not covered by the present contribution.
148. *ATAF Suggested Approach*, *supra* n. 14, at sec. 4.5(a).
149. Id., at p. 33.
150. Discussing the "entrenching effect" in relation to blended CFC tax regimes, *see* H. Wardell-Burrus, *GloBE Administrative Guidance – The QDMTT and GILTI Allocation*, p. 4 (Policy Brief, Oxford University Center for Business Taxation, 17 Feb. 2023).
151. *See*, e.g., M. Devereux & J. Vella, *The Impact of the Global Minimum Tax on Tax Competition*, 15 World Tax J. 3, sec. 5.1. (2023), Journal Articles & Opinion Pieces IBFD.
152. Example III, IV and V (Figures 3.-8.) disregard the impact of the SBIE and assume that, for the purpose of the calculation basis of the PE and CFC regimes, the income of the relevant entities is identical to its GloBE income. In the examples, all CEs are wholly owned and the UPE jurisdiction adopts an IIR.
153. *GloBE Commentary*, *supra* n. 9, at p. 97, para. 50.

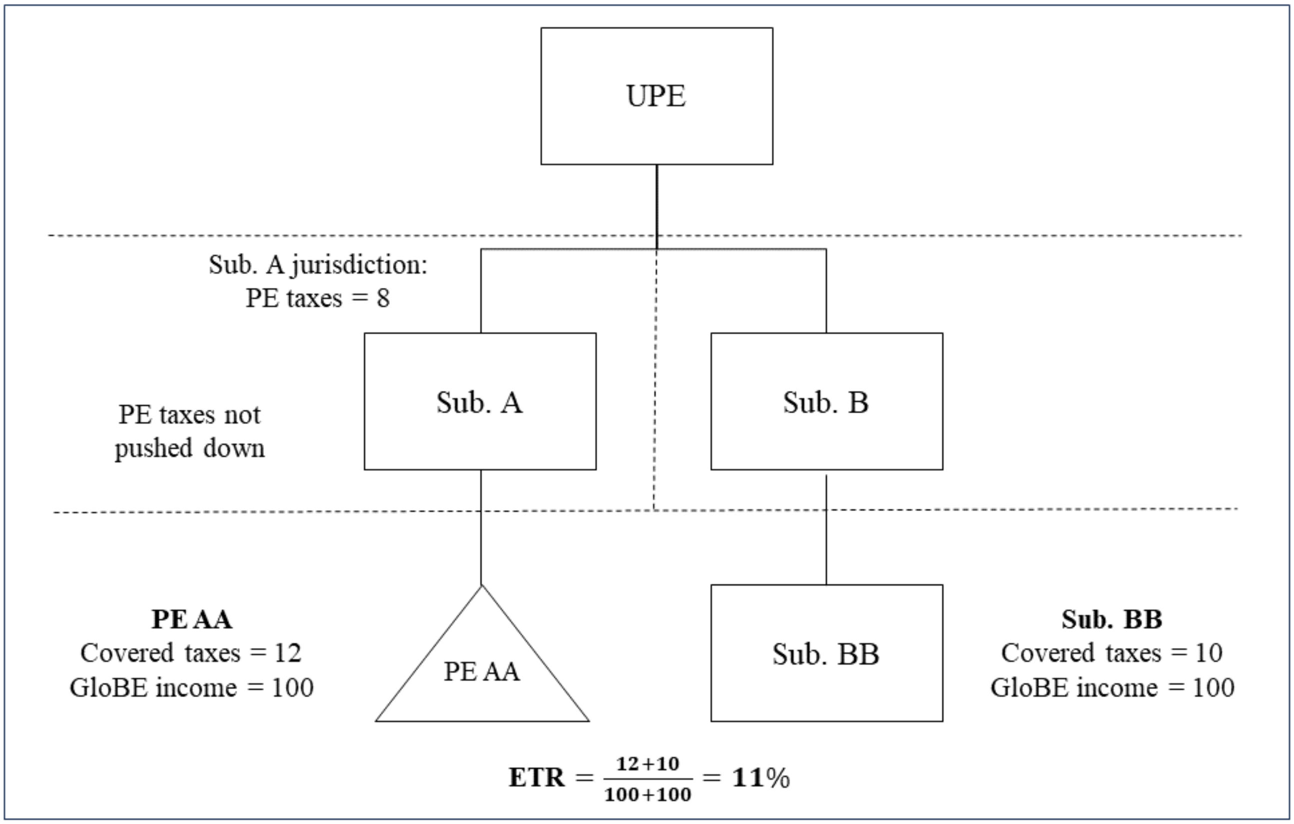
Figure 3. Example III with pushdown



With the pushdown, no top-up tax would be due, because the CEs are subject to an ETR of 15% in the host jurisdiction. For the purpose of applying an IIR, the calculation would stop here, as the floor to tax competition has been respected.

The scenario changes completely, however, for the purpose of applying a QDMTT (i.e., without the pushdown of PE taxes). If the host jurisdiction adopted a QDMTT, the outcome could be schematically represented as shown in Figure 4.

Figure 4. Example III without pushdown



The ETR in the host jurisdiction in Example III would be 11% and a top-up tax would have to be calculated. The top-up tax percentage in this case would be 4%, and the calculation basis would be the net GloBE income for the jurisdiction in the amount of 200, leading to a jurisdictional top-up tax of 8.

Under the GloBE Model Rules, the jurisdictional top-up tax is allocated to each CE, in proportion to their GloBE income, under the following formula:[154]

$$\textit{Top-up tax of the CE} = \textit{Jurisdictional top-up tax} \times \frac{GloBE\ income\ of\ the\ CE}{Aggregate\ GloBE\ income\ of\ all\ CEs}$$

Hence, considering that both have earned the same amount of GloBE income, PE AA would be subject to a top-up tax of 4 (8 x 100/200), and Sub. BB would be subject to the other 4 of top-up tax (8 x 100/200). Assuming that the relevant PE taxation in Sub. A jurisdiction allows for the credit of the QDMTT paid by PE AA, Sub. A would still be subject to 4 of tax under the PE regime, and PE AA would be subject to a QDMTT of 4. The QDMTT charged on Sub. BB would not be creditable against the taxes of Sub. A, because Sub. BB is not a PE of Sub. A.

Therefore, in a scenario without the QDMTT, an amount of 8 would be charged under the PE regime and no top-up tax would be charged under any potential IIR or UTPR, as the ETR in the host jurisdiction would reach the 15% floor. In a scenario with the creditable QDMTT, an amount of 4 would be charged under the PE regime, and an amount of 8 would be charged under the QDMTT, leading to a total tax of 12. In this case, there is a clear competitive shortcoming in the adoption of the QDMTT, even if the PE regime allows for the crediting of the QDMTT paid.

The July 2023 AG is very permissive with regard to the allocation of QDMTT tax liability among CEs. Deviating from the formula reproduced above, it states that, for QDMTT purposes, "it is not generally necessary to allocate the QDMTT liability among

154. *GloBE Model Rules*, *supra* n. 8, at art. 5.2.4.

Constituent Entities in any particular manner”.[155] Also, the February 2023 AG affirms that, instead of article 5.2.4., jurisdictions could conceive alternative mechanisms for allocating QDMTT liability and should “ensure that the legal liability for the tax is enforceable against at least one Constituent Entity in that jurisdiction”.[156] On the other hand, the agreed administrative guidance also acknowledges that the rules on the allocation of QDMTT tax liability are “not binding on another jurisdiction for purposes of that jurisdiction’s local tax rules, including CFC Tax Regimes”.[157] In any case, it is highly unlikely that any PE regime applicable to Sub. A would allow for the credit of the 4 that arises due to the low taxation of Sub. BB in Example III (*see* Figures 3. and 4.).

This distortive result is essentially a consequence of jurisdictional blending in the calculation of the top-up tax, which is an essential feature of the GloBE Model Rules but is strange to PE regimes. Considering the object of the article, Example III, considered both with and without the pushdown (Figures 3. and 4.), suffices to make the case for the single top-up tax principle and demonstrates that crediting the QDMTT is not sufficient to outweigh the shortcomings of eliminating the pushdown for QDMTT purposes. This deviation from the single top-up tax principle will eventually bring a competitive disadvantage for host jurisdictions adopting a QDMTT, even if PE regimes are adapted to include the corresponding crediting mechanism.

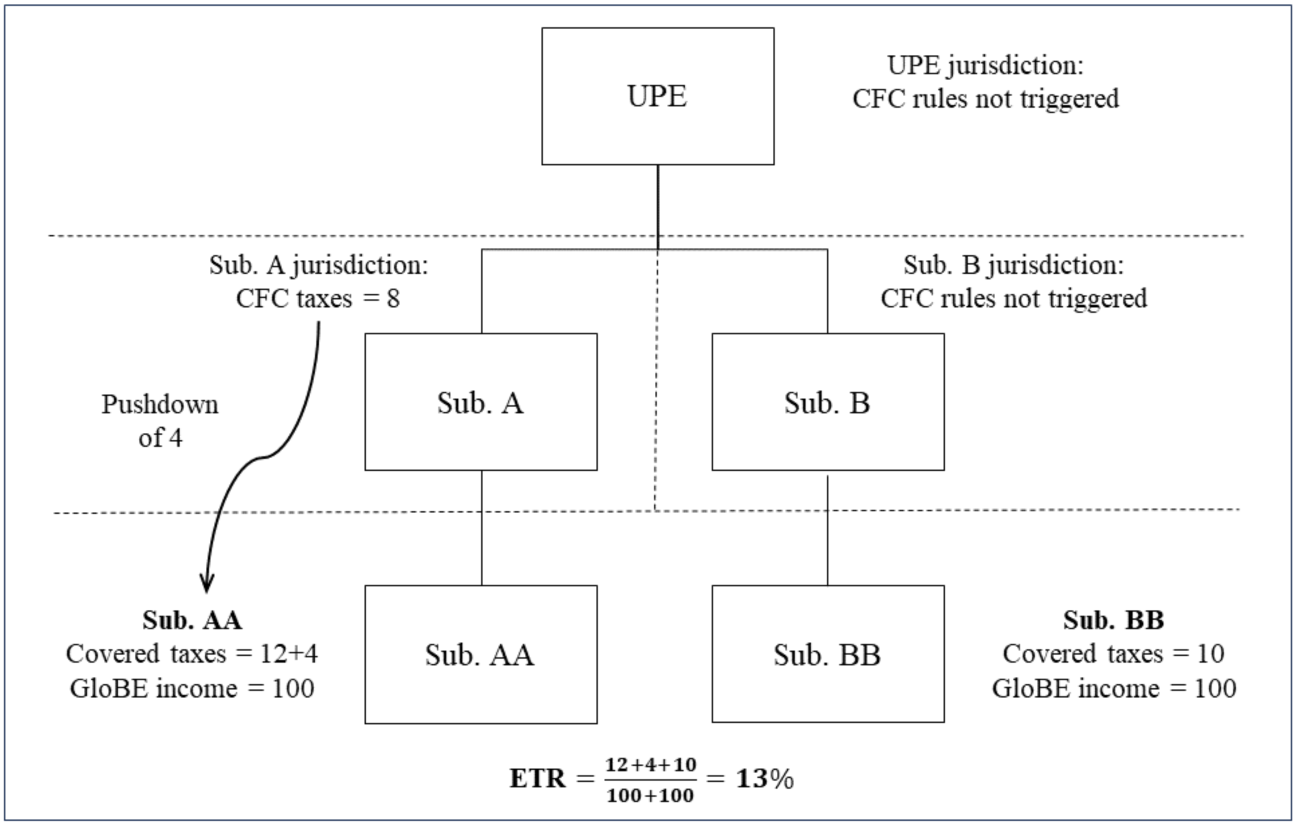
4.3.1.1.2. Three CFC examples

Example III (*see* Figures 3. and 4.) would be equally problematic in relation to a CFC tax regime that applies to income other than passive income, as defined in the GloBE Model Rules.[158] If PE AA were instead a subsidiary subject to a 20% CFC tax regime in the jurisdiction of Sub. A, which allows for the crediting of the QDMTT, the schematic example would engender the same outcome. Therefore, the adoption of a QDMTT is equally problematic if the jurisdiction of Sub. A adopts a CFC tax regime that is triggered also in relation to income other than passive income.[159]

However, in relation to a CFC tax regime that burdens passive income only, the limitation of article 4.3.3. would partially prevent the distortion. Consider, as in Example IV (*see* Figure 5.), that the CFC tax regime of the jurisdiction of Sub. A submits the total income of Sub. AA to a 20% tax, offering a credit to taxes paid in the host jurisdiction, including the QDMTT. Assuming that the total amount of the GloBE income of Sub. AA is passive income, the application of article 4.3.3. to the fact pattern under Example IV would limit the pushdown for the calculation of an IIR to the amount of 4.[160] The calculation of the ETR for IIR purposes would be as shown in Figure 5.

155. *July 2023 AG*, *supra* n. 20, at p. 59, para. 13.
156. *February 2023 AG*, *supra* n. 15, at p. 102, para. 118.12.
157. *July 2023 AG*, *supra* n. 20, at p. 59, para. 12.
158. *See* the definition in *GloBE Model Rules*, *supra* n. 8, at art. 10.1.
159. An example thereof can be found in the Brazilian worldwide taxation regime. *See*, on the topic, L.E. Schoueri & G. Galdino, *Controlled Foreign Company Legislation in Brazil*, in *Controlled Foreign Company Legislation* sec. 7.1.2.3. (Georg Kofler et al. eds., IBFD 2020), Books IBFD.
160. The pushdown is limited to the top-up tax percentage for the CE’s jurisdiction, determined without regard to the covered taxes incurred with respect to such passive income by the CE owner (which, in Example IV, is 4%), multiplied by the amount of the CE’s passive income includible under any CFC tax regime or fiscal transparency rule (which, in Example IV, corresponds to the GloBE income of Sub. AA, which is 100).

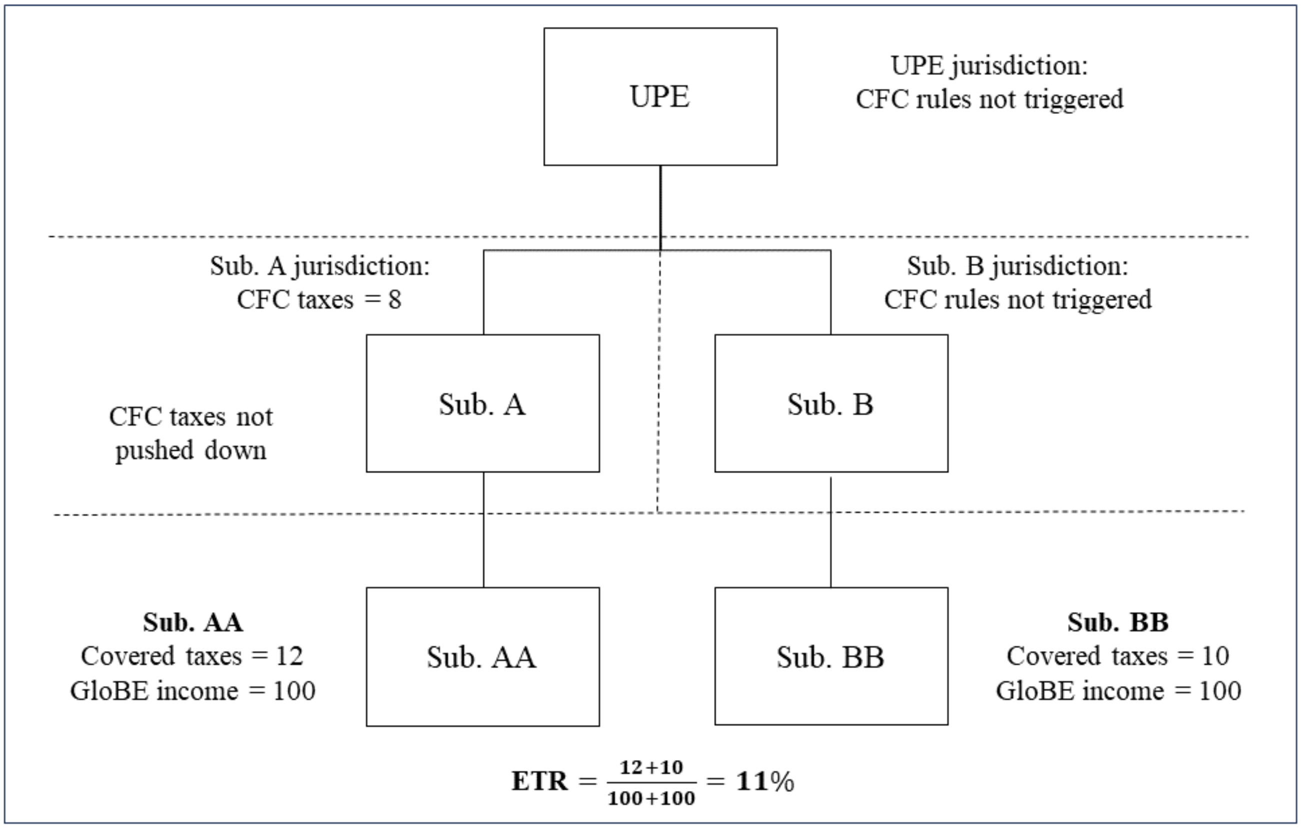
Figure 5. Example IV with pushdown



A jurisdictional top-up tax of 4 (2% x 200) would be calculated for IIR purposes, being equally apportioned between Sub. AA and Sub. BB, and further charged under the IIR of the UPE jurisdiction. Therefore, the MNE Group would be subject to the CFC taxes of 8 and the top-up tax of 4.

If the host jurisdiction were to adopt a QDMTT, the pushdown would not apply, and the ETR would be calculated as shown in Figure 6.

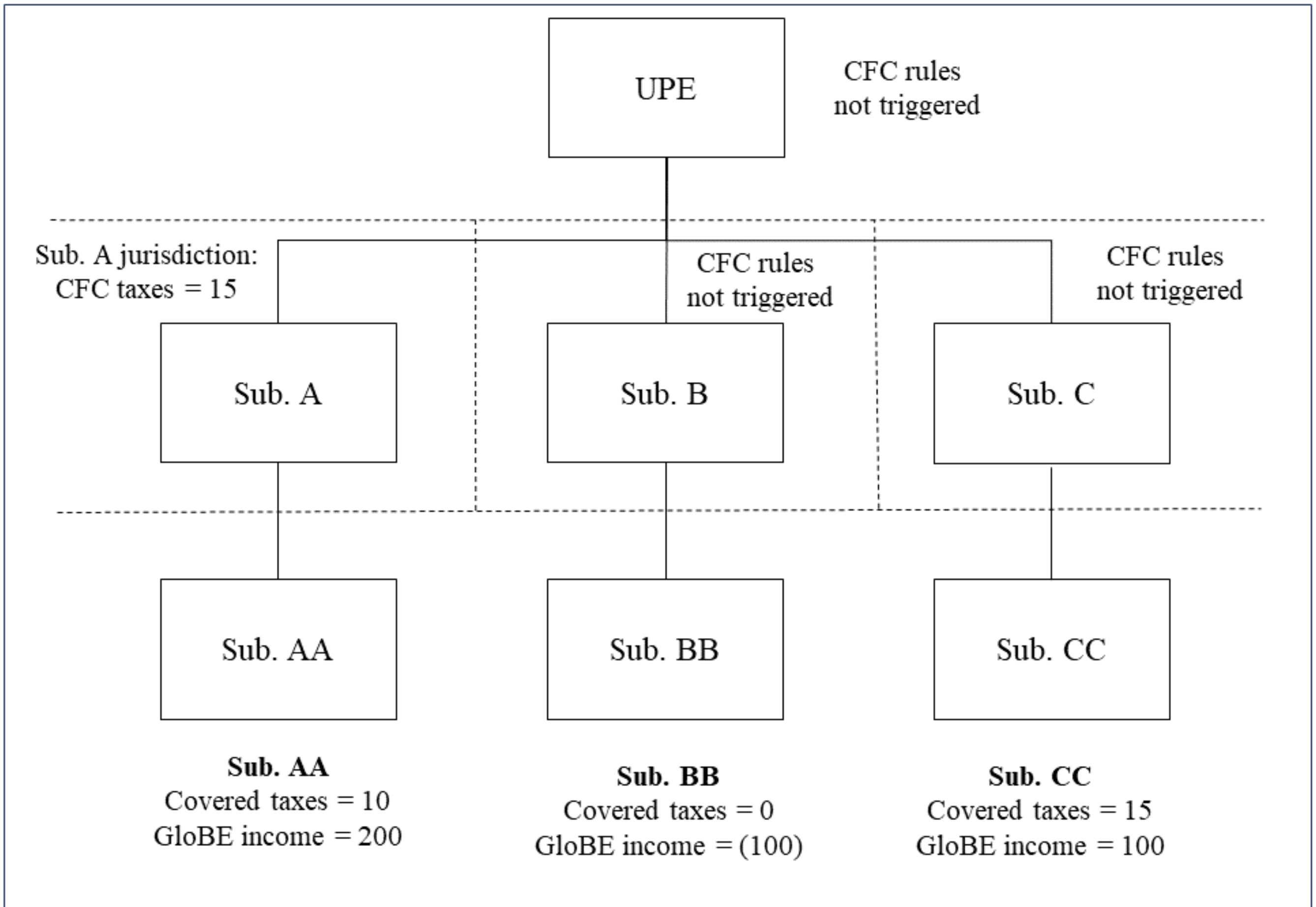
Figure 6. Example IV without pushdown



A jurisdictional top-up tax of 8 (4% x 200) would be calculated for QDMTT purposes, being equally apportioned between Sub. AA and Sub. BB. The amount apportioned to Sub. AA (4) would be credited against the CFC taxes of Sub. A. Therefore, the MNE group would be subject to a CFC tax of 4 and a QDMTT of 8, leading to a total burden of 12, which is the same burden as the case in which the IIR is applicable.

Example V (*see* Figures 7. and 8.) shows, however, that also in cases where the limitation of article 4.3.3. applies, it is possible that the enactment of a QDMTT brings a competitive disadvantage to the host jurisdiction. In Example V, Sub. A is subject to a 20% CFC tax regime, and 15 of CFC taxes are due on the income of Sub. AA, which is taxed at a 5% rate in the host jurisdiction, where it only derives passive income. For GloBE purposes, Sub. AA is blended with Sub. BB, which is loss-making, and Sub. CC, which is taxed at a 15% rate. No other CFC rules are applicable in Example V. Without the pushdown of the CFC taxes, the ETR in the host jurisdiction would be calculated as shown in Figure 7.

Figure 7. Example V without pushdown



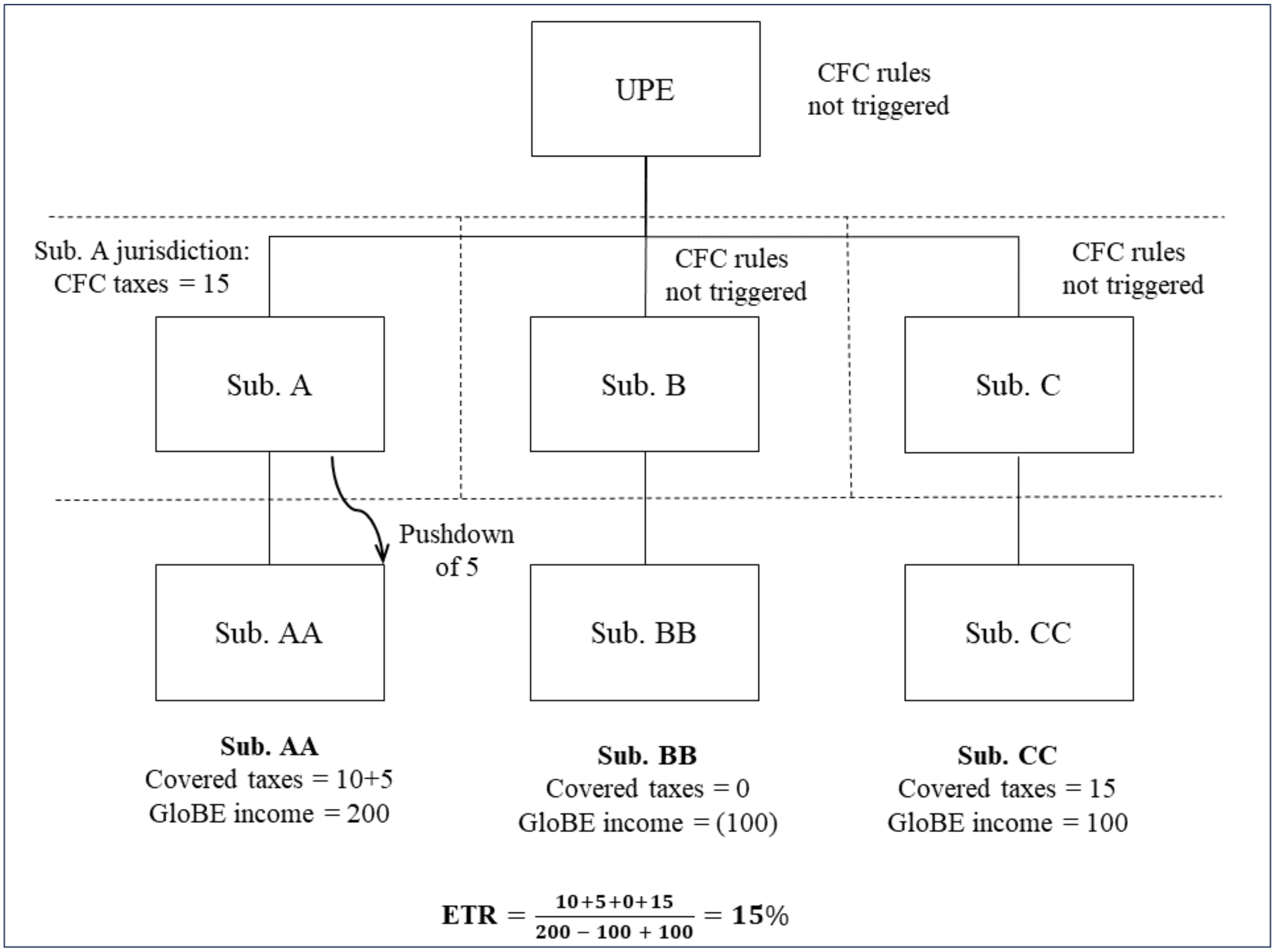
$$\mathbf{ETR} = \frac{\mathbf{10+0+15}}{\mathbf{200 - 100 + 100}} = \mathbf{12.5\%}$$

In this case, if the host jurisdiction were to adopt a QDMTT, the jurisdictional top-up tax would be 5 (2.5% x 200), which would be allocated to Sub. AA and Sub. CC only, proportionally to their GloBE income, as Sub. BB is a loss-making CE. In Example V, 3.33 of top-up tax would be apportioned to Sub. AA, and 1.66 of Top-up Tax would be apportioned to Sub. CC. Assuming that the CFC tax regime of Sub. A allows for the crediting of the QDMTT, the QDMTT paid by Sub. AA would be credited against the CFC taxes of Sub. A, but no crediting would be granted to the QDMTT paid Sub. CC. Therefore the MNE group would be subject to 11.66 of CFC taxes and 5 of QDMTT, totalling 16.66.

However, in this case, if a QDMTT is not adopted, and the MNE Group is subject to the IIR of the UPE jurisdiction, no top-up tax will be due, as a consequence of pushing down the CFC taxes to Sub. AA. In this case, the limitation of article 4.3.3. would allow for the pushdown of the amount of 5.[161] With the pushdown of the CFC taxes of Sub. A, the ETR would be calculated as follows:

161. The pushdown is limited to the top-up tax percentage for the CE's jurisdiction, determined without regard to the covered taxes incurred with respect to such passive income by the CE owner (which, in Example V, is 2.5%), multiplied by the amount of the CE's passive income includible under any CFC tax regime or fiscal transparency rule (which, in Example V, corresponds to the GloBE income of Sub. AA, which is 200).

Figure 8. Example V with pushdown



Therefore, with the pushdown, the ETR would be identical to the minimum rate and no top-up tax would be calculated. The MNE group would be subject to the 15 of CFC taxes only, as opposed to the situation with a QDMTT (without the pushdown), in which the total amount of tax (CFC + QDMTT) would be 16.66.

In summary, even if the CFC tax regime or the PE regime allows for the crediting of the QDMTT (which cannot be taken for granted, as jurisdictions have no obligation to allow it), there are still cases where the absence of a pushdown will create shortcomings for the adoption of the QDMTT. For this reason, the adoption of a QDMTT, as tailored by the February 2023 AG, may present a competitive downside for the host jurisdiction, as compared to a scenario where only the IIR applies.

4.3.1.2. The arguments against the pushdown of taxes

The explanation of the February 2023 AG for opting not to allow for the pushdown of CFC and PE taxes is essentially grounded in simplification concerns (both from the perspective of tax authorities and taxpayers), while the ATAF suggested approach also adds a "conceptual" argument, related to the allocation of taxing rights. There are essentially three arguments against the pushdown of taxes to be addressed.

First, it is argued that the exclusion of CFC and PE taxes allows the operation of the QDMTT "as a simple calculation" not requiring "the complex calculations"[162] that would otherwise apply.[163] However, considering the formula of the jurisdictional

162. On the complexity of the calculations, *see* H. Wardell-Burrus, *Should CFC Regimes Grant a Tax Credit for Qualified Domestic Minimum Top-Up Taxes?*, 106 Tax Notes International 13 (27 June 2022).
163. *February 2023 AG*, *supra* n. 15, at p. 106, para. 118.30. A similar argument is also made in relation to CFCs in the *ATAF Suggested Approach*, *supra* n. 14, at p. 33.

top-up tax, “complex calculations” will have to be made anyway for the purpose of calculating the IIR or the UTPR in other jurisdictions, and the measure brings no simplification to the MNE group. On the contrary, the “simple calculation” is just a calculation that will have to be made in addition to the already “complex calculations”[164] that are needed to apply the IIR and the UTPR. From the perspective of the host jurisdiction, the creation of a peculiarity in relation to the GloBE Model Rules eliminates the possibility of synergistic monitoring under the GloBE information return. Even though the calculation may be simpler, the monitoring advantages inherent to the single top-up tax principle will not be present, which may outweigh any potential advantage arising from the intended simplification.[165]

Second, there is also the concern with the situation in which the QDMTT is creditable against either a CFC tax charge or a PE tax, in which the interaction between the crediting mechanisms would be problematic. The potential distortion is that the QDMTT could be creditable under the CFC rules of the parent’s jurisdiction or under PE treatment by the main entities’ jurisdiction, and lead to a situation where the floor to tax competition is not reached. Accordingly, the exclusion would “ensure that this practical problem does not arise”.[166] This is a legitimate concern, but there are other means to ensure that the floor to tax competition is respected in such cases. In fact, the GloBE Model Rules already provide a tool for that purpose. This potential distortion is already addressed by means of the additional current top-up tax,[167] which arises in cases where there is a recalculation related to a previous year, as a consequence of correcting information previously provided. According to one of the ETR adjustment articles,[168] an adjustment related to an unpaid covered tax for a previous fiscal year is foreseen,[169] leading to an additional current top-up tax in a subsequent fiscal year. This is enough to solve any eventual issue of the interaction between the crediting mechanisms, but further monitoring by the IF is advised.[170] In any case, even if the additional current top-up tax does not work as intended in this context, the IIR and the UTPR will always work as a backstop for the QDMTT, if the latter does not achieve its intended outcomes. The possibility that the QDMTT falls short of the floor to tax competition does not present an integrity risk for the GloBE Model Rules.[171]

Finally, the ATAF suggested approach also brings a conceptual argument in relation to CFC taxes. It informs that, according to some countries, pushing down the CFC taxes would not be consistent with the “conceptual approach to the DMTT, which is that it ranks first before any taxes in the residence country”.[172] However, the scope of the QDMTT in the GloBE Model Rules is not so comprehensive. It is specifically intended to prevent IIRs and UTPRs from being charged by other jurisdictions, but it does not address the issue of CFC rules in general, which were already in place and being applied before the Pillar Two proposals. They were already part of the status quo of the international tax rules. Nothing in the GloBE Model Rules leads to the conclusion that the QDMTT should be used by host jurisdictions as a countermeasure against CFC rules.

Even if the “conceptual approach” cannot be derived from the GloBE Model Rules, the host jurisdiction has legitimate taxing rights in such circumstances. Against this policy choice, one can only repeat the benefits of the single top-up tax principle and the general considerations on the restraints of tax competition, which is expected to work as a disincentive for host countries to adopt QDMTTs that go beyond the charging rules that would otherwise be applicable. After all, abandoning the pushdown of CFC and PE taxes makes the QDMTT more restrictive than the IIR and the UTPR, adding a competitive downside to its adoption.[173] Host countries wishing to neutralize the impact of CFC rules should pursue more specific reforms, as the enactment of a QDMTT is not tailored to achieving this goal.

4.3.1.3. Outsmarting GloBE: An incentive to expand CFC tax regimes?

Another argument that has been raised is that the precedence of CFC rules over the QDMTT would create an incentive for parent jurisdictions to increase the scope of their CFC rules in order to “jump the queue” in relation to the QDMTT.[174] While this incentive is very clear with regard to blended CFC tax regimes,[175] the concern in relation to a CFC tax regime is much less evident and should be given further thought. The incentive is mitigated by the limited scope of the GloBE Model Rules, which

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164. As argued in sec. 3.2.1.
165. As argued in sec. 3.2.2.
166. *February 2023 AG*, *supra* n. 15, at p. 106, para. 118.30. A similar argument is also made in relation to CFCs in the *ATAF Suggested Approach*, *supra* n. 14, at p. 33.
167. *GloBE Model Rules*, *supra* n. 8, at art. 5.2.3(c).
168. Id., at art. 10.1.1. “ETR adjustment articles” means arts 3.2.6., 4.4.4., 4.6.1., 4.6.4. and 7.3.
169. *GloBE Model Rules*, *supra* n. 8, at art. 4.6.4.
170. As will also be necessary in relation to the IF’s current solution on this topic. *See February 2023 AG*, *supra* n. 15, at p. 106, para. 118.30.
171. This feature of the *GloBE Model Rules* is also acknowledged by the IF. *See*, for instance, in the *July 2023 AG*, *supra* n. 20, at p. 77, para. 2.: “This possibility of an MNE Group paying less Top-up Tax under a QDMTT than it would have incurred under the GloBE Rules, does not, however, give rise to any integrity risks because the credit mechanism in Article 5.2 ensures that any shortfall in domestic Top-up Tax payable under the QDMTT will simply result in additional tax being payable under the GloBE Rules”.
172. *ATAF Suggested Approach*, *supra* n. 14, at p. 33. A similar argument is found in Wardell-Burrus, *supra* n. 162.
173. Wardell-Burrus, *supra* n. 150.
174. Discussing the argument, *see* Wardell-Burrus, *supra* n. 162; J. Li, *Introducing a Global Minimum Tax (Pillar Two) in Canada: Some Knowns and Unknowns*, 71 Canadian Tax Journal 1, pp. 103-36 (2023).
175. *See* discussion in sec. 4.3.2.

is not identical to that of CFC rules. There are several triggers to apply the GloBE Model Rules, which are not present in the case of domestic CFC rules. If a jurisdiction were to reform its CFC rules, it would probably do so in relation to all CFCs and not exclusively to the MNE Groups that are subject to the GloBE Model Rules. As a consequence, the jurisdiction would become less competitive in general, as it would apply stricter rules to entities that are not part of an MNE group. Tax competition may remain as an element that discourages jurisdictions from adopting broader CFC rules, with the sole intent of jumping the GloBE queue.

In any case, from a conceptual point of view, this is a risk that, if present, would be attributable to the GloBE Model Rules as a whole, and should not be used exclusively as an objection against the pushdown for QDMTT purposes. The problem of "jumping the queue", if present, would apply to the interaction with the IIR as well, and would not be specific to the interaction between CFC rules and the QDMTT. As a consequence of the implementation of the IIR, home jurisdictions could also be incentivized to expand their CFC rules as a way to jump the IIR queue. The jurisdiction applying CFC rules and the IIR will not always be the same. It is possible that the jurisdiction of the UPE has not implemented an IIR but applies CFC rules in relation to the LTCE, competing with the IIR of an intermediate entity. It is also possible that CFC rules are applied by an intermediate entity, while only the jurisdiction of the UPE has the right to charge a top-up tax under an IIR. Many other possible scenarios can be conceived if POPEs are also considered.

In order to properly face this risk, it would be necessary to further refine the definition of CFC tax regime, in order to cover only those that have an anti-abuse behaviour within their scope, thus preventing that parent jurisdictions from being able to unduly expand their jurisdictions in relation to the GloBE Model Rules (both IIRs and QDMTTs). This reform would imply a difficult line-drawing exercise and likely increase the complexity and vagueness of the rules.

4.3.1.4. CFC tax regimes, PEs and the single top-up tax principle

In summary, with regard to the pushdown of CFC and PE taxes, the single top-up tax principle plays both a function of supplementary guidance and a function of optimization guidance.

The wording of the February 2023 AG indicates that the exclusion of CFC and PE taxes is not optional but actually a requirement for the qualification as a QDMTT.[176] There is no conceptual reason for such a requirement. A DMTT with pushdown for CFC and PE taxes would still be within the range of the February 2023 AG guiding principles, as it still calculates the jurisdictional top-up tax according to the GloBE Model Rules. The observations made by the February 2023 AG regarding simplification are all policy considerations that are of interest to the host jurisdiction alone and do not impact the application of the GloBE Model Rules by other jurisdictions or harm their ultimate goal. If the host jurisdiction does not tailor the rules on the pushdown of CFC and PE taxes properly, the outcome will be that there will still be top-up tax left for home jurisdictions to charge and the floor to tax competition will still be observed, with IIRs and UTPRs backing up the application of the QDMTT.

In relation to PE taxes, the single top-up tax principle simply condones the ATAF suggested approach and demands that the pushdown of taxes is preserved in the case of PEs.[177] In relation to CFC taxes, a more analytical consideration is needed, as the single top-up tax principle plays both a function of supplementary guidance and a function of optimization guidance.

Within its function of supplementary guidance, the single top-up tax principle clarifies that the content of paragraph 118.30, as inserted by the February 2023 AG, cannot be derived from the GloBE Model Rules, as it unjustifiably limits the leeway that should be available for host jurisdictions on the design of the tax. In this case, the principle performs a negative function, evidencing that the February 2023 AG went too far in the requirements for the qualification as a QDMTT. The paragraph requires that host jurisdictions implement measures that are more restrictive than the IIR and the UTPR, by lowering the trigger of the QDMTT and broadening its tax base. From this perspective, the approach is not even in line with the asymmetric approach sustained in the February 2023 AG guiding principles.[178] While the paragraph provides valuable insights on the design of the QDMTT, its content should be drafted in the form of an optionality, weighing the pros and cons of the alternatives, in the fashion of the ATAF suggested approach.[179] The possibility of strict alignment with the outcome of an IIR should be kept and the paragraph should be amended to ensure this possibility.

Within its function of optimization guidance, the single top-up tax principle suggests that, among the possible designs, host jurisdictions should adopt a pushdown of taxes that is in accordance with the GloBE Model Rules, aligning the outcomes of their QDMTTs with that of IIRs. This recommendation is derived from the benefits of the single top-up tax principle[180] and from the general considerations on the restraints that will still persist above the floor to tax competition.[181]

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176. Converging, *see* Wardell-Burrus, *supra* n. 150.
177. *ATAF Suggested Approach*, *supra* n. 14, at sec. 4.5(a).
178. *See* sec. 3.1.
179. *See ATAF Suggested Approach*, *supra* n. 14, at p. 33.
180. *See* sec. 3.2.
181. *See* sec. 2.3.

4.3.2. Blended CFC tax regimes

The February 2023 AG also provides guidance on the allocation of US global intangible low-taxed income (GILTI)[182] taxes and taxes arising under other blended CFC tax regimes. Besides general introductory remarks,[183] it adds seven paragraphs to the Commentary to Article 4.3.2. of the GloBE Model Rules[184] and provides two examples on the application of the mechanism.[185] The new guidance is intended to be applied only "in the first years"[186] of implementation of the GloBE Model Rules.

4.3.2.1. The importance of the blended CFC tax regimes

The notion of blended CFC tax regimes has been tailored to embrace the GILTI regime, which was specifically mentioned by the 2021 IF Statement as a regime whose interaction with the GloBE Model Rules would demand further consideration.[187] The February 2023 AG openly addresses the GILTI regime specifically, providing for a brief explanation of its functioning and concluding that, in its current form, it is a (blended) CFC tax regime for the purpose of the GloBE Model Rules.[188]

A blended CFC tax regime is defined as "a CFC Tax Regime that aggregates income, losses, and creditable taxes of all the CFCs for the purposes of calculating the shareholder's tax liability under the regime and that has an Applicable Rate of less than 15%".[189] Hence, the definition does not demand an anti-abuse nature of the regime, covering, in more general terms, minimum tax regimes that allow for the blending of income and taxes from multiple jurisdictions. Blended CFC tax regimes follow a logic of worldwide blending of CFCs, ensuring that the aggregate foreign income derived through CFCs is subject to a minimum level of tax.[190] Unlike in the case of ordinary CFC tax regimes, simply "pushing down" the covered taxes to the CFC in case of blended CFC tax regimes is not an alternative. Because the income and losses of the CFCs are blended for the purpose of computation of the tax base, tracing the CFC tax to a specific LTCE becomes problematic.[191] The CFC tax, in this case, is generated by a combination of CEs and not by a standalone LTCE.

4.3.2.2. The February 2023 AG solution for blended CFC tax regimes

The February 2023 AG was therefore expected to come up with a solution for the assignment of GILTI taxes, and the issue has been dealt with by means of the design of a new mechanism, which treats the GILTI regime under a more general defined term (blended CFC tax regime).

The solution of the February 2023 AG is to apportion the taxes under an allocation formula that privileges the CEs with lower covered taxes under the GloBE Model Rules and larger amounts of income under the blended CFC tax regime. The logic behind this allocation is to assign taxes to the CEs that present the most significant downward impact on the aggregate ETR under the blended CFC tax regime.[192]

The implementation of this solution involves the creation of new defined terms. By means of a formula,[193] the CFC tax incurred under a blended CFC tax regime is allocated to CEs located in jurisdictions in which the GloBE jurisdictional ETR is below the applicable rate for the blended CFC tax regime (13.125% in the case of GILTI).[194] The mechanism therefore ensures that the taxes paid under a blended CFC tax regime are pushed down to CEs that are taxed below the ETR.

This feature diminishes the competitive disadvantage of a jurisdiction adopting such a regime, allowing it to remain attractive as the jurisdiction of the headquarters of the MNE group. If the GloBE jurisdictional ETR equals or exceeds the applicable rate

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182. For comparisons between GILTI and GloBE, *see* M. Herzfeld, *Can GILTI + BEAT = GLOBE?*, 47 Intertax 5, pp. 504-513 (2019); D.W. Blum, *The Proposal for a Global Minimum Tax: Comeback of Residence Taxation in the Digital Era?: Comment on Can GILTI + BEAT = GLOBE?*, 47 Intertax 5, pp. 514-522 (2019); J.G. Rienstra, *Pillar Two from the US Perspective*, in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* pp. 315-56 (A. Perdelwitz & A. Turina eds., IBFD 2021); F. Schildgen, *GloBe – Lehren aus GILTI*, 8 Internationale SteuerRundschau 11, pp. 400-408 (2019).
183. *February 2023 AG*, *supra* n. 15, at pp. 67-68, paras. 1-6.
184. Id., at pp. 68-69, paras. 58.1-58.7.
185. Id., at pp. 69-70.
186. Id., at pp. 68, para. 58.1. Specifically, the regime applies for "Fiscal Years that begin on or before 31 December 2025 but not including a Fiscal Year that ends after 30 June 2027" (*February 2023 AG*, *supra* n. 15, at pp. 68, para. 58.3). The IF will assess in the future whether the regime will also apply after this period (*February 2023 AG*, *supra* n. 15, at pp. 67-68, para. 5).
187. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project (8 Oct. 2021).
188. *February 2023 AG*, *supra* n. 15, at p. 67, paras. 4-5. Considering the GILTI rules as "essentially a broad expansion of the 1962 enacted US controlled foreign corporation rules", *see* Herzfeld, *supra* n. 13, p. 889.
189. *February 2023 AG*, *supra* n. 15, at pp. 68, para. 58.2. The *February 2023 AG* also refers to a blended CFC tax regime as "one in which the tax charge under the CFC Tax Regime is computed based on a blend of income, losses and/or creditable taxes of multiple CFCs whose Ownership Interests are held by a Constituent Entity-owner (or multiple Constituent Entity-owners that file a single tax return)". *See* id., at p. 67, para. 2.
190. Id., at p. 67, para. 3.
191. Id., at p. 67, para. 2.
192. Id., at pp. 67-68, para. 6.
193. Id., at p. 68, para. 58.2.
194. Id., at p. 67, para. 6.

or the minimum rate, the blended CFC allocation key for the CE will be treated as zero.[195] The feature aims at ensuring that no amount of tax paid under a blended CFC tax regime is "lost". The amount paid under a blended CFC tax regime is pushed down to increase the ETR of a CE that is being taxed below the ETR in the host jurisdiction, generally reducing an amount of top-up tax that would otherwise be due, taking precedence over the IIR and the UTPR.

The February 2023 AG also provides for guidance regarding the interaction with QDMTTs. Accordingly, an income tax expense attributable to a QDMTT reduces the GloBE jurisdictional ETR, meaning that blended CFC taxes are only apportioned after taking the QDMTT into consideration. Put differently, the QDMTT tops up taxation in the host jurisdiction and is further topped-up by the blended CFC tax regime and, after that, by the other charging rules, if applicable. This means that the top-up tax calculated for the purpose of the QDMTT and of the other charging rules will, again, be different, thus adding a disincentive for the adoption of QDMTTs by host countries.

Curiously enough, the income tax expense attributable to a QDMTT of a jurisdiction is included in the computation of the GloBE jurisdictional ETR for that jurisdiction only if the blended CFC tax regime allows a foreign tax credit for the QDMTT on the same terms as any other creditable covered tax.[196] Not only is the blended CFC tax regime not pushed down, but the home jurisdiction can decide whether it will credit the QDMTT or not when computing the GloBE jurisdictional ETR. In other words, the jurisdiction that implements the blended CFC tax regime has the power to decide on the interaction between the blended CFC tax regime and the QDMTT. The relationship between both taxes is not determined by the GloBE Model Rules but by the jurisdiction implementing the blended CFC tax regime.

4.3.2.3. Outsmarting GloBE: The incentives of the February 2023 AG

The application of a blended CFC tax regime takes precedence over the IIR and the UTPR. The adoption of a blended CFC tax regime does not represent a competitive disadvantage for the home jurisdiction, at least until there are low-tax jurisdictions not adopting QDMTTs, to which the blended CFC taxes can be pushed down.[197]

The treatment conceived for a blended CFC tax regime ensures that the jurisdiction adopting the blended CFC tax regime has the best of both worlds. On the one hand, its taxing rights take precedence over the taxing rights of jurisdictions applying an IIR or a UTPR. On the other hand, because of the way blended CFC taxes are apportioned, optimizing the allocation of the taxes to low-tax jurisdictions, the adoption of a blended CFC tax regime does not present a competitive disadvantage for the home jurisdiction – again, at least until there is no unanimous adoption of QDMTTs.

As a consequence, jurisdictions with blended CFC tax regimes would likely want to perpetuate this mechanism. Furthermore, if the mechanism is made definitive, home jurisdictions will actually be incentivized to adopt blended CFC tax regimes, as a means to outsmart the whole chain of incentives of the GloBE Model Rules.[198] In fact, this would be a much better alternative than the expansion of ordinary CFC rules.[199] Therefore, instead of promoting harmonization, the February 2023 AG solution may end up incentivizing diversification, with the widespread adoption of blended CFC tax regimes as a response to the incentives provided by the GloBE Model Rules, as expressed in the February 2023 AG. This outcome is the complete opposite of what the GloBE Model Rules were expected to achieve. Instead of a set of harmonized rules for a global minimum tax, Pillar Two would ultimately promote the design of multiple blended CFC tax regimes, with increased complexity for MNEs, and a random allocation of taxing rights to jurisdictions with the most well-designed blended CFC tax regimes.

This solution also comes at the expense of the host jurisdiction. Since the jurisdiction of the blended CFC tax regime can decide on the crediting of the QDMTT, it will be able to make its own policy choices according to each different jurisdiction. Even considering the "entrenching" effect of the mechanism, which creates an incentive for the crediting of QDMTTs,[200] since the total tax on the MNE would otherwise be increased, the potential for discrimination among jurisdictions in this context cannot be ignored.

The allocation mechanism also creates a negative incentive[201] that may give rise to a new modality of post-GloBE tax havens. In a scenario where all jurisdictions adopt QDMTTs, the blended CFC tax regimes would in fact increase the global tax burden of the MNE group and become a competitive disadvantage for the jurisdiction adopting it. However, some jurisdictions could still wish to waive the QDMTT tax revenue, in order to attract the capital that would turn them into deposits of blended CFC taxes. Some jurisdictions – generally those in which the MNE group does not have any significant amount of SBIE – may be incentivized not to adopt a QDMTT. If jurisdictions without QDMTTs become scarce, MNE groups would seek candidates to

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195. Id., at p. 69, para. 58.6.
196. Id.
197. For a discussion with complete examples of the allocation of GILTI taxes, *see* Wardell-Burrus, *supra* n. 150.
198. *See*, sustaining the expansion of scope of the Canadian Foreign Accrual Property Income (FAPI) rules, to bring it close to the GILTI rules, Li, *supra* n. 174, at pp. 103-26.
199. *See* sec. 4.3.1.
200. Wardell-Burrus, *supra* n. 150, at p. 4.
201. *See*, describing this case as a "brinkmanship" situation, Wardell-Burrus, *supra* n. 150, at p. 22.

become the deposit of blended CFC taxes of the MNE group. In this case, it would be possible to push down the blended CFC taxes of the whole MNE group to such jurisdictions and correspondingly reduce the global tax burden of the MNE group. In this post-GloBE modality of tax haven, such jurisdictions would be able to continue to offer taxation below the floor, without triggering top-up taxes.

4.3.2.4. Blended CFC tax regimes and the single top-up tax principle

The single top-up tax principle, alone, is not very helpful in finding a solution for the assignment of taxes from blended CFC tax regimes. This is due to the fact that the blended CFC tax regimes are not properly CFC regimes, but rather competing minimum taxes, which are expected to coexist with the GloBE Model Rules.

The GloBE Model Rules creates a floor to tax competition – and this is their ultimate justification. Any other possible justification for the rules ends up doing more harm than good. Anti-abuse reasons do not withstand the fact that the rules also target active income derived by legitimately structured schemes with economic substance and business purpose. Ability-to-pay and equality considerations fail to explain the option for jurisdictional blending, which is a core structural element of the rules. As a consequence of this choice, the rules may burden a loss-making MNE group – which is enough evidence of the limited whole played by these principles. The floor can be criticized as insufficient,[202] as excessive,[203] but it cannot be denied that it is a floor.

The need to coexist with alternative global minimum taxes is a symptom of an insufficiency of Pillar Two, and also a reason for inconsistencies. Any attempt at making two global minimum taxes compatible leads to the question of which is the *real* global minimum tax. The treatment attributed to the blended CFC tax regimes indicates that Pillar Two does not have the dominance that could be expected from an approach to which 138 nations have committed.[204] It still has to bow to the aspirations of a single domestic regime that does nothing more than foster the domestic policy goals of a single country. However, it does so in generic terms, thus incentivizing that other jurisdictions also adopt blended CFC tax regimes. In doing so, it incentivizes jurisdictions to try and outsmart the GloBE Model Rules, instead of actually implementing them.

Following the February 2023 AG, the QDMTT applies before the blended CFC tax regime that, in its turn, applies before the IIR and the UTPR. Jurisdictions adopting the IIR and the UTPR will have their tax bases eroded by blended CFC tax regimes. Whether the QDMTT will be able to comply with the single top-up tax principle is out of the hands of the host jurisdiction, as the February 2023 AG prevents them from pursuing this goal, and the jurisdiction adopting a blended CFC tax regime has the power to decide whether the QDMTT will be creditable or not.

If blended CFC tax regimes are replicated by other jurisdictions, new questions are expected to arise. Which blended CFC tax regime should be pushed down first? Which ones should be credited by the others? How does one determine the order in which the blended CFC tax regimes will be applied? The level of complexity will be increased, and interpreters of the GloBE Model Rules will be faced with questions that are actually an expression of the failure of the IF in designing and implementing the minimum tax envisaged within Pillar Two.

In summary, following the single top-up tax principle, jurisdictions should be discouraged and not encouraged to adopt blended CFC tax regimes. The GloBE Model Rules should be designed and interpreted to ensure their dominance, instead of allowing for a backdoor for the strategic behaviour of jurisdictions. The February 2023 AG creates the wrong incentives, and, if the current rules are kept, instead of the adoption of coordinated top-up taxes, the multiplication of blended CFC tax regimes should be expected.

4.4. The QDMTT safe harbour

The February 2023 AG provided only partial guidance on the QDMTT. There were many aspects that required further clarification and were subject to further consideration by the IF. These features included guidance in respect of blending of income and taxes under a QDMTT in light of a jurisdiction's domestic legal framework, the treatment of stateless CEs, as well as the treatment of tax neutrality and distribution regimes, including flow-through entities and investment entities.[205] These topics were covered by the July 2023 AG.[206]

A very sensible and much awaited topic was the development of a QDMTT safe harbour.[207] The terms of such a safe harbour determine which jurisdictions will ultimately be tasked with enforcing the floor to tax competition envisaged by the IF. Depending

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202. *See*, e.g., K. Dziurdź & C. Marchgraber, *GloBE: Why a Nominal Tax Rate of More Than 15% Might Not Be Enough*, 76 Bull. Intl. Taxn. 11, pp. 510-520 (2022).
203. *See*, e.g., Titus, *supra* n. 81, at p. 414.
204. They were agreed on by 136 members of the IF on 8 October 2021. Mauritania and Azerbaijan also joined the Inclusive Framework, and the number of committed jurisdictions increased to 138. Only Kenya, Nigeria, Pakistan and Sri Lanka have not approved the agreement, out of the 142 IF members.
205. *February 2023 AG*, *supra* n. 15, at p. 98, para. 3.
206. *July 2023 AG*, *supra* n. 20, at pp. 56-76.
207. *February 2023 AG*, *supra* n. 15, at p. 98, para. 3; p. 109, para. 118.46.

on how the safe harbour is drafted, host jurisdictions can either be partially relieved from the burden of enforcing the floor to tax competition or become the sole responsible for ensuring that the minimum rate is observed. The February 2023 AG already gave a hint on where the IF was headed, and the July 2023 AG confirmed the trend initially presented.

As put by the July 2023 AG, the coexistence between IIRs, UTPRs and QDMTTs requires at least two separate top-up tax calculations in respect of the same jurisdiction: the first, based on the QDMTT legislation in the host jurisdiction, and the second, under the other applicable charging rules.[208] It is a concern for the IF members that the requirement for multiple top-up tax calculations under parallel rules may result in increased compliance costs for MNE groups and tax administrations.[209] The issue is, then, which jurisdictions should be relieved from the administrative burden of enforcing the floor to tax competition.

4.4.1. The home jurisdiction-friendly QDMTT safe harbour

On the one hand, the QDMTT safe harbour could work to relieve the MNE group from IIR and UTPR obligations. One possible simplification would be to establish that an IIR calculation is not required in relation to a jurisdiction in which there is an applicable QDMTT.[210] This logic could also be extended to relieve the MNE group from obligations related to the UTPR. This was the path initially advanced by the February AG 2023 and further implemented by the July 2023 AG.

In a single paragraph discussing the prospects of a QDMTT safe harbour, the February 2023 AG speaks of "simplifications for MNE Groups",[211] without taking into account that the simplification is also relevant for the tax authorities involved – and that conflicting positions may arise therefrom. The February 2023 AG tentatively described a safe harbour that would work "for example by exempting the MNE Group from the requirements to perform additional GloBE calculations in respect of Constituent Entities located in a jurisdiction that qualifies for the Safe Harbour".[212] In other words, if the QDMTT being applied in the host jurisdiction is robust enough, the MNE group would be exempted, in relation to such CEs, from the obligations related to the IIR and the UTPR, which would otherwise arise in other jurisdictions.

This political choice was indeed confirmed by the July 2023 AG. The QDMTT safe harbour operates under article 8.2. of the GloBE Model Rules and excludes the application of other charging rules by deeming the jurisdictional top-up tax to be zero in a jurisdiction whose QDMTT meets an additional set of standards.[213] In order to qualify for the QDMTT safe harbour, the QDMTT implemented by the jurisdiction must meet an additional set of standards, including a QDMTT accounting standard, a consistency standard and an administration standard.[214] The IF will examine the QDMTT legislation of the host jurisdiction and supervise how they are applicable, by means of a peer-review process.[215]

Drafted in such a way, the QDMTT safe harbour will be of no benefit for host jurisdictions. This safe harbour operates to the exclusive benefit of the tax authorities of the IIR and UTPR jurisdictions, while transferring all the complications of calculating the top-up tax to the host jurisdiction. The obvious impact of such a measure is to completely shift the burden of monitoring the floor to tax competition to the tax authorities of the host jurisdiction, in a way that would have been unimaginable when the Pillar Two project was launched. The central role played by the GAAP of the UPE in the GloBE Model Rules is enough evidence that the enforcement efforts were always intended to be concentrated in the UPE jurisdiction.

4.4.2. A host jurisdiction safe harbour derived from the single top-up tax principle

On the other hand, an alternative version of the safe harbour could work to relieve the MNE group from incremental QDMTT liabilities. Host countries should consider adopting their own safe harbour for the purpose of application of their very QDMTTs. Accordingly, such a safe harbour would state that the taxpayer shall not be subject to any form of adjustment or incremental liability under the QDMTT rules if the amount of QDMTT calculated is sufficient to neutralize the application of IIRs and UTPRs by other jurisdictions.

Host jurisdictions could therefore use the GloBE information return to check whether the MNE group is being subject to IIRs and UTPRs in other jurisdictions, in relation to CEs within the host jurisdiction. Enforcement efforts would correspondingly be focused on CEs that are still being subject to IIRs and UTPRs in other jurisdictions, which could be indicative of a misapplication of the QDMTT. In a case where no IIR or UTPR arises, it is assumed that home jurisdictions have audited the relevant GloBE information return and concluded that no additional top-up tax should be due. It would be important that

208. *July 2023 AG*, *supra* n. 20, at p. 77, para. 2.
209. Id., at p. 77, para. 2.
210. Wardell-Burrus, *supra* n. 162
211. *February 2023 AG*, *supra* n. 15, at p. 109, para. 118.46.
212. *February 2023 AG*, *supra* n. 15, at p. 109, para. 118.46.
213. *July 2023 AG*, *supra* n. 20, at p. 77, para. 4.
214. Id., at pp. 77-78, para. 5.
215. Id., at p. 78, para. 6.

jurisdictions would also share information in cases where an audit has been performed and an IIR or a UTPR has been identified with information that deviates from the GloBE Information Return.

Home jurisdictions do not need to carefully examine the calculations under the QDMTT. The QDMTT appears as a simple deduction for the purpose of calculating the top-up tax under IIRs and UTPRs. Even if they do not expect to collect revenue, if they have enacted IIRs and UTPRs, they are expected to enforce it. As the QDMTT is a deduction from the jurisdictional top-up tax, they need to take the QDMTT into consideration, in order to ensure the proper application of IIRs and UTPRs. Besides that, only by ensuring the enforcement of their IIRs and UTPRs will they ensure the authority of the floor to tax competition, which is within their interests.

As seen, the calculation of the QDMTT is a necessary step for the calculation of the IIR and UTPR. If no IIR or UTPR is being applied, it means that other jurisdictions have concluded that the floor to tax competition is being respected, including due to the neutralization of the other charging rules by an applicable QDMTT. Such a safe harbour would be in line with the February 2023 AG guiding principles. The minimum tax would be consistent with the design of the GloBE Model Rules and would provide for outcomes that are consistent with the GloBE Model Rules. Such a safe harbour would, by no means, be a “benefit” in relation to the application of the GloBE Model Rules, as it would precisely take the GloBE Model Rules as a reference point to conclude whether the taxpayer is compliant with the minimum tax.

The safe harbour is intended to minimize interpretative conflicts and compliance costs. In practice, the adoption of the safe harbour will mean that the host jurisdiction adheres to the home jurisdiction interpretation of the relevant charging rules. By giving away this interpretative power, host jurisdictions will be able to benefit from the monitoring of home jurisdictions over IIRs and UTPRs while still capturing the relevant tax revenue under their QDMTTs.

A similar provision to the type of safe harbour suggested in the present contribution may be found in the ATAF suggested approach. The model sets forth that the determination of the top-up tax under the QDMTT “will be deemed to be in accordance with the GloBE Information Return provided that such calculations were made by a Member of the Group in accordance with a Qualified Income Inclusion Rule or Qualified UTPR”.[216] The deeming provision acknowledges the calculation of the top-up tax performed by another jurisdiction and takes into consideration that “it would be burdensome to require a Group to recalculate based on these relatively narrow range of differences”[217] that may arise between IIRs, UTPRs and QDMTTs. The deeming provision is not labelled as a “QDMTT safe harbour”, but it in fact operates as such, as it accepts the outcomes from the application of the GloBE Model Rules by other jurisdictions.[218] The difference between the ATAF suggested approach and the approach advanced above is essentially that the latter leaves more leeway for host jurisdictions and creates an incentive for MNE groups to pay all top-up tax in the form of QDMTT.

Even if the ATAF suggested approach provides for a much better solution than the one tentatively described in the February 2023 AG, host countries should further refine the provision advanced in the ATAF suggested approach and plead for its inclusion in the GloBE Commentary. It is also important to consider that the enactment of a QDMTT safe harbour does not eliminate the need for the other amendments to the February 2023 AG suggested above.[219]

5. Conclusions

Following the February 2023 AG, the decision of host countries on whether to adopt a QDMTT involves a trade-off: they have to choose between remaining attractive for investments, considering the remaining pressures of tax competition still existing above the floor to tax competition, or obtaining additional tax revenue within the context of Pillar Two. This development may come as a surprise for those who had an optimistic view of the QDMTT,[220] expecting that it would work as a “pure soak-up tax”[221] that ensures that host countries are able to generally neutralize the IIR without further distortions. In fact, things did not have to develop the way they did. The design of the QDMTT as a more restrictive top-up tax than the IIR was a *choice* made by the IF upon the enactment of the February 2023 AG,[222] which is not immediately derived from the structure of the GloBE Model Rules and in fact contradicts their underlying logic.

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216. *ATAF Suggested Approach*, *supra* n. 14, at sec. 13.3.
217. Id., at p. 46.
218. Like the present contribution, the *ATAF Suggested Approach* fosters a uniform implementation of the *GloBE Model Rules*. Sec. 13.2 sets forth that the *GloBE Model Rules* and the *GloBE Commentary* shall be a relevant source of interpretation of the suggested QDMTT.
219. Namely those addressed in secs. 4.2. and 4.3.
220. *See*, e.g., Arnold, *supra* n. 59, at p. 227. Describing the QDMTT as a soak-up tax, *see also* J. Li, A. Nikolakakis & J. Vidal, *Canadian QDMTT Challenges*, 71 Canadian Tax Journal 1, p. 137 (2023).
221. For the expression, *see* Wardell-Burrus, *supra* n. 150, at p. 10.
222. For a critical examination of the development and structure of the IF, *see* Y. Brauner, *Serenity Now!: The (Not So) Inclusive Framework and the Multilateral Instrument*, 25 Florida Tax Review 2 (2022).

The goal of home jurisdictions influencing the design of the QDMTTs in the IF is very clear. They want not only to build a floor to tax competition but also to collect tax revenues in the process. The "competitive game of minimum taxation"[223] is not a game that will start at the stage of implementation of the GloBE Model Rules but rather a game that is already being played at the IF. The prevalence of ad hoc solutions in the February 2023 AG, which cannot be explained by the underlying logic of the rules, and have a clear bias with respect to their outcomes, gives us a hint of who are the winners of this game. The IF must seek a principled solution that ensures the implementation of the agreed floor to tax competition without harming the legitimate tax claims of host jurisdictions.

An alternative to the asymmetric and unprincipled February 2023 AG approach can be derived from the general structure and justifications of the GloBE Model Rules. The single top-up tax principle is able to assist the IF and host countries in overcoming the current design hurdles and offers a solid foundation for tailoring QDMTTs while still respecting the general structure of the GloBE Model Rules. The measures addressed in this contribution can all be implemented either unilaterally by host jurisdictions[224] or by means of agreed administrative guidance and amendments to the GloBE Commentary,[225] without requiring any amendment to the GloBE Model Rules. In a scenario where the assumptions on the adoption of the GloBE Model Rules are confirmed,[226] the single top-up tax principle ensures that the QDMTT optimally performs its functions, and should be adopted by the IF and by host jurisdictions.

The justification, content and functions of the single top-up tax principle, developed throughout the article, can be summarized as follows as a theoretical framework to assist host countries and the IF in designing QDMTTs:

Justification. The single top-up tax principle is justified both on goal reasons and practical reasons. It is justified on goal reasons since it implements the floor to tax competition, which is the ultimate justification of the GloBE Model Rules, while allowing host jurisdictions to capture the tax revenues from this implementation (allocative function) in the simplest possible way (simplification function), which is the reason why the QDMTT was conceived. It is also justified on practical reasons since it allows for the calculation of only one top-up tax, which facilitates compliance by MNE groups and allows for the creation of synergies among tax authorities.

Content. The principle demands that the QDMTT is designed as a soak-up tax, and the same rules are used for the purpose of calculating the jurisdictional top-up tax under the IIR and the QDMTT. It requires strict alignment with the IIR, charging the amount corresponding to the allocable share of the top-up tax that would have been charged under the relevant IIRs, irrespective of whether the relevant jurisdictions actually adopt IIRs.

Functions. The single top-up tax principle is able to consistently (i) guide host jurisdictions on the choice of optimal design features for their QDMTTs among the available options (*function of optimization guidance*); (ii) guide the IF on the revision and further development of the GloBE Commentary and agreed administrative guidance, considering the existence of gaps and inconsistencies in the current design of the QDMTT (*function of supplementary guidance*); and (iii) guide the IF on the development of additional mechanisms that promote the efficacy of the QDMTT and subsequently ensure that the GloBE Model Rules are able to achieve their goals (*function of creative guidance*).

The application of this theoretical framework to the specific design issues that have been examined leads to the following practical conclusions:

(1) Host countries should not implement deviations from the GloBE Model Rules. Peculiarities should be avoided, and the design of the QDMTT should be as independent from domestic peculiarities as possible.

(2) The QDMTT should be levied, similarly to the IIR, on the allocable share of the top-up tax and not on the whole amount of the jurisdictional top-up tax computed under article 5.2.3., like the UTPR.

  (a) In relation to the IIR, clarifying paragraphs should be added to the Commentary to Article 2.1.1., 2.1.2. and 2.1.4. of the GloBE Model Rules. The commentaries would clarify that no IIR shall be charged, under each of these provisions, in case the allocable share of the top-up tax of the LTCE, as referred therein, but calculated without deduction of the QDMTT, has already been taxed under a QDMTT. The rationale of these commentaries would be to ensure that host jurisdictions are able to enact a QDMTT that is levied only on the allocable share of the top-up tax and still prevent the charging of a top-up tax under an IIR. This outcome would be in line with the single top-up tax principle and also within the range of the February 2023 AG guiding principles.

223. Christians, *supra* n. 67.
224. As is the case of the solution presented in sec. 4.1.
225. As is the case of the solutions presented in secs. 4.2. and 4.4..
226. As enunciated in the introduction of this article (sec. 1.).

(b) In relation to the UTPR, a clarifying commentary should be added to article 2.5.2. of the GloBE Model Rules. The commentary would make clear that the exemption mechanism of article 2.5.2. also applies if all of the allocable share of the top-up tax corresponding to the UPE's ownership interests in the LTCE, directly or indirectly held, is taxed under the QDMTT in the host jurisdiction. In summary, the adoption of a QDMTT corresponding to all of the allocable share of the top-up tax corresponding to the UPE's ownership interests in the LTCE should also trigger the exemption mechanism of the UTPR.

(3) In relation to PE taxes, deviating from the February 2023 AG, the ATAF suggested approach should be endorsed and the pushdown of taxes should be preserved.

(4) In relation to CFC taxes, a more analytical consideration is needed, as the single top-up tax principle plays both a function of supplementary guidance and a function of optimization guidance.

(a) Within its function of supplementary guidance, the single top-up tax principle clarifies that the content of paragraph 118.30, as inserted by the February 2023 AG, cannot be derived from the GloBE Model Rules, as it unjustifiably limits the leeway that should be available for host jurisdictions on the design of the tax. Its content should be drafted in the form of an optionality, weighing the pros and cons of the alternatives, in the fashion of the ATAF suggested approach. The possibility of strict alignment with the outcome of an IIR should be kept and the paragraph should be amended to ensure this possibility.

(b) Within its function of optimization guidance, the single top-up tax principle suggests that, among the possible designs, host jurisdictions should adopt a pushdown of taxes that is in accordance with the GloBE Model Rules, aligning the outcomes of their QDMTTs with that of IIRs.

(5) The treatment of blended CFC tax regimes should be reviewed. Jurisdictions should be discouraged and not encouraged to adopt blended CFC tax regimes. The GloBE Model Rules should be designed and interpreted to ensure their dominance. The current treatment of blended CFC tax regimes creates the wrong incentives, and, if the current rules are kept, instead of the adoption of coordinated top-up taxes, the multiplication of blended CFC tax regimes should be expected.

(6) The QDMTT safe harbour, as hinted in the February 2023 AG, and later confirmed by the July 2023 AG, will be of no benefit for host jurisdictions and should face resistance from them within the IF. Such a safe harbour would operate to the exclusive benefit of the tax authorities of the IIR and UTPR jurisdictions while transferring all the complications of calculating the top-up tax to the host jurisdiction.

(7) Host countries should consider fostering in the IF an alternative version of safe harbour. This safe harbour would state that the taxpayer shall not be subject to any form of adjustment or incremental liability under the QDMTT rules if the amount of QDMTT calculated is sufficient to neutralize the application of IIRs and UTPRs by other jurisdictions.

While the QDMTT is a measure to be welcomed, host countries should be careful with regard to monitoring issues. They risk ending up with a truly complicated tax, which they will themselves have to enforce. This is an unforeseen development, as the GloBE Model Rules are very complex and other design issues are expected to arise as their implementation and application take place.