International

The OECD/G20 Global Minimum Tax and Dispute Resolution: A Workable Solution Based on Article 25(3) of the OECD Model, the Principle of Reciprocity and the GloBE Model Rules[*]

Robert Danon,[**]
Daniel Gutmann,[***]
Guglielmo Maisto[****]
and Adolfo Martín Jiménez[*****]

Issue: World Tax Journal, 2022 (Volume 14), No. 3
Published online: 30 June 2022

The implementation of the G20/OECD global minimum tax ("GloBE") raises an immediate and practical challenge in terms of dispute resolution. On the one hand, the GloBE framework will require an unprecedented degree of coordination between jurisdictions with naturally a high potential for bilateral and multilateral disputes. On the other hand, it is foreseen that the GloBE rules will not be incorporated into a Multilateral Convention. Rather, the GloBE architecture will be exclusively transposed into domestic laws through so-called "model rules". Therefore, at least in an initial phase, no ad hoc international binding dispute resolution mechanism will be available to solve GloBE disputes. In order to address this pressing challenge, this article proposes a readily workable solution to solve GloBE disputes without the need for a Multilateral Convention. The model advocated here consists in a (i) reinforced interpretation of article 25(3) second sentence of the OECD Model on the basis of a subsequent practice (article 31(3)(b) of the VCLT), (ii) a domestic dispute resolution mechanism incorporated into the model rules and mirroring article 25(3) of the OECD Model which would also (iii) apply to non-treaty situations on the basis of the principle of reciprocity and which would (iv) rely on the Convention on Mutual Administrative Assistance in Tax Matters. The authors find that the proposed framework is particularly in line with the object and purpose of the GloBE Model Rules which are to operate between jurisdictions as "mirror legislations" and in a synchronized fashion. This solution may also be combined with other mechanisms currently discussed to simplify and enhance the certainty of the GloBE framework for both MNE groups and tax administrations.

1. Introduction

The global minimum tax – the Global Anti-Base Erosion (GloBE) Rules – developed by the OECD/G20 Inclusive Framework on BEPS is intended to represent a global coordinated policy response to what is perceived as a race to the bottom in corporate income taxes and, therefore, undesirable tax competition.

The GloBE framework, however, relies on an unprecedented degree of international tax cooperation and interdependency between jurisdictions. Therefore, it was always felt that the potential for bilateral and multilateral disputes involving the GloBE rules would be high, especially in the initial phase of the implementation of the framework. For this reason, the necessity for such framework to incorporate a robust dispute prevention and resolution mechanism has been a key concern and was again reiterated during the latest public consultation organized by the OECD on 25 April.

* **The authors wish to thank the anonymous peer reviewers for their comments as well as the editor-in-chief of the World Tax Journal, Professor Pasquale Pistone, for the opportunity to publish in this special issue in memoriam of our dear and esteemed colleague and friend, Professor Frans Vanistendael. They finally wish to thank Mr. Benjamin Malek, PhD candidate and research associate at the Tax Policy Center for the editorial assistance.**
** **Professor of Law, Director Tax Policy Center, University of Lausanne, Partner, Danon, Lausanne, Chairman of the Permanent Scientific Committee of the International Fiscal Association (IFA).**
*** **Professor of Law, Université Paris 1 – Panthéon Sorbonne, Partner, CMS Francis Lefebvre Avocats, Paris.**
**** **Professor of Law, Università Cattolica del Sacro Cuore, Sede di Piacenza, Founding Partner, Maisto e Associati, Milan.**
***** **Professor of Tax Law, University of Cádiz.**

Of course, the ideal solution to this problem would be to include the essence of the GloBE architecture into a Multilateral Convention which could then provide for an *ad hoc* binding dispute prevention and resolution mechanism to solve GloBE disputes. While ideal, this approach does not currently have the necessary political traction to be put in place, at least immediately. Rather, it is at this stage foreseen that the GloBE architecture will exclusively be transposed into domestic laws through so-called model rules as interpreted and applied according to their commentaries and any administrative guidance issued by the Inclusive Framework. At the same, time, however, there is broad agreement on the fact that the GloBE framework should provide tax certainty, avoid risks of double taxation and, therefore, that the availability of a dispute resolution mechanism is in essence desirable.

This article thus explores the possibilities to deal with GloBE disputes under the current international tax framework and without the need for a Multilateral Convention. In our opinion, this objective may be achieved. This article presents in this regard a workable solution involving (i) an enhanced interpretation of article 25(3) second sentence of the OECD Model Tax Convention on Income and on Capital (2017),[1] (ii) a domestic dispute resolution mechanism mirroring such provision which could be included in the GloBE Model Rules and which would also (iii) apply to non-treaty situations on the basis of the principle of reciprocity and (iv) rely on the Convention on Mutual Administrative Assistance in Tax Matters (MAAC).

As will be shown, the principle of reciprocity, which is a key component of the solution advocated here, allows us to develop a model that would also provide for a dispute resolution mechanism in cases where tax treaty law does not incorporate a clause modelled after article 25(3) of the OECD Model or, simply, where no tax treaty obligation is in place. It is true that recourse to the principle of reciprocity is not frequent in cross-border corporate taxation because the focus is intuitively on tax treaties. However, the application of the principle of reciprocity is well-established in international tax relations and frequently used in areas such as for example VAT or with respect to the elimination of double taxation involving selected territories. We therefore see no reason why such a principle could not be deployed to justify the application of a dispute resolution mechanism between jurisdictions applying the GloBE rules where no appropriate tax treaty obligation is in place. More generally, the model proposed in this article is very much aligned with the object and purpose of the GloBE rules which are to be transposed in domestic laws but which will apply between jurisdictions in an interdependent way as “mirror” legislations.

Before moving to the core of this article, we begin with general contextual considerations on the GloBE architecture (section 2) and emphasize the practical and pressing question of dispute resolution (section 3). Without claiming to be exhaustive, we then illustrate some of the disputes which, we feel, the interpretation and application of the GloBE rules may entail (section 4). We finally turn to the essence of this article and to the presentation and discussion of our solution to deal with GloBE disputes under the current international tax framework (section 5).

2. General Contextual Considerations on the GloBE Architecture

2.1. A global coordinated policy approach

The GloBE framework undoubtedly represents a strong example of multilateral fiscal policy. This trend finds its inception in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, which led to the creation of its Inclusive Framework bringing together more than 140 jurisdictions to date. The Two-Pillar Solution which includes the GloBE framework belongs to these “global coordinated policy approaches”.[2] The GloBE rules indeed reflect a political agreement[3] which is to be put in place by the members of the Inclusive Framework in the form of a “common approach”.[4]

This status of common approach has two main consequences. First, this means that Inclusive Framework members are not required to adopt the GloBE rules, but, if they choose to do so, they then agree to implement and administer such rules in a way that is consistent with the outcomes provided for under Pillar Two. This includes so-called “model rules” and guidance agreed by the Inclusive Framework to which we revert below. Second, countries applying the GloBE rules also commit to accept the agreed order through which they have to be applied, although they have some options in this respect.[5] The policy serves to end what is perceived as the race to the bottom in corporate income tax through a global minimum tax for groups with an annual turnover of more than EUR 750 million.[6]

1. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model* (2017)]. *See also* the *OECD Model Tax Convention on Income and on Capital: Commentaries* (21 Nov. 2017), Treaties & Models IBFD [hereinafter *OECD Model: Commentary* (2017)]. All references to the *OECD Model* and its *Commentary* within the text are to the 2017 version, unless indicated otherwise.
2. OECD, *Tax Co-operation for the 21st Century: OECD Report for the G7 Finance Ministers and Central Bank Governors* (OECD 2022), available at https://www.oecd.org/tax/tax-co-operation-for-the-21st-century-oecd-report-g7-may-2022-germany.htm, para. 2 (accessed 23 June 2022).
3. OECD/G20, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD 2021).
4. Id., at p. 3.
5. Id., at p. 3. *See also* para. 14 and the footnote therein.
6. OECD, *supra* n. 2, at para. 2.

2.2. An unprecedented degree of international tax interdependency

The idea that the application of a rule in one state is dependent on the treatment applied in another state is certainly not new to the international tax system. The problem is well-known in tax treaty law for example with conflicts of attribution or qualification of income.[7] The policy was also reinforced at the domestic law level with the BEPS Project. A prominent example is of course BEPS Action 2 relating to hybrid mismatch arrangements.[8]

However, the GloBE architecture is characterized by an unprecedented degree of interdependency heavily relying on common and coordinated rules across jurisdictions.[9] This transpires, for example, very clearly in the fact that the GloBE rules have been designed to apply according to a specific order.[10] The relations between the undertaxed payment (profit) rule (UTPR) and the income inclusion rule (IIR) or between the latter and the qualified domestic minimum tax (QDMT) which under both instances indicate the order and priority of application of one provision over the other are in this regard illustrative.

2.3. Genuine and substantive multilateral international tax rules

Although it is at this stage foreseen that the GloBE framework will only be transposed in domestic laws,[11] from a substantive perspective, the GloBE rules have all the attributes of genuine international tax rules. First, the existence of the interdependency between jurisdictions referred above is a classical feature of international tax rules and reminds of the relation between, e.g. source and residence states in the operation of tax treaties. In fact, this interdependency is even stronger under the GloBE framework than under tax treaties. Second, the effect of the GloBE framework is clearly to allocate taxing rights between jurisdictions. For this reason, the relation of the GloBE rules with existing tax treaty obligations and possible incompatibility problems related thereto, which will not be discussed in this article, has recently received scholarly attention.[12] Therefore, it is hard to dispute that the GloBE framework will form an integral part of the international tax system alongside with the rules found in tax treaties.

2.4. A natural and logical fit in treaty law

In light of the foregoing features, it would thus seem intuitively obvious, logical and efficient to elevate the GloBE rules to the rank of treaty law and to include their architecture into a Multilateral Convention. This would present several advantages. First, recourse to treaty law would ensure consistency with the approach followed with respect to Pillar One (for which a Multilateral Convention is foreseen)[13] and the implementation of the BEPS tax treaty changes through a Multilateral Instrument (MLI). Second, and more fundamentally, an undesirable weakening of treaty law and, more generally, a fragmentation of the international tax system would be prevented. This latter form of fragmentation is different from the well-known problem of fragmentation of international law caused by diverging interpretations within its specialized sub-regimes which the principle of systemic integration, laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),[14] seeks to avoid.[15] Rather, the fragmentation to which we here refer takes place within the same specialized sub-regime itself (i.e. the international tax system) and may thus even more directly affect its harmonious functioning. This problem could be avoided if the GloBE framework were to be formally included into a treaty. A further advantage of this approach would be that the interpretation of GloBE rules would then be governed by the VCLT. The rules of the VCLT would in this regard strongly support an application of the GloBE rules according to the principle of common interpretation,[16] which would then give international

---

7. *See* art. 1(2) *OECD Model* (2017); *OECD Model: Commentary on Article 1*, para. 2 et seq. (2017) regarding conflicts of attribution involving hybrid entities and thereupon. *See also* A. Nikolakakis et al. *Some Reflections on the Proposed Revisions to the OECD Model and Commentaries and on the Multilateral Instrument, with Respect to Fiscally Transparent Entities*, Brit. Tax Rev. 3, pp. 295-373 (2017); R. Danon, *Qualification of Taxable Entities and Treaty Protection*, 68 Bull. Intl. Taxn. 4/5, pp. 192-20 (2014), Journal Articles & Opinion Pieces IBFD and with respect to conflicts of qualification, *OECD Model: Commentary on Article 23*, para. 32.1 (2017).
8. OECD/G20, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report* (OECD 2015), Primary Sources IBFD.
9. OECD, *supra* n. 2, at para. 8.
10. This interdependence is even more complex as the GloBE framework allows a certain number of relevant options for Member States (e.g. whether to levy a qualified domestic minimum top-up tax as per art. 5.2.; whether to implement CFC rules, etc.) and taxpayers (e.g. the GloBE loss election per jurisdiction of art. 4.5.; the elective de minimis exclusion of art. 5.5. etc.).
11. *See* sec. 2.5.
12. *See* for example thereupon J. Li, *The Pillar 2 Undertaxed Payments Rule Departs From International Consensus and Tax Treaties*, 105 Tax Notes International, (2022); 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(2022), Journal Articles & Opinion Pieces IBFD; M.C. Bennett, *Contemplating a Multilateral Convention to Implement OECD Pillars 1 and 2*, 102 Tax Notes International, p. 1453 ff (2021).
13. OECD/G20, *supra* n. 3, at p. 3.
14. *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD [hereinafter *VCLT*].
15. *See* in particular International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC Finalized by M. Koskenniemi, A/CN.4/L.682, para. 413 (13 Apr. 2006); C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 Intl. & Comparative L. Q. 2, p. 280 (2005).
16. *See* generally K. Vogel & A. Rust, *Klaus Vogel on Double Taxation Conventions*, Introduction, para. 90. *See also* OECD, *Tax Treaty Override*, 2 Oct. 1989, para. 20, published in *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Treaties & Models IBFD: "the interpretative process should, in the case of tax treaties, rely on the co-ordination of approaches by the tax authorities […]".

legal and interpretative value to the global coordinated policy approach[17] pursued by the GloBE framework. Finally, recourse to treaty law would also allow the development of an *ad hoc* binding dispute prevention and resolution mechanism to solve GloBE disputes. In fact, the OECD Report prepared for the recent G7 Finance Ministers and Central Bank Governors meeting in Germany recognizes that early and binding dispute resolution mechanisms are not only best suited but will also be needed in the post Two-Pillar Solution international tax architecture.[18]

2.5. The path currently followed: Exclusive transposition in domestic laws

It is however the authors' understanding that the ideal framework described above is currently not within political reach. Rather, for the time being, it is envisaged that the GloBE rules will be exclusively transposed into domestic laws. The OECD GloBE Model Rules[19] are in this regard intended to serve as a template for domestic legislations.[20] These Model Rules are supplemented by detailed commentaries.[21]

However, this approach will likely raise a number of issues, in particular from a law-making and judiciary perspective. For example, may the GloBE Model Rules simply be imported into domestic laws by a jurisdiction without any change to accommodate the specificities of that jurisdiction's legal tradition? Further, assuming that a mere reference to the Model Rules or an automatic transposition of these rules would not be possible and that adjustments may be necessary, would this then increase risks of disputes involving the GloBE rules? Finally, how would the interpretation of the GloBE rules fit into the canons of interpretation provided by domestic law? While the genesis and commentaries to the GloBE rules would certainly have some relevance in most countries, that relevance may not necessary be the same in all of them. These problems will undoubtedly require further attention and, in our view, their proper analysis will be key to a successful implementation of the GloBE framework in accordance with the principle of legal certainty and the rule of law. An extensive analysis of these issues is however beyond the scope of this contribution. We shall nonetheless briefly touch on some of these problems when discussing article 8.3 of the GloBE Model Rules and the Agreed Administrative Guidance to which it refers.

3. A Pressing Practical Question: The GloBE Rules and Dispute Resolution

3.1. The problem

This being said, the exclusive transposition of the GloBE rules into domestic laws triggers an immediate and more pressing practical problem on which this article focuses. That is, as long as the GloBE framework is not supported by a Multilateral Convention, no dedicated international dispute resolution mechanism will be in place to deal with GloBE disputes. The problem is significant because as discussed in the opening considerations of this article, the potential for bilateral and multilateral disputes involving the GloBE rules is high, especially in the initial phase of the implementation of the framework.[22] Several options are in this regard envisaged to prevent or minimize GloBE disputes. For example, stakeholders have suggested that a pre-clearance process could be carried out by the ultimate parent entity's jurisdiction or via a panel process in order to provide legal certainty regarding the calculation of the IIR/UTPR liability at the level of an entire MNE group. Other options have also been tabled by other inputs, but their consequences and architecture remain largely unexplored.[23] While these approaches are desirable in essence, none of them may – in our view – replace a proper dispute resolution mechanism.

3.2. The solution proposed in this article

Therefore, starting from the premise that the implementation of the GloBE Model Rules without a proper international tax dispute settlement mechanism in place is not viable, this article explores the possibilities to deal with GloBE disputes under the current international tax framework. In order to keep the discussion within manageable proportions, we focus solely on what we refer to as GloBE disputes *stricto sensu*, i.e. disputes involving the interpretation and application of the GloBE Model Rules. On the other hand, disputes rooted in the interaction between the GloBE Model Rules and the existing international tax system or Pillar One will not be discussed here. As indicated, we shall equally not address the issue of incompatibility of the GloBE Model Rules with existing tax treaty obligations.

17. OECD, *supra* n. 2, at para. 2.
18. Id., at p 18.
19. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (OECD 2021) [hereinafter *GloBE Model Rules* (2021)].
20. B.J. Arnold, *An Investigation into the Interaction of CFC Rules and the OECD Pillar Two Global Minimum Tax*, 76 Bull. Intl. Taxn. 6, sec. 1 (2022), Journal Articles & Opinion Pieces IBFD.
21. OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)* (OECD 2022) [hereinafter *Commentary to the GloBE Model Rules* (2022)].
22. *See also* D. Gutmann, *Les Piliers de la réforme OCDE/G20 : vers davantage de différends entre Etats ?*, *Fiscalité internationale* 3-2021, p. 1 ff (2021).
23. *See*, for instance, the options referred to in sec. 4.

The approach advocated in this article relies, as a starting point, on the mutual agreement procedure provided by the second sentence of article 25(3) of the OECD Model which states that: "The competent authorities of the Contracting States […] may also consult together for the elimination of double taxation in cases not provided for in the Convention". It will be shown that this form of mutual agreement procedure known as the "legislative MAP" represents a legal basis to deal with GloBE disputes.

An immediate objection that might be raised in this regard is however that the MAP as a bilateral procedure in which the competent authorities simply endeavour to resolve a tax dispute is by essence ill-suited to deal with GloBE disputes. Further, we also recognize that (i) the applicability of article 25(3) of the OECD Model to GloBE Model Rules might still be disputed, (ii) in some states, domestic law might prevent competent authorities from making tax adjustments or from establishing dispute resolution mechanisms which are not expressly permitted by domestic law and, finally (iii), there could be situations in which an applicable tax treaty does not contain a clause modelled after article 25(3) or no tax treaty is in place between the relevant jurisdictions.

We show, however, that the foregoing obstacles may be overcome through the following adjustments.

First, additions should be made to the OECD Model Commentary on Article 25 with a view to clarify the application of article 25(3) of the OECD Model to GloBE disputes in accordance with any guidance to be agreed by the Inclusive Framework.

Second, a domestic model provision incorporating the framework provided by article 25(3) of the OECD Model should be inserted in the GloBE Model Rules. To that end, we have drafted such a model provision and a commentary thereupon. The objective of such a model provision would be threefold. To begin with, from a tax treaty interpretation standpoint, the adoption of such provision by states would in our view be regarded as a subsequent practice confirming the application of treaty provisions modelled after article 25(3) of the OECD Model to GloBE disputes, in accordance with article 31(3)(b) of the VCLT. Second, by the adoption of such a model rule a jurisdiction would no longer be prevented by its domestic law from giving effect to a MAP based on article 25(3) in the context of a GloBE dispute. Third, the proposed rule would also extend the framework provided by article 25(3) to non-treaty situations on the basis of the principle of reciprocity, which is already regularly applied in international tax relations. The domestic provision could thus be applied in parallel to treaty solutions, therefore closing the existing gaps for dispute resolution purposes.

Third, a crucial element to the successful operation of this domestic provision would be the MAAC. Accordingly, we discuss the interaction between the MAAC and the proposed domestic model provision.

In sum, therefore, the framework we suggest relies on (i) an enhanced interpretation of article 25(3) of the OECD Model compatible with the rules of the VCLT, (ii) the principle of reciprocity and (iii) a domestic model provision giving full effect to such framework. As a result, the dispute resolution mechanism arising from this proposed framework comes close to the one which would be based on a Multilateral Convention. Therefore, our approach does justice to the substantive nature of the GloBE architecture. It could then operate at least in a transitional phase while a Multilateral Convention with a mandatory dispute prevention and resolution mechanism is not yet in place.

4. The GloBE framework and the importance of dispute prevention and resolution

This section presents the fundamental reasons why we believe that existing dispute resolution mechanisms must be adapted to the new legal setting created by the GloBE Model Rules. We start with some opening considerations which underline the novelty of the dispute resolution problems in the international legal order and present an overview of potential issues connected to the GloBE Model Rules (section 4.1.). We then turn specifically to the typology of disputes that are directly connected to the interpretation and application of the GloBE Model Rules on which this article is primarily focused (section 4.2.).

4.1. Opening considerations

We appreciate that the GloBE Model Rules have been designed to apply rather mechanically with a view to minimize disputes.[24] However, as the commentary to the GloBE Model Rules expressly recognizes, "there are a number of places in the GloBE Rules where determinations by one tax administration are likely to have corresponding consequences for the application of the GloBE Rules in other jurisdictions".[25] While it is foreseen that tax administrations will collaborate with each other through the Inclusive Framework and that this collaboration will ultimately lead to the development of an Agreed Administrative Guidance,[26] we feel, as others who provided comments on the Implementation framework of the global minimum tax and

24. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project* para. 711 (OECD 2020).
25. *Commentary to the GloBE Model Rules* (2022), *supra* n. 21, at para. 41 on art. 8.3.1.
26. *GloBE Model Rules* (2021, *supra* n. 19, at art. 8.3.1.

insisted on the link between rule coordination and dispute resolution,[27] that this approach (while of course desirable in essence) is insufficient to address bilateral and multilateral disputes that will inevitably emerge, especially during the initial phase of the implementation of the GloBE framework.

The likelihood of a significant rise of international disputes finds its roots in the new legal setting created by the adoption of the Pillar Two rules (section 4.1.1.). From a concrete perspective, some areas which could give rise to disputes have already been identified and will be discussed in section 4.1.2.

4.1.1. A new legal setting that triggers new issues

The high potential for disputes is obvious because the application of the GloBE Model Rules will entail a simultaneous interconnection between multiple tax systems which is unprecedented in the international tax history. Under the legal scenario, which is contemplated by the Inclusive Framework, this interconnection is not supposed to be governed by a multilateral treaty but rather by a parallel implementation of domestic legislations. While these legislations are meant be aligned on the GloBE Model Rules provided by the Inclusive Framework, consistently with the idea that the GloBE Model Rules have the status of "common approach", one cannot exclude that some jurisdictions will depart – even if on details – from those GloBE Model Rules. As the UK government observed, "the effectiveness of the Globe rules … depends on a high degree of consistency in the implementation in different jurisdictions, [and] there would be a high risk of double taxation or double non-taxation if implementing jurisdictions adopted different rules to measure the level of taxation and top ups required in each jurisdiction".[28] The "transposition" of draft domestic rules (such as the GloBE Model Rules) into domestic legislations – which is also a unique feature of Pillar Two – is thus likely to raise issues of coordination and co-existence with other domestic law provisions; it is a situation which is unparalleled if compared to the adoption of draft model treaty rules which in the past jurisdictions have in any event also adjusted to their own domestic legal systems.[29]

Therefore, the first years of application of the GloBE framework are likely to be marred by technical coordination problems which may result in multiple taxation situations. A common framework that prevents these failures and gaps through, for instance, joint audits or ICAP-like procedures, still needs to be adapted to the new GloBE Model Rules context.

4.1.2. A variety of potential disputes

Without claiming to be exhaustive, one can distinguish several types of disputes connected – directly or indirectly – to the new GloBE Model Rules.

First, problems may affect the interaction between "classical" rules of international taxation and the definition of the GloBE income. An important example concerns the interpretation of article 3.2.3. of the GloBE Model Rules according to which "any transaction between Constituent Entities located in different jurisdictions […] that is not consistent with the Arm's Length Principle must be adjusted so as to be […] consistent with the Arm's Length Principle". In light of the importance of disputes involving the arm's length principle in practice, it is reasonable to assume that this fundamental principle underlying the GloBE Model Rule will likely give rise to disputes which may then affect the symmetric and synchronic allocation of taxing rights under the GloBE framework. This is especially more so in view of the divergent and different interpretations of the OECD Transfer Pricing Guidelines[30] that are emerging across the world.[31] Similar problems may also arise with respect to article 3.4 (or even article 3.5) and the allocation of income between a main entity and a PE (or other PEs), an issue as controversial as the application of the arm's length principle, especially in view of the fact that not all countries interpret the concept of PE uniformly or apply the same system to allocate profits to PEs (or head offices). In both areas, the assumption that all the countries involved will apply the arm's length principle simultaneously in the same form, conclude that there is a PE or allocate profits to PEs symmetrically is not aligned with what many countries or MNEs are facing when domestic laws and treaties are interpreted and applied simultaneously by tax audit officers and competent authorities of different jurisdictions. These issues are the source of protracted disputes which may have relevant effects upon the computation of the GloBE income and taxable amounts giving rise to problems of double or multiple taxation also in the GloBE context. These are just some relevant examples, but probably

27. *See* especially the comments provided by BDI, Business at OECD (BIAC), the Chartered Institute of Taxation, Foglia & Partners, the International Bar Association, the International Chamber of Commerce, MEDEF and the Silicon Valley Tax Directors Group.
28. HM Treasury and HM Revenue & Customs, *OECD Pillar 2 – Consultation on Implementation*, para. 3.7. (Jan. 2022).
29. Examples of adoption of model rules may be found in relation to domestic legislations taking the wording of provisions included in the *OECD Model*. For instance, art. 162 of the Italian Consolidated Tax Act has been revised in 2017 to reflect art. 5 *OECD Model* (2017). However, unlike art. 5(5) *OECD Model* (2017), under the domestic provision reflecting the agency PE, the intermediary is not required to play a "principal" role and the contracts concluded by the foreign principal do not need to be "routinely" concluded by the foreign principal. Both adjustments are in essence the deletion of two words but determine a clear departure from the scope of the *OECD Model* (2017) and signify the reluctance of domestic legislations to adopt a model rule as is.
30. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2022), Primary Sources IBFD [hereinafter *OECD Guidelines*].
31. *See*, on the current issues with the *OECD Guidelines* (2017-2022), J.L. Andrus & R.S. Collier, *Transfer Pricing and the Arm's-Length Principle After the Pillars*, 105 Tax Notes International, 27 Jan. 2022, pp. 543-555 (2022); or R. Collier & I. Dykes, *On the Apparent Widespread Misapplication of the OECD Transfer Pricing Guidelines*, 76 Bull. Intl. Taxn. 1, pp. 20-43 (2022), Journal Articles & Opinion Pieces IBFD, and *The Virus in the ALP*, 74 Bull. Intl. Taxn. 12, p. 1-19 (2020), Journal Articles & Opinion Pieces IBFD.

not the only ones (e.g. different characterization of income resulting in ex post allocation of withholding taxes, effects of GAARs or similar provisions, subsequent changes made to domestic law which may affect the application of the GloBE Model Rules, etc.). The issues related to the interaction between the procedural means to solve such "classical" disputes through the mutual agreement procedure and the procedural means to solve GloBE disputes do not fall within the scope of this input but are obviously an important concern for the future. We observe in this regard that some (but not all) of these issues are tackled in the Commentary of the GloBE Model Rules relating for instance to the application of the arm's length requirement between constituent entities[32] and to the concept of permanent establishment.[33]

Other disputes problems may arise because of the connection between the two Pillars. There is indeed a connection between potential disputes arising from the implementation of Pillar One and those affecting Pillar Two. Paragraph 29 of the Commentary to the Pillar Two GloBE Model Rules regarding the computation of Adjusted Covered Taxes provides that: "tax on net income of a Constituent Entity under Pillar One would be treated as a Covered Tax under the GloBE Rules as a tax with respect to income or profits. Because Pillar One applies before the GloBE Rules, any income tax with respect to Pillar One adjustments will be taken into account by the Constituent Entity that takes into account the income associated with such Tax for purposes of calculating its GloBE Income or Loss".

Because disputes may equally arise under both Pillars, it seems difficult to disconnect dispute resolution mechanisms under Pillars One and Two entirely. It would be difficult in practice to see how a dispute involving the simultaneous implementation of the two Pillars could be solved under two completely separate and distinct sets of procedural rules. A dual approach of dispute resolution for the purposes of establishing the single tax burden of a company or of a group for a specific tax year could raise practical difficulties and create significant costs, both in financial terms and in terms of time spent to arrive at a satisfactory solution. Of course, the ideal solution would be a single dispute resolution mechanism for companies falling within the scope of both Pillars. We understand, however, that this solution is currently not envisaged. Nevertheless, it is at least necessary to ensure that disputes which affect both Pillars are addressed in the most coordinated fashion possible.

4.2. GloBE disputes *stricto sensu*

Lastly, it is clear that, notwithstanding the significant efforts displayed by the Inclusive Framework to dispel as many ambiguities as possible in the Commentary of the GloBE Model Rules, the application of the GloBE Model Rules as such may give rise to divergent interpretations throughout the world. A new type of international disputes is therefore about to emerge, namely GloBE disputes *stricto sensu*. The following developments aim at providing a few examples of such disputes which are the core subject of our input.

First, disputes may arise because of divergent approaches of the personal scope of the MNE groups that fall within the scope of the GloBE Model Rules. While the definition of the MNE group in article 1.2. of the Model Rules is generally clear, uncertainties may be raised with respect to the definition of excluded entities.[34] For instance, the activity test of some excluded entities as worded in article 1.5.2. (a) ii. of the GloBE Model Rules is open to interpretation in many respects (relating notably to the meaning of holding assets "for the benefit" of another entity or to the concept of "ancillary activity" that is key to the characterization of certain excluded entities). If a jurisdiction takes the view that an entity should be treated as an excluded entity while another jurisdiction takes a different view, the whole balance of taxing rights allocated by GloBE Model Rules is affected.

Second, disputes may also take place because of different interpretations of the rules that define the effective tax rate (ETR). Diverging views may exist, for instance, in the way financial accounting rules are being interpreted, the financial rules that are "reasonably practicable"[35] to determine the financial accounting net income or loss which is the base of the GloBE income or loss (article 3.1.), the interpretation of the adjustments regulated in article 3.2. to determine the Entity's Globe Income or Loss, or what tax credits are regarded as "qualified refundable tax credits" or "non-refundable tax credits". These kinds of potential disputes are new in many respects in the tax field, and we would be surprised if they did not arise in the future. Disagreements may also affect not only the amount of covered taxes but even the identification of the taxes to be taken into account in the numerator of the ETR formula.

---

32. *GloBE Model Rules* (2021), *supra* n. 19, at art. 3.2.3; *Commentary to the GloBE Model Rules* (2022), *supra* n. 21, at para. 96 et seq., p. 61, in particular para. 99 relating to the GloBE adjustments triggered by an agreement between the relevant tax authorities following a tax audit.
33. *Commentary to the GloBE Model Rules* (2022), *supra* n. 21, at para. 99, p. 209, drawing the consequences on GloBE implementation of a mutual agreement procedure that has driven the competent authorities to agree that a permanent establishment exists in accordance with the applicable tax treaty.
34. *See* L.A. Sheppard, *Pillar 2 and Private Investment Funds*, 105 Tax Notes International, pp. 861-867 (2022); *see also* V. Agianni, R.H.M.J. Offermanns & M. Schellekens, *The Income Inclusion Rule*, in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* pp. 55, 64-65 (A. Perdelwitz & A. Turina eds., IBFD 2021).
35. *See* C. Döllefeld et al., *OECD Implementation Framework of the global minimum tax*, pp. 1-26 (2022); *see also* P. Das & A. Rizzo, *The OECD Global Minimum Tax Proposal under Pillar Two: Will It Achieve the Desired Policy Objective?*, 76 Bull. Intl. Taxn. 1 (2022), Journal Articles & Opinion Pieces, and P. Pistone et al., *The OECD Public Consultation Document "Global Anti-Base Erosion (GloBE) Proposal – Pillar Two", An Assessment*, 74 Bull. Intl. Taxn. 2 (2020), Journal Articles & Opinion Pieces.

Third, other elements and concepts of the GloBE Model Rules can also be interpreted differently by tax administrations. For instance, the so-called "charging provisions"[36] which are laid down in chapter 2 of the GloBE Model Rules may look relatively straightforward at first sight, but their implementation will not always be easy, to say the least. This can be illustrated by the complex but frequent situation where an MNE owns several low-taxed entities through a combination of direct and indirect holdings via a chain of entities, some of which are partially owned companies while others are joint ventures. In such situations, it would be quite surprising if the jurisdictions at stake always came to the same conclusion as to which of them is supposed to implement the IIR and/or the UTPR. Another set of disputes is therefore predictable in this respect.

The latter are only some examples but there are probably others where asymmetric interpretation may be the source of difficulties (for instance the excluded activities in the international shipping income exception, allocation of covered taxes from one constituent entity to another constituent entity, the application of the carve-outs or the safe harbours, etc.). Among these other conflicts, the order of application of the rules (i.e. CFC rules versus QDMT; QDMT versus IIRs or the "mutual recognition" and "classification" of different rules (i.e. is GILTI an IIR or a CFC rule? What QDMT will be recognized as equivalent to IIRs?)) is also another important issue on which there can be very relevant divergences and conflicts.[37]

4.3. Synthesis

In light of the foregoing, we reiterate that the implementation of the GloBE Model Rules without an international tax dispute settlement mechanism is not viable. As shown, the potential for disputes in the interpretation and application of the rules is high with regard to their complexity and differences in interpretation which may arise across countries (which may or may not be rooted in differences in the transposition of the framework into domestic laws). In addition, the fact that the GloBE framework will apply in parallel and as an overlay to the existing international tax rules increases the potential for disputes. In the following section, we will therefore present our dispute resolution model based on article 25(3) of the OECD Model, the principle of reciprocity and the GloBE Model Rules.

5. A Model Based on Article 25(3) of the OECD Model: Reciprocity and the GloBE Model Rules

The possibilities to deal with GloBE disputes under the current international tax framework have been set forth in the 2020 Blueprint on Pillar Two[38] and have already been discussed in earlier public consultations.[39] Our focus here is to reflect on whether the MAP framework provided by article 25(3) second sentence of the OECD Model (the so-called "legislative MAP") (A)[40] and its relation with the MAAC) (section 5.2.)[41] can be used to find a new system of dispute resolution without having a Multilateral Convention.

---

36. Agianni, Offermanns & Schellekens, *supra* n. 34, at pp. 55-97 and T. Morales & O. Popa, *The Undertaxed Payments Rule*, in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative* pp. 133-165 (A. Perdelwitz & A. Turina eds., IBFD 2021).
37. *See* on this M. Herzfeld, *More on GLOBE Ordering: CFC Rules*, 106 Tax Notes International, pp. 603 ff (2022). In this respect, the following comments submitted on 11 Apr. 2022 by Business Round Table to the OECD in the context of the Public Consultation on Pillar Two illustrate some of these problems and also suggest solutions:
    > We are concerned about the potential risk that individual countries may be able to exercise their own discretion as to whether the relevant laws of other countries are Qualified IIRs, Qualified UTPRs, and/or QDMTTs, as the case may be for a given country. […] In the context of implementing the GloBE rules, we believe that it is crucial for all participants in the system to be able to rely on the status of explicitly identified Qualified IIRs, Qualified UTPRs, and QDMTTs of all Inclusive Framework countries. We propose that a comprehensive list of all of these taxes be incorporated into the GloBE Implementation Framework, and that the list be updated on a continuous basis.
    >
    > As you are undoubtedly aware, the current uncertainty as to whether the U.S. GILTI rules will be treated as a Qualified IIR is making it difficult for MNEs to determine how the GloBE rules will apply to their facts. If the U.S. Congress modifies the current GILTI regime to adopt jurisdictional reporting requirements, whatever the Inclusive Framework decides in this regard needs to be written into the GloBE Implementation Framework, indicating that the GILTI regime is a Qualified IIR and must be so treated by all Inclusive Framework members. Alternatively, if the current GILTI rules continue to apply, GILTI should be treated as an acceptable Controlled Foreign Company Tax Regime as defined in the GloBE Model Rules. Similar clarity needs to be provided with respect to the relevant laws of all countries in the Inclusive Framework.

    Similar concerns were also raised by AstraZeneca (on the nature of GILTI rules and the interaction with CFCs), the Tokyo Foundation for Policy Research (focusing more on the problems and priority of CFC rules) or the Association of German Chambers of Commerce (also insisting on the need of a white list for CFC rules and explaining the problems of CFC rules or GILTI). Even if the proposed list of qualifying rules for GloBE purposes is provided as a solution, there can be relevant problems in the context of domestic reforms that are not immediately reflected on the list. Another relevant issue with lists is that their elaboration usually takes time and it may not be ready for the effective day of application of the GloBE rules.
38. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, para. 711 et seq. (OECD 2020), available at https://doi.org/10.1787/abb4c3d1-en (accessed 30 June 2022).
39. *See* for example: BIAC (2020), Public Comment on *OECD Public Consultation Document – Reports on the Pillar One and Pillar Two Blueprints, 12 October 2020 – 14 December 2020* (OECD 2020) [hereinafter *OECD Public Comments on Pillar One and Two*], pp. 56-57, available at https://www.oecd.org/tax/beps/public-comments-received-on-the-reports-on-pillar-one-and-pillar-two-blueprints.htm (accessed 30 June 2022); PricewaterhouseCoopers (2020), in *OECD Public Comments on Pillar One and Two*, at p. 34.
40. Art. 25(3) second sent. *OECD Model* (2017): "They [the competent authorities] may also consult together for the elimination of double taxation in cases not provided for in the Convention".
41. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (amended in 2010), art. 5 [hereinafter *MAAC*]: "1. At the request of the applicant State, the requested State shall provide the applicant with any

In this section, we will discuss to what extent this framework could be strengthened and even expanded with a view to optimize the prevention and resolution of GloBE disputes.

5.1. Strengthening the legislative MAP model under article 25(3) of the OECD Model

Moving to the legislative MAP under article 25(3) of the OECD Model, we begin with opening considerations that are relevant to set the scene, namely the applicability of article 25(3) to GloBE disputes (section 5.1.1.1.), the proper interpretation of the notion of consultation in this context (section 5.1.1.2.), the relevance of article 25(3) in multilateral disputes (section 5.1.1.3.), the taxpayer's position under a legislative MAP (section 5.1.1.4.) and, finally but most importantly, the relation between article 25(3) and domestic law (section 5.1.1.5.).

5.1.1. Opening considerations

5.1.1.1. The applicability of article 25(3) of the OECD Model to GloBE disputes

To the extent that the GloBE Model Rules would only form part of domestic law and would thus not have a treaty rank (i.e. by incorporation into a Multilateral Instrument), there is little doubt that a MAP on the basis of article 25(1) of the OECD Model would not be available. This is because a misalignment of these rules between the relevant contracting states would not amount to "taxation not in accordance with the provisions of this Convention".[42] This naturally also means that tax treaty arbitration[43] – to the extent that it is provided by the applicable tax treaty – would equally not be available.

Under the current tax treaty framework, therefore, the only provision coming into play would be article 25(3) second sentence of the OECD Model. According to this provision, the competent authorities of the contracting states "may also consult together for the elimination of double taxation in cases not provided for in the Convention".[44] In our opinion, an interpretation of article 25(3) in good faith pursuant to the customary rules of interpretation laid down in the VCLT supports the position that a misalignment of domestic GloBE rules may be resolved through this channel.

First, the treaty wording[45] ("elimination of double taxation in cases not provided for in the Convention") is sufficiently broad. Article 25(3) of the OECD Model indeed applies to cases of double taxation which may be rooted either in tax treaty or domestic law. This interpretation is in line with the OECD Model Commentary which contemplates the example of the profits attributable to two permanent establishments located in two contracting states belonging to a head office which is a resident of a third state. The OECD Model Commentary notes in this regard that article 25(3):

> allows the competent authorities of the Contracting States to agree on the facts and circumstances of a case in order to apply their respective domestic tax laws in a coherent manner. As shown by these examples, paragraph 3 therefore plays a crucial role to allow competent authority consultation to ensure that tax treaties operate in a co-ordinated and effective manner.[46]

---

information referred to in Article 4 which concerne particular persons or transactions. 2. If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested";
Art. 6: "With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, two or more Parties shall automatically exchange the information referred to in Article 4"; and
Art. 7: "A Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances: a) the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party; b) a person liable to tax obtains a reduction in or an exemption from tax in the first mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party; c) business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both; d) a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; e) information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party. 2. Each Party shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to another Party".

42. *OECD Model* (2017). *See* generally on the mutual agreement procedure, including its relation with other dispute settlements mechanisms, K. Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution* secs. 3.1 to 3.5, pp. 65-84 (IBFD 2014), Books IBFD; G. Groen, *Arbitration in Bilateral Tax Treaties*, 30 Intertax 1, pp. 3 and 4 (2002); and L. Riza, *Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on the Hybrid Norms of International Taxation*, 34 Pace L. Rev. 3 (July 2014), J. Avery Jones et al., *The Legal Nature of the Mutual Agreement under the OECD Model Convention, Part I*, Brit. Tax Rev. 6, p. 337 (1979); M. Züger, *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law* (IBFD 2001), Books IBFD; R. Danon & S. Wuschka, *International Investment Agreements and the International Tax System: The Potential of Complementarity and Harmonious Interpretation*, 75 Bull. Intl. Taxn. 11/12, pp. 687-703 (2021), Journal Articles & Opinion Pieces IBFD. R. Ismer & S. Piotrowski, *Article 25 of the OECD Model Convention*, in *Klaus Vogel on Double Taxation Conventions*, pp. 2047- 2048 (E. Reimer & A. Rust eds., Vol. II, Wolters Kluwer 2022); J.S. Wilkie, *Article 25: Mutual Agreement Procedure – Global Tax Treaty Commentaries* sec. 2.3., Global Topics IBFD; G. Maisto et al., *Dual Residence of Companies under Tax Treaties*, 1 Intl. Tax Stud. 1, pp. 52-53 (2018), Journal Articles & Opinion Pieces IBFD; A. Martín Jiménez, *El procedimiento Amistoso y el arbitraje (artículo 25 OECD MC)*, in *Convenios de Doble Imposición*, p. 934 (J.M. Calderón Carrero et al. eds., Wolters Kluwer 2018); *see also* A.A. Skaar, *The Legal Nature of Mutual Agreements Procedure under Tax Treaties*, 5 Tax Notes International 26, pp. 1443-1445 (1992).
43. Art. 25(5) *OECD Model* (2017).
44. Id., at art. 25(3).
45. Art. 31(1) *VCLT*.
46. Para. 55.1 *OECD Model: Commentary on Article 25* (2017).

While the Commentaries here envisage an agreement "on the facts and circumstances of a case",[47] we see no reason why article 25(3) of the OECD Model could not be mobilized to agree on a symmetrical interpretation and application of domestic GloBE rules derived from common model rules.

Second, the object and purpose of article 25(3) of the OECD Model is precisely to allow the competent authorities to deal with cases of double taxation that do not fall within the scope of a tax treaty.[48] Further, as discussed, article 25(3) permits the elimination of double taxation through the coordination of domestic tax rules or may operate in a transitional phase where domestic rules are intended to be included in tax treaty law at a later point in time.[49] In that sense, therefore, the object and purpose of article 25(3) is very much aligned with the GloBE framework which is intended to be applied in a coordinated fashion.

5.1.1.2. The proper interpretation of "consultation" under article 25(3) of the OECD Model

In the context of GloBE disputes, one objection which could be raised in relation to the use of article 25(3) of the OECD Model is that this provision only requires the competent authorities to "consult" each other with no obligation to eliminate a case of double taxation. It is quite clear that if the consultation foreseen by article 25(3) is interpreted in this fashion, this provision would naturally be ill-suited to deal with GloBE disputes.

In our opinion, the history of the OECD Model Commentary on Article 25 indicates that this "consultation" is supposed to lead to a resolution of the case and to the elimination of double taxation.[50] This is even clearer in the 2014 version of the Commentary stating that:

> it is not merely desirable but, in most cases also will particularly reflect the role of Article 25 and mutual agreement procedure in providing that the competent authorities may consult together as a way of ensuring the convention as a whole operates effectively, that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation.[51]

Indeed, "consultation" alone would not serve the object and purpose of article 25(3).

We of course appreciate the textual difference between, on the one hand, "may consult" (article 25(3) of the OECD Model) and, on the other hand, "shall endeavour" (article 25(2) of the OECD Model). However, we submit that the overarching principle that the "competent authorities are obliged to seek to resolve the case in a fair and objective manner"[52] not only applies to paragraphs 1 and 2 but also to paragraph 3 of article 25 of the OECD Model. On this point, the Commentaries merely reiterate what can already be derived from a proper interpretation of article 25 as a whole and in good faith.

In our view, therefore, paragraph 3 does impose on the contracting states a commitment to attempt to resolve a dispute in good faith, similar to the one undertaken under paragraph 2 of article 25 of the OECD Model.[53]

5.1.1.3. The relevance of article 25(3) OECD of the Model in multilateral disputes

As discussed at the beginning of this article, GloBE disputes are likely to take place not just in a bilateral but also in a multilateral context. A relevant consideration, therefore, is whether article 25(3) of the OECD Model could also represent the basis of a multilateral mutual agreement.[54]

The OECD Model Commentary appropriately confirms that:

> the combination of bilateral tax conventions concluded among several States may allow the competent authorities of these States to resolve multilateral cases by mutual agreement under paragraphs 1 and 2 of Article 25 of these conventions. A multilateral mutual agreement may be achieved either through the negotiation of a single agreement between all the

47. Id.
48. Wilkie, *supra* n. 42, at sec. 4.2.1., Global Topics IBFD; R. Ismer & S. Piotrowski, in *Klaus Vogel on Double Taxation Conventions*, Art. 25, para. 94 (E. Reimer & A. Rust eds., Wolters Kluwer 2021); A. Martín Jiménez, *El procedimiento Amistoso y el arbitraje (artículo 25 OECD MC)*, in *Convenios de Doble Imposición* p. 934 (J.M. Calderón Carrero et al. eds., Wolters Kluwer 2018).
49. Ismer & Piotrowski, *supra* n. 48.
50. *See* J. Avery Jones et al., *The legal nature of the mutual agreement procedure under the OECD Model Convention*, Brit. Tax Rev. 1, p. 12 (1980).
51. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* para. 55. (15 July 2014), Treaties & Models IBFD.
52. Para 5.1 *OECD Model: Commentary on Article 25* (2017).
53. *See* in the same vein J. Schwarz, *Schwarz on Tax Treaties*, para. 20.11 (Wolters Kluwer 2021): "On one view, this creates no obligation to resolve such double taxation. However, the better view, based on the purpose of the treaty, is that consultation for the elimination of double taxation should require them to achieve that result."
54. In this regard, *see* European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010, Appendix II, Report on Non-EU Triangular Cases, p. 30, COM(2011) 16 final (25 Jan. 2011).

competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.[55]

The main example foreseen by the Commentaries in this regard is that of a multilateral mutual agreement between the state of residence of an enterprise and two other contracting states in which permanent establishments are situated. The Commentaries clarify that the state of residence of the enterprise may initiate a MAP with these two states pursuant to article 25(1) and (2) of the OECD Model[56] and that, on the other hand, article 25(3) may apply between the two contracting states in which the permanent establishment are situated.[57] Yet, we see no reason why article 25(3) of the respective tax treaties concluded by several states could not give rise either to a multilateral mutual agreement or to "separate, but consistent, bilateral mutual agreements".[58]

Therefore, a consultation with a view to eliminating double taxation arising out of a misalignment of the GloBE Model Rules between several states bound by treaties incorporating article 25(3) of the OECD Model is in our view possible.

However, we appreciate that the foregoing reasoning reaches its limits where an applicable tax treaty does not incorporate article 25(3) of the OECD Model or, simply, where no tax treaty is applicable. As discussed below, a solution to this problem could be to extend the consultation procedure provided by article 25(3), through a domestic model provision, to non-treaty situations, subject to a reciprocity requirement.[59]

5.1.1.4. The taxpayer's position in the context of article 25(3) of the OECD Model

Another relevant consideration is the taxpayer's position in the context of article 25(3) of the OECD Model. It is quite clear that paragraph 3 does not give a taxpayer a right to initiate a MAP that is comparable to that laid down in article 25(1). However, it is recognized that a MAP conducted under article 25(3) may involve the taxpayer. In practice, therefore, a consultation based on article 25(3) is often rooted in a request initially made by the taxpayer.[60]

As discussed below, however, the taxpayer's position could be reinforced by the model provision we suggest. That model provision would indeed give a right to a taxpayer to initiate a MAP based on article 25(3) of the OECD Model in his jurisdiction (irrespective of other domestic legal remedies available). The advantage of this approach is that, from a domestic perspective, such right would then be subject to judicial review.[61]

5.1.1.5. The relation with domestic law

Finally, it is well-known that the main obstacles to the implementation of a MAP based on article 25(3) of the OECD Model are the possible limits imposed by domestic law. The Commentaries highlight that there will be contracting states whose domestic laws prevent a tax treaty from being complemented on points which are not explicitly (or at least implicitly) dealt with in this agreement.[62] This is of course a relevant consideration here insofar as the GloBE Model Rules are not covered by tax treaties. As will be seen, this problem may be resolved through the inclusion into the Model Rules of a dispute resolution mechanism.

5.1.1.6. Synthesis

In light of the foregoing, we therefore submit that article 25(3) of the OECD Model could represent a suitable way of handling GloBE disputes whether on a permanent or in a transitional phase.

At the same time, however, we believe that the applicability of article 25(3) of the OECD Model to GloBE disputes should be clarified and strengthened for several reasons: (i) article 25(3) might be found not to apply to the GloBE rules; and/or (ii) article 25(3) might be found to cover the GloBE rules but domestic law may prevent competent authorities from making tax adjustments or from establishing dispute resolution mechanisms which are not expressly permitted by municipal law.

Therefore, we find it desirable to make additions to the OECD Model Commentary to clarify and strengthen the application of article 25(3) to the GloBE rules and to include in the GloBE Model Rules a domestic rule incorporating an express reference to tax treaty provisions patterned upon article 25(3) of the OECD Model. Such a domestic model provision would then further strengthen the application of article 25(3) to the GloBE Model Rules as it would be regarded as a "subsequent practice" under article 31(3)(b) of the VCLT. Further, the proposed rule would also lift the domestic law constraints which may prevent

55. Para. 38. 1 *OECD Model: Commentary on Article 25* (2017).
56. Id., at para. 38.2.
57. Id., at paras. 38.4 and 55.
58. Id., at para. 38.1.
59. *See* sec. 5.1.2.2.1.
60. *See also* OECD, *Improving the Process for Resolving International Tax Dispute* (OECD 2014), noting that art. 25(3) second sentence *OECD Model* (2017) "does not itself expressly afford taxpayers the same right of initiation as under paragraph 1 for matters relating to the Convention, but does not prevent CAs from together allowing such rights".
61. *See* sec. 5.1.2.2.2.
62. Para. 55.1 *OECD Model: Commentary on Article 25* (2017).

competent authorities from applying article 25(3). As will now be seen, these changes could eliminate some of the objections or uncertainties which might be raised in relation to the application of article 25(3) of the OECD Model to GloBE disputes.

5.1.2. Proposed framework to strengthen the application of article 25(3) of the OECD Model to GloBE disputes

5.1.2.1. Additions to the Commentary on Article 25 of the OECD Model

The first addition to the OECD Model Commentary on Article 25 which we propose is a new paragraph confirming the application of article 25(3) of the OECD Model in both bilateral and multilateral situations to GloBE disputes. This new paragraph would also recommend that, in the framework of article 25(3), the GloBE rules be interpreted and applied in accordance with the guidance to be agreed by the Inclusive Framework. That new paragraph would be in line with the already existing language emphasizing the need for the contracting states to apply their respective domestic tax laws "in a coherent manner".[63] With regard to multilateral mutual agreements, the addition would also be consistent with paragraph 38 et seq. of the OECD Model Commentary on Article 25.

The OECD Model Commentary on Article 25 should also include a domestic model provision, which we will present in the next section. As shown, the incorporation by both contracting parties of this model provision into their domestic laws could then be regarded as a subsequent practice within the meaning of article 31(3)(b) of the VCLT and, as such, would strengthen the dispute resolution commitment of the contracting States in the area of GloBE disputes.

5.1.2.2. Proposed domestic model provision covering treaty and non-treaty situations

5.1.2.2.1. The proposed domestic model provision

We now move to the proposed domestic model provision which would foresee as being part of the GloBE Model Rules. As it currently stands, article 8.3 of the Model Rules reads as follows:

> Article 8.3. Administrative Guidance
>
> 8.3.1 The tax administration of [insert name of implementing-Jurisdiction] shall, subject to any requirements of domestic law, apply the GloBE Rules in accordance with any Agreed Administrative Guidance.

We propose the following changes to this provision:

> Article 8.3. Administrative Guidance and Dispute Resolution
>
> 8.3.1 Subject to any requirements of domestic law, the GloBE Rules will be interpreted and applied in accordance with the object and purpose of the GloBE Model Rules adopted by the OECD/G20 BEPS Inclusive Framework and in accordance with any Agreed Administrative Guidance.
>
> 8.3.2 Any bilateral or multilateral dispute relating to the interpretation or application of the GloBE rules with other jurisdictions shall be resolved and any related tax adjustments be made by the tax administration of [insert name of implementing-Jurisdiction] through the mutual agreement clause provided by the applicable double taxation conventions related to cases not provided for in such conventions. Where no double taxation convention is in place between the parties or where an applicable double taxation convention does not provide for such a clause, the procedure is subject to reciprocity and is conducted according to article 25(3) of the 2017 OECD Model Tax Convention.
>
> 8.3.3 The affected taxpayer may present the case to the competent authority of [insert name of implementing-Jurisdiction]. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authorities of all the other affected States in accordance with paragraph 8.3.2.
>
> 8.3.4 The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement. The competent authorities shall also notify each other of any significant changes that have been made in their taxation laws and which may affect their interpretation and application of their GloBE Rules with other States.

5.1.2.2.2 Commentary to the proposed domestic model provision

In essence, the proposed model provision pursues several objectives.

First, paragraph 8.3.1., which follows, with some minor adaptation, article 8.3.1. of the OECD /G20 BEPS Inclusive Framework GloBE Model Rules, explicitly establishes a connection between domestic implementation of the GloBE Model Rules and

63. Id., at para. 55.1.

the OECD/G20 Inclusive Framework model rules and subsequent work in this area. It, therefore, explains that the domestic rules will be interpreted and applied in line with those international materials. Countries permitting a direct reference to OECD/G20 BEPS Inclusive Framework materials to make clear that they have an interpretative effect on their legislation may delete the reference at the beginning of the sentence "Subject to any requirements of domestic law". In this case, the OECD/G20 Inclusive Framework work and administrative guidance with regard to GloBE will automatically have an interpretative effect upon the domestic implementing legislation, very much as it happens in other areas of law, where the principle of "conforming interpretation" of domestic laws according to constitutional law or EU law legislation and principles is well known.[64] This clause seeks to achieve a similar effect and connection between domestic legislation and OECD/G20 BEPS Inclusive Framework model rules, its Commentaries and subsequent administrative guidance. Countries where such an effect is not allowed (as indicated in paragraph 41 of the Commentaries to the GloBE Model Rules should leave the reference to "Subject to domestic law" and make sure that their internal procedures for implementing the guidance provided by the OECD/G20 Inclusive Framework are duly followed. Still, this rule signals that any implementing legislation or domestic administrative guidance should be interpreted in line with the spirit and works of the OECD/G20 Inclusive Framework.

Second, from a tax treaty interpretation perspective the proposed model provision would clarify and strengthen the position that article 25(3) of the OECD Model entails a dispute resolution commitment to GloBE disputes. This transpires very clearly in the use of the word "shall" in the proposed model provision. Where a tax treaty is in place between the relevant jurisdictions, we submit that the transposition of this model rule into their respective domestic laws could be regarded as a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31(3)(b) of the VCLT.[65] Within the framework of the VCLT, such subsequent practice would then be regarded as a primary means of interpretation. A subsequent practice is a conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding its interpretation.[66] A subsequent practice may consist of "any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions".[67]

Therefore, the legislative adoption of this model rule by the contracting jurisdictions would confirm and establish their understanding and interpretation of treaty provisions modelled after article 25(3) of the OECD Model for purposes of the GloBE disputes. The fact that this subsequent practice might even elevate their commitment to resolve disputes (as compared to the application of article 25(3) to other cases) would remain compatible with the rules governing treaty interpretation. It is indeed settled that a subsequent practice may result "in widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties".[68] Furthermore, as discussed, reading article 25(3) as incorporating a commitment to resolve double taxation remains compatible with a proper interpretation of this provision in accordance with its object and purpose.[69]

Third, by the adoption of such a model rule a jurisdiction would no longer be prevented by its domestic law from giving effect to a MAP based on article 25(3) of the OECD Model in relation to a GloBE dispute. Finally, the rule would extend the framework of article 25(3) to non-treaty situations on the basis of the principle of reciprocity. Such a mechanism is not uncommon in international tax relations: for instance, in the case of the elimination of double taxation relating to some territories,[70] or for

64. This principle is also found in relation to transfer pricing legislation, where it is not uncommon to recognize interpretative effects also to the *OECD Guidelines*. This is, for instance, the case in the Preamble of the Spanish Corporate Tax Law 27/2014, which explicitly recognizes the interpretative value of the *OECD Guidelines* (without citing a specific version) to interpret the domestic transfer pricing legislation.
65. On subsequent practice under art. 31(3)(b) *VCLT*, *see* G. Nolte, *Treaties and their practice – Symptoms of their rise or decline*, in RCADI p. 209 et seq. (Brill/Nijhoff 2017); *Treaties and Subsequent Practice* (G. Nolte ed., Oxford U. Press 2013). On the application of art. 31(3)(b) *VCLT* to tax treaties, *see* G. Maisto, *Interpretation of Tax Treaties and the Decisions of Foreign Tax Courts as a "Subsequent Practice" under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969)*, 75 Bull. Intl. Taxn. 11/12 (2021), Journal Articles & Opinion Pieces IBFD.
66. ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Conclusion 4.2. (ILC 2018).
67. Id., at Conclusion 5.1.
68. Id., at Conclusion 7.1.
69. Art. 31(1) *VCLT*.
70. An illustrating example is the approach taken by several states in relation to territories which are not recognized as states although they may have the features of a state under the Montevideo Convention on the Rights and Duties of States. In order to achieve a substantially equivalent result, some countries have adopted special domestic legislation reflecting the *OECD Model*, which finds application solely vis-à-vis citizens or residents of Taiwan, such legislation having been adopted in parallel by Taiwan under its own domestic law (the parallel domestic law of the other contracting party being permitted to avoid the issue of the non-recognition of Taiwan).
    This was done in Italy through a domestic law titled "Provisions relating to the special tax regime applicable to the relations with the territory of Taiwan" It was not therefore a ratification of a treaty but rather a unilateral set of rules. As they are not treaty provisions, they cannot rely on the principle of the primacy of treaty rules on domestic law provisions so that in case of conflict with other domestic provisions enacted at a later stage, they prevail by virtue of the principle of *lex specialis* derogating to *lex generalis*.
    In the Netherlands, the tax regime applicable to Taiwan is based on NL: General Taxes Act, art. 37, which gives the Netherlands the possibility to avoid double taxation levied by an administrative unit, such as Taiwan. In reciprocity, Taiwan also provides double taxation relief for taxes levied by the Netherlands. As a result, the Ordinance of 25 Apr. 2001 of the Netherlands State Secretary of Finance concerning the income tax agreement and protocol of 27 Feb. 2001 between the Netherlands Trade and Investment Office in Taipei (Taiwan) and the Taipei Representative Office in the Netherlands was published in Law Gazette No. 214 of 10 May 2001. The agreement will be applied by the Netherlands on the basis of reciprocity.

providing VAT reliefs[71] or to recognize exemptions for air transport and shipping companies,[72] a system of mirror laws has been adopted that is based on parallel application of the same provisions by different states, subject to reciprocity. In that latter case in particular, as discussed below, the relationship between the proposed provision and the MAAC may be further developed.

As to its structure, the core of the provision is laid down in article 8.3.2 of the GloBE Model Rules. The provision first confirms the applicability of provisions patterned upon article 25(3) of the OECD Model to both bilateral and multilateral GloBE disputes. Where no double taxation convention is in place between the parties or where an applicable convention does not incorporate such provisions, the procedure would be conducted according to article 25(3) pursuant to the principle of reciprocity. Article 8.3.3 gives the taxpayer a right to initiate the procedure under the domestic law of the relevant jurisdiction which may then be subject to judicial review. Article 8.3.4 also provides that jurisdictions should notify each other of any significant domestic law changes that may affect the GloBE rules. This rule which is inspired from the one proposed in the OECD Model Commentary on Article 2 is desirable to preserve the equilibrium of the rules between the parties and is intended to contribute, at least in some specific areas, to dispute prevention. This provision also permits the competent authorities to communicate directly (e.g. in cases where a tax treaty is in force).

5.2. Relation between article 25(3) of the OECD Model or the proposed domestic provision for GloBE disputes and the MAAC

5.2.1. Opening considerations

Paragraph 713 of the 2020 Blueprint on Pillar Two pointed out that the MAAC (as updated by the 2010 Protocol)[73] can play a relevant role in connection with GloBE.

The 2020 Blueprint suggested that the exchange of information provisions in the MAAC (articles 5-7) could be used for the purposes of calculating the amount of GloBE due in a jurisdiction, obtaining information relevant for all the countries involved in the application of the GloBE rules, or even for laying down the foundations of a system of prevention of disputes through simultaneous audits (articles 8-9) (with adequate guidance and development, this system may even resemble one of joint audits).[74]

For that purpose, a multilateral mutual agreement procedure linked with the different provisions of the MAAC can be considered in order to:

In India, the Agreement between India-Taipei Association and Taipei Economic and Cultural Center in New Delhi of 12 July 2011, as adopted by IN: Income Tax Act 1961, sec. 90A empowers the Central Government to make such provisions as may be necessary for adopting and implementing the agreement made between any specified association in India and any specified territory outside India.
In Germany this is implemented through DE: Law of 2 Oct. 2012, BGBl. I Nr. 46/2012, on the agreement for the avoidance of double taxation concluded with Taiwan on 19 and 28 Dec. 2011
In Switzerland, this was done through the Agreement between the Taipei Office of Swiss Industries and the Taipei Cultural and Economic Delegation in Switzerland of 8 Oct. 2007 (BBl 2011 9351/FF 2011 8587 adopted through CH: Law 17 June, 2011, SR/RS 672.3; AS/RO 2011 4797, art. 1. Switzerland adopted a general law provision on the recognition of agreements between private institutions for the avoidance of double taxation on income and capital which permits the Federal Council to recognize such agreements when the conclusion of a tax treaty is prevented.

In France, an agreement with the territory of Taiwan has been enacted through ordinary legislation (FR: Law n° 2010-1658 of 29 Dec. 2010, art. 77). The report presented by the Finance Commission of the National Assembly on the draft agreement significantly mentioned that the French legislation would be a "mirror" to that adopted in the territory of Taiwan (report of the Assemblée nationale n° 2998, t. 1, on art. 32 of the draft finance bill).

71. *See* Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory, art. 2, OJ L 326 (21 Nov. 1986), Primary Sources IBFD, provides the following: "2. Member States may make the refunds referred to in paragraph 1 conditional upon the granting by third States of comparable advantages regarding turnover taxes".

72. Historically, reciprocal tax exemptions were introduced to eliminate double taxation with regard to profits derived from shipping and air transportation (G. Maisto, *Article 8: International Transport and Other Operations – Global Tax Treaty Commentaries*, Global Topics IBFD (accessed 6 May 2022)). These exemptions are still present in the legislation of some countries and are conditional "upon reciprocity" in the other state or jurisdiction. For instance, ES: Royal Legislative Decree 5/2004 on Non-resident Income Tax Law, art. 14.3. provides the following: "The Minister of Economy and Finance may declare, subject to reciprocity, the exemption of income corresponding to maritime or air navigation entities resident abroad whose ships or aircraft touch Spanish territory, even if they have consignees or agents in Spain".

73. On this *MAAC*, see https://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm (accessed 23 June 2022).

74. Based on Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, arts. 11 and 12, OJ L 64 (11 Mar. 2011), Primary Sources IBFD [hereinafter DAC], which are very similar to arts. 8 and 9 *MAAC*, the EU Joint Transfer Pricing Forum (EU JTPF) developed a common framework for transfer pricing controls that, in essence, is a system of "joint audits" (*see* EU JTPF, *A Coordinated Approach to Transfer Pricing Controls Within the EU* (2018), available at https://ec.europa.eu/taxation_customs/system/files/2018-10/jtpf_report_on_a_coordinated_approach_to_transfer_pricing_controls_within_the_eu_en.pdf). Nothing prevents a multilateral mutual agreement from developing how those articles would apply for the purposes of GloBE rules and having some sort of outcome similar to that of a joint audit. The JTPF report was later used as a basis for the regulation of joint audits by the so-called DAC7: Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104 (25 Mar. 2021), Primary Sources IBFD, which introduced art. 12a in DAC.

(1) make clear that GloBE rules are included within the scope of the MAAC;[75]

(2) regulate an automatic exchange of information system of GloBE tax returns or information[76] (article 6) or any other type of exchange of information relevant for the application of GloBE rules (article 5, exchange of information upon request, or article 7, spontaneous exchange of information);[77] and

(3) establish how simultaneous (joint audits) will be conducted for GloBE purposes.

A multilateral mutual agreement with such a content may help prevent disputes, but will not mean that an effective system of dispute resolution for GloBE purposes is put effectively in place. There are different options in this regard that could also rely upon the MAAC (without really needing a brand-new multilateral treaty for these purposes).

One option would be adding a protocol on dispute resolution to the MAAC. This protocol would have to be ratified by all the parties to the MAAC and the application of the new dispute resolution system would be postponed for, probably, a number of years and will not apply simultaneously to all the parties (the experience with the ratification of the BEPS MLI and the 2010 Protocol to the MAAC is illuminating in this respect). Because of those difficulties, other options are proposed in the next section.

5.2.2. The interaction of the MAAC with the (proposed) GloBE model provision on dispute resolution

5.2.2.1 Option 1: combination of exchange of information provisions in the MAAC and the (proposed) domestic dispute provision for GloBE

The OECD Model Commentaries on Article 25(4) and Article 26(3) make clear that article 26 governs exchange of information in the case of MAP procedures. Indeed, exchange of information (and its safeguards) are needed to permit the MAP to work smoothly.

Since articles 5-7 of the MAAC regulate a system of exchange of information analogous to article 26 of the OECD Model, where the domestic dispute resolution provision proposed in section 5.1.2.2.1. applies, the exchange of information necessary for the purposes of such a provision can take place by making use of those articles. Taken together, the domestic provision proposed in section 5.1.2.2.1. and the MAAC will produce an analogous effect to (legislative) MAPs regulated in double tax treaties and can be used as a basis to resolve GloBE disputes. Due to the large number of countries applying the MAAC,[78] this will extend the dispute resolution system far beyond the cases of tax treaty covered situations.

This option 1 (which combines the domestic provision and the MAAC exchange of information articles) closely follows the system of “mirror provisions” at the roots of the domestic law provision proposed in section 5.1.2.2.1. Different domestic legislations implementing the GloBE rules will apply in parallel, as mirrors, and the exchange of information of the MAAC and the dispute resolution rule proposed in section 5.1.2.2.1. would make it possible to preserve such a “mirror effect” and “symmetric resolution” of GloBE disputes in all countries.

The advantage of this option is that it only requires enactment of a domestic law provision such as the one proposed in section 5.1.2.2.1. and that the country is a party to the MAAC. This solution can also be applied in parallel and simultaneously with tax treaties when, for instance, some of the states have ratified and now apply the MAAC and others have not, but still have tax treaties with the other contracting states.

The guarantees, safeguards and rights regarding the flow of tax information of the MAAC will also protect the information exchanged for GloBE purposes.

75. This would have the effect of an interpretative agreement of art. 2 *MAAC* (the same outcome can probably be achieved with the updates of Annex A as provided by arts. 2.3 and 2.4.).
76. Under Rule 8.1., this is referred to as a “qualifying competent authority agreement”, which means, according to the definitions in para. 10 *Commentaries to the GloBE Model Rules* (2021), “a bilateral or multilateral agreement or arrangement between Competent Authorities that provides for the automatic exchange of annual GloBE Information Returns”. Explicit reference to the *MAAC* is made in paras. 4 and 11 of ch. 8 *Commentaries to the GloBE Model Rules* (2021).
77. Para. 26 *Commentaries to the GloBE Model Rules* (2021) to Rule 8.1.6 suggest that exchange of information (other than automatic exchange) may be needed to apply the GloBE Model Rules. However, it does not specify which provisions will apply for those purposes (probably because it assumes that bilateral tax treaties or the *MAAC* will apply).
78. *See*, on the status (on 21 Dec. 2021) in the 144 jurisdictions participating in the *MAAC*, https://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf .

5.2.2.2. Option 2: Concluding a multilateral competent authority agreement (similar to the already existing country-by-country reporting agreement) that links domestic GloBE rules and exchange of information under article 5 and 7 of the MAAC:

In addition to Option 1, it is also possible to have a multilateral competent authority agreement that tights up all the provisions involved and, at the same time, is linked with the domestic law provision proposed in section 5.1.2.2.1. and the MAAC.[79]

Interestingly, the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports,[80] which is based on article 6 of the MAAC, has the following provision in section 6:

> Consultations 1. In case an adjustment of the taxable income of a Constituent Entity, as a result of further enquiries based on the data in the CbC Report, leads to undesirable economic outcomes, including if such cases arise for a specific business, the Competent Authorities of the Jurisdictions in which the affected Constituent Entities are resident shall consult each other and discuss with the aim of resolving the case

A similar (more nuanced) provision exists in the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (section 6).[81]

These are useful precedents. If the domestic rule suggested in section 5.1.2.2.1. is added to the GloBE Model Rules, it could also refer to the possibility of further developing the dispute resolution provision for GloBE in a multilateral mutual agreement procedure linked with articles 5 and 7 of the MAAC for exchange of information purposes.

This multilateral competent authority agreement linked with both the GloBE domestic rule for dispute resolution and the MAAC (articles 5 and 7) would:

(1) make it unnecessary to have a protocol reforming the MAAC;

(2) link all the separate domestic legislations implementing the domestic GloBE dispute resolution rule; and

(3) provide flexibility to include in it "rules" that may be necessary to execute the national provisions or to link with it "handbooks" or "toolkits" further developing the dispute resolution system.

Like Option 1, this possibility can also work in parallel and be applied simultaneously to tax treaties for states that do not wish to ratify the MAAC but still have tax treaties with other states.

This multilateral competent authority agreement could also regulate other aspects already mentioned in section 2.1., such as automatic exchange of GloBE returns (under article 6 of the MAAC) or the application of the simultaneous controls and presence of foreign official provisions (articles 8 and 9 of the MAAC) to GloBE or be used to further develop the concept of joint audits.

6. Flexibility of the Proposed Solution to Make it Compatible with Other Options

Some of the stakeholders submitting comments in the OECD's public consultation on Pillar Two in April 2022 put forward proposals either to simplify the returns MNL groups would have to file or to resolve disputes. First, in line with article 8.1. of the GloBE Model Rules, a centralized or single filing mechanism (a one-stop shop like the one for VAT purposes in the EU) was suggested, with either the tax authority of the country where it is submitted being competent to conduct tax audits (with

79. This solution is different to the one proposed by EY, p. 9, to the OECD's Public Consultation on Pillar 2, Apr. 2022 available at https://www.oecd.org/tax/beps/public-comments-received-on-the-implementation-framework-of-the-global-minimum-tax.htm. EY proposed a Multilateral Competent Authority Agreement in which it is agreed that art. 25.3 *OECD Model* (2017), or similar provisions in bilateral treaties, are used to address GloBE disputes. This proposal would not cover cases where there is no tax treaty between two Contracting States and would have a rather doubtful legal basis since in the end it is an agreement between administrative authorities. Our proposal would have the domestic provision similar to art. 25.3 *OECD Model* (2017) as a legal basis for the part of regulating the dispute resolution procedure in domestic law and the MAAC to cover all aspects regarding exchange of information and coordination of the "interaction" between the domestic dispute resolution rules. These authors, however, agree with EY that within the European Union, Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265 (14 Oct. 2017), Primary Sources IBFD, could be amended to cover disputes affecting Pillar Two (yet, again, this would require a domestic implementation with provisions similar to the one proposed in this work), although this will only work for disputes within the European Union. This solution will be of limited value, then, if a non-EU Member State is involved, where a domestic provision like the one this article proposes would be needed.

80. *See Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports*, available at https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf, which has 92 signatories as of 31 Jan. 2022 (*see* https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf).

81. *See* on this agreement and the signatories (115 jurisdictions as of Jan. 2022), https://www.oecd.org/tax/exchange-of-tax-information/multilateral-competent-authority-agreement.htm (accessed 11 May 2022).

other administrations being involved) or with coordinate joint audits on this return.[82] Provided that countries agree that GloBE audits can be conducted at the level of the ultimate parent company and by the tax administration of that country,[83] the solution proposed in this article to resolve disputes is not incompatible with this option: any dispute regarding the single tax return or the subsequent audit can be addressed in the context of the MAP regulated by the proposed domestic GloBE dispute resolution rule (or, obviously, the tax treaty MAP).

Second, stakeholders also insisted on the need of some kind of arbitration or a central committee or panel (similar to the one being considered for Pillar One) to resolve or advise on GloBE disputes.[84] Such arbitration procedure or specific committee could function as a second phase for cases where there is no agreement of the competent authorities involved, in a form that could very much resemble article 25.5 of the OECD Model or the alternative dispute resolution commission of article 10 the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.[85] In fact, the documents the OECD has recently released in the public consultation (May-June 2022) on Pillar One suggest that the dispute resolution system, apart from the advance certainty procedures, will resemble (with nuances) the current one in article 25 of the OECD Model and consist in a MAP phase followed by a binding dispute resolution system. Our proposal goes very much in this direction, with the difference that the MAP phase, and probably the binding dispute resolution one, can be regulated in domestic law instead of making use of a multilateral tax treaty.[86]

7. Concluding Remarks

This article has stressed that the implementation of the GloBE rules without a proper tax dispute settlement mechanism would not be viable. Starting from the assumption that this implementation would take place exclusively through an incorporation of the GloBE rules into domestic laws, we have explored the possibilities to address GloBE disputes without a dedicated multilateral instrument.

In our view, GloBE disputes – including those arising in a multilateral context – could, to a very fair extent, be addressed on the basis of a framework relying on (i) a strengthened interpretation of article 25(3) second sentence of the OECD Model in the commentaries, (ii) a newly drafted model domestic provision confirming that interpretation as a subsequent practice and extending it to non-treaty situations on the basis of the principle of reciprocity and, finally, (iii) an administrative implementation of the provisions on exchange of information laid down in the MAAC.

At the same time, however, this framework merely offers a dispute resolution mechanism which mirrors that laid down by the mutual agreement procedure under tax treaties. From this perspective, this framework thus remains obviously suboptimal as compared to a mandatory dispute prevention and resolution mechanism which could be put into place in a dedicated multilateral instrument. Whether the implementation of such a multilateral instrument will (ultimately) be in reach from a political standpoint is of course another question. However, there is little doubt that this would be the most coherent and desirable path to follow in order to ensure the certainty and stability of the new international tax architecture on a long-term basis.

82. *See*, for example, the comments by AstraZeneca, p. 3, BIAC, pp. 21, 25, Grupo Ferrovial, p. 2, the Association of German Chambers of Commerce and Industry, pp. 3 and 8, Deloitte, p. 9, and Foglia & Partners, p. 7, all in *OECD Public Comments on Pillar One and Two*, *supra* n. 39.
83. It cannot be taken for granted that countries will trust other countries and agree that one of them will conduct GloBE audits for all the countries involved. This consensus will be difficult to achieve since countries have different tax audit priorities and sensibilities and will probably be reluctant to transfer this power to other countries.
84. *See*, for instance, the comments by AstraZeneca, p. 5, or BIAC, pp. 43-44 (in this case proposing a Standing Body within the OECD which will also assume ex ante functions, i.e. certify qualifying regimes or provide advance rulings or APAs, to minimize the risk of disputes), all in *OECD Public Comments on Pillar One and Two*, *supra* n. 39.
85. On this alternative dispute resolution commission, *see* the Fiscalis Project Group, *Working Paper on the Implementation of Article 10 of Directive (EU) 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union* (2019), available at https://ec.europa.eu/taxation_customs/system/files/2019-10/2019-tax-dispute-resolution-fiscalis-project-group-report.pdf (accessed 11 May 2022).
86. *See* on this consultation https://www.oecd.org/tax/beps/oecd-invites-public-input-on-tax-certainty-aspects-of-amount-a-under-pillar-one.htm (accessed 14 June 2022).