The Justification and Structure of the GloBE Model Rules: Methodological and practical afterthoughts

Ricardo André Galendi Júnior

I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.
(Rudyard Kipling)

1. INTRODUCTION

The Mitchell B. Carroll Prize is awarded to "original work making either a theoretical or a practical contribution to the study of the effects of taxation, whether it concerns international taxation or comparative tax law". The doctoral thesis "*The Justification and Structure of the GloBE Model Rules"* is one of the first in-depth legal studies on the GLOBE MODEL RULES[1]. It takes the GLOBE MODEL RULES as a closed system and provides for a systematization of the rules, critically evaluating its content against its implicit and explicit goals. With one chapter dedicated to answering each of the six questions for information gathering and problem solving (why, how, what, who, where, when), the thesis provides for a critical exam of the justification and structure of the GLOBE MODEL RULES.

The thesis was delivered in the beginning of 2023, which means that it was written during a period in which there were no examples of practical adoption of the rules. The absence of hard law to be examined created many methodological challenges, whose solution also represents a contribution to the development of tax law as a scientific field. Instead of providing for a policy analysis, the thesis opts for legal methodology, resorting to doctrinal research as means of systematization of the rules. The choice was made to take the GLOBE MODEL RULES (a piece of soft law) as a closed system, and examine it against a normative framework which was built with reference to the Inclusive Framework's and the OECD's work on the topic, including the POLICY NOTE[2], the POW[3], the PUBLIC CONSULTATION DOCUMENT[4], the ECONOMIC IMPACT ASSESSMENT[5], the PILLAR TWO

[1] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (Paris: OECD, 2021). (hereinafter "GLOBE MODEL RULES").
[2] OECD, "Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note" (as approved by the Inclusive Framework on BEPS on 23 January, 2019). (hereinafter "POLICY NOTE").
[3] OECD, "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy" (28 May, 2019). (hereinafter "POW").
[4] [4] OECD, "Public Consultation Document, Global Anti-Base Erosion Proposal ('GloBE') - Pillar Two" (8 November 2019- 2 December, 2019). (hereinafter "PUBLIC CONSULTATION DOCUMENT").
[5] OECD, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD, 2020). (hereinafter "ECONOMIC IMPACT ASSESSMENT").

BLUEPRINT[6], the GLOBE COMMENTARY[7] and the GLOBE EXAMPLES[8] (referred jointly as "RELEVANT MATERIAL" along the thesis).

With the increasing amount of interstate initiatives on international tax law, legal scholars are commonly confronted with ambiguity of purposes, vague diplomatic language and statements that exaggerate the achievement of policy principles in certain initiatives. The object of the thesis is much more modest than providing for a solution to the problems with which Pillar 2 is expected to deal. Without discussing how the design of an ideal minimum tax should be, or even taking a stand on its desirability in the first place, the thesis is intended to provide for a systematization of the GLOBE MODEL RULES, in order to examine their actual effects, as well as their inconsistencies and shortcomings.

The present article draws on excerpts of the thesis to evidence its theoretical and practical relevance, being structured as follows. Sec. 2 describes the design of the research question, Sec. 3 explains the choice for doctrinal research as its methodology and Sec. 4 acknowledges the tax legal theory assumption which is behind the thesis as a whole. These sections evidence the theoretical contribution of the thesis to the field of tax law. Sec. 5 explains why a critical systematization of the rules is needed, while Sec. 6 lists the 26 theses which represent the conclusion of the research performed. These last two sections are therefore dedicated to show the practical contribution of the thesis.

2. THE DESIGN OF THE RESEARCH QUESTION

The thesis is aimed at answering a single question, which is phrased as follows:

What are the justifications of the GLOBE MODEL RULES and how are such justifications expressed in the structure of the rules?

The initial impulse for the research was the astonishment with the claim that the GLOBE MODEL RULES were able to provide for a tax on economic rents[9], with all the allocative and distributive gains arising therefrom[10]. The rules only burden Excess Profits[11], which, according to the GLOBE COMMENTARY, would mean that they avoid "*any tax induced distortions of investment decisions*"[12]. Such statement is very controversial and its support is far from clear. Nevertheless, the legal framework that had to be built to examine whether the taxation of economic rents is a possible justification for the rules was very complex, and it could also be used as means to enlighten further elements of the GLOBE MODEL RULES. As a result, the choice for a broader research question has been made, and the thesis also sheds light on the lack of a strict anti-abuse justification of the rules, on their inability to ensure single taxation, on the enthronement of the goal of setting a floor

[6] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD, 2020). (hereinafter "PILLAR TWO BLUEPRINT"),
[7] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)* (Paris: OECD, 2022).(hereinafter "GLOBE COMMENTARY").
[8] OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) Examples* (Paris: OECD, 2022). (hereinafter "GLOBE EXAMPLES").
[9] See, ch. I, sec. 4.3.
[10] See, on the superiority of economic rent taxation *vis-à-vis* traditional CITs, ch. I, sec. 3.4.
[11] As a defined term, not to be confused with the excess profits from economic theories. See, on this disambiguation, ch. IV, sec. 3.
[12] GLOBE COMMENTARY, para. 26, p. 120.

to tax competition, and on the sense in which the reference to the ability-to-pay can be understood as a justification for the rules. Ultimately, the thesis provides for a comprehensive account of the justifications of the GLOBE MODEL RULES, with reference to their actual content, by means of a systematization effort. In order to achieve this outcome, the thesis examines the structural elements of the GLOBE MODEL RULES.

Within the intent of answering the research question, six sub-questions have been conceived. They relate to general features of the GLOBE MODEL RULES, and aim at their systematic comprehension. The six sub-questions are taken as steps to answer the research question, providing for a more analytical approach towards the topic and assisting in the structuring of the chapters. The sub-questions have been designed to clarify why the GLOBE MODEL RULES have been enacted (what is their justification), how they operate (which are the mechanisms that ensure taxation), whose income do they burden (what is the relevant entity for the purpose of calculating the Top-up Tax and whose income is subject to taxation), what they burden (which income is subject to taxation), where it is burdened (which assignment and charging rules are applied) and when it is burdened (what is the relevant period for calculating the Top-up Tax, and which are the mechanisms dealing with temporal differences).

3. THE CHOICE FOR DOCTRINAL RESEARCH AS A METHOD

The thesis certainly benefits from interdisciplinary work and from the dialogue between law and other fields. But it is, in essence, a dogmatic thesis, in the traditional sense, engaging in what is often termed as "doctrinal research"[13]. It aims at examining a set of positive rules and contributing to its interpretation and systematization, while also making suggestions to its improvement[14].

The thesis describes the GLOBE MODEL RULES as a normative system, but an evaluative effort is also undertaken. The legal rules are evaluated against legal standards, which are derived from the RELEVANT MATERIAL and from legal scholarship. The thesis does not evaluate the GLOBE MODEL RULES against the normative framework of any specific state. Nor does it build an ideal framework for a minimum tax, against which the rules could be examined. Instead, it examines the rules against legal principles and policy objectives, such as the ability-to-pay and the purported need to combat tax competition, to the extent that these legal principles and policy objectives are evoked as justifications for the GLOBE MODEL RULES. The thesis takes into account that there may be a lot of indetermination in the way such terms are used in legal and economic scholarship, and provides for the relevant delimitations where necessary.

Therefore, the normative framework against which the GLOBE MODEL RULES are analysed is built with reference to the RELEVANT MATERIAL – the "stated and implied

[13] See Jan M. Smits, "What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research," in *Rethinking Legal Scholarship: A Transatlantic Dialogue*, ed. Edward L. Rubin, Hans-W. Micklitz, and Rob van Gestel (Cambridge: Cambridge University Press, 2017), 207–28; Sanne Taekema, "Methodologies of Rule of Law Research: Why Legal Philosophy Needs Empirical and Doctrinal Scholarship," *Law and Philosophy* 40, no. 1 (2021): 33–66.

[14] The effort is well described as "a desire to place the prevalent sources of law (including legislation and case law) in a system and to develop this system further", which is also an approach whose creative nature (as opposed to merely descriptive) cannot be denied. See Jan M. Smits, *The Mind and Method of the Legal Academic* (Cheltenham: Edward Elgar Publishing, 2012), 13.

policy goals"[15] of the GLOBE MODEL RULES. The thesis engages in the examination of whether the goals attributed to the rules are in fact translated in the GLOBE MODEL RULES' structure. The thesis is not intended to engage in a discussion on how the ideal minimum tax should look like, or on whether a minimum tax should be adopted in the first place. Instead, it unveils the justifications behind its adoption, as stated in the RELEVANT MATERIAL, and examines whether the structure of the GLOBE MODEL RULES is able to achieve the intended objectives, and to what extent. The approach is also justified by the political importance attributed to the matter, which often blurs a more rational debate. Considering the "ambiguity of the Pillar Two objectives"[16], contrasting the justifications with the actual content of the rules is essential to understand what the implementation of the rules could be expected to achieve.

4. THE TAX LEGAL THEORY ASSUMPTION

There is an important premise to the thesis, which needs to be spelled out. The thesis assumes that tax law has to make sense – which is an assumption which is not unanimously shared in the literature. Why do states tax corporate income? "Because they can", "because the states need revenue" and "because it is practical" are all possible explanations, but none of them is a justification in the sense intended in legal scholarship[17]. The question of how the total tax burden should be divided among taxpayers can only be answered according to principles of individual justice[18]. Such justification, which is fundamental for both tax law and tax policy, is ultimately based on moral criteria (often dressed as constitutional arguments), over which a certain level of consensus can be reached[19].

The pursuit of a legal justification for taxes implies attributing legal scholarship with the task of formulating (constitutionally grounded) normative discourses on tax fairness. Legal theories thus aim at justifying taxes by reference to the values acknowledged by a certain constitution[20], or even broader considerations on tax justice[21] - sometimes blurring

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[15] Pasquale Pistone and Alessandro Turina, "The Way Ahead: Policy Consistency and Sustainability of the GloBE Proposal," in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative*, ed. Andreas Perdelwitz and Alessandro Turina, IBFD Tax Research Series 4 (Amsterdam: IBFD, 2021), sec. 14.2.1.

[16] Johanna Hey, "The 2020 Pillar Two Blueprint: What Can the GloBE Income Inclusion Rule Do That CFC Legislation Can't Do?," *Intertax* 49, no. 1 (2021): 10. See also Conrad Turley and Khoon Ming Ho, "GloBE - Overriding the Value Creation Principle as Lodestone of International Tax Rules?," *Intertax* 47, no. 12 (2019): 1076; Johanna Hey, "Von Anti-Hybrids-Regeln zur Globalen Mindeststeuer (GloBE)," in *Festschrift für Jürgen Lüdicke*, ed. Dietmar Gosch, Arne Schnitger, and Wolfgang Schön (München: Beck, 2019), 261–62.

[17] For the distinction between explanation and justification, see Aulis Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification* (Dordrecht: Kluwer, 1987), 22.

[18] Klaus Vogel, "The Justification for Taxation: A Forgotten Question," *American Journal of Jurisprudence* 33 (1988): 57.

[19] Vogel, 23.

[20] Ekkehart Reimer, "Die sieben Stufen der Steuerrechtfertigung," in *Demokratie und Wirtschaft: eine interdisziplinäre Herausforderung*, ed. Boris Gehlen and Frank Schorkopf (Tübingen: Mohr Siebeck, 2013), 131.

[21] This approach is very common in international tax law. There are interesting theses that take economic principles and/or philosophical ideas as a normative reference. See, *e.g.,* Maarten Floris de Wilde, *Sharing the Pie: Taxing Multinationals in a Global Market* (Doctoral Thesis: Erasmus Universiteit Rotterdam, 2015), 23. (clarifying that "*the sole axiom appreciated in this study is the notion that equal economic circumstances should be treated equally for tax purposes*" and stating clearly that the thesis "*is the product of a deduction from the principle of equality as I understand it*"); See also Antony Ting, *The Taxation of*

the border between law and other fields, as well as between law and policy. Within this intent, a multitude of theories is possible, ranging between two extremes. On the one hand, one could imagine a tax legal theory that emphasizes the freedom of the parliament in formulating tax legislation (no matter how inconsistently)[22], without attributing any powers of material revision to any court and significantly restricting the creative role of the courts on the interpretation of legislation[23]. On the other hand, one could conceive a theory strongly grounded on general clauses (such as "equality", "ability-to-pay", or even the fundamental freedoms), deriving very specific commands regarding a tax by means of deductive reasoning, while also arguing for the corresponding duty of the parliament to comply with such commands and the duty of the courts to enforce them if parliament fails to do so[24].

Tax legal theories are necessarily situated somewhere within this spectrum, and they will vary according to each legal system[25] and legal tradition within each system[26]. These theories mix deductive and inductive reasoning in order to either build a system, which parliament should respect and the courts should enforce, or argue that there is only chaos, and no consistency can be expected from the parliament – nor any interference from the courts[27]. Conscious of the insufficiency of semantics, they will ultimately present different levels of balance between idealism and realism, pragmatically maintaining that in some cases the consistency of the system shall be pursued, while in other cases the

Corporate Groups under Consolidation: An International Comparison, Cambridge Tax Law Series (Cambridge: Cambridge University Press, 2013), 8.(examining group regimes "*critically against generally accepted tax policy objectives including simplicity, neutrality and competitiveness*").

[22] Often due to the belief that consistency would not even be possible in tax law. Illustratively: "*Even the astrophysicist probing the secrets of the universe knows that it is at least theoretically possible that one day someone will find the ultimate answer to the laws of nature. But the tax lawyer knows that the ultimate answers in taxation can never be found*" (John Prebble, "Why Is Tax Law Incomprehensible?," *British Tax Review*, no. 4 (1994): 393.)

[23] Courts sometimes adhere to such sort of view when resorting to a more literal interpretation of a statute. As stated in a court decision quoted by PREBBLE: "*... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing implied. One can only look fairly at the language used.*" (Prebble, 390.)

[24] The defense of a "constitutional concept of income", for instance, is very common in the Brazilian doctrine. For a critical view on this sort of reasoning, see Luís Eduardo Schoueri, "O mito do lucro real na passagem da disponibilidade jurídica para a disponibilidade econômica," in *Controvérsias Jurídico-Contábeis*, ed. Roberto Quiroga Mosquera and Alexsandro Broedel Lopes, vol. 1 (São Paulo: Dialética, 2010), 246.

[25] Comparing the Brazilian and the German constitutional tax systems, see Humberto Ávila, *Sistema constitucional tributário*, 5th ed. (São Paulo: Saraiva, 2012). Comparing the German and the Swiss systems, see Christian Waldhoff, *Verfassungsrechtliche Vorgaben für die Steuergesetzgebung im Vergleich Deutschland-Schweiz* (München: Beck, 1997).

[26] Comparing the different schools of thought in German tax law, see Christian Waldhoff, "Die 'andere Seite' des Steuerverfassungsrechts," in *Zukunftsfragen des deutschen Steuerrechts* (Berlin-Heidelberg: Springer, 2009), 125–60.

[27] On the importance and limitation of the inductive and deductive arguments in the construction of systematic arguments, see Michael Rodi, *Die Rechtfertigung von Steuern als Verfassungsproblem* (München: Beck, 1994), 69–72.

unfairness of the system is an inevitable outcome[28]. Dogmatic mechanisms are developed to distinguish one case from the other[29].

While it is not the aim of the thesis to sustain any specific tax law theory, a mildly optimistic perspective on tax legal scholarship is naturally implicit to its content, as a certain level of coherence is pursued. In summary, the thesis as a whole rejects the position according to which a statute is legitimate merely because it is positive law. Even though the law as such has a special role in the justificatory basis for legal interpretation, "justification refers and has to refer to different types of substantial reasons, either goal reasons or rightness reasons", which in practice means that "the law has to be connected with values and evaluations"[30]. Likewise, in the sense intended in the thesis, the GLOBE MODEL RULES cannot be justified solely on the basis that it has been agreed to by the IF, or that it has been adopted as legislation by a certain jurisdiction.

More specifically, the thesis also rejects the idea that a tax is legitimate solely on the basis of the state's financial needs – which is, at the end of the day, also a source of irrationality. The primary purpose of any tax is to raise revenue for the government, in order to ensure the financing of public goods: a tax that raises no revenue is useless[31]. Such statement is neither controversial nor helpful for justifying the GLOBE MODEL RULES. Stating that a tax must raise revenue says very little about how such a tax should be. It is self-evident that the ultimate goal of taxation is to fulfil the financial needs of the state[32], but, under the rule of law, such needs must be attended by means of a fair repartition of the burden among the relevant subjects. The imposition of a tax is ultimately justified by its fairness, and the mere financial need of the state is not sufficient to justify burdening a subject[33].

5. THE PRACTICAL IMPORTANCE OF THE RESEARCH

Based on such theoretical assumptions, it is easier to understand the choice for a doctrinal approach towards the GLOBE MODEL RULES, which ultimately lead to the need for examining soft law provisions as a closed system[34]. There is, however, clearly a leap of

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[28] VOGEL's description of the legal system as a "wild garden" is particularly illustrative of this idea. Neither the legislature nor the interpreter would be able to perfectly take care of the "garden", which would inevitably present some inconsistencies that would possibly not be eliminated by a court grounded on equality considerations. See Klaus Vogel, "Die Abschichtung von Rechtsfolgen im Steuerrecht," *Steuer und Wirtschaft* 54 (1977): 104.

[29] The extensive theorization on legal gaps is an example thereof. See *e.g.* Rainer Barth, *Richterliche Rechtsfortbildung im Steuerrecht* (Berlin: Duncker & Humblot, 1996). Another example is the development of anti-avoidance theories – which also deal with legal gaps, and with the level of interference of the interpreter in ensuring the consistency of the legal system. For comparative perspectives on the topic, see Christine Osterloh-Konrad, *Die Steuerumgehung. Eine rechtsvergleichende und rechtstheoretische Analyse* (Tübingen: Mohr Siebeck, 2010); Markus Seiler, *GAARs and Judicial Anti-Avoidance* (Wien: Linde, 2016).

[30] Aarnio, *The Rational as Reasonable: A Treatise on Legal Justification*, xv.

[31] Michael Devereux et al., *Taxing Profit in a Global Economy* (Oxford: Oxford University Press, 2021), 34.

[32] Klaus Tipke, *Steuerrechtsordnung*, 2nd ed., vol. II (Köln: Otto Schmidt, 2003), 578.

[33] Tipke, II:579. See also Rainer Wernsmann, "§ 4," in *AO FGO Kommentar*, ed. Hübschmann, Hepp, and Spitaler (Köln: Otto Schmidt, 2018), 229; Wolfgang Schön, "The Odd Couple: A Common Future for Financial and Tax Accounting?," *Tax Law Review* 58, no. 2 (2005): 128.

[34] In fact, there is nothing new to such choice of object. In the case of DTC model conventions, which are also soft law instruments, it is a common scientific approach to discuss them as such, without reference to DTCs actually signed. See, for a recent contribution in this sense, Kees van Raad, "A Blueprint for Restructuring the OECD Model's Distributive Rules," *Bulletin for International Taxation* 75, no. 10 (2021): 541. Discussing the role of the GLOBE MODEL RULES as soft law, see Chris Noonan and Victoria

faith inherent to the choice of the object[35]. After all, there is no guarantee that the rules will be implemented by the jurisdictions as designed, as the diplomatic efforts within the IF do not make the adoption of the rules binding for the states[36].

Despite the absence of a binding agreement, by time the thesis was finished, there were already some positive initiatives that contributed to advancing a more uniform approach towards the topic. Only two days after the GLOBE MODEL RULES were published, the European Commission issued a directive proposal[37], whose content was very similar to that of the GLOBE MODEL RULES[38] – which was interpreted as a translation of the commitment of the EU with their implementation[39]. Other jurisdictions outside the EU had already initiated proceedings to adopt rules that resemble the GLOBE MODEL RULES[40]. Since then, the adoption of the rules by individual states has been intensified to an extent that scholarship is now discussing whether Pillar 2 is a *fait accompli*[41] or not[42].

In any case, what was clear from the beginning was that Pillar Two could only be deemed as successful if a strong form was provided, which, on its turn, would only be possible if there was clarity of purposes. The doctrinal approach is essential for the successful achievement of this goal. The thesis, by unveiling the justifications and structural elements of the GLOBE MODEL RULES, aims to contribute to a rational discussion on their implementation by states[43], as well as to reduce the gap between the alleged goals and the actual content of the rules.

In order to effectively combat tax competition, without raising the problem of double or over taxation, the GLOBE MODEL RULES need to be adopted by all or most countries, guarantee sufficient harmonization of details, and bring forward a "strong form" of minimum tax[44]. The rules have been designed to be implemented consistently in every jurisdiction and are intended to operate in a way that produces the same overall result regardless of the place where the MNE is headquartered, aiming at setting a floor to tax

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Plekhanova, "Compliance Challenges of the BEPS Two-Pillar Solution," *British Tax Review*, no. 5 (2022): 534–39.

[35] On the difficulties in implementing the GLOBE MODEL RULES, see Francesco De Lillo, "The Implementation of Pillar Two," in *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative*, ed. Andreas Perdelwitz and Alessandro Turina, IBFD Tax Research Series 4 (Amsterdam: IBFD, 2021), 395–414.

[36] See, critically on the 2021 IF STATEMENT, Yariv Brauner, "Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective," *Intertax* 50, no. 1 (2022): 2.

[37] European Commission, Proposal for a Council Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union, Brussels, 22 Dec. 2021 COM(2021) 823 Final.

[38] See, comparing the GLOBE MODEL RULES and the directive proposal, Marco Dietrich and Cormac Golden, "Consistency versus 'Gold Plating': The EU Approach to Implementing the OECD Pillar Two," *Bulletin for International Taxation* 76, no. 4 (2022): 183–96.

[39] See Ana Paula Dourado, "Is There A Need for A Directive on Pillar Two?," *Intertax* 50, no. 6/7 (2022): 521.

[40] UK, Canada, New Zealand and Japan have issued consultations and reports on the implementation of the GLOBE MODEL RULES. See Noonan and Plekhanova, "Compliance Challenges of the BEPS Two-Pillar Solution," 526–27.

[41] Reuven Avi-Yonah, "Pillar 2 and the United States: What's Next," Tax Notes Int'l, Jan. 29, 2024, p. 619.

[42] Jefferson VanderWolk, "Pillar 2: More Realism, Please," *Tax Notes International* 113 (2024): 903–4.

[43] On the importance of an adequate implementation of Pillar Two as means to achieve the intended goals, see Aitor Navarro, "Jurisdiction Not to Tax, Tax Sparing Clauses, and the OECD Minimum Taxation (GloBE) Proposal," *Nordic Tax Journal* 2021, no. 1 (2021): 18.

[44] Michael Devereux et al., *The OECD Global Anti-Base Erosion ("GloBE") Proposal* (Oxford: Oxford University Centre for Business Taxation, 2020), 2–3.

competition, without giving rise to the risk of double or over taxation[45]. In such context, the space for cherry-picking is expected to be very limited, and the dogmatic approach of the thesis allows for the proper comprehension of the structure of the GLOBE MODEL RULES. The approach is expected to contribute not only to the critical exam of rules enacted by individual states, but also to the evaluation of the EU directive proposal, as well as to the drafting of a multilateral convention on the topic[46].

A strong form of model legislation, however, is only possible if there is clarity of purposes. Without such clarity, the design of the rules becomes arbitrary, and interpretative controversies are also increased. There is one example where the interpretation of a provision is not even possible without regard to teleological (purposive) elements. In order to determine whether a certain jurisdiction has a QDMTT, a Qualified IIR or a Qualified UTPR, one has to examine, among other elements, whether such rules are "implemented and administered in a way that is consistent with the outcomes provided for under the GloBE Rules and the Commentary"[47]. Consistency with the outcomes can only be evaluated if it is minimally clear what the outcomes of the application of such rules should be. While this is an extreme example of indetermination in the GLOBE MODEL RULES, the clarity of purposes can also be important in other milder cases. The approach of the thesis allows for a further refinement of the theoretical goals and justifications underlying the rules, also connecting them with the concepts embedded in the relevant provisions.

6. THE CONCLUSIONS AS THE FUNDAMENTAL PRACTICAL CONTRIBUTION

The fundamental practical contribution of the dissertation are the theses formulated as a conclusion. The chosen methodology allowed for the formulation of very objective and direct theses, which contribute to the understanding and improvement of the GLOBE MODEL RULES.

The main goal of the dissertation is to answer what are the justifications of the GLOBE MODEL RULES and how are they expressed in the structure of the rules. In light of the discussion contained in each of the chapters, the research question can be answered by the following thesis:

1. The GLOBE MODEL RULES are primarily aimed at setting a floor to tax competition. This goal supersedes any other possible justification for their adoption, and ultimately guides the design of the model provisions. The floor to tax competition is established by means of a set of complex rules, which resort to opposing theoretical assumptions, thus limiting the possibility of a systematic and principled approach towards their content. Despite being generally in line with the goal of establishing a floor to tax competition, the rules are hard to reconcile with traditional nexus rules and tax policy principles. Their structure evidence an eclectic and pragmatic approach, which is extremely dependent on uniform adoption to be successful. The crystallization of a "strong form" requires that the rules are approached doctrinally as a closed system. Their adoption by IF states will add another layer of complexity to international taxation, but the most troublesome distortions will arise if divergent approaches are undertaken

[45] PILLAR TWO BLUEPRINT, p. 112, para. 411.
[46] As foressen within Pillar Two. See PILLAR TWO BLUEPRINT, p. 178, para 705.
[47] GLOBE MODEL RULES, Art. 10.1.1.

by states. Even minor deviations from their content upon domestic adoption are likely to either render the minimum tax less effective or give rise to double or over (minimum) taxation.

This main thesis has been reached with the assistance of six sub-questions. Answering each of these sub-questions also allowed for the formulation of the following specific theses, which grounded the main thesis and are also a fundamental part of the dissertation.

WHY DO THE GLOBE MODEL RULES BURDEN?

2. *The GLOBE MODEL RULES are intended to set a floor to tax competition, being therefore primarily a tool against tax competition* (ch. I). Setting a floor to tax competition is the ultimate justification for the enactment of the rules, which supersedes any other possible reason for adopting them. Many of the design features of the GLOBE MODEL RULES – including the fundamental choice for jurisdictional blending – can only be explained by the intention of setting a floor to tax competition.

3. *The GLOBE MODEL RULES have not been designed to enthrone the ability-to-pay principle (broadly understood as the tax concretization of the equal treatment among subjects), despite containing several elements that can be explained as a deference to it* (ch. I, ch. III, and ch. IV). The choice for jurisdictional blending contradicts any possible reference to the ability-to-pay of the MNE Group, of the CEs, or any other possible subject to which the rules apply (ch. III). Besides, practical aspects related to the definition of the tax object have oriented the determination of the GLOBE Income and of Covered Taxes, to an extent that a uniform tax base is not obtained. The definition of the tax base ultimately varies according to the location of the UPE, and may vary also according to choices made by the taxpayer, considering the need to reduce complexity (ch. IV). At a more fundamental level, however, ability-to-pay is not restrained by geographical or political borders. Nor is it contingent on the will of the taxpayer. The goal of taxing subjects according to the ability-to-pay is therefore superseded in the GLOBE MODEL RULES by the goal of establishing a floor to tax competition, and many of the policy choices lack a theoretical justification, being merely grounded on practicability – while the outcome is still a very complex set of rules.

4. *The GLOBE MODEL RULES do not provide for a tax on economic rents* (ch. I, ch. III, ch. IV, ch. VI). The RELEVANT MATERIAL present ambiguous and contradictory wording on the goal of setting a tax on economic rent. The wording of the GLOBE COMMENTARY is overly optimistic regarding the effects of the carve-out, and it lacks theoretical support. There is no reason to believe that the carve-out, as designed, "avoids any tax induced distortions of investment decisions". The ECONOMIC IMPACT ASSESSMENT keeps its scientific tone and offers no support to such statement. A closer exam of the Substance-Based Income Exclusion evidences that it is not able to turn the Top-up Tax into a tax on economic rents (ch. IV). Even if some relief to normal returns is provided, there is no reason to believe that the GLOBE MODEL RULES exclusively burden economic rents.

5. *The GLOBE MODEL RULES have not been designed as anti-abuse rules* (ch. I, ch. IV, and ch. V). The calculation of the Top-up Tax does not take any subjective or objective element of artificiality into account, being strictly based on the ETR to which the jurisdictionally-blended CEs are subject. Therefore, it is possible that a Top-up Tax

is charged on to the performance of legitimate business by a CE, simply due to the fact that it is taxed below the Minimum Rate. This is a measure against tax competition (behaviour of states) and not against abusive schemes (behaviour of the taxpayer). Of course, by limiting tax competition, the benefits that an MNE Group may obtain by exploring differences of tax burden across jurisdiction is also restricted. The relationship between the GLOBE MODEL RULES and tax abuse is, however, merely indirect, and the rules are not specifically designed to target abusive schemes. The GLOBE MODEL RULES may burden structures that are completely legitimate, while leaving behind schemes that could potentially be considered as artificial.

6. *The GLOBE MODEL RULES are neither intended nor able to ensure the application of the "single tax principle"* (ch. I, ch. III, ch. IV, ch. VI). The GLOBE MODEL RULES do not prevent the existence of pockets of low-taxed profits in high-tax jurisdictions. It is possible, for instance, that a high-tax jurisdiction offers a privileged tax regime compliant with BEPS Action 5 to a certain "pocket" of profits, while submitting the rest of the activities of the MNE to its ordinary (high) rate. The GLOBE MODEL RULES do not ensure the taxation of each item of profit made by an MNE, but rather that a jurisdictionally blended profit is subject to a minimum tax. Even in a hypothetical world of uniform implementation and application of the GLOBE MODEL RULES by all jurisdictions, there is no "single tax principle" being enforced. Pockets of low-taxed income can still exist, provided that they are blended with other highly-taxed activities of the MNE in the same jurisdiction. The application of the Substance-Based Income Exclusion further aggravates this scenario.

HOW DO THE GLOBE MODEL RULES BURDEN?

7. *The GLOBE MODEL RULES provide for a very complex mechanism to ensure a floor to tax competition, dealing with a series of autonomous concepts, which evidence the eclectic and pragmatic nature of the rules and hinder a more principled approximation* (ch. II). The mechanism provides for two interlocking domestic rules, which complement each other (the IIR and the UTPR), ultimately aiming at ensuring that no Top-up Tax remains unallocated, and enforcing the taxation of GLOBE Income that would otherwise be taxed below the ETR. In doing so, the GLOBE MODEL RULES deal with several concepts and realities, which are often incompatible with each other from a theoretical point of view, thus inhibiting a more systematic and principled approach towards their content.

WHOSE INCOME DO THE GLOBE MODEL RULES BURDEN?

8. *The GLOBE MODEL RULES define a plurality of subjects, which are relevant at different stages of the application of the rules* (ch. II and ch. III). The definition of the subjects is in line with the goal of setting a floor to tax competition. The Top-up Tax is calculated by reference to the jurisdictionally-blended CEs, ultimately aiming at ensuring that the ETR in each jurisdiction is kept at least at the Minimum Rate. The income being burdened is the income of the LTCE. Such income, however, is only burdened after taking into consideration elements related to the MNE Group and to the jurisdictionally blended CEs, which play an important role in the justification of the minimum tax.

9. *The GLOBE MODEL RULES are not aimed at burdening the overall income of the MNE Group (enterprise doctrine), and merely refer to the MNE Group in order to*

determine which CEs fall within their scope. MNE Groups are not necessarily treated equally, and the GLOBE MODEL RULES cannot be justified as a measure intended to capture the ability-to-pay of the MNE Group (ch. III). In the GLOBE MODEL RULES, it is possible that an MNE Group is subject to an overall effective taxation that is very high, but also to a Top-up Tax, due to the configuration of a part of its business activities. An MNE Group may be subject to a 30% overall effective taxation, but still trigger a Top-up Tax in a certain jurisdiction, because of the existence of a LTCE therein. At the same time, another MNE Group may be subject to a 15% overall effective taxation, and still trigger no Top-up Tax, due to the distribution of the CEs across the jurisdictions. It is also possible that the MNE Group incurs in an overall loss in a given Fiscal Year and is still subject to a Top-up Tax, due to the configuration of the CEs across the jurisdictions. There is no guarantee that all MNE Groups will be treated equally: a loss-making MNE Group may trigger the charge of a Top-up Tax, a highly-taxed MNE Group may trigger a Top-up Tax, and many other unequal treatments between MNE Groups may be drawn from the GLOBE MODEL RULES

10. *The definition of MNE Group is very broad, and take only control into consideration, leaving behind any form of integration requirement. An MNE Group is not necessarily a synergistically managed enterprise, and may comprise several CEs which bear no relation with each other, besides common control, and which present different sets of minority shareholders* (ch. III). This policy choice engenders significant effects on the definition of the tax object and on the charging rules, allowing for the blending of CEs which present no integration with each other, as well as for the charging of a Top-up Tax on a CE which is completely unrelated to the LTCE that is taxed below the ETR. The definition of MNE Group is a decisive structural element of the GLOBE MODEL RULES, and its broad formulation is the root of many of their theoretical shortcomings.

11. *For the purposes of triggering a Top-up Tax, the GLOBE MODEL RULES do not take into account the income of CEs individually considered (separate-entity doctrine), and there is no equal treatment between CEs* (ch. III). In the GLOBE MODEL RULES, it is possible that the same CE is subject to a Top-up Tax or not, depending on the characteristics of the other CEs located in the same jurisdiction. A CE that, considered in isolation, would trigger a Top-up Tax, may not trigger it depending on the characteristics of the other CEs located in the same jurisdiction. It is possible that, individually considered, a CE is subject to an ETR lower than 15%, but, due to the jurisdictional blending, is diluted by other CEs that are subject to a higher ETR, and no Top-up Tax is triggered. Due to the broad definition of MNE Group, the blending may occur also among CEs that are not economically integrated, and/or among CEs that present a completely different set of minority shareholders.

12. *The only "subjects" that are, as a rule, treated equally under the GLOBE MODEL RULES are the jurisdictionally blended CEs* (ch. III). What matters for the purpose of triggering the Top-up Tax is whether the ETR on the Excess Profits of the jurisdictionally blended CEs is below the ETR. This pattern cannot be justified on the ability-to-pay alone. The ability-to-pay, understood as a measure for the sharing of the tax burden among subjects, is not able to justify the reason why "jurisdictionally blended CEs" are treated as the relevant subject that must be burdened at least at the ETR level. In order to justify this treatment, one has to resort to the goal of setting a floor to tax competition, which is unrelated to the ability-to-pay. This finding confirms the assertion that the goal

of setting a floor to tax competition supersedes any other possible justification for the design of the GLOBE MODEL RULES.

WHAT DO THE GLOBE MODEL RULES BURDEN?

13. *The GLOBE MODEL RULES burden by means of the computation of a Jurisdictional Top-up Tax, which is levied on the Excess Profit* (ch. II and ch. IV). The GLOBE Income or Loss of the CEs for the jurisdiction are blended, to arrive at the Net GLOBE Income for the jurisdiction. The Excess Profit for the jurisdiction is obtained by subtracting the Substance-Based Income Exclusion from the Net GLOBE Income for the jurisdiction. The GloBE Income or Loss of a CE is calculated by means of a partial dependence model, subject to adjustments that are generally intended to bring the CE's GLOBE Income or Loss into alignment with the computation of taxable income under a typical CIT, prevent double taxation of the MNE Group's income, as well as prevent the types of low-tax outcomes that the GLOBE MODEL RULES are intended to address.

14. *The GLOBE MODEL RULES do not ensure a uniform set of rules to calculate the Top-up Tax for a LTCE, as the determination of the ETR and of the Excess Profits is, as a rule, contingent on the GAAP of the UPE* (ch. IV). Ultimately, even in a world of uniform adoption of the GLOBE MODEL RULES, MNE Groups whose UPEs are located in different jurisdictions will not be subject to the same rules for the calculation of the Top-up Tax, as the GAAPs of the UPEs may vary. The floor to tax competition is therefore not established with milimetrical precision, but by means of the rough approximations that the convergence of GAAPs is able to provide. Setting the realization principle as an optionality also raises equality concerns, as it makes the tax burden contingent on the ability of the taxpayer to operate within the complexities of the system, with potentially unfair results.

15. *The Substance-Based Income Exclusion does not make the Top-up Tax a tax on economic rents* (ch. I and ch. IV). Upon the definition of the carve-out, the GLOBE MODEL RULES conceived a mechanism that could be labelled as a "soft ACE". While the BEPS concerns regarding a carve-out on intangible assets are to a certain extent understandable, the Substance-Based Income Exclusion, as it is written, is excessively restrictive. Not every intangible asset allows for the sort of profit-shifting with which the prohibition is concerned, and there would certainly be other means to address the issue in a more proportionate way. The addition of a carve-out based on personnel, besides the absence of a clear theoretical justification, does not eliminate the risk that the GLOBE MODEL RULES also ends up capturing normal returns. The adoption of a fixed rate is likely to impact investments in some jurisdictions adversely, with a particularly higher impact on countries that are considered risky and do not offer a stable environment for investments.

16. *One evident outcome of the Substance-Based Income Exclusion, mainly when combined with jurisdictional blending, is that, while some countries will continue to be able to use their tax systems to attract intangible-related income, other countries will lose such ability* (ch. IV). The carve-out benefits jurisdictions with a significant level of tangible assets and personnel, to the detriment of countries where such elements are scarcer. Considering the way it is drafted, this approximation between the carve-out and elements which are an indication of substance bears no relation with any possible meaning of the so-called "value creation principle". This is because the MNE Group is allowed a

carve-out on assets and payroll that are completely unrelated to the activities of the CE benefiting from the tax incentive, provided that they are under common control.

WHERE DO THE GLOBE MODEL RULES BURDEN?

17. *The GLOBE MODEL RULES first assign the GLOBE Income and Covered Taxes to the CEs, in order to calculate a Top-up Tax, and, in a subsequent step, allocate a taxing right to another jurisdiction, based on a charging rule, applied on another CE* (ch. II and ch. V). They attribute a taxing right to a jurisdiction with regard to income that is allocated, under the GLOBE MODEL RULES, to a CE located in another jurisdiction. Systematically, the person earning the income (the LTCE) is not the tax debtor of the resulting tax claim, which extends to another person.

18. *The assignment of GLOBE Income and Covered Taxes follows from the location of the CEs (residence principle), and these rules are based on the separate-entity doctrine* (ch II and ch. V). Special rules are necessary in case of PEs, Flow-Through Entities and Hybrid Entities, to the extent that such CEs are subject to a specific tax treatment under domestic legislation. The treatment of Stateless CEs and the allocation of CFC taxes are particularly designed to ensure the integrity of the rules, within the scope of setting an effective floor to tax competition. The special rules confirm the preference for the separate-entity doctrine, being designed to ensure the proper allocation of income and taxes do CEs individually considered.

19. *The right to charge a Top-up Tax is commonly allocated to another jurisdiction, under the IIR and the UTPR, while still privileging the right of the host jurisdiction to tax the income, either by means of reforming the system or by the enactment of a QDMTT* (ch. II and ch. V). The rules acknowledge that the income arises in a certain jurisdiction, but allocate a right to tax it to another jurisdiction, under the charging rules. Once again, one notices the eclecticism of the GLOBE MODEL RULES: it provides for the allocation of income to CEs, following the separate-entity approach, but then, as a backstop, allocates taxing rights to members of the MNE Group based on participation or on a formula, thus mimicking elements of a formulary approach.

20. *The IIR and the UTPR are not grounded on a principled approach, and the allocation of taxing rights they provide is justified in the RELEVANT MATERIAL on practicability arguments* (ch. II and ch. V).

21. *Unlike CFC rules, the IIR is not justified as an anti-abuse rule, but rather as a rule aimed at setting a floor to tax competition* (ch. I and ch. V). As a consequence, there is no immediate answer with respect to the jurisdiction that should be entitled to tax such income. The RELEVANT MATERIAL avoids making arguments on the fairness of the allocation of taxing rights arising from the IIR, resorting, instead, to a reasoning based on practicability. The outcome is that the right to tax may be allocated to the UPE Jurisdiction, to the jurisdiction of an Intermediate Parent Entity or to the jurisdiction of the POPE, contingent on the adoption of the IIR by the relevant jurisdictions, as well as on the participation structure of the CEs. The IIR also impacts minority shareholders adversely, and they may or may not be burdened by the IIR, following elements which are unrelated to their ability-to-pay. Such difference of treatment, despite not being minor, is grounded on the practical concerns of the IIR, being treated as a collateral damage of the design of operable rules.

22. *The UTPR can only be justified as a measure of last resort, aimed at ensuring a floor to tax competition, which is expected to play only a limited role. Neither a separate-entity nor an enterprise approach is able to explain the nexus element underlying the UTPR* (ch. V). Its content is very unusual, as a consequence of the eclecticism inherent to Pillar Two. As far as nexus rules are concerned, the pragmatic solution does not meet a principled reasoning. The differences in scope between the IIR and the UTPR, despite being explained in the RELEVANT MATERIAL as simplification measures, cannot be justified from an allocative perspective.

WHEN DO THE GLOBE MODEL RULES BURDEN?

23. *The GLOBE MODEL RULES work under the assumption that Excess Profits shall be taxed at least at the Minimum Rate in all Fiscal Years, also providing for some leeway against temporary differences* (ch. VI). The main provisions addressing temporary differences are the mechanism to address temporary differences (Art. 4.4) and the GLOBE Loss Election (Art. 4.5).

24. *The mechanism to address temporary differences (Art. 4.4) is limited to the reality of a single CE, and the reference to jurisdictionally blended CEs is not kept consistent across periods* (ch. VI). The mechanism works with reference to deferred tax assets and liabilities of the CE. No reference to the blended CEs is found. A GLOBE Loss of a CE may be carried forward to compensate a GLOBE Income of the CE, but may not be carried forward to compensate GLOBE Income of another CE in the same jurisdiction. While, within a Fiscal Year, the income of blended CEs is the decisive element for triggering the Top-up Tax, this logic does not extend to a longer period.

25. *The GLOBE Loss Election (Art. 4.5) takes a jurisdictional approach on the carry-forward of losses, and only allows for a carry-forward in case there is a Net GLOBE Loss, which is defined jurisdictionally* (ch. VI). As a simplification mechanism, which applies optionally, it ensures some leeway for interperiodical loss compensation, but ignores other temporal differences. The simplification mechanism may be an acceptable alternative for MNE Groups in case of CEs located in jurisdictions with no or very low CITs.

26. *The temporal mechanisms completely ignore the Substance-Based Income Exclusion, which cannot be carried forward, driving the GLOBE MODEL RULES further away from the justification grounded on the taxation of economic rents* (ch. I, ch. IV and ch. VI). Besides the shortcomings of the Substance-Based Income Exclusion, normal returns may also be captured by the GLOBE MODEL RULES as a consequence of mere temporal mismatches between income and expenses. This feature is also a deviation from the theoretical model on the taxation of economic rents.

7. CONCLUSION

Regardless of whether Pillar 2 is considered a *fait accompli*[48] or not[49], the Pillar is being built while people are still questioning whether there should be a Pillar in the first place – which is only natural. While the more fundamental tax policy discussion is essential

[48] Reuven Avi-Yonah, "Pillar 2 and the United States: What's Next," Tax Notes Int'l, Jan. 29, 2024, p. 619.
[49] VanderWolk, "Pillar 2: More Realism, Please."

and will still remain for a long time, it is not too soon to approach the rules dogmatically. Both the policy and the dogmatic approaches can and should coexist.

The approach is important for the ones who wish to navigate and improve a world in which Pillar 2 is adopted by a critical mass. After all, the GLOBE MODEL RULES are built to provide for a "strong form" of minimum tax, not allowing the states any substantive leeway for cherry-picking upon their implementation[50]. As a consequence, they need to be treated as "a closed system, largely independent of other aspects of a country's domestic law"[51]. At the same time, as the GLOBE MODEL RULES are not applicable as such, being merely model rules, the reference to them, as approached in the thesis, cannot be more than a metonymy to refer to the adoption of domestic rules patterned after the GLOBE MODEL RULES. This requires a curious theoretical attitude of seeking to systematize and justify a body of very complex non-binding model rules. This is certainly a methodological challenge, but the alternative to it is either the failure of the project (with no minimum taxation and no floor to tax competition) or the adoption of multiple uncoordinated minimum taxes by states (which is a very similar outcome to the failure of the project).

The approach is also fundamental for those who are critical of BEPS 2.0. The doctrinal approach does not exclude the possibility of formulating critiques from a policy perspective. On the contrary, the conclusion of the thesis may in certain cases contribute to demonstrate the undesirability of the current approach. The content of the thesis may also be appealing for a more pragmatic audience. The devil is in the details, and many important policy decisions are still being made by means of the Administrative Guidance[52]. A detailed account of the content of the complex rules is essential for companies and states if they wish to protect their interests and influence the debate at the current stage.

In summary, discussions that seek for systematization and dogmatic consistency in the GLOBE MODEL RULES can be fruitful. They seem to be our only hope in a context of multiple overlapping legislations that will potentially burden the same item of income. Debating issues such as whether the IIR is an allocation or a charging rule is essential to understand the justification and structure of the rules, and also contributes to evidence further shortcomings of the GLOBE MODEL RULES. The thesis is the first to address such challenges and therefore constitutes an "original work making either a theoretical or a practical contribution to the study of the effects of taxation, whether it concerns international taxation or comparative tax law".

[50] Devereux et al., *The OECD Global Anti-Base Erosion ("GloBE") Proposal*, 2–3.
[51] Brian J. Arnold, "An Investigation into the Interaction of CFC Rules and the OECD Pillar Two Global Minimum Tax," *Bulletin for International Taxation* 76, no. 6 (2022): 275.
[52] See, for a critical review on aspects related to the QDMTT, Ricardo André Galendi Jr., "The Single Top-Up Tax Principle: Justification, Content and Functions upon the Design of QDMTTs," *World Tax Journal* 15, no. 4 (2023): 574–620.