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In this article, Kern analyzes how treating global intangible low-taxed income as an income inclusion rule will affect the stability of pillar 2.

If the G7 has its way, the global minimum tax will not be truly global. On June 28, the G7 declared its intention that two of the core provisions of the global minimum tax — the income inclusion rule and the undertaxed profits rule — will not apply to U.S. firms.[1]

Intentions, of course, are one thing; law is another. The global minimum tax (also known as "pillar 2") has been negotiated within the OECD/G20 inclusive framework, not the G7. It is uncertain whether the members of the G7 will prevail within the OECD and, if so, exactly what the U.S. exception to pillar 2 will look like.

Nonetheless, a new direction for pillar 2 appears to be taking shape. It seems likely that the U.S. tax on global intangible low-taxed income will be deemed compliant with pillar 2.[2] Treating GILTI as compliant has been the Trump administration's main ask in global tax negotiations — a "red line," according to Treasury Deputy Secretary Michael Faulkender — and it would be an elegant way of excluding U.S. firms from the IIR and the UTPR.[3] Moreover, because the G7 includes many of pillar 2's staunchest champions, there is a good chance that this policy will prevail at the OECD.

It is important to understand how an exception for firms parented in the world's largest economy might affect pillar 2's stability. Previously in this publication, I argued that the Trump administration's hostility to pillar 2 likely wouldn't destabilize it, so long as the UTPR remains asserted against non-U.S. firms.[4] That analysis is worth revisiting now that the Trump administration has obtained a major concession.

Despite this new challenge, pillar 2 remains likely to endure. Deeming GILTI to be compliant is a particularly durable way of exempting U.S. firms from other countries' IIRs and UTPRs. This exemption provides incentives for non-U.S. firms to move their parent entities to the United States, incentives which do indeed threaten pillar 2's stability. Nonetheless, because the United States maintains GILTI as well as the corporate alternative minimum tax, the tax advantages gained by moving to the United States will prove to be modest for many firms. Moreover, strategic responses by source countries may offset some revenue loss to countries whose domiciliaries exit to the United States. All told, pillar 2 is likely to

[1] U.S. Department of the Treasury, "G7 Statement on Global Minimum Tax" (June 28, 2025).

[2] The One Big Beautiful Bill Act also changed GILTI's name to "Net CFC Tested Income" (NECTI), thereby dooming many terrible tax puns. H.R. 1, "One Big Beautiful Bill Act," section 70323(a)(3)(ii) (July 1, 2025).

[3] Alexander Rifaat, "Faulkender Threatens OECD Over Pillar 2 Stance," *Tax Notes Int'l*, June 9, 2025, p. 1640.

[4] Adam Kern, "Reports of Pillar 2's Death Are Greatly Exaggerated," *Tax Notes Int'l*, Feb. 24, 2025, p. 1237.

survive, albeit in a form that provides more favorable treatment to U.S. firms.

The Pre-Trump Baseline

Pillar 2 establishes a 15 percent minimum tax on much of the profits of the world's largest firms. To do this, it deploys three main rules that operate in a strict hierarchy.

At the top of this hierarchy sit qualified domestic minimum top-up taxes (QDMTTs).[5] When a source country enacts a QDMTT, it collects any additional tax needed to bring locally earned profits up to the 15 percent minimum rate. For instance, if an Irish subsidiary of a French multinational pays only 8 percent tax on its Irish profits, Ireland can impose a 7 percent QDMTT.

If source countries don't tax a firm's profits at the minimum rate of 15 percent, the IIR kicks in.[6] An IIR is imposed by the country in which a firm's ultimate parent entity is located.[7] If any subsidiary within the corporate group faces an effective tax rate of less than 15 percent, the IIR imposes additional tax to "top up" the subsidiary's effective tax rate to 15 percent.[8] Returning to our example, if the firm's Irish subsidiary is taxed at a rate of 8 percent, France could impose an additional 7 percent tax on the Irish subsidiary's profits.

The UTPR provides the final backstop.[9] If a firm's ultimate parent entity is located in a country that has not adopted an IIR, the UTPR authorizes other countries to impose top-up taxes on the firm's subsidiaries.[10]

GILTI complicates this neat hierarchy. GILTI functions as a minimum tax on the foreign earnings of U.S.-parented firms, topping up the effective tax rate on those earnings to a minimum rate that currently ranges between 10.5 percent and 13.125 percent (rising to between 12.6 percent and 14 percent once the One Big Beautiful Bill Act (OBBBA) takes effect).[11] While GILTI resembles an IIR, it is less stringent than an IIR in two main ways. First, its rate is lower. Second, it calculates a firm's effective tax rate on what is known as a "blended" rather than a per-country basis. GILTI's blended structure — which allows firms to offset taxes paid to low-tax countries with taxes paid to high-tax countries — accommodates more profit shifting than an IIR does.[12]

During the Biden administration, after it became clear that the United States would not immediately reform GILTI to qualify as an IIR, the OECD had to decide how pillar 2 and GILTI would coexist.[13] On the one hand, deeming GILTI to be an IIR would give U.S. firms especially favorable treatment. If GILTI were deemed to qualify as an IIR, U.S. firms could pay tax at a rate of less than 15 percent, while firms parented elsewhere in the pillar 2 coalition would be constrained by a minimum rate of 15 percent. On the other hand, if GILTI were entirely disregarded under pillar 2, U.S. firms could face double taxation. They would pay tax under GILTI and then an additional 15 percent under the UTPR.

The OECD took a middle course. Administrative guidance released in February 2023 classified GILTI as a "blended CFC regime."[14] This decision meant that the UTPR would apply to U.S. firms but in a limited fashion. The UTPR would only apply to whatever difference existed between a U.S. firm's effective tax rate under GILTI and 15 percent. The UTPR, in effect, would be a top-up tax upon a top-up tax.

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[5] OECD, "Tax Challenges Arising From Digitalisation of the Economy — Global Anti-Base Erosion Model Rules (Pillar Two)," art. 5.2.3 (Dec. 20, 2021).

[6] *Id.* at arts. 5.2, 2.1.

[7] *Id.* at art. 2.1.

[8] *Id.* at arts. 2.1, 5.2, 10.1.

[9] *Id.* at arts. 2.4-2.6.

[10] *Id.* at art. 2.5.

[11] For the law applicable to taxable years beginning in 2025, see IRC section 250(a)(1)(B) (allowing a 50 percent deduction for GILTI income, which halves the effective rate on that income from 21 percent to 10.5 percent); IRC section 960(d) (limiting the foreign tax credit to 80 percent of taxes paid on the GILTI base and thereby increasing the effective tax rate under GILTI to as much as 13.125 percent). The One Big Beautiful Bill Act reduces the section 250 deduction from 50 percent to 40 percent and raises the foreign tax credit limitation to 90 percent. *Supra* note 2, at sections 70321(a)(2) and 70312(a).

[12] *See* Kimberly Clausing, "Fixing Five Flaws of the Tax Cuts and Jobs Act," 11 *Colum. J. Tax L.* 31, 57-58 (2020).

[13] The proposed Build Back Better Act — which would have brought GILTI into conformity with pillar 2 — died in the Senate. *See* "Build Back Better Act," H.R. 5376, 117th Cong., sections 138121, 138124-138127 (Nov. 19, 2021). Instead, Congress passed the Inflation Reduction Act, which substituted the corporate alternative minimum tax for GILTI reform. *See* "Inflation Reduction Act," 117th Cong. (Aug. 12, 2022).

[14] *See* OECD, "Tax Challenges Arising From Digitalisation of the Economy — Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)," art. 2.10.1, para. 4 (July 13, 2023).

To illustrate: Suppose that a U.S. firm has foreign subsidiaries earning $100 million globally. GILTI taxes this foreign income at a rate of 10 percent, and GILTI liability is equally apportioned across the firm's subsidiaries for pillar 2 purposes. Because GILTI is recognized as a blended CFC regime, a UTPR can only be assessed at a 5 percent rate, collecting the difference between the firm's GILTI rate (10 percent) and the pillar 2 minimum (15 percent).

Even this moderate approach was politically sensitive. Later in 2023, the OECD released a "transition rule" that delayed, until 2026, the application of the UTPR to any firm parented in a country whose statutory corporate tax rate was at least 20 percent.[15] In effect (and not coincidentally), this exempted U.S. firms from the UTPR on a temporary basis.

The Trump Administration's Negotiating Stance

The Trump administration has been hostile to the UTPR from the outset. On the first day of President Trump's current term, he issued a presidential memorandum opposing "any tax rules . . . that are extraterritorial or disproportionately affect American companies," clearly targeting the UTPR.[16]

Initially, it was not clear what concession the Trump administration would seek from other countries. Perhaps the Trump administration would have been content with an extension of the UTPR transition rule. Or perhaps the Trump administration would have accepted a series of handshake agreements with other countries to exempt U.S. firms from their UTPRs.

Recent developments reveal that the Trump administration has made a more ambitious ask — and obtained a more significant concession. The Trump administration has sought for GILTI to be deemed an IIR rather than merely a blended CFC regime. The effect of this designation would be to exempt U.S. firms from IIRs and, more significantly, UTPRs imposed by other countries. The UTPR cannot be applied to any firm whose ultimate parent entity is in a country that has an IIR.[17] If GILTI is an IIR, then U.S. firms would be exempt from the UTPR.

Moreover, this exemption would be particularly durable. Transition rules have built-in expiration dates. A future U.S. president, more sympathetic to multilateral cooperation than the current one, could simply choose to let any such rule elapse. Similarly, handshake agreements made with one president could be construed to expire as soon as he leaves office. By contrast, any future president who might want to undo GILTI's designation as an IIR would have to take affirmative acts — acts to undo a protection that U.S. businesses will have come to expect. Thus, recognizing GILTI as an IIR would transform forbearance into an entitlement, raising the political costs of acquiescing to the UTPR in the future.

Analysis of GILTI's Designation as an IIR

Designating GILTI as an IIR would enable some non-U.S. firms to save tax by moving their ultimate parent entities to the United States. They would be able to save the difference between their GILTI rate (somewhere between 12.6 percent to 14 percent) and 15 percent. And if they can take advantage of GILTI's blended structure, they might be able to save even more. The durability of GILTI's designation as an IIR only extends these benefits. If GILTI is deemed an IIR for the long term, firms that move their parent entities to the United States would stand to collect a prolonged stream of tax benefits.

If, for this reason, sufficiently many firms could credibly threaten to exit to the United States, pillar 2 could unravel. Countries within the pillar 2 coalition would face pressure to unwind their IIRs, lest they lose parent entities to U.S. competition.

Nonetheless, designating GILTI as an IIR is unlikely to seriously destabilize pillar 2 — for four reasons.

First, as I have noted elsewhere, the gap between GILTI and pillar 2 is relatively modest.[18] The statutory differential is small: 2.4 percentage points at most, once the OBBBA takes effect.

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[15] *See* OECD, GLOBE model rules, *supra* note 5, at art. 5.2.

[16] The White House, "The Organization for Economic Co-operation and Development (OECD) Global Tax Deal (Global Tax Deal)" (Jan. 20, 2025).

[17] OECD, GLOBE model rules, *supra* note 5, at art. 5.2.3.

[18] Kern, *supra* note 4.

While it is true that some firms would be able to achieve even greater savings by blending taxes paid to high-tax countries with taxes paid to low-tax countries, not every firm's operations neatly lend themselves to this strategy.

Moreover, once the OBBBA takes effect, GILTI will be more stringent than pillar 2 in one important respect. The OBBBA eliminates GILTI's exclusion for "qualified business asset income," a 10 percent deemed return on physical assets.[19] Pillar 2, meanwhile, will retain its analogue to qualified business asset income, the "substance-based income exclusion."[20] In effect, this makes pillar 2 a more favorable regime for firms with substantial physical assets.

Second, GILTI's designation as an IIR would provide benefits that are durable — but not permanent. True, a future president likely would bear substantial political costs for undoing GILTI's IIR-qualifying status with executive action. But a future Congress could amend GILTI to conform to the IIR (as the Biden administration repeatedly proposed). While doing so would indeed subject U.S. firms to higher tax burdens, it would also have the distinct political advantage of raising revenue for the United States. Any firm considering whether to move its ultimate parent entity to the United States must discount its potential tax savings by the risk that they will eventually evaporate.

This risk is real. The United States is on track to run substantial budget deficits for the foreseeable future, which might not prove to be sustainable. The next piece of tax legislation might need to raise revenue, and shifted profit — a substantial portion of the GILTI base — will likely prove to be a politically attractive target. That GILTI was enacted during the first Trump term and tightened during the second, in legislation that otherwise significantly cut taxes, only underscores this point.

Third, the U.S. corporate AMT poses an independent constraint on tax-motivated migration to the United States.[21] The corporate AMT is a third minimum tax at a rate of 15 percent, assessed on a base that is distinct from GILTI's. Many firms whose effective tax rates under GILTI are below 15 percent might find those rates pushed toward 15 percent by the corporate AMT.

Finally, the relatively favorable treatment of U.S. firms under GILTI might induce strategic responses that actually increase revenue collected by IIRs and UTPRs. If every country in the world enacted an IIR, source countries would have strong incentives to set their corporate tax rates or QDMTTs at 15 percent to "soak up" the revenue that might be raised by IIRs.[22] Doing so would raise additional revenue, and it would not compromise any source jurisdiction's competitive position as a destination for corporate profit since firms subject to pillar 2 must pay tax at a rate of at least 15 percent regardless. As a consequence of this response, however, IIRs and UTPRs would collect no tax revenue.

By contrast, if some firms were to receive more favorable treatment under GILTI, source countries would find themselves cross-pressured.[23] They would not be able to raise their corporate tax rates or QDMTTs to 15 percent without potentially causing U.S. firms to shift profit to lower-tax jurisdictions. Their best response, instead, would be to set a tax rate somewhere below 15 percent. That would enable IIRs and/or UTPRs to collect revenue from non-U.S. firms at the difference between that rate and 15 percent.

Of course, it would be rash to predict that classifying GILTI as an IIR would, on net, benefit countries that enact IIRs and UTPRs. But the OECD's own economic analysis of pillar 2 estimates that IIRs and UTPRs will collect more revenue when pillar 2 is partially implemented rather than fully implemented, largely for this reason.[24] These revenues would counteract potential incentives to unwind IIRs.

[19] *Supra* note 2 at section 70323(a)(2).

[20] OECD, GLOBE model rules, *supra* note 5, at arts. 5.2.2, 5.3.

[21] *See* IRC section 55.

[22] *See* Wei Cui, "Strategic Incentives for Adopting the Global Minimum Tax," 16 *J. Leg. Analysis* 211 (2024).

[23] This effect has been described in other contexts. *See* Chris William Sanchirico, "Should a Global Minimum Tax Be Country-by-Country?" *Tax Notes Int'l*, Apr. 25, 2022, p. 485; J. Clifton Fleming et al., "Two Cheers for the Foreign Tax Credit," 91(1) *Tulane Law Review* 20-22 (2016); Harry Grubert and Rosanne Altshuler, "Fixing the System," 66 *Nat'l Tax Journal* 671, 697 (2013).

[24] Felix Hugger et al., "The Global Minimum Tax and the Taxation of MNE Profit," OECD Taxation Working Papers No. 68, at 50 (2024).

Conclusion

The G7's proposal to recognize GILTI as a qualifying IIR is a milestone in the project of establishing a global minimum tax. If accepted, it would establish two minimum tax regimes: one for firms parented in the United States, another for firms parented in the rest of the world.

Nonetheless, this U.S. exception to pillar 2 will likely not prove fatal. The modest tax differentials between GILTI and pillar 2, political uncertainty about GILTI's future trajectory, and the further constraint of the corporate AMT all limit the likelihood of a mass exodus of parent entities to the United States. Moreover, even if the U.S. minimum tax regime proves to be porous — and U.S. firms can shift profit effectively — one of its effects might be to increase the tax revenue collected by IIRs and UTPRs.

Many questions remain. It is unknown whether the OECD will accept the U.S. exception and, if so, how that exception will be defined. Other countries might try to fit within the U.S. exception or seek their own. The "global" minimum tax, perhaps, might prove to be anything but. ■