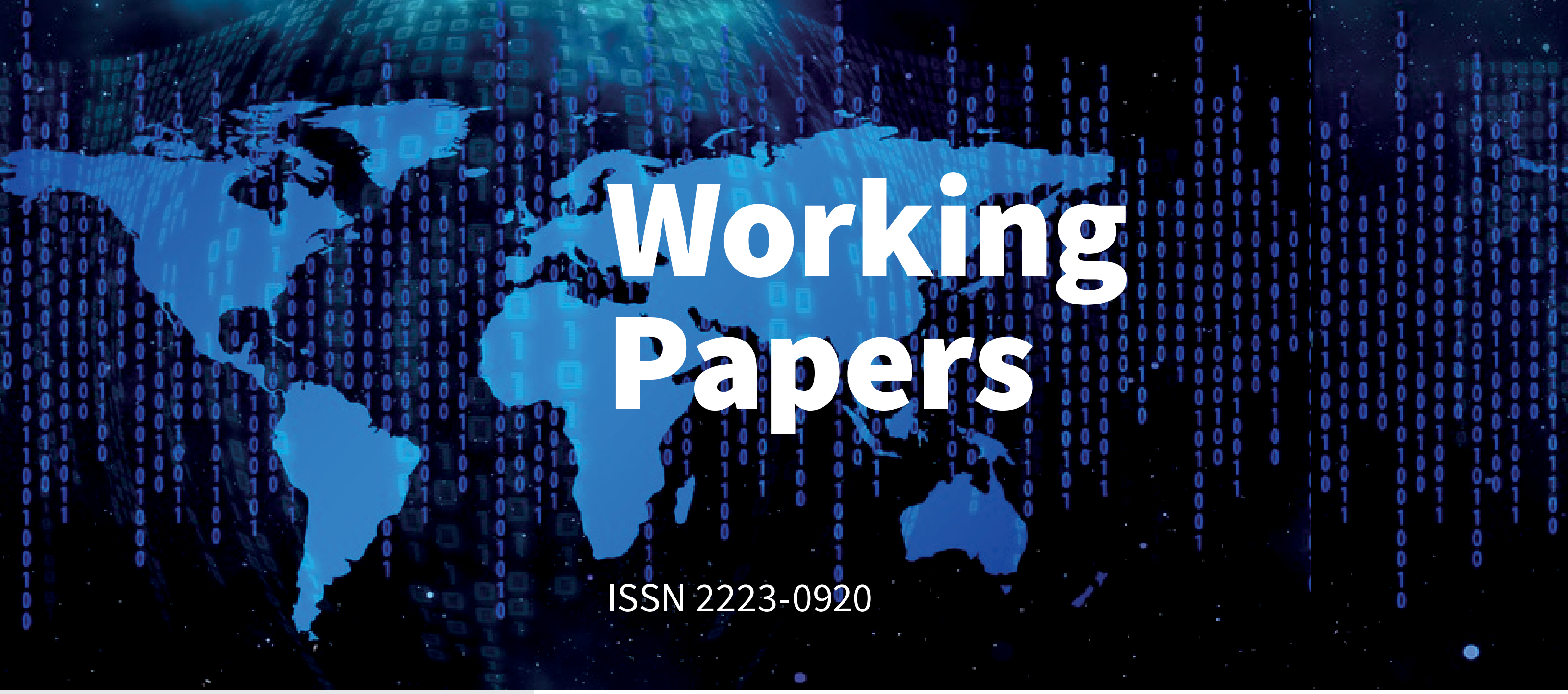

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The Challenge of the Undertaxed Profits Rule (UTPR) in the Framework of Tax Treaties.

An Analysis of Legality, Tax Sovereignty and Treaty Override

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Content

Executive Summary

The Undertaxed Profits Rule (UTPR) is probably one of the most debated components of the OECD/G20 Pillar Two framework.

Its function is to operate as the backstop rule of the GloBE system. In practical terms, it allows jurisdictions that have implemented the regime to collect top-up tax on low-taxed profits that have not been captured by a Qualified Domestic Minimum Top-up Tax (QDMTT) or by an Income Inclusion Rule (IIR).

The central legal problem is not merely whether the UTPR is a sound tax-policy instrument. The decisive question is how it should be characterized for purposes of tax treaties: as a domestic tax charge imposed on a local constituent entity or local permanent establishment, or as a mechanism that allows an income tax to be levied on foreign-source profits in respect of which the implementing State lacks a sufficient treaty nexus.

International scholarship does not provide a single answer. For purposes of this paper, it can be grouped into four broad currents: a formal-compatibility thesis, associated principally with Allison Christians, Stephen Shay and Takato Masuda; a systemic or evolutionary compatibility thesis, linked to Reuven Avi-Yonah, Sol Picciotto and Jeffery Kadet; a critical thesis of incompatibility or strong treaty friction, represented by Jinyan Li, Angelo Nikolakakis, Jefferson VanderWolk, Ana Paula Dourado, Maarten de Wilde, Peter Hongler, Irma Mosquera, Filip Debelva, Vikram Chand and Julien Chaisse; and an intermediate position, particularly useful for practice, which depends on the treaty text, the existence of a saving clause, the type of taxpayer and the available procedural route.

The thesis advanced in this paper is deliberately critical, but nuanced: the UTPR can be defended as an instrument of global tax policy, but its domestic implementation without an express treaty amendment places serious pressure on the classical logic of bilateral conventions designed to avoid double taxation and tax evasion.

That tension becomes especially acute where the rule operates, in substance, as a mechanism for taxing foreign business profits or undistributed profits of foreign entities through a local constituent entity of the multinational group that is neither the legal nor the economic owner of that income.

As of the date of this paper, the Belgian litigation is the only judicial proceeding identified that directly challenges the validity of the UTPR. The other precedents examined are functional analogies. They should be used to assess risks of characterization, proportionality, treaty override or domestic constitutionality, but not as decisions that have resolved the compatibility of the UTPR with tax treaties.

1. Introduction: the UTPR as a Stress Test for the Treaty System

The architecture of the international tax system, built upon commitments dating back to the work of the League of Nations in 1923, is currently undergoing one of its deepest transformations with the implementation of OECD Pillar Two.

At the centre of that transformation lies the Undertaxed Profits Rule (UTPR), conceived as the backstop mechanism of the Global Anti-Base Erosion (GloBE) regime.

The UTPR allows jurisdictions that have adopted these rules to collect a top-up tax on the profits of entities belonging to multinational enterprise groups that have been taxed below the minimum effective income-tax rate of 15% in other jurisdictions.

However, that taxing power creates an unprecedented tension with the existing network of tax treaties, which are based on the principle that business profits may be taxed only in the taxpayer's State of residence, or in the source State where there is a permanent establishment to which such income or business profits are attributable.

The UTPR should not be analysed as an isolated technical rule. It functions as a stress test for the treaty system: it forces the question whether treaties designed primarily to allocate taxing rights between residence and source can accommodate a multilateral minimum-tax rule that allocates residual collection rights to jurisdictions where the multinational group has employees and assets, even though the profits being taxed were generated elsewhere.

The legality of the UTPR is not merely a matter of tax technique. It presents a fundamental challenge to the principles of nexus, prescriptive jurisdiction, separate-entity treatment, profit attribution and non-discrimination that have governed international taxation for decades.

Scholars have noted that the UTPR may be in tension with treaty obligations assumed by States, especially in jurisdictions where treaties prevail over domestic law or where the constitution limits the possibility of unilaterally rewriting a treaty through subsequent domestic legislation. That phenomenon is generally known as treaty override: the unilateral precedence of a later domestic rule over obligations assumed under a treaty.

Put simply, the discussion is not only about who pays the tax, but why that State has the right to demand it.

2. From the Undertaxed Payments Rule to the Undertaxed Profits Rule

One of the most relevant points of legal friction is the shift in the UTPR's design. Originally, the mechanism was presented as an Undertaxed Payments Rule, which suggested a direct connection with deductible payments made from a high-tax jurisdiction to a low-tax jurisdiction.

Under that initial conception, the rule was functionally similar to classic base-eroding rules, where the tax nexus was justified by the protection of the local tax base being eroded through intra-group expenses.

However, in the final version of the Model Rules published in December 2021, the UTPR became an Undertaxed Profits Rule, eliminating any requirement that there be an intra-group payment between the entity applying the adjustment and the entity whose profits are undertaxed.

This change is not merely terminological. The transformation of a payment-based rule into a profit-based rule alters the legal justification for the charge. In the first case, the jurisdiction applying the rule protects its own tax base against a local deduction. In the second, the jurisdiction participates in collecting top-up tax on low-taxed profits generated outside its territory, even where no eroding transaction directly affects its base.

This evolution means that a jurisdiction may tax profits generated entirely abroad by an entity with which the local taxpayer does not necessarily have a direct ownership relationship, relying only on membership in the same multinational group and on a formulaic allocation key based on assets and employees.

The critical hypothesis is that the UTPR creates a new jurisdictional basis that does not fit comfortably within the previous international consensus on residence, source, permanent establishment, separate entity and functional attribution of profits. By allowing a State to act as a third party in relation to the income it ultimately taxes, the UTPR may, at least in certain cases, place pressure on the duty to perform treaties in good faith under the Vienna Convention on the Law of Treaties.

3. The Normative Architecture of the UTPR within the GloBE System

The UTPR is part of a sequential architecture. First, where applicable, the Qualified Domestic Minimum Top-up Tax (QDMTT) operates in the jurisdiction where the low-taxed income arises.

The IIR then operates, normally in the jurisdiction of the ultimate parent entity or of an intermediate parent entity. Only to the extent that the top-up tax is not captured by those rules does the UTPR allocate the residual amount to UTPR jurisdictions through a formula generally based on employees and tangible assets.

This sequence is important for treaty analysis because the UTPR is not triggered as an ordinary tax on local income. It is triggered after a global or jurisdictional low-tax calculation and distributes a residual top-up tax amount among jurisdictions where the group has an economic presence. The rule is therefore simultaneously a collection mechanism, an allocation rule and an indirect pressure device to encourage other jurisdictions to adopt a QDMTT or a qualified IIR.

Element	Treatment under GloBE	Treaty implication
QDMTT	Priority in the jurisdiction where the low-taxed income arises.	Reduces the scope for the IIR and the UTPR; it is the least problematic instrument from the perspective of territorial nexus.
IIR	Collection by the parent jurisdiction in respect of income of controlled entities.	Its defence relies on analogies with CFC rules and saving clauses.
UTPR	Residual allocation among jurisdictions with employees and assets of the group.	It is the most disputed mechanism because it may tax profits of foreign entities not controlled by the local constituent entity of the multinational group.
Side-by-Side Package	Safe harbours and solutions to coordinate the operation of the global minimum tax, including the treatment of groups subject to equivalent minimum-tax regimes.	Reinforces the political and coordination dimension, but does not by itself eliminate all treaty objections.

4. Material Scope and the Article 2 Challenge

To determine whether the UTPR is compatible with a tax treaty, the first legal step is to analyse whether this top-up tax falls within the scope of Article 2 of the OECD Model.

That article defines covered taxes by referring generally to taxes on income and on capital, as well as to taxes of an identical or substantially similar character imposed after the treaty is signed.

Scholarship is divided on the legal nature of the UTPR. On the one hand, because the top-up tax base is calculated by reference to financial accounting profits adjusted under the GloBE rules, it may be characterized as inherently an income tax. The method of implementation, which may consist of a denial of deductions or an equivalent adjustment, reinforces the view that it is a tax charge connected with income or business profits.

On the other hand, the formal defence of compatibility argues that the UTPR does not legally tax the income of the low-taxed foreign entity, but rather imposes a domestic tax consequence on a local constituent entity. On that reading, the rule would not be, or would not necessarily be, a covered tax under Article 2 with respect to the foreign income used as a reference for the calculation.

This distinction is decisive. If the UTPR is treated as a covered tax, the limitations in Articles 7, 9, 10(5), 21 and 23 become more relevant. If it is not, the implementing State may argue that the distributive rules of the treaty are not triggered in the same way. Even in that scenario, however, Article 24 remains relevant, because the non-discrimination clause often applies to taxes of every kind and description.

Feature of the charge	Characterization under the GloBE rules	Legal implication under Article 2
Tax base	Excess profit or top-up tax calculated on adjusted GloBE income.	Suggests the nature of an income tax or substantially similar charge.
Formal taxpayer	Local constituent entity or local permanent establishment.	Supports the defence that the tax is imposed on a resident or local presence.
Reference income	Low-taxed profits of group entities in another jurisdiction.	Feeds the objection that the substance of the charge falls on foreign income.
Mechanism	Denial of deductions, tax surcharge or other equivalent adjustment.	May be presented as a domestic computational rule, but with extraterritorial effects.
Feature of the charge	Characterization under the GloBE rules	Legal implication under Article 2
Purpose	To ensure a minimum effective tax rate of 15%.	May be seen as a systemic anti-abuse rule or as an unagreed redistribution of taxing rights.

5. The State of International Scholarship: Four Main Positions

5.1. Formal compatibility: legal incidence on a local resident

The first current, associated principally with Allison Christians, Stephen Shay and Takato Masuda, argues that the UTPR may be compatible with tax treaties because it should not be characterized as a tax on the foreign entity or on that entity's profits. According to this thesis, it is a domestic tax consequence imposed on a resident constituent entity or on a local permanent establishment. From this perspective, Article 7 would not block the rule because the State would not legally be taxing the foreign enterprise protected by the treaty, but rather its own local taxpayer.

This current also weakens the non-discrimination objection through the selection of the comparator. The comparison should not be made, in the abstract, between a domestically owned subsidiary and a foreign-owned subsidiary, but rather between local entities belonging to multinational groups that are in equivalent circumstances under the GloBE regime. If the relevant factual situation is membership in a group with low-taxed profits not captured by a QDMTT or an IIR, the difference in treatment would not be explained exclusively by the nationality or residence of the shareholder.

5.2. Systemic compatibility: residence, substance and multilateral consensus

A second current, associated with Reuven Avi-Yonah, Sol Picciotto and Jeffery Kadet, advances a broader defence: the residence or local presence of the taxpayer subject to the charge is a sufficient jurisdictional anchor. On this reading, concepts such as economic allegiance, benefits theory or value creation have not crystallized as strict rules of public international law capable of invalidating the UTPR.

Under this approach, Pillar Two reflects a multilateral evolution of the system, rather than a mere unilateral overreach.

The strength of this position is that it avoids turning open-ended tax-policy concepts into rigid legal rules. Its weakness is that treaty adjudication begins with the text of the applicable bilateral treaty, not with a general systemic evolution. Thus, even if the defence is attractive from the perspective of general public international law, it may be insufficient before a court that interprets Articles 7, 9, 10(5), 23 or 24 of a concrete tax treaty strictly.

5.3. Incompatibility or strong treaty friction

The third, critical current argues that the UTPR operates in substance as a tax on low-taxed foreign profits in respect of which the implementing jurisdiction has no taxing right under the treaty. Jinyan Li, Ana Paula Dourado, Maarten de Wilde, Vikram Chand, Alessandro Turina, Kinga Romanovska, Peter Hongler, Irma Mosquera, Filip Debelva and Julien Chaisse have developed different versions of this thesis.

The core of this position is that tax treaties are negotiated agreements allocating taxing rights. If States wish to create a residual collection right over low-taxed foreign profits, they should expressly amend their tax treaties through bilateral protocols or a specific multilateral instrument. Coordinated domestic implementation may be politically effective, but it does not necessarily solve the problem of treaty legality.

5.4. An intermediate position: compatibility dependent on design and forum

A fourth, methodologically more prudent line argues that there is no universal answer. The compatibility of the UTPR depends on at least five variables: characterization as a covered tax; the existence or absence of a saving clause; application to a resident company or to a permanent establishment; the comparator selected under Article 24; and domestic rules governing the hierarchy between treaties and later statutes.

This intermediate position is probably the most useful for professional practice. It allows a critical thesis to be maintained without asserting that every UTPR will be invalid in every jurisdiction. It also explains why future litigation may produce narrow decisions specific to the treaty and the facts, rather than a general declaration of universal invalidity.

Doctrinal position	Main authors	Central hypothesis	Strength	Weakness
Formal compatibility	Christians, Shay, Masuda	The UTPR legally taxes a local constituent entity of the multinational group, not the foreign entity.	Works well before formalist courts and where a saving clause exists.	Vulnerable where the forum looks to economic substance.
Systemic compatibility	Avi-Yonah, Picciotto, Kadet	Residence or local presence is sufficient; the Pillar Two consensus reshapes the context.	Responds to broad objections based on lack of nexus.	May be weak against the specific treaty text.
Critical incompatibility	Li, Dourado, de Wilde, Chand, Hongler, Mosquera, Debelva, Chaisse	The UTPR reallocates taxing rights without treaty amendment.	Strong under pacta sunt servanda and Articles 7, 10(5), 23 and 24.	Must explain massive Pillar Two implementation without treaty reform.
Intermediate thesis	Hallade, Chand, Turina and Romanovska	The outcome depends on treaty text, domestic design, taxpayer type and forum.	More realistic for litigation and advisory work.	Less categorical as an editorial thesis.

6. Conflict with Article 7: Business Profits and Permanent Establishments

The most evident conflict arises under Article 7(1) of tax treaties. That provision reflects a central rule of international taxation: the profits of an enterprise of one Contracting State may be taxed in the other State only if the enterprise carries on business through a permanent establishment situated there, and only to the extent that those profits are attributable to that permanent establishment.

The UTPR disrupts this scheme where it allows a jurisdiction to tax, even indirectly, profits that legally belong to an entity resident in another country and that have no functional connection with the operations of the local constituent entity of the multinational group in the State applying the rule.

The OECD's defence and the defence advanced by scholars favouring compatibility rest on a clear premise: the UTPR does not tax the foreign entity, but adjusts the taxation of the resident entity through a denial of deductions or an equivalent mechanism. Critics respond that this argument is formalistic and that, in practice, the presence of a local subsidiary is used as a collection point for tax on profits generated outside the jurisdiction.

The most vulnerable point arises in permanent establishment structures. Where the UTPR is imposed on a local permanent establishment of a foreign enterprise, the collision with Article 7 may be more direct: the treaty already regulates the extent to which the source State may tax profits attributable to that permanent establishment. If the UTPR ends up allocating to that permanent establishment a charge calculated by reference to profits of foreign group entities, the formal defence loses part of its force.

7. Formulaic Allocation and the Displacement of the Separate-Entity Approach

The UTPR uses a mathematical formula to distribute residual top-up tax among the different jurisdictions that have implemented the GloBE rules. In general terms, that formula considers the relative weight of the group's employees and tangible assets in each UTPR jurisdiction.

This allocation method is diametrically different from the separate-entity approach and from the analysis of functions, assets and risks required by Article 7 for the attribution of business profits to a permanent establishment and by Article 9 for transactions between associated enterprises.

By replacing transactional reality with an allocation based on macroeconomic factors, the UTPR may be viewed as a form of unitary taxation not authorized by existing tax treaties. The objection is not that unitary taxation is necessarily wrong as a matter of public policy; the objection is more precise: these treaties were not drafted to allocate taxing rights through a global formula based on employees and assets.

8. The Arm’s Length Principle and Article 9

Article 9 of tax treaties enshrines the arm’s length principle, requiring transactions between associated enterprises to be valued as if they had been carried out between independent parties.

The UTPR adjustment does not seek to correct the price of a transfer or to restore the market value of a transaction. Its purpose is to achieve a minimum level of global taxation, regardless of whether the transfer prices applied by the multinational group comply with the arm’s length principle.

Critical scholarship argues that, if the UTPR results in an increased tax burden not based on a correction of profits under the arm’s length standard, there is a tension with Article 9. Although Article 9 is often regarded as an enabling rule allowing States to make adjustments, it may also operate as a limiting rule: States should not tax more profits than would have arisen under market conditions.

The opposing defence is that the UTPR is not a transfer pricing rule and therefore should not be constrained by Article 9. This point should be stated expressly so that the analysis does not appear to assume that every intra-group adjustment is automatically subject to the arm’s length principle.

Ultimately, Article 9 is probably not the strongest treaty objection against the UTPR, because the rule does not technically operate as a transfer pricing adjustment. Its relevance is more conceptual than direct: it highlights the distance between the transactional method of tax treaties and the formulaic logic of Pillar Two.

9. Article 10(5), Article 21 and Undistributed Profits

A potential conflict may also arise under Article 10(5) of the OECD Model and comparable provisions in tax treaties. This rule prevents a Contracting State from taxing the undistributed profits of a company resident in the other State, except within the limits expressly provided by the treaty.

If the UTPR is substantially characterized as a tax on undistributed profits of low-taxed foreign entities, an additional objection may arise: the jurisdiction applying the rule would be capturing, through a local constituent entity of the multinational group, a charge calculated on profits that the treaty protects against extraterritorial taxation. The strength of this objection depends on whether the court follows the formally liable taxpayer or the economic income used as the basis of the calculation.

The strength of this objection will depend on the forum's willingness to look at the underlying economic income rather than only at the party formally liable for payment under domestic law.

Article 21, dealing with other income, may also enter the discussion, although its relevance will depend on the specific treaty. The issue is not mechanical: if the top-up tax is viewed as an autonomous charge, Article 21 may have limited application; if the State is viewed as taxing a residual category of foreign income, the analysis may change.

10. Article 23 and the Risk of Double or Multiple Taxation

The UTPR also raises questions under the rules for the elimination of double taxation. The GloBE design seeks to avoid over-taxation through coordination, priority for the QDMTT and the IIR, and residual allocation through the UTPR. From a treaty perspective, however, it is not always clear which State should grant relief where a UTPR charge is calculated by reference to profits of an entity located in a third jurisdiction.

The practical risk is not only classic double taxation between the residence State and the source State, but also imperfectly coordinated multiple taxation among GloBE jurisdictions, non-implementing jurisdictions and States with tax treaties that do not expressly contemplate the top-up tax. This point reinforces the desirability of an express treaty solution or, at a minimum, coordinated administrative guidance among competent authorities.

11. Non-Discrimination and Article 24: the Residence Trap

The analysis of the UTPR's legality under the non-discrimination clause in Article 24 of tax treaties requires careful distinction among its different paragraphs. Not every objection under Article 24 operates in the same way. In particular, two possible lines of conflict must be separated: first, the protection of the deductibility of certain payments under Article 24(4); and second, the prohibition of more burdensome taxation of local companies whose capital is owned or controlled by residents of the other Contracting State under Article 24(5).

Here the debate changes focus: the question is no longer only whether the State may tax, but whether it may do so in a manner that treats certain payments or certain companies worse because of their foreign connection.

11.1. Article 24(4): Denial of Deductions and Equal Treatment of Cross-Border Expenses

Article 24(4) of the OECD Model provides, in broad terms, that interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State must be deductible under the same conditions as if they had been paid to a resident of the first State. Its purpose is to prevent a State from discriminating against cross-border payments as compared with equivalent domestic payments.

This provision may be especially relevant if a jurisdiction implements the UTPR through a denial of deductions. Under that technique, the top-up tax is not necessarily collected through an autonomous surcharge, but by reducing or eliminating deductions available to a local constituent entity. If the denied deductions relate to interest, royalties or other expenses paid to residents of the other Contracting State, a direct tension with Article 24(4) may arise.

The technical objection would be as follows: if a local enterprise loses the deductibility of certain cross-border payments because of the UTPR, while equivalent payments to local residents would not suffer the same treatment in comparable circumstances, the rule could operate as a discriminatory restriction on deductibility protected by the treaty. In that case, the problem would not only be that the UTPR falls on foreign group profits, but that the mechanism chosen to collect it specifically affects the deductibility of payments covered by a treaty non-discrimination clause.

However, this argument must be formulated with precision. The conflict with Article 24(4) will be strongest where the denial of deductions can be specifically linked to payments made to residents of the other Contracting State. By contrast, if the UTPR is implemented as an autonomous tax surcharge, an equivalent adjustment not linked to specific payments, or a global denial of deductions not connected with interest, royalties or other payments made to residents of the other State, the objection under Article 24(4) will be weaker. In those cases, the discussion will move toward other paragraphs of Article 24 or toward the treaty's distributive rules.

Accordingly, from a practical perspective, the Article 24(4) analysis requires a review of the concrete domestic legislative technique used to implement the UTPR. It is not enough to assert that every UTPR automatically violates this provision.

The correct question is whether the mechanism used affects the deductibility of cross-border payments protected by the treaty on terms less favourable than those applicable to comparable domestic payments.

11.2. Article 24(5): Foreign-Owned Companies and More Burdensome Taxation

Article 24(5), by contrast, raises a different objection. This provision prohibits an enterprise of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, from being subjected to any taxation or connected requirement that is more burdensome than that imposed on other similar enterprises of the first State.

In the UTPR context, the vulnerability under Article 24(5) does not necessarily depend on the denial of a specific deduction. It depends on whether the additional tax burden falls, in practice, on a local constituent entity because of its membership in a multinational group whose parent or related entities are located in another jurisdiction, particularly where that jurisdiction has not implemented a qualified IIR or does not have a regime treated as equivalent.

The compatibility defence would argue that the correct comparator is not, in the abstract, a domestically owned enterprise versus a foreign-owned enterprise, but rather a local constituent entity belonging to a multinational group in comparable GloBE circumstances. On this reading, the difference in treatment would not derive from the nationality, residence or location of the shareholders, but from the existence of low-taxed profits within the group that were not captured by a QDMTT or a qualified IIR.

The critique, by contrast, is that this defence may be excessively formal. In practice, application of the UTPR may depend on factors closely connected with the residence of the parent or with the group's foreign ownership and control structure. Two economically comparable local companies could receive different tax treatment if one belongs to a group whose parent is in a jurisdiction with a qualified IIR and the other belongs to a group whose parent is in a jurisdiction without an IIR or with a regime not recognized as equivalent. In that case, the local constituent entity may bear an additional tax burden not because of its own income, functions or deductions, but because of the tax position of other group entities located abroad.

This is the so-called "residence trap": although the UTPR is formulated as a neutral rule based on low taxation within the group, its practical operation may create a heavier burden for local entities controlled by foreign parents located in non-implementing or non-qualified jurisdictions. If the forum adopts a substantive reading of Article 24(5), it could consider the rule to produce less favourable treatment indirectly linked to foreign ownership or control.

11.3. Technical Difference between Paragraphs 24(4) and 24(5)

The distinction between the two paragraphs is fundamental. Article 24(4) looks primarily at the deductibility of specific payments made to residents of the other Contracting State. Its relevance therefore depends on the UTPR implementation technique and on whether there is a sufficient connection between the denial of deductions and cross-border payments covered by the treaty.

Article 24(5), by contrast, looks at the overall tax burden borne by a local enterprise controlled by foreign residents. Its focus is not the nature of a particular expense, but whether the local enterprise is subject to taxation or a connected requirement more burdensome than that imposed on a comparable local enterprise whose capital is not owned by residents of the other State.

This difference allows the incompatibility analysis to be refined. A UTPR implemented through an autonomous surcharge may not create a strong problem under Article 24(4), but may still raise a possible objection under Article 24(5). Conversely, a UTPR implemented through a denial of deductions may trigger both planes at the same time: Article 24(4), if it affects treaty-protected deductible payments, and Article 24(5), if the additional burden is linked in practice to the foreign ownership or control of the local constituent entity.

Consequently, the compatibility of the UTPR with Article 24 should not be assessed in the abstract. It must be analysed by considering: (i) whether domestic implementation operates through a denial of deductions, tax surcharge or equivalent adjustment; (ii) whether the affected expenses are interest, royalties or other payments to residents of the other State; (iii) whether comparable domestic payments are treated more favourably; (iv) whether the additional burden falls on a local constituent entity because it belongs to a group with a parent or related entities in non-qualified jurisdictions; and (v) how the forum defines the universe of comparable enterprises.

The practical consequence is clear: separating paragraphs 24(4) and 24(5) strengthens the technical argument. The first permits challenges to the UTPR collection technique where it affects protected cross-border deductions. The second permits challenges to the economic result of the rule where a local constituent entity controlled by foreign residents bears a heavier burden because of circumstances attributable to the multinational group and not to its own local income.

Scenario	Relevant paragraph of Article 24	Technical risk
UTPR implemented through denial of deductions on interest, royalties or other payments to residents of the other State	Art. 24(4)	High risk if comparable payments to local tax residents would be deductible on better terms.
UTPR implemented as an autonomous surcharge or equivalent adjustment not linked to specific payments	Art. 24(5), more than 24(4)	Low risk under 24(4), but a possible more burdensome treatment objection remains under 24(5).
Local subsidiary of a group with a parent in a jurisdiction without a qualified IIR	Art. 24(5)	Risk of more burdensome treatment due to foreign ownership or control, depending on the chosen comparator.
Local subsidiary of a group with a parent in a jurisdiction with an IIR or equivalent regime	Art. 24(5)	Lower UTPR exposure; may reinforce the critical argument if another comparable subsidiary bears a heavier burden because of the parent's residence.
Local permanent establishment of a foreign enterprise	Art. 24(3), Art. 7 and possibly Art. 24(4)	Higher risk if the charge exceeds profits attributable to the permanent establishment or affects protected deductions.

12. Saving Clauses, CFC Rules and the Limits of the Analogy with the IIR

A frequent defence of the UTPR invokes the saving clause incorporated into Article 1(3) of the OECD Model beginning with the 2017 version, under which a treaty generally does not affect a State's right to tax its own residents. This defence works more naturally for the IIR, because the IIR is closer to a CFC rule: the residence State taxes its own resident with respect to income of controlled entities.

The analogy is weaker in the case of the UTPR. The UTPR may impose a charge on a local subsidiary by reference to profits of sister entities, higher-tier entities or entities in other jurisdictions over which the subsidiary has no control. The control nexus that normally justifies CFC rules, and that makes a saving clause easier to invoke, is therefore absent.

Japanese case law on CFC rules and the Japan-Singapore treaty offers an argument favourable to compatibility: the court appears to have privileged the formal legal incidence on the Japanese resident. However, that analogy does not automatically resolve the UTPR issue because CFC rules tax a controlling shareholder, whereas the UTPR may tax a local constituent entity of the multinational group merely by reason of group affiliation.

From this perspective, the analogy with CFC rules must be used cautiously. The compatibility argument often relies on the idea that the State taxes its own tax resident, as in certain CFC precedents. However, the UTPR does not always rest on corporate control: it may apply to a local constituent entity by reference to profits of sister companies, higher-tier entities or entities located in third States.

That difference marks the principal limit of the CFC/IIR analogy. Cadbury Schweppes and X GmbH are useful in showing that, under European Union law, rules attributing foreign income must satisfy an analysis of justification, proportionality and economic substance, even though those cases are not strictly treaty cases.

Moore v. United States and Canada v. Loblaw Financial Holdings Inc. may be cited as comparative precedents on the domestic attribution of undistributed foreign income, but they should not be treated as cases concerning the compatibility of the UTPR with tax treaties.

Their utility is more limited: they show that certain supreme courts accept, under particular constitutional or statutory conditions, the attribution of foreign income to a resident taxpayer. They do not resolve whether a tax treaty permits that logic to be extended to a local constituent entity that does not control the taxed income.

13. Treaty Override, the Vienna Convention and the Need for Treaty Amendment

The treaty override problem arises when a later domestic rule purports to produce effects incompatible with an existing international treaty. In monist jurisdictions, or in jurisdictions that give treaties strong constitutional recognition, the implementation of the UTPR through domestic law may face objections based on normative hierarchy.

The Vienna Convention on the Law of Treaties provides the basic interpretive grammar: pacta sunt servanda, interpretation in good faith in accordance with the ordinary meaning, context, object and purpose, the impossibility of invoking internal law to justify failure to perform a treaty, and the need for consent to impose obligations on third States.

The critical position argues that, if Pillar Two requires a significant redistribution of taxing rights, the legally clean solution would be an express treaty amendment, either through bilateral protocols or through a specific multilateral instrument. The fact that the BEPS project previously used the MLI shows that multilateral techniques exist for amending tax treaties when States consider it necessary.

However, the domestic enforceability of a treaty override is not uniform. In Germany, the Federal Constitutional Court has accepted the constitutional possibility of certain legislative treaty overrides. In the United States, the later-in-time rule allows a later statute to prevail domestically over an earlier treaty. These examples do not prove that an override is consistent with international law, but they do show that the practical outcome depends on each constitutional system.

The German Bundesverfassungsgericht precedent on treaty override and the U.S. later-in-time rule should not be cited as international validation of the UTPR, but as evidence that some legal systems may internally allow a later statute to prevail over an earlier treaty. That conclusion does not remove the State's possible international responsibility nor the objection under the Vienna Convention; it only shows that the judicial solution may vary according to domestic normative hierarchy.

Comparative case law shows that this debate will not be resolved only through abstract formulae. Much will depend on how the judge chooses to view the operation.

13.1. Schneider Electric and Rubis: the Tension between Economic Substance and Formal Characterization

The contrast between Schneider Electric and Rubis, both decided by the French Conseil d'État, offers one of the most useful jurisprudential keys for anticipating how a future dispute over the UTPR and tax treaties may unfold.

Although neither precedent resolved a controversy concerning the UTPR, both address a functionally analogous question: whether a domestic rule may attribute to a resident taxpayer a tax burden calculated by reference to profits generated by a foreign entity without violating the allocation of taxing rights agreed in a tax treaty.

In practical terms, the issue can be reduced to a simple question: when a judge looks at the UTPR, what is she really seeing — a domestic charge on a local constituent entity, or a mechanism for collecting tax on foreign profits?

In Schneider Electric, the Conseil d'État adopted a substantive approach. The court examined the true economic object of the French controlled foreign company regime and concluded that, in the statutory version then in force, the rule sought to tax in France the business profits earned by a foreign company. On that reading, Article 7 of the France-Switzerland treaty prevented France from taxing those profits, since they belonged to an enterprise resident in Switzerland and were not attributable to a permanent establishment situated in France.

The importance of this precedent lies in the fact that the court did not simply accept the domestic characterization of the rule. Instead, it analysed the substantial nature of the taxed income and the treaty allocation of taxing rights.

This line is particularly relevant to the critical thesis on the UTPR. If a court followed an approach similar to Schneider Electric, it could conclude that, although the UTPR is formally imposed on a local constituent entity or a local permanent establishment, the top-up tax is substantially calculated on the business profits of foreign group entities.

In that case, the decisive question would be whether the State applying the UTPR has, under the applicable treaty, a sufficient treaty nexus to tax those profits. If the answer is negative, the UTPR could be viewed as a form of indirect taxation of foreign income protected by Article 7 of the treaty.

Rubis, by contrast, illustrates the opposite line of argument. In that decision, the Conseil d'État accepted that the later version of the French regime could characterize the attribution of foreign income as income of the French resident, capable of being brought within a different treaty category, including a residual clause. The court did not treat the rule as direct taxation of foreign business profits protected by Article 7, but as a tax consequence legally attributed to the resident taxpayer. This formal approach reduces the force of the treaty objection because it shifts the analysis from the underlying economic income to the domestic tax obligation of the local subject.

For the UTPR, Rubis probably represents the most important counterargument to the critical thesis. A jurisdiction defending the UTPR's compatibility could argue that it is not taxing the foreign entity or its business profits in the treaty sense, but imposing an autonomous tax consequence on a local constituent entity of the multinational group, located within its tax jurisdiction. Under that logic, the undertaxed foreign income functions as a parameter for calculating the top-up tax, but not as the direct legal object of the charge.

The tension between Schneider Electric and Rubis allows the central question for future UTPR litigation to be formulated precisely: should the judge look at the foreign income that forms the economic basis for calculating the top-up tax, or should she focus on the subject formally liable for payment under domestic law? If the forum privileges economic substance, the UTPR will face greater risks under Articles 7, 10(5), 21, 23 and 24 of tax treaties. If the forum privileges domestic formal characterization, the compatibility defence will be stronger, particularly where the charge falls on a resident company and the treaty contains a saving clause or a sufficiently broad residual clause.

This distinction also shows that the debate over the UTPR cannot be resolved in the abstract. The outcome will depend on the specific legislative design, the implementation technique used — denial of deductions, tax surcharge or equivalent adjustment — the party liable for payment, the applicable treaty and the interpretive methodology of the forum. In particular, treaty risk will be greater where the UTPR applies to a permanent establishment, because in that case Article 7 already expressly limits the source State's taxing power to profits attributable to that permanent establishment. By contrast, the formal defence will be stronger where the UTPR is imposed on a resident company and can be presented as that entity's own tax obligation.

From this perspective, Schneider Electric and Rubis should not be read as precedents that directly resolve the legality of the UTPR, but as the two poles of possible judicial reasoning. Schneider Electric represents the substantive view: the treaty protects foreign income against a domestic attribution that seeks to tax it without express treaty authorization. Rubis represents the formal view: domestic law may construct income or an obligation of the resident, thereby reducing the scope of the treaty objection. Future UTPR disputes are likely to be decided in the space between these two approaches.

Accordingly, the most prudent thesis is neither that the UTPR will necessarily be blocked by tax treaties nor that it will automatically be compatible with them. The strongest thesis is that the UTPR occupies a zone of contested legality, where the decisive point will be the judicial characterization of the charge. If it is interpreted as an autonomous domestic tax on a local constituent entity, its defence will be plausible. If it is interpreted as an indirect form of taxing foreign business profits not attributable to that local constituent entity, the conflict with the treaty architecture will be much more difficult to overcome.

13.2. Why No MLI for Pillar Two? The Choice of Soft Law as a Political Exit

The inevitable question is why the Inclusive Framework did not design a specific multilateral instrument to adapt tax treaties to the Pillar Two rules, especially if the UTPR raises significant doubts of treaty compatibility. The earlier BEPS project shows that a technical tool was available: the Multilateral Instrument to modify bilateral tax treaties. From a strictly legal perspective, a similar instrument would have been the cleanest route to introduce into tax treaties an express authorization for the IIR, the UTPR and, where relevant, coordination rules with QDMTTs.

However, the absence of an MLI for Pillar Two appears to reflect less a legal preference than a political constraint. An enforceable multilateral instrument would have required formal processes of signature, approval and ratification in multiple jurisdictions. In the United States, any substantive treaty amendment would have had to pass through the constitutional process applicable to tax treaties, with the Senate playing a decisive role. In the U.S. political context, and in light of resistance to rules perceived as extraterritorial, discriminatory or contrary to Congress's tax sovereignty, timely and effective ratification was uncertain.

This reality shaped the architecture of Pillar Two. Instead of formally amending tax treaties, the Inclusive Framework chose a more flexible normative model: model rules, commentary, administrative guidance, safe harbours, peer review, political coordination and domestic transposition. That strategy accelerated global implementation of the minimum tax without depending on simultaneous ratification of a multilateral treaty. But the legal price of that choice is clear: political coordination does not necessarily amount to treaty amendment, and parallel domestic implementation does not by itself remove the limits arising from existing treaties.

From this perspective, the architecture of Pillar Two may be understood as a compromise solution. It is not purely conventional international law, but it is also not simply isolated domestic legislation. It operates in an intermediate zone: a global standard designed through political consensus, internalized through national legislation and sustained by reputational and institutional pressure mechanisms. That formula may be effective from a tax-policy perspective, but it leaves open the central question of this paper: whether a multilateral political agreement can alter, without express amendment, the allocation of taxing rights agreed in thousands of existing tax treaties.

The UTPR is the point at which this tension becomes most visible. The IIR can be defended more easily through analogies with CFC rules and with the residence State's power to tax its own residents. The QDMTT, in turn, rests on a clearer territorial nexus because it operates in the jurisdiction where the low-taxed income arises. The UTPR, by contrast, residually allocates top-up tax to jurisdictions that may be neither the jurisdiction of the parent nor the jurisdiction where the undertaxed income was generated. Precisely for that reason, if any rule required an express treaty basis, it was the UTPR.

The decision not to use a specific MLI for Pillar Two therefore reinforces the critical but nuanced thesis: the UTPR may be understandable as the backstop of the global minimum tax, but its implementation through coordinated domestic rules does not provide the same degree of legal certainty as an express treaty amendment. The absence of treaty reform does not prove that the UTPR is invalid in all cases, but it explains why its legality remains contested and will depend on treaty text, domestic design, the forum and the interpretive methodology adopted.

In short, Pillar Two reveals a tension between political feasibility and legal purity. An MLI would have provided greater treaty certainty, but it might have delayed or even blocked global implementation of the standard. The chosen path — soft law, administrative guidance and parallel domestic implementation — was politically functional, but legally imperfect. That imperfection is precisely what fuels the debate over treaty override, tax sovereignty and the legitimacy of the UTPR's connecting factor.

14. Geopolitical Perspective: the United States, the G7 and Side-by-Side

The legality of the UTPR cannot be separated from the global political context, especially the resistance of the United States. On 20 January 2025, the White House issued a memorandum stating that the OECD global tax agreement would have no force or effect in the United States unless adopted by Congress, and directing the evaluation of responses to foreign tax regimes considered extraterritorial or discriminatory.

On 28 June 2025, the G7 issued a statement on the global minimum tax referring to a shared understanding for a side-by-side system. According to the U.S. Treasury release, that system would fully exclude U.S.-parented groups from the UTPR and the IIR with respect to both their domestic and foreign profits.

In January 2026, the OECD published the Side-by-Side Package, approved and declassified by the Inclusive Framework on 5 January 2026. The package seeks to coordinate the operation of the global minimum tax and provide safe harbours, simplifications and coexistence mechanisms with certain national minimum-tax regimes.

In Working Paper No. 3 published by CIAT, we argued that the Side-by-Side package should not be viewed as a political concession to the United States of America, but rather as a mechanism of "regulated coexistence" between the GloBE regime and certain pre-existing domestic regimes. Under this reading, the Side-by-Side package operates as a kind of "tax peace treaty": it seeks to avoid the fragmentation of global trade and tax retaliation measures, while recognizing the functional equivalence of regimes such as GILTI and CAMT in relation to the objectives of the global minimum tax. This characterization reinforces the central thesis of this paper: the controversy surrounding the UTPR has not been resolved exclusively through legal or treaty-based means, but rather through a political-administrative solution that reduces the risk of conflict without fully eliminating the questions of legality under tax treaties.

The most relevant technical contribution for the UTPR analysis is the distinction between three levels of relief. First, the SbS Safe Harbour may result in the Top-up Tax being treated as zero, for IIR and UTPR purposes, for groups whose ultimate parent entity is located in a jurisdiction with a qualified Side-by-Side regime. Second, the UPE Safe Harbour protects only the profits generated in the parent jurisdiction from foreign UTPR, but does not necessarily protect the group's foreign subsidiaries. Third, none of these forms of relief eliminates the application of QDMTTs, which continue to operate with local priority and must be computed without the "push-down" of CFC taxes. This architecture shows that the Side-by-Side Package reduces UTPR exposure in certain cases, but does not turn Pillar Two into a general exemption regime nor suppress the location of the minimum tax in source jurisdictions.

From the perspective of tax treaties, this precision matters because it confirms that Side-by-Side does not directly amend treaties or introduce a treaty clause expressly authorizing the UTPR. Rather, it displaces part of the conflict into an architecture of safe harbours, functional equivalences, administrative elections, transitional periods and future review. The package may therefore reduce the practical exposure of certain groups — especially those with parents in qualified jurisdictions — but it does not resolve the underlying legal question in older treaties, treaties without a saving clause or structures in which the UTPR is applied through permanent establishments.

In any event, this conclusion should be formulated carefully. Side-by-Side does not by itself prove that the UTPR is legally invalid or incompatible, in the abstract, with all tax treaties. Rather, it shows that global implementation required a political stabilization that the original design could not ensure on its own. The package should therefore not be read as a confession of illegality, but as an institutional response to the difficulty of sustaining a global backstop rule in the face of tax sovereignty objections, U.S. resistance and structural differences among national minimum-tax regimes.

The temporal dimension also matters. Side-by-Side operates from 2026 onward, so fiscal years 2024 and 2025 may preserve a specific risk space for groups that do not have effective protection under transitional safe harbours. This transition confirms that the legal debate over the UTPR does not disappear with the Side-by-Side Package; it is conditioned by effective dates, elections, domestic implementation and the review scheduled for 2029.

This political evolution has two readings. On the one hand, it may be interpreted as evidence that the UTPR required adjustments to preserve the stability of the system. On the other hand, it may also be viewed as an indirect confirmation of the political and legal fragility of the mechanism: if the rule were treaty-neutral and politically uncontested, it would not have been necessary to design a parallel exclusion solution for a central category of multinational groups.

From the U.S. perspective, the problem was not only the potential amount of UTPR at stake, but the institutional precedent: allowing foreign jurisdictions to capture top-up tax on U.S. groups through a rule that Congress had not incorporated into domestic law.

14.1. Side-by-Side, Structural Fragmentation and the Loss of UTPR Neutrality

The Side-by-Side package should not be understood as a political concession to the United States of America, nor as a mere technical coordination solution. Its significance is deeper: it introduces a form of structural fragmentation within the global minimum tax. The UTPR was designed as a backstop rule with an aspiration of mathematical neutrality: if the top-up tax was not collected through a QDMTT or a qualified IIR, UTPR jurisdictions could collect the remaining amount pursuant to a formula based on employees and tangible assets. The Side-by-Side package alters that logic by incorporating safe harbours, exclusions, and coexistence regimes that filter the application of the rule according to the political and technical status of certain jurisdictions.

From this perspective, the UTPR ceases to operate as a purely automatic mechanism for the residual allocation of top-up tax. This does not necessarily eliminate the rationale of Pillar Two, but it does weaken the idea that the system operates under uniform neutrality. The practical application of the UTPR comes to depend not only on technical variables — effective rate, excess profit, employees and assets — but also on the negotiating power of the jurisdictions involved.

This conclusion is particularly relevant in the case of the United States. Side-by-Side recognizes, directly or indirectly, that national regimes such as GILTI or CAMT may receive functionally equivalent or protected treatment within the global minimum tax architecture, even though they do not mechanically replicate the GloBE rules. The consequence is that groups parented in certain jurisdictions may be fully or partially protected from the UTPR, while groups located in jurisdictions without comparable political leverage may remain exposed to the full application of the rule.

In terms of tax political economy, the Side-by-Side Package reveals that the global minimum tax is not merely a technical system of tax coordination. It also reflects political balances among jurisdictions with different negotiating capacity. The backstop rule does not operate in a vacuum; it operates within an international structure in which some jurisdictions can negotiate exceptions, deferrals or equivalences, while others must simply adapt their domestic legislation to preserve revenue or prevent top-up tax from being collected by third States.

This reinforces the critical thesis of this paper. If the UTPR already raised treaty concerns by allowing one jurisdiction to collect top-up tax on profits generated in another jurisdiction, Side-by-Side adds another layer of complexity: the rule not only strains tax treaties, it also ceases to apply homogeneously. The controversy is no longer limited to whether the UTPR has a sufficient connecting factor; it also includes whether that connecting factor will be applied neutrally or filtered through subsequent political arrangements.

The notion of a "tax peace treaty" is therefore useful, provided it is understood as an analytical metaphor and not as a formal legal category. Side-by-Side politically stabilizes the system, but at the price of recognizing that the original uniformity of Pillar Two was difficult to sustain in the face of U.S. resistance and the tensions between tax sovereignty, competitiveness and multilateral coordination. In that sense, it does not destroy Pillar Two, but it changes its nature: from a supposedly uniform global architecture to a regime of regulated coexistence, with zones of exception, differentiated recognition and managed fragmentation.

The practical conclusion is that Side-by-Side reduces certain immediate conflict risks, especially for groups with parent companies in qualified jurisdictions, but it does not resolve the underlying legal objection. On the contrary, it confirms that the UTPR needed to be politically modulated in order to survive. That modulation may make it more viable diplomatically, but it also shows that the application of the global minimum tax will inevitably be conditioned by the negotiating capacity of the major jurisdictions.

15. The European Judicial Front: the Belgian Preliminary Reference before the CJEU

The debate is no longer purely academic. On 17 July 2025, the Belgian Constitutional Court decided to refer a preliminary question to the Court of Justice of the European Union concerning the validity of the UTPR provisions of Directive (EU) 2022/2523. The challenge was brought by the American Free Enterprise Chamber of Commerce against provisions of the Belgian minimum-tax law.

The preliminary question asks, in essence, whether Articles 12 to 14 of the Directive are compatible with rights and principles of EU law, including equality and non-discrimination, the right to property, freedom of establishment, freedom to provide services, legal certainty and the principle of territorial taxation, insofar as they require constituent entities established in the European Union to bear UTPR tax calculated on undertaxed profits of other group entities located in another jurisdiction.

For purposes of this paper, the litigation confirms that the principal controversy is not merely one of GloBE accounting technique, but of the legal legitimacy of the connecting factor. The outcome before the CJEU will not necessarily resolve all bilateral treaty issues, but it may significantly influence the European acceptance of the UTPR and the litigation strategy of multinational groups.

15.1. Direct and Analogous Litigation on Pillar Two, the UTPR and Minimum Taxes

Comparative jurisprudential research helps clarify the scope of the judicial front. The Belgian case is pioneering because it directly challenges the validity of the UTPR mechanism incorporated into Directive (EU) 2022/2523.

By contrast, the other cases available so far are functional analogues and should be classified according to their proximity: (i) procedural litigation against the Minimum Tax Directive; (ii) CFC and foreign-income attribution precedents; (iii) decisions on treaty override and the domestic hierarchy of treaties; (iv) decisions on domestic minimum taxes; and (v) still unresolved investment arbitration hypotheses.

The expression "functional analogies" or "functional analogues" is used in this paper to refer to precedents that do not deal directly with the UTPR, but that address structurally similar legal problems. Their value is not that they resolve the legality of the UTPR, but that they show how courts have reasoned in comparable situations: domestic attribution of foreign income, CFC rules, treaty override, non-discrimination, proportionality, the principle of territorial taxation or minimum taxation.

These analogies make it possible to build a risk matrix in the absence of direct case law. They must, however, be used with caution. Schneider Electric, Rubis, Cadbury Schweppes, X GmbH, Moore, Loblaw and the treaty override precedents do not decide whether the UTPR is compatible with tax treaties. Their utility is different: they help anticipate whether a court might privilege the legal form of the charge — that is, a burden imposed on a local entity — or the economic substance of the transaction — that is, a tax calculated by reference to foreign profits of entities that are not taxpayers in the jurisdiction applying the rule.

Functional analogies therefore do not replace the analysis of the concrete treaty, the domestic design of the UTPR and the competent forum. Rather, they help organize the debate and avoid two opposite errors: asserting that the UTPR is automatically invalid because critical precedents exist on foreign income, or maintaining that it is automatically compatible because other courts have accepted CFC rules or domestic mechanisms attributing undistributed income.

The possible Fugro precedent should be treated cautiously and only as a procedural precedent on standing in direct actions against the Minimum Tax Directive. Its utility for this paper is limited: it illustrates the difficulties of direct access to judicial review of the Directive, but it does not decide the substantive compatibility of Pillar Two with primary EU law or with tax treaties.

Colombian decisions on the minimum tax rate are useful as references on the domestic constitutionality of minimum-tax formulae based on financial or adjusted profit, especially regarding ability to pay, tax equity and the legislature's margin of appreciation. Their value for the UTPR analysis is limited, however: they concern a local minimum tax, not an extraterritorial allocation rule for top-up tax calculated on the profits of foreign group entities. These precedents therefore contribute to comparative analysis of the constitutionality of minimum taxes, but they do not resolve the treaty legality of the UTPR, the IIR, the QDMTT or their interaction with tax treaties.

With respect to bilateral investment treaties and international arbitration, the most relevant point is not the existence of decided awards — which do not yet appear to exist in relation to Pillar Two — but the conceptual risk. A QDMTT, an IIR or a UTPR may place pressure on tax incentives, stabilization clauses or the investor's legitimate expectations. However, the analysis of economic damage is complex: if a source State does not collect the minimum tax because the QDMTT is invalid, the same top-up tax may be collected by the parent jurisdiction through the IIR or by other States through the UTPR. This reduces, although it does not eliminate, the economic appeal of certain arbitration claims.

Category	Examples	Usefulness for the paper	Editorial caveat
Direct UTPR case **Level 1**	Belgium / Cour constitutionnelle → CJEU, C-519/25	Principal direct judicial front concerning the validity of the UTPR.	Pending a judgment on the merits from the CJEU.
Direct action against the Directive **Level 3**	The possible Fugro precedent should, for now, be kept only as a procedural reference pending full official identification. It should not be presented as substantive precedent on the compatibility of the UTPR with primary EU law or tax treaties.	Useful to explain standing/admissibility and the limits of direct litigation.	Verify official identification before a closed citation; it does not resolve the merits.
CFC / treaty compatibility **Level 2**	Schneider Electric, Rubis and European CFC precedents	Risk map between substantive and formal readings.	Analogies, not UTPR cases.
EU freedoms / territoriality **Level 3**	Cadbury, Columbus, X GmbH	Proportionality, justification, substance and foreign low taxation.	Not pure tax treaty cases.

To turn this analysis into a useful advisory and litigation tool, each case should be evaluated through the following matrix:

Variable	Key question	Effect on UTPR risk
Article 2	Is the UTPR a covered or substantially similar tax?	If the answer is yes, risks under distributive articles increase.
Saving clause	Does the treaty expressly preserve the power to tax residents?	A saving clause strengthens the formal defence for resident companies.
Type of taxpayer	Does the charge fall on a resident company or on a permanent establishment?	Risk is higher in permanent establishment cases.
Comparator	How is the comparator defined under Article 24?	Selection of the comparator may decide the non-discrimination objection.
Domestic hierarchy	Does the constitution allow treaty override or give priority to the tax treaty?	Determines whether the treaty defence can block domestic law.
Forum	Will the decision be made by a domestic court, competent authority, arbitrator or the CJEU?	Different fora may privilege form, substance, EU law or international law.

15.2. Complementary Jurisprudential Matrix

For practical purposes, the treaty matrix should be complemented by a jurisprudential matrix. If the case resembles Schneider Electric, treaty risk increases because the forum looks to the substance of foreign income or business profits protected by Article 7 of the treaty.

If it resembles Rubis, the debate shifts to the domestic characterization of income and the possibility of locating it within a residual clause.

If it resembles Cadbury or X GmbH, the axis will be proportionality, justification and the presence or absence of economic substance.

If it resembles the German treaty override precedent, the conflict may be resolved domestically in favour of the later statute, without closing the debate under international law.

This matrix helps avoid two opposite errors: presenting the UTPR as automatically illegal solely because it touches foreign profits, or presenting it as automatically valid because it formally falls on a local constituent entity.

The strongest position remains intermediate and critical: the UTPR is defensible as global public policy, but its treaty compatibility will depend on the characterization of the tax, the treaty text, the type of taxpayer, the forum and the willingness of the judge to look at economic substance over legal form.

16. The “Domino Effect” of the Belgian Litigation: Risk of Asymmetric Fracture within the Inclusive Framework

The Belgian preliminary reference before the Court of Justice of the European Union is not only relevant to the internal validity of Directive (EU) 2022/2523. Its systemic importance lies in the fact that it tests the legal legitimacy of the connecting factor used by the UTPR: the possibility of imposing on a constituent entity located in one jurisdiction a tax burden calculated on undertaxed profits earned by other group entities in another jurisdiction.

If the CJEU were to hold that Articles 12 to 14 of the Directive infringe primary EU law — for example, by disproportionately affecting freedom of establishment, the right to property, legal certainty, equal treatment or the principle of territorial taxation — the impact would not be limited to the Belgian case. It could produce a domino effect within the European system for implementing Pillar Two, because the UTPR would cease to operate as a fully available backstop rule in the European Union.

The geopolitical consequence would be significant: the European Union, one of the first regions to transform the political agreement of the Inclusive Framework into a regional legal obligation, could be limited or even prevented from applying one of the most sensitive mechanisms in the GloBE design. At the same time, jurisdictions outside the Union could continue applying their own versions of the UTPR or equivalent rules. The result would be an asymmetric fracture: the same global standard would produce different consequences depending on the legal bloc implementing it.

That asymmetry would affect one of Pillar Two’s central assumptions: that multilateral coordination can work through parallel domestic implementation even without simultaneous amendment of tax treaties. If a central economic bloc such as the European Union could not apply the UTPR because of restrictions arising from its own supranational constitutional law, the system’s claimed uniformity would be weakened. The UTPR would cease to be a homogeneous global backstop rule and would become a tool available only in certain jurisdictions, depending on each legal order’s constitutional, treaty or supranational limits.

The issue would be especially sensitive because the UTPR performs a systemic pressure function. Its existence encourages low-tax jurisdictions to adopt a QDMTT and parent jurisdictions to apply a qualified IIR. If the UTPR cannot operate in the European Union, that pressure is partially reduced and the balance between implementing and non-implementing jurisdictions may be altered. This could generate regulatory arbitrage opportunities, greater complexity in safe harbour coordination and an even greater dependence on political solutions such as the Side-by-Side Package.

However, the scope of an adverse ruling would depend on the technique used by the CJEU. A broad judgment structurally questioning the UTPR’s connecting factor would have a much greater systemic impact than a judgment limited to specific issues of proportionality, legislative design, lack of safeguards or application to particular situations. In the latter scenario, the European Union could attempt to correct the rule through regulatory adjustments, exceptions or proportionality mechanisms, without necessarily abandoning the UTPR altogether.

From a tax treaty perspective, an adverse CJEU judgment would not by itself resolve the compatibility of the UTPR with bilateral tax treaties. It would, however, have significant persuasive effect. If the CJEU concluded that the UTPR lacks a sufficiently legitimate connecting factor under EU law, that reasoning could be used by taxpayers in domestic or treaty litigation to reinforce the thesis that the rule operates, in substance, as taxation of foreign profits not attributable to the local constituent entity.

In this sense, the Belgian litigation may become a turning point. If the UTPR is upheld, the formal-compatibility argument will gain force, especially for States that argue that the rule taxes only the local constituent entity. If, by contrast, the UTPR is invalidated in whole or in part, the Inclusive Framework will face a structural-coherence problem: its backstop rule could operate outside the European Union but not within it, precisely in one of the markets that most quickly incorporated Pillar Two into positive law.

The Belgian case should therefore not be analysed merely as a European dispute. It should be understood as an institutional stress test for Pillar Two. The underlying question is not only whether the UTPR is compatible with a European directive, but whether the global minimum tax can preserve its claim to uniformity when its backstop mechanisms collide with constitutional, supranational or treaty limits in central jurisdictions of the system.

Ultimately, the possible “domino effect” of the Belgian litigation confirms the central thesis of this paper: the UTPR is not simply a calculation rule for the global minimum tax, but a test of legitimacy for the new tax connecting factor that Pillar Two seeks to introduce into international tax law.

For that reason, the UTPR problem is not merely technical. It is institutional.

Conclusion: Contested Legality, Tax Sovereignty and Legal Certainty

The UTPR represents a profound evolution of the international tax system. From a public-policy perspective, it can be defended as a necessary mechanism to protect the integrity of the global minimum tax and reduce incentives for aggressive tax competition. From the perspective of tax treaties, however, its legality cannot be regarded as settled.

The most robust thesis is not that the UTPR is illegal under all treaties, nor that it is fully compatible in all cases. The strongest thesis is that the UTPR lies in a zone of contested legality, whose treaty validity depends on the legal characterization of the tax, the specific treaty text, the existence or absence of a saving clause, the type of local taxpayer used as the connecting factor and the formal or substantive approach adopted by the deciding forum.

If the forum privileges legal form, especially where the UTPR is applied to a resident company and a saving clause exists, the compatibility defence has significant arguments. If the forum privileges economic substance, especially in cases involving permanent establishments or treaties without a saving clause, the critical objection gains force: the UTPR may be viewed as the collection of tax on foreign profits through a substitute local taxpayer.

The cleanest solution from the perspective of legality, tax sovereignty and legal certainty would be an express treaty adaptation. This does not deny the political desirability of the global minimum tax; it simply recognizes that such a significant redistribution of taxing rights should be achieved through transparent treaty instruments, not through domestic characterizations that pre-existing treaties did not expressly contemplate.

The real question raised by the UTPR is not whether the global minimum tax is desirable as a matter of public policy, but whether an architecture of soft law, administrative guidance and coordinated domestic implementation can alter, without express amendment, the treaty balance built over decades among residence, source, permanent establishment, separate entity and non-discrimination.

Methodological Note

The official sources of the OECD, the European Union and the courts cited were verified in public repositories. With respect to scholarship published in specialized journals, at least the public existence of the document, authorship, title, year and place of publication was verified through official repositories, SSRN, institutional websites, Kluwer, Tax Notes, IBFD, university repositories or public academic libraries.

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Annex: Glossary of Acronyms and Abbreviations

This glossary lists the acronyms and abbreviations used throughout the paper. It includes their meaning and a brief explanation in English to facilitate technical reading of the document.

Acronym / abbreviation	Meaning	Use in the paper
AFECC	American Free Enterprise Chamber of Commerce	Organization that brought the Belgian challenge against minimum-tax law provisions connected with the UTPR.
ALP	Arm's Length Principle	Transfer pricing standard requiring transactions between related parties to be priced as if carried out between independent parties.
BEPS	Base Erosion and Profit Shifting	OECD/G20 project against base erosion and profit shifting.
BIT / TBI	Bilateral Investment Treaty	Treaty protecting foreign investments, which may include fair and equitable treatment, stabilization or protection against expropriation.
BvG / BVerfG	Bundesverfassungsgericht	Federal Constitutional Court of Germany.
CAMT	Corporate Alternative Minimum Tax	U.S. corporate alternative minimum tax, relevant to the discussion of functional equivalence with the global minimum tax.
CFC	Controlled Foreign Corporation	Regime allowing certain foreign income to be attributed to a resident shareholder.
CDI / Tax treaty	Convention for the avoidance of double taxation	Bilateral treaty allocating taxing rights between two States and establishing mechanisms to avoid double taxation and prevent tax evasion or fraud.
CIAT	Inter-American Center of Tax Administrations	International organization specialized in tax administration.
VCLT / CVDT	Vienna Convention on the Law of Treaties	International treaty setting out general rules on interpretation, performance and effects of treaties.
U.S. / USA	United States of America	Central jurisdiction in the political debate on Pillar Two, GILTI, CAMT, the UTPR and Side-by-Side.
PE / EP	Permanent Establishment	Sufficient business presence in a State allowing profits to be attributed and taxed under a tax treaty.
FET	Fair and Equitable Treatment	Investment-treaty standard that may become relevant in disputes arising from tax changes.
G7	Group of Seven	Political forum consisting of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States, with the European Union as an institutional participant.
GILTI	Global Intangible Low-Taxed Income	U.S. regime taxing certain low-taxed foreign income of CFCs owned by U.S. shareholders.
GloBE	Global Anti-Base Erosion Rules	Pillar Two rules designed to ensure a 15% minimum effective tax rate for in-scope multinational groups.
MNE Group	Multinational Enterprise Group	Business group with entities or permanent establishments in more than one jurisdiction.
IIR	Income Inclusion Rule	Rule allowing the parent jurisdiction to collect top-up tax in respect of low-taxed income of group entities.

Acronym / abbreviation	Meaning	Use in the paper
Inclusive Framework	OECD/G20 Inclusive Framework on BEPS	Framework of jurisdictions negotiating and coordinating international BEPS standards, including Pillar Two.
IRC	Internal Revenue Code	Federal tax code of the United States.
IRS	Internal Revenue Service	Federal tax administration of the United States.
MLI	Multilateral Instrument	Multilateral instrument used in the BEPS project to modify bilateral tax treaties simultaneously.
OECD	Organisation for Economic Co-operation and Development	International organization leading, together with the G20, technical development of the BEPS project and Pillar Two.
Pillar Two	Second pillar of the OECD/G20 international tax agreement	Normative architecture seeking to ensure a global minimum tax for large multinational groups.
QDMTT	Qualified Domestic Minimum Top-up Tax	Qualified domestic minimum tax allowing the source jurisdiction to collect priority top-up tax arising in its territory.
SbS	Side-by-Side	Package or approach of coexistence between the GloBE regime and certain national minimum-tax regimes, particularly relevant to the United States.
TCJA	Tax Cuts and Jobs Act	U.S. federal tax reform of 2017, relevant to understanding the origin of GILTI and other elements of the U.S. international tax system.
CJEU / TJUE	Court of Justice of the European Union	EU court competent to interpret EU law and resolve preliminary references.
Top-up tax	Additional tax needed to bring effective taxation to the minimum required under the GloBE rules.	Used throughout the paper to describe the residual tax collected under QDMTT, IIR or UTPR mechanisms.
EU / UE	European Union	Regional bloc that implemented the global minimum tax through Directive (EU) 2022/2523.
UPE	Ultimate Parent Entity	Ultimate parent entity of the multinational group.
UPE Safe Harbour	Ultimate Parent Entity Safe Harbour	Side-by-Side mechanism that may protect certain profits of the parent jurisdiction from foreign UTPR.
UTPR	Undertaxed Profits Rule	Pillar Two backstop rule allocating residual top-up tax to implementing jurisdictions where the QDMTT or IIR does not capture the relevant amount.
VCLT	Vienna Convention on the Law of Treaties	English acronym for the Vienna Convention on the Law of Treaties.

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