KU LEUVEN

UTPR and the right to property in the ECHR

Prof. dr. Filip Debelva (KU Leuven)
Attorney-at-law (Deloitte Legal – *Lawyers*)

The right to property (Art. 1/1 ECHR) & the UTPR

General introduction

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. […]
(2) The preceding provisions shall not, however, in any way impair the right of a State to […] to **secure the payment of taxes** or other contributions or penalties.

- Relation to article 17 EU Charter
- Justification according to triple test
  - Lawfulness
  - Public interest
  - Proportionality
    - Individual and excessive burden – "fair balance"

The right to property (Art. 1/1 ECHR) & the UTPR

Proportionality analysis

- Relevant criteria for assessing “fair balance”
  - Legal uncertainty
    - Very complex rules and much is still unclear (good governance requirement)
    - Even if rules are clear: *minimal foreseeability* of the effects of the rules is required (Who should pay the tax within the jurisdiction, application depends on taxes paid by low taxed constituent entity)?
    - Chronic uncertainty (cf. *Intersplav*)
    - However: subjective analysis – status of MNE has implications (cf. *Yukos*)
  - Discriminatory character
    - Combination with article 14 ECHR
    - Comparison to other group entities in the UTPR jurisdiction?
    - Comparison to non-group entities in the UTPR jurisdiction who are not subject to the globe rules?
    - However: wide margin of appreciation.

The right to property (Art. 1/1 ECHR) & the UTPR
Proportionality analysis

- Relevant criteria
  - Tax burden
    - Tax of 15% is low - but calculated on low-taxed entity's profits and imposed on the entity that is subject to the UTPR ("UTP(ayo)R" ☺)
    - No other means of subsistence / Principle of *minimum vitale*: can the taxpayer continue his activities or still make a profit? (*Orion-Břeclav, S.R.O.*)
    - Selling assets in order to pay the tax (*Imbert de Tremiolles*)
    - Depending on qualification as large enterprise
    - Assessment at group level or entity level?

- Conclusion: Holistic analysis will be conducted by the ECtHR - several criteria point could contribute towards violation of property rights

- Compensation by ECtHR?
    - Sum awarded 'reasonably related' to value of property lost
    - Court hesitant to make specific calculations in case of disproportionate tax levies

The right to property (Art. 1/1 ECHR) & the UTPR

Lawfulness criterion

- Different possibilities
  - Lack of clarity or consistency
    - Cf. proportionality analysis
  - Breach of a rule
    - Customary rules, e.g. the nexus requirement (see slides P. Hongler)
- Lawfulness analysis suffices for determining breach of property rights
- Proportionality analysis not necessary
- Procedure before ECtHR: compensation = full restitution

Thanks for your attention!


ARTICLE

Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective*

Filip Debelva** & Luc De Broe***

This article discusses potential jurisdictional conflicts between the Pillar 2 rules and international customary law, taking into account potential frictions with tax treaty law and European Union law. In addition, the authors assess whether the Pillar 2 rules can be justified in the same way as controlled foreign company (CFC) rules, thereby referring to the principle of personality. Part three of the article evaluates how conflicts between the Pillar 2 rules and international law are to be resolved. The authors conclude by providing potential solutions to resolve jurisdictional conflicts.

Keywords: Pillar 2, IIR, UTPR, international customary law, EU law, tax treaties, jurisdiction, nexus, VCLT.

1 INTRODUCTION

Any taxation that is based on the Pillar 2 rules will be the result of a domestic provision of tax law that implements the Pillar 2 framework, either on the basis of the OECD/G20 GloBE Model Rules[1] or because of the obligation of EU Member States to transpose an (future) EU Directive into domestic law.[2] This implies that a Pillar 2 tax measure is still to be regarded as a purely domestic tax measure. As with any other domestic tax measure, taxation arising from the Pillar 2 framework should comply with the existing body of rules limiting the exercise of domestic tax jurisdiction such as rules of international customary law or the distributive rules contained within double tax treaties. In this contribution, the authors discuss whether the income inclusion rule (IIR) and the undertaxed profits rule (UTPR) of the Pillar 2 framework are compliant with international customary law. As in the European Union, the Pillar 2 framework will be incorporated in an EU Directive, therefore attention will be paid to the EU law dimension of this discussion.[3]

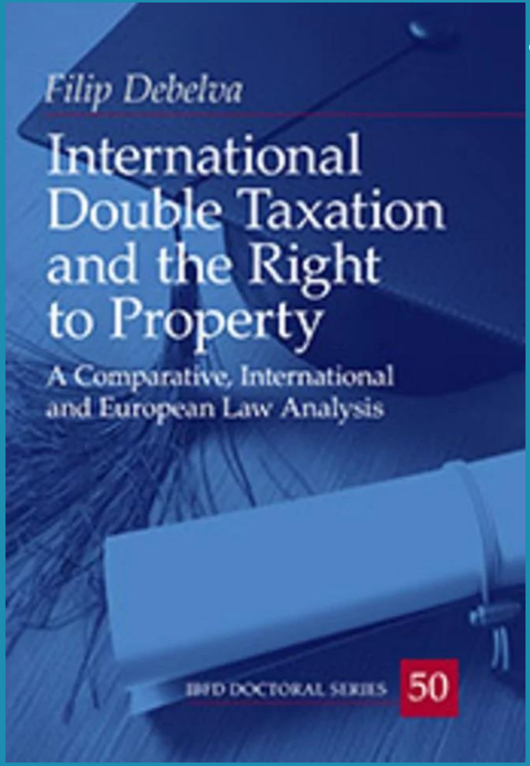
2 DOES THE PILLAR 2 FRAMEWORK DEVIATE FROM THE (CURRENT) NEXUS RULE?

In international tax doctrine, it is generally accepted that the principle of a 'nexus' must be satisfied in order for a state to exercise its tax jurisdiction, i.e., that a certain (genuine or sufficient) connecting factor to a person or income exists when a state decides to exercise its tax jurisdiction. This rule finds its origins in public international law rules on jurisdiction and has attained the status of international customary law.[4] In the area of tax law, however, important consequences are attached to the type of connecting factor that is called upon to justify taxation (i.e., residence jurisdiction justifies unlimited tax liability on worldwide income while source jurisdiction implies a limited tax liability on income sourced in the country levying the tax). It has been submitted that these secondary consequences of connecting factors could also qualify as rules of international customary law.[5]

The main rationale behind the nexus requirement is to achieve equity in international taxation. Indeed, in legal

Notes

898



- Further details:
  - UTPR and nexus requirements: https://kluwerlawonline.com/JournalArticle/Intertax/50.12/TAXI2022098
  - Right to property and taxation: https://www.ibfd.org/shop/book/international-double-taxation-and-right-property

Contact:
Prof. Dr. F. Debelva
KU Leuven – Tax Law Institute
filip.debelva@kuleuven.be