



University of St.Gallen

Institute of Public Finance, Fiscal Law
and Law and Economics

UTPR and International Law

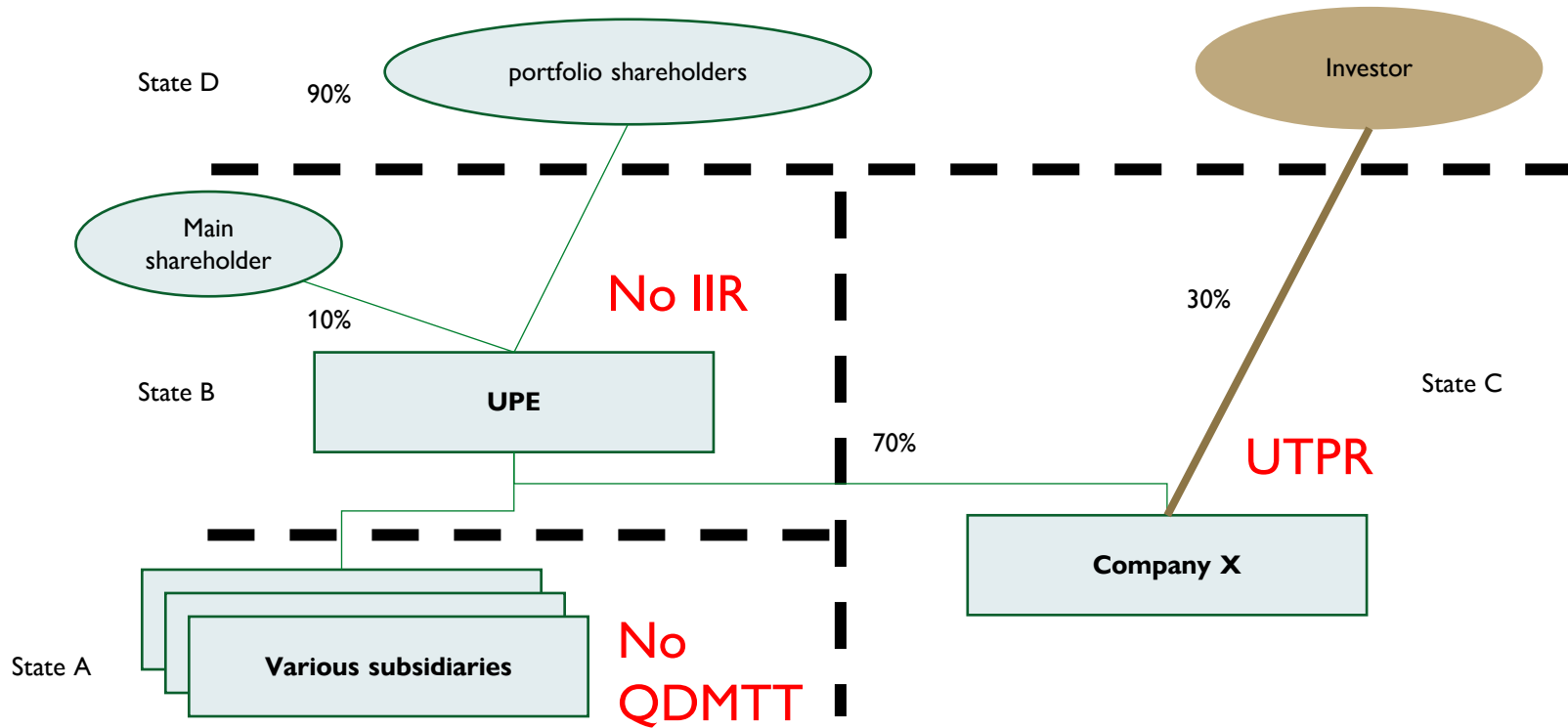
Online, 31 March 2023

Agenda

Programme

13:00	Welcome	
13:05	Pillar 2- UTPR and international law obligations	Peter Hongler
13:25	UTPR and infringement of tax treaties	Vikram Chand
13:45	UTPR and tax treaties	Suniel Pancham
13:55	Q&A	
14:05	UTPR and infringement of the right to property in the ECHR	Filip Debelva
14:25	UTPR and infringement of bilateral investment treaties	Julien Chaisse
14:45	Q&A	
15:15	Pillar 2 – EU Extraterritorial regulatory power	Irma Mosquera Valderrama
15:25	Q&A	
15:30	Closing	

Facts



	Country A	Country B	Country C
Adjusted Covered Taxes	1'000	200	20
GloBe Income	10'000	1'000	100
Substance-based income exclusion	0	0	0
Jurisdictional ETR	10%	20%	20%
Top Up-Tax	0 (no QDMTT)	0 (no IIR)	500 (UTPR)

Top Up-Tax equals five times the GloBE income of Company X and twentyfive times its Adjusted Covered Taxes. The Model Rules do not contain a mandatory compensation mechanism.

Genuine Link Doctrine in Tax Matters

German case law

Federal Constitutional Court, 2 BvR 475/78, BVerfGE 63, 343.

In simplified terms:

- In order to levy taxes on a foreign resident person, there needs to be an appropriate link to a state (“sachgerechte Anknüpfung”)
- There needs to be a minimum justification for a tax claim

Indian case law

GVK Industries Ltd. & Anr. V. ITO

Within international law, the principles of strict territorial jurisdiction have been relaxed, in light of greater interdependencies, and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such **as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc.** However, one singular aspect of territoriality remains, and it was best stated by Justice H.V. Evatt: “The extent of extraterritorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. **But certainly no State attempts to exercise jurisdiction over matters, persons, or things with which it has absolutely no concern.**” (See Trustees Executors & Agency Co Ltd v. Federal Commissioner of Taxation (1933) 49 CLR. 220 at 239). The reasons are not too far to grasp. To claim the power to legislate with respect to extraterritorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self-determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and coequal sovereignty of nation-states. **Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.**

US case law

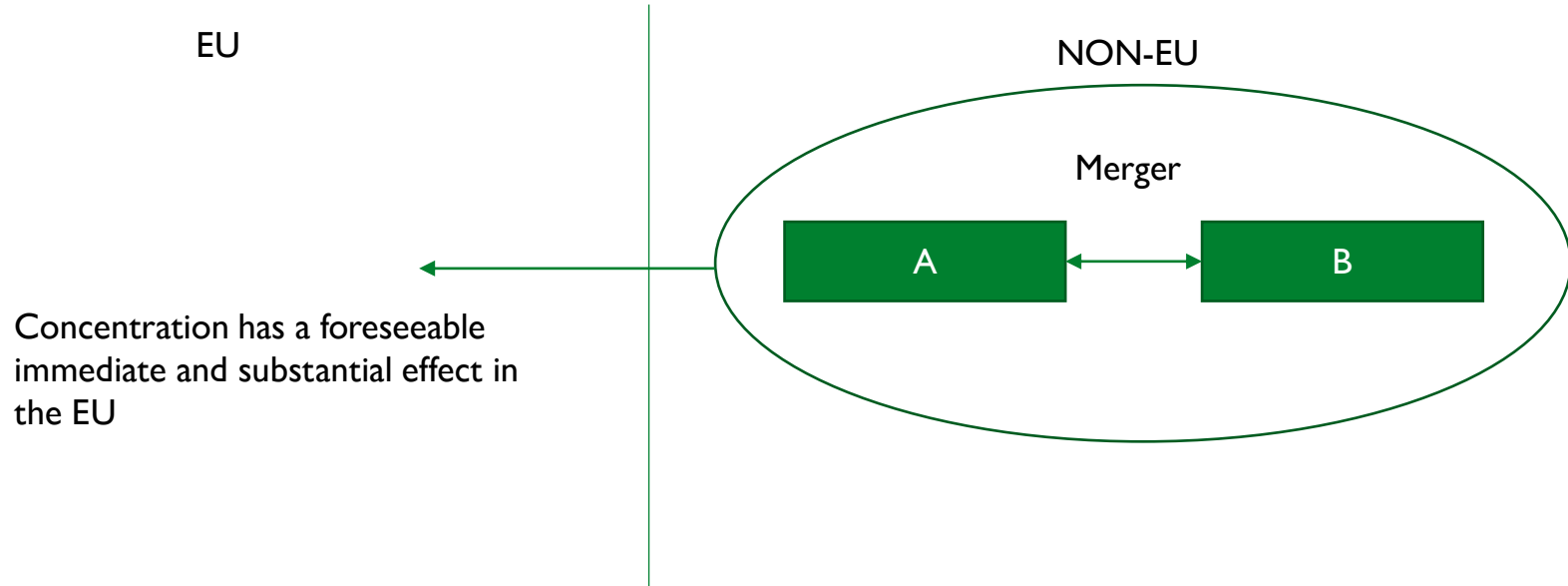
Cook v. Tait, collector of International Revenue, 265 U.S. 47 (1924)

In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal, the government having power to impose the tax.

What is a
sufficient
link?

What is a sufficient link?

Example 1: Antitrust law



What is a sufficient link?

Example 2: Corporate income tax law

EU

NON-EU

Merger

A

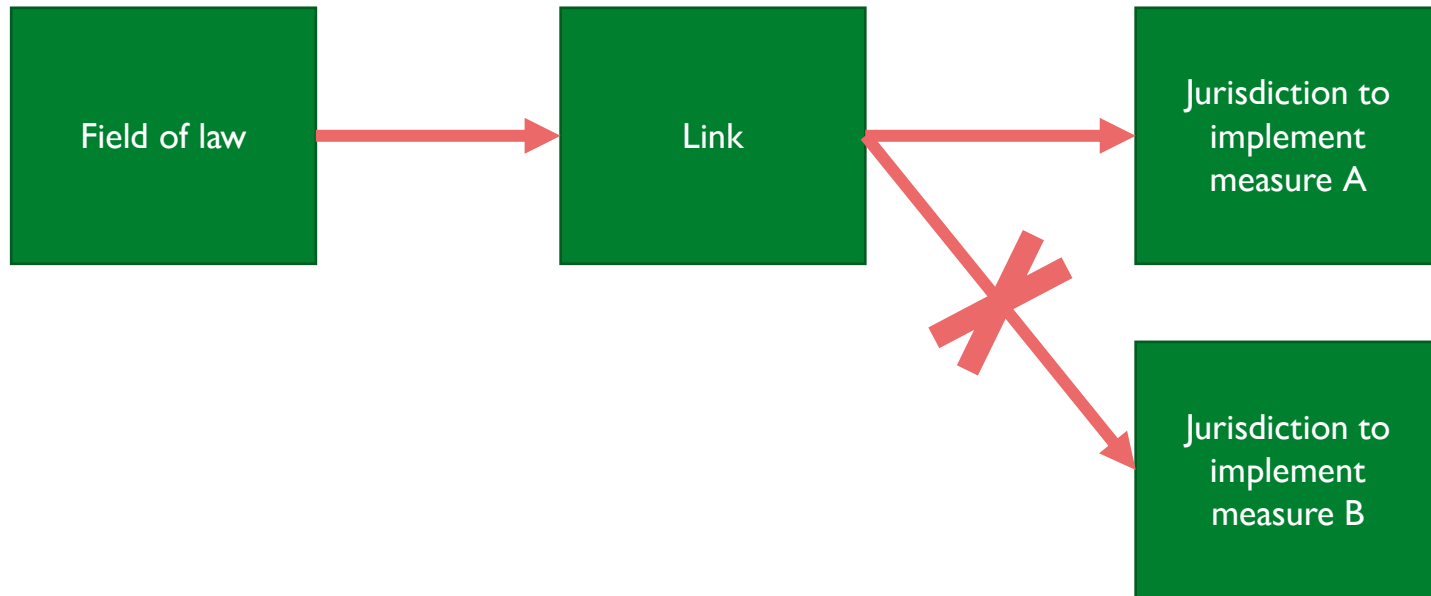
B

Concentration has a foreseeable immediate and substantial effect in the EU

Is «the EU» allowed to tax A and B as corporate tax payers?

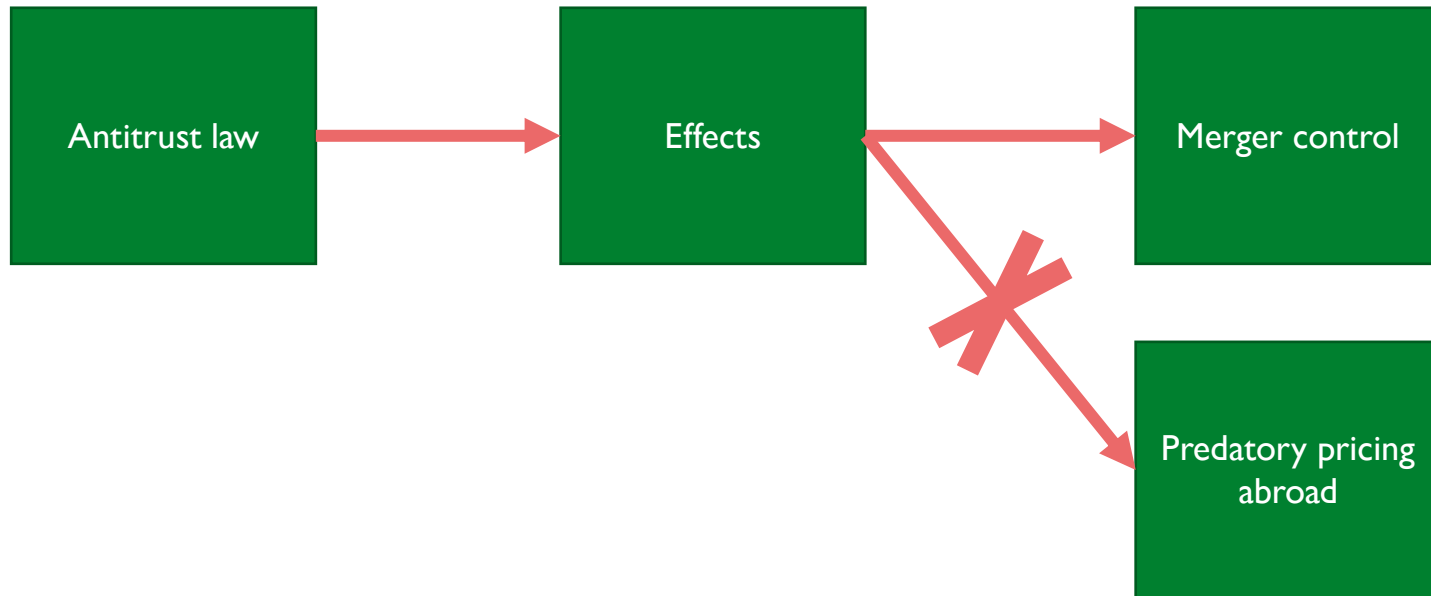
What is a sufficient link?

Each link justifies jurisdiction to a certain extent in a certain field of law



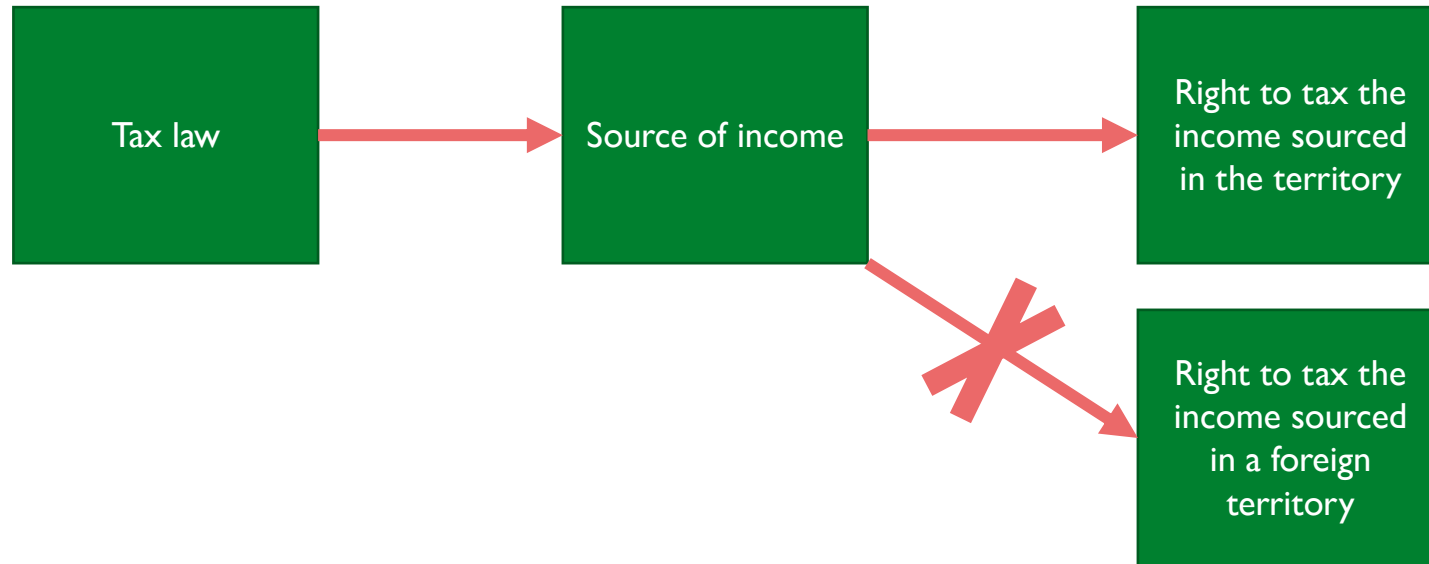
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What is the
legal base?
(of the genuine
link doctrine)

What is the legal base?

Two situations need to be distinguished:

- **Explicit legal base (constitutional or treaty base):**
 - Germany-USA Treaty of Friendship, Commerce and Navigation of 1954 (prohibition of extraterritorial taxation)
 - Constitutions?
- **No explicit legal base at an international level**
 - What is the base?

What is the legal base?

See Art. 38 ICJ Statute

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.



What is the legal base?

Various options:

1. Customary international law
 - *Opinio iuris*
 - State practice
2. (Treaty law)
3. Legal precondition of the international law regime

Zoom in: Opinio iuris

Simplified definition: States believe that a rule is accepted as law

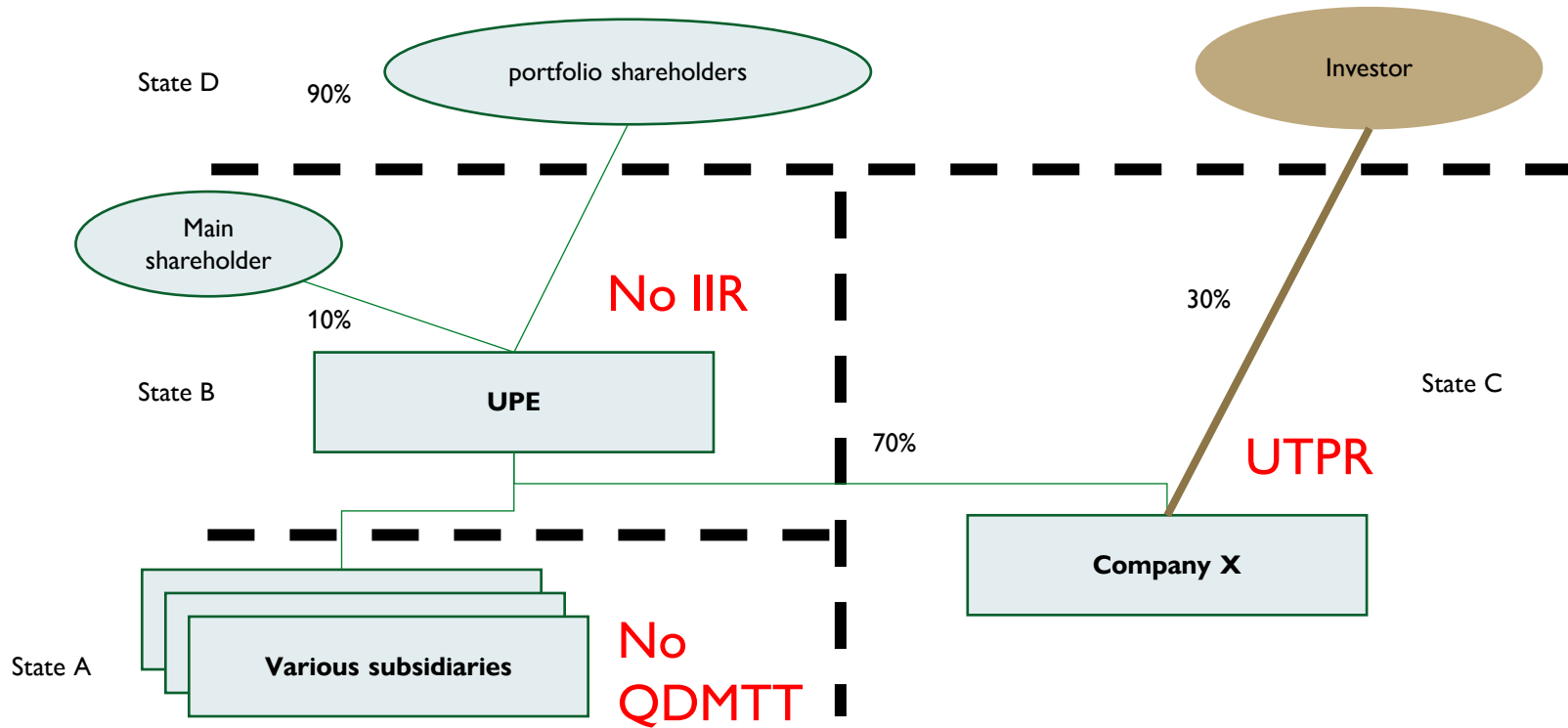
Three important obstacles to demonstrate that there is an opinio iuris regarding the UTPR:

- 1. There has not been a genuine agreement*
- 2. Is a state introducing an IIR, UTPR and/or a QDMTT because they believe that international law contains a rule allowing UTPRs or because they simply fear to lose tax revenue*
- 3. The reaction of states is decisive (eg due to the persistent objector doctrine). Strong opposition to the IIR, the UTPR and the QDMTT will demonstrate that states feel uncomfortable with developments in international tax policy*

My personal recommendation:

- 1. States that are unwilling or unable to implement a QDMTT and an IIR (or change their tax incentives) should publicly oppose the Model Rules and their extraterritorial effect*
- 2. Even states implementing an IIR and a QDMTT should publicly oppose the Model Rules if they only implement these due to the fear of losing tax revenue*

Conclusions

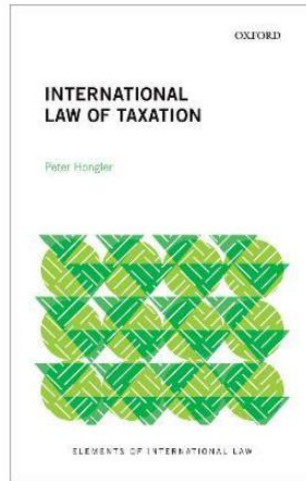
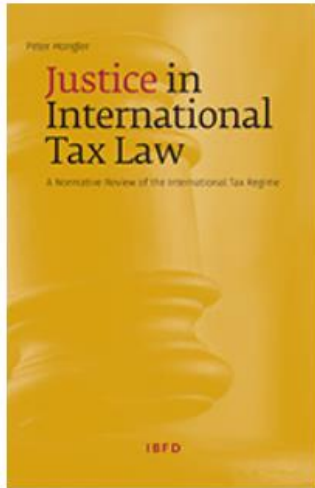


Conclusions

- **Lowest common denominator: no jurisdiction if there is no link!**
- **Whether a link is sufficient depends on (i) the extent of jurisdiction and (ii) the normative justification.**
- **The extent under Pillar 2 is very broad (application of UTPR leads to worldwide taxation!) and the link is very minimal (renting a hotel room can be sufficient to create worldwide taxation)**
- **The normative justification is challenging (anti-abuse measure? global problem? Ryngaert: cosmopolitan jurisdiction?)**
- **My personal opinion: The UTPR seems to be contrary to international law**
- **Enforceability depends on each jurisdiction and on whether the genuine link doctrine has become part customary international law or is understood as a legal precondition of the international tax regime.**
- **States not willing or not able to implement the UTPR should publicly oppose the Model Rules in order not to risk to be bound by custom**
- **Be careful what you wish for!**

Conclusions

For further details concerning my own opinion:



Blog: <https://globtaxgov.weblog.leidenuniv.nl/2021/11/12/is-the-pillar-2-agreement-infringing-international-law-obligations/>

Book: https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf

Many thanks!

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