

UTPR and international customary law

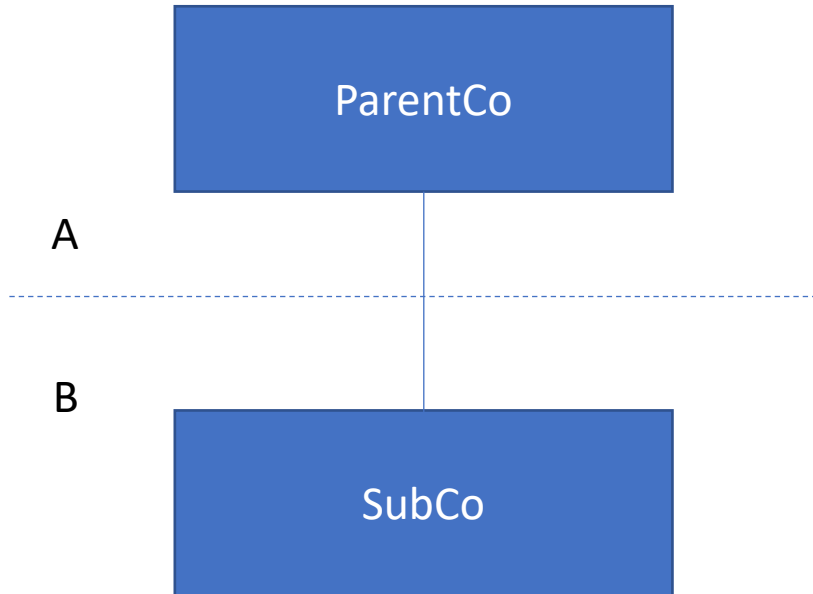
A Dutch perspective

Suniel Pancham

IIR and UTPR

- Are the IIR and UTPR essentially CFC rules from a customary law perspective?
- If so, are the IIR and UTPR compatible with tax treaties from a customary law perspective?

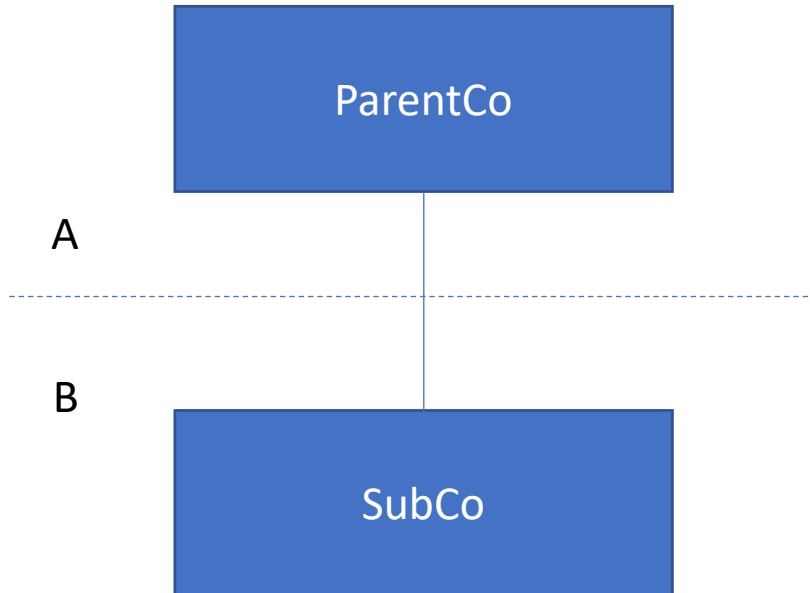
Art. 7 par 1 OECD Model



- Text does **not** provide clear **nexus rule**
 - State A is not restricted to tax SubCos profits
- State A restricted by customary law?
 - State A taxing SubCo profits **conflicts with customary law *nexus principle*** (“*main nexus principle*”)
- However, is there a ‘*special CFC nexus principle*’ in customary law stating that CFC rules compatible with tax treaties?
 - Nexus: no one-size-fits-all solution

IIR and UTPR under tax treaties

- ‘a *‘special CFC nexus principle’* in customary law stating that CFC rules compatible with tax treaties?



i) **State practice**

- A sufficient number of countries apply such principle
- It is about *practice*
- *Limited number of states*

- “... the majority of case law endorses the OECD view on the compatibility of CFC rules with tax treaties...” *Debelva / De Broe 2022*

ii) **Opinio juris**

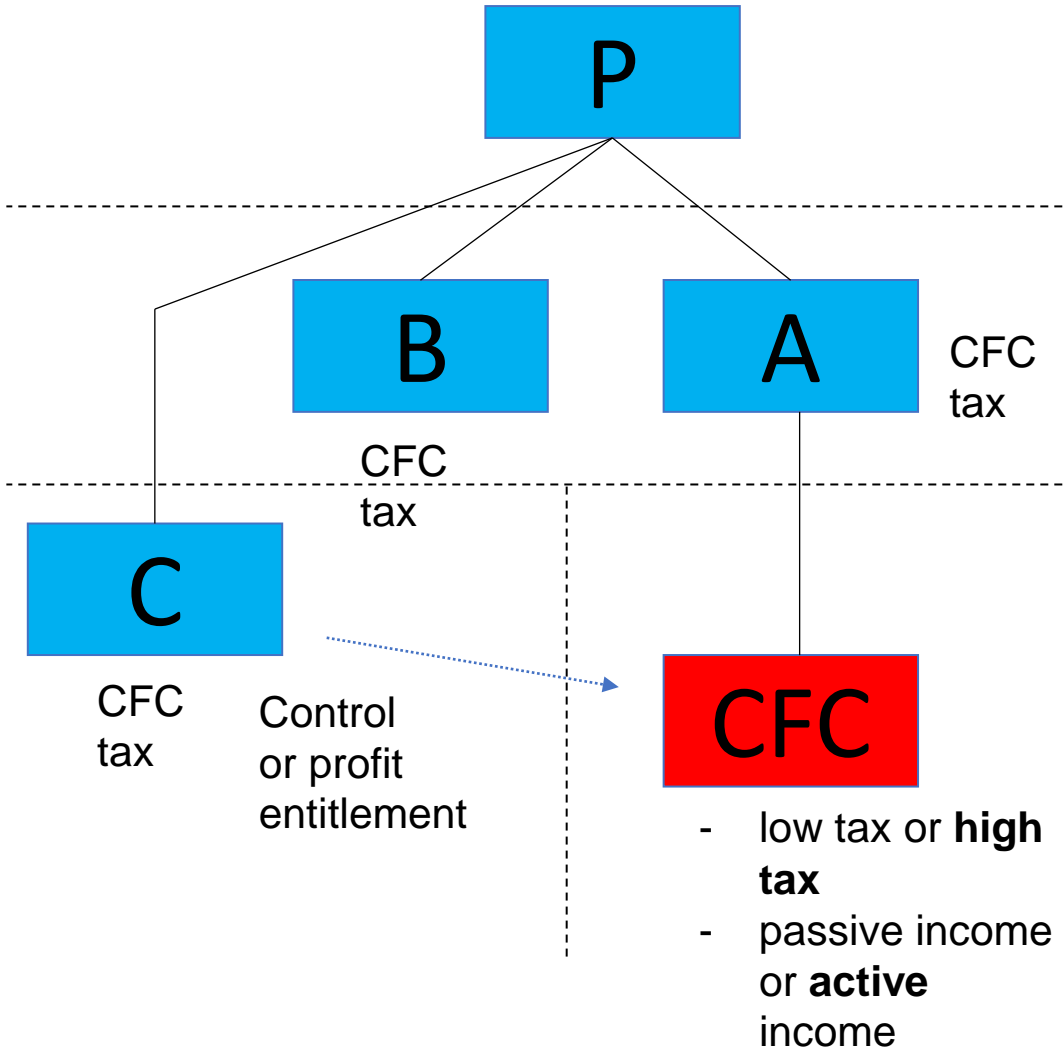
- State must feel that it has a right to act so.

- “ a **sense of legal right** or obligation ...” *ILC Conclusions*

- Rapid formation of certain thinking - (particular) customary law

Conclusions? CFC taxation effectiveness can be based on customary law / ‘special CFC nexus principle’?

IIR and UTPR under tax treaties



Basics of CFC rules

i) Policy objective

- to **prevent shifting** or diverting certain **income to CFCs established in lower-tax countries**

ii) Wide variety in design

- 1) Connecting factor: (in)direct shareholder / control / **acting in concert**
- 2) **Not only passive income** "...but many countries extend the rules to certain types of **business income**, and some countries **apply their rules to all of a CFC's income.**"

3) Even high-taxed CFCs

Compare UTPR

Arnold 2022, Lindgren 2023

Is there a resemblance to the UTPR for customary law purposes?

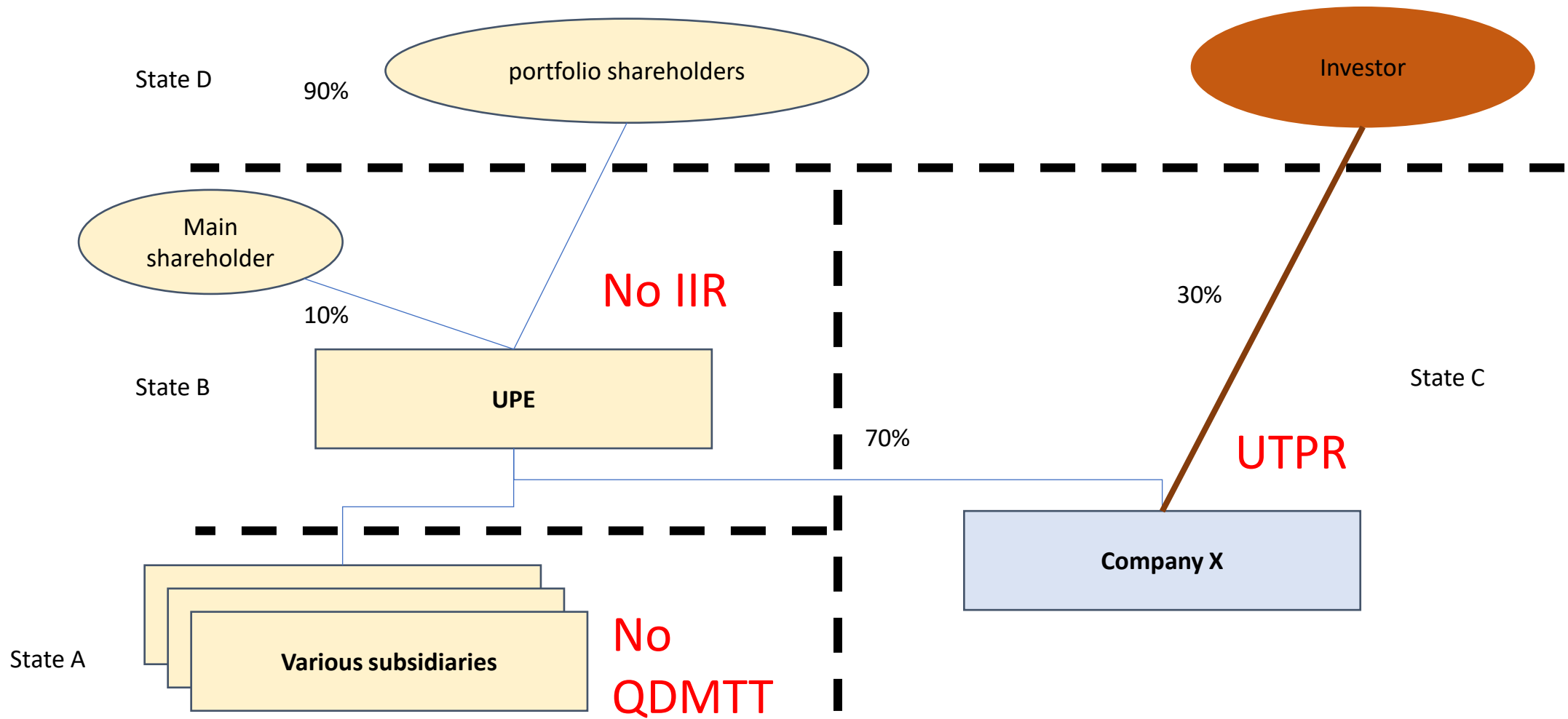
IIR and UTPR under tax treaties

Objective of Top up Tax?

- **OECD / The Netherlands / EU Pillar II Directive**
 - “(...) designed **to ensure** large multinational **enterprises (MNEs) pay a minimum level of tax** on the income arising in each jurisdiction where they operate.”
 - **NL: to set a lower limit on tax competition between states.** This should prevent the race to the bottom in the profit tax and create a more level playing field for internationally operating companies.”
- Same basic objective as CFC rules from a customary law perspective?

IIR and UTPR under tax treaties

- Are **both IIR and UTPR effective under tax treaties** i) given the possible **resemblance** to CFC rules and ii) based on a '**special CFC nexus principle**' *under customary law*?
 - **Objective** - CFC rules and UTPR / IIR overlapping objective ?
 - **Design** – IIR/UTPR comparable with CFC rules?



Thank you