



University of St.Gallen

Institute for Law and Economics

Limits of Tax Jurisdiction

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WU Wien
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From insight to impact.

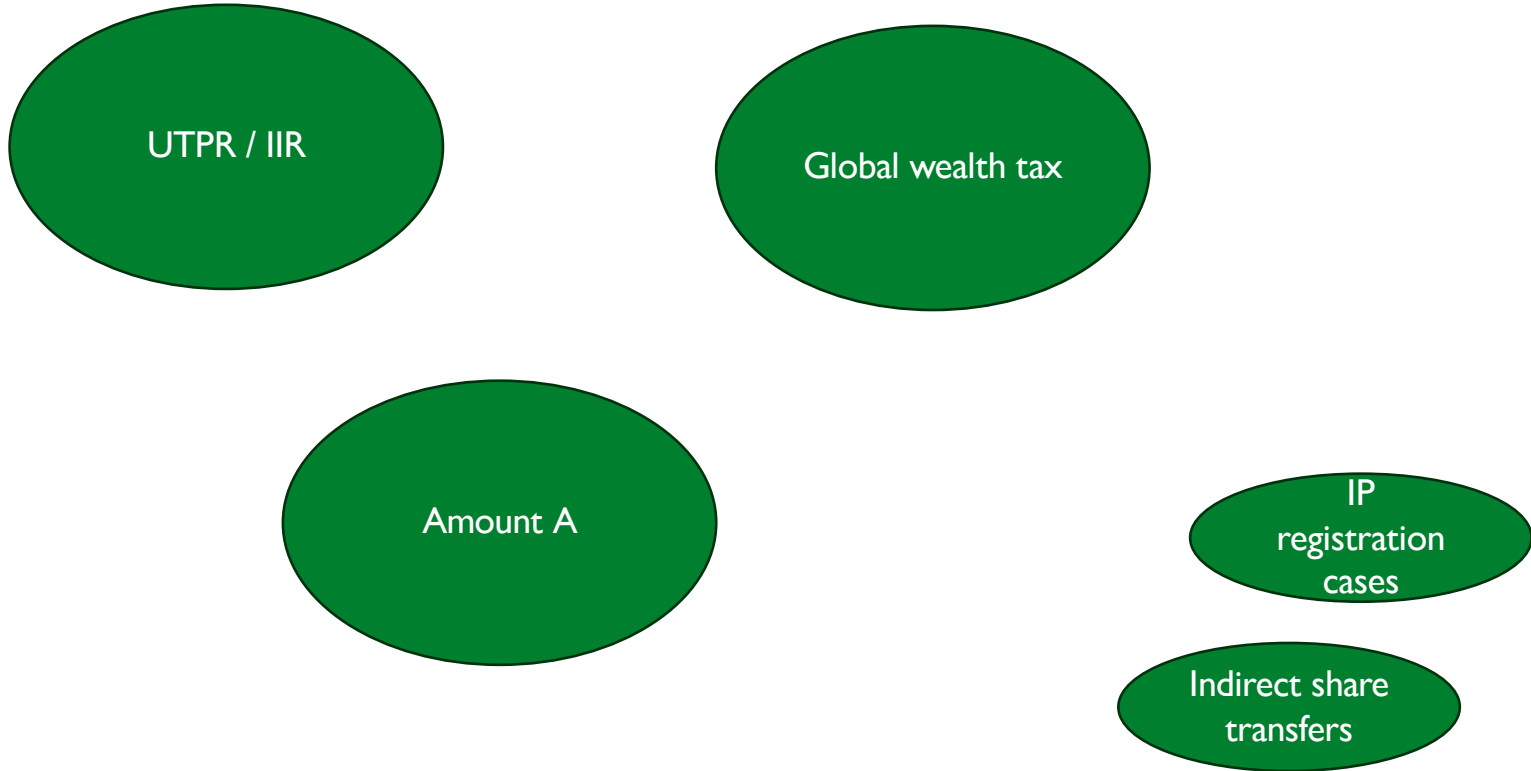
Agenda

1. Why now?
2. International law framework
3. 10 examples
4. General conclusions

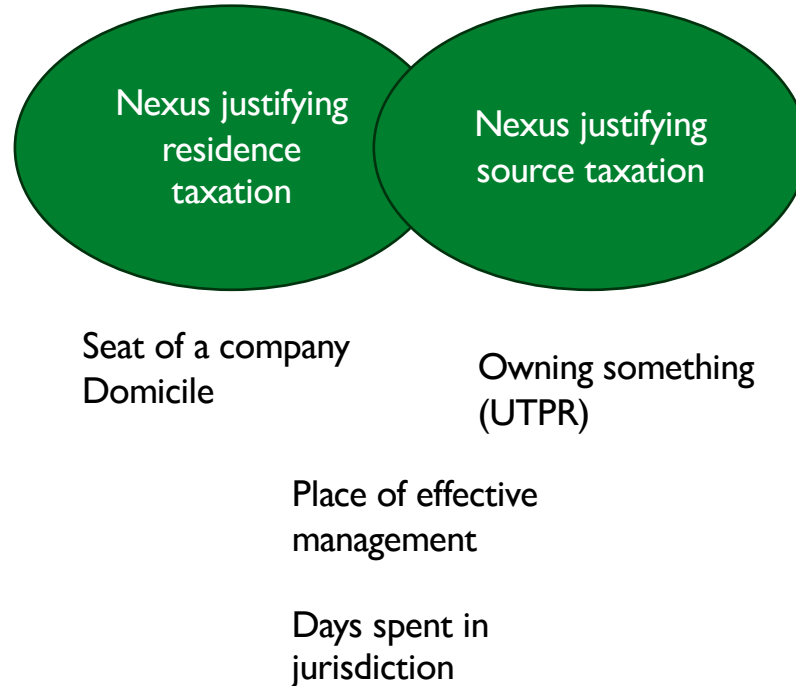


Why now?

1. New (global) tax proposals with extraterritorial effects



2. The end of the source v. residence dichotomy?



International law framework

What is the legal base?

Options for the legal base (prescriptive jurisdiction):

1. Customary international law
 - *Opinio iuris*
 - State practice
2. Legal precondition of the international law regime
3. Domestic legal standard
4. International treaties (e.g. friendship agreement GER-US)

What is the legal base?

Supreme Court, India, GVK Industries Ltd. & Anr. v. Civil Appeal No. 7796, 1 Mar. 2011

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 extra-territorial 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

What is the legal base?

Austrian VwGH – 3 June 1993 - 92/16/0174

Sofern dabei die Beschwerdeführerin auf das Erfordernis eines Inlandsbezuges des Gebührenrechts hinweist, ist ihr zuzugestehen, daß die Staaten Sachverhalte, zu denen sie keinerlei persönliche oder sachliche Beziehung aufweisen, nach den allgemeinen Regeln des Völkerrechts nicht besteuern dürfen (vgl. Ruppe in Herrmann-Heuer-Raupach, Rz 98 der Einführung zum EStG, Februar 1990). Diese Anknüpfung an sachliche Momente zum Inland erfolgt hinsichtlich der im III. Abschnitt des Gebührengesetzes, näherhin in den einzelnen Tarifposten des § 33, geregelten Rechtsgebühren im § 16 GebG 1957. Das Gebührengesetz bindet mit dieser Bestimmung formell an einen Beurkundungsort im Inland an. Das Gesetz erfaßt somit Auslandsbeurkundungen nicht, sofern nicht der Tatbestand des § 16 Abs. 2 GebG 1957 erfüllt ist (vgl. das Erkenntnis des Verwaltungsgerichtshofes vom 6. November 1980, 2511/78). Entgegen der Auffassung der Beschwerdeführerin kann weder den allgemeinen Bestimmungen des III. Abschnittes noch den Tarifvorschriften des § 33 GebG 1957 jedoch ein Grundsatz dergestalt entnommen werden, daß über die formelle Anknüpfung an die Beurkundung hinaus das jeweilige Rechtsgeschäft an sich eine weitere Nahebeziehung zum Inland aufzuweisen habe.

Some background: Special Rapporteur for Cape Town – Professor Cedric Ryngaert

- Topical Report on “**Nexus and International Tax Jurisdiction**” by a pre-eminent international lawyer in the field of State jurisdiction.
- Highlights include
 - Explains why international law of jurisdiction is relevant for tax law
 - What counts as the outer limits of an acceptable tax nexus?
 - Explains how international law can evolve in this sphere
 - What is the methodological approach that should be followed
 - Considers 3 possible areas where acceptable nexus may be shifting in tax law:
 - **nationality-based jurisdiction;**
 - **anti-avoidance jurisdiction; and**
 - **market-/profit-based jurisdiction**

My personal take-aways from debates with international lawyers

1. Akehurst: “[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests”
2. We need to consider the level of intervention into other territories as this is the underlying goal of limited jurisdiction
3. There are not a lot of customary rules left but jurisdiction is an exception
4. New rules of jurisdiction can develop!

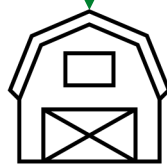
10 Examples

Example 1

Country A



Is Country A allowed to tax the the rental
income sourced in Country B?



Country B



Rental income

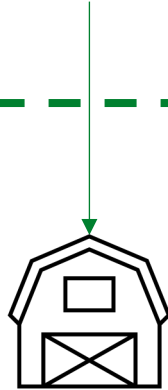
Example 2

Country A



← Employment income

Is Country B allowed to tax the employment income sourced in Country A and paid to a resident of Country A?



Country B

Example 3

Country A

ParentCo

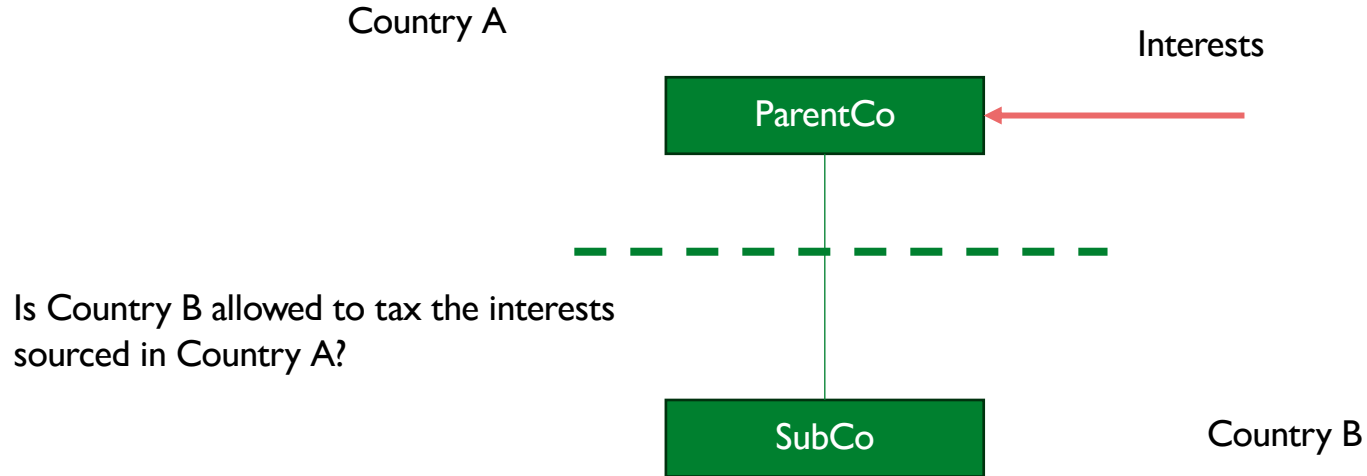
Is Country A allowed to tax the interests sourced in Country B and paid to a resident of Country B?

SubCo

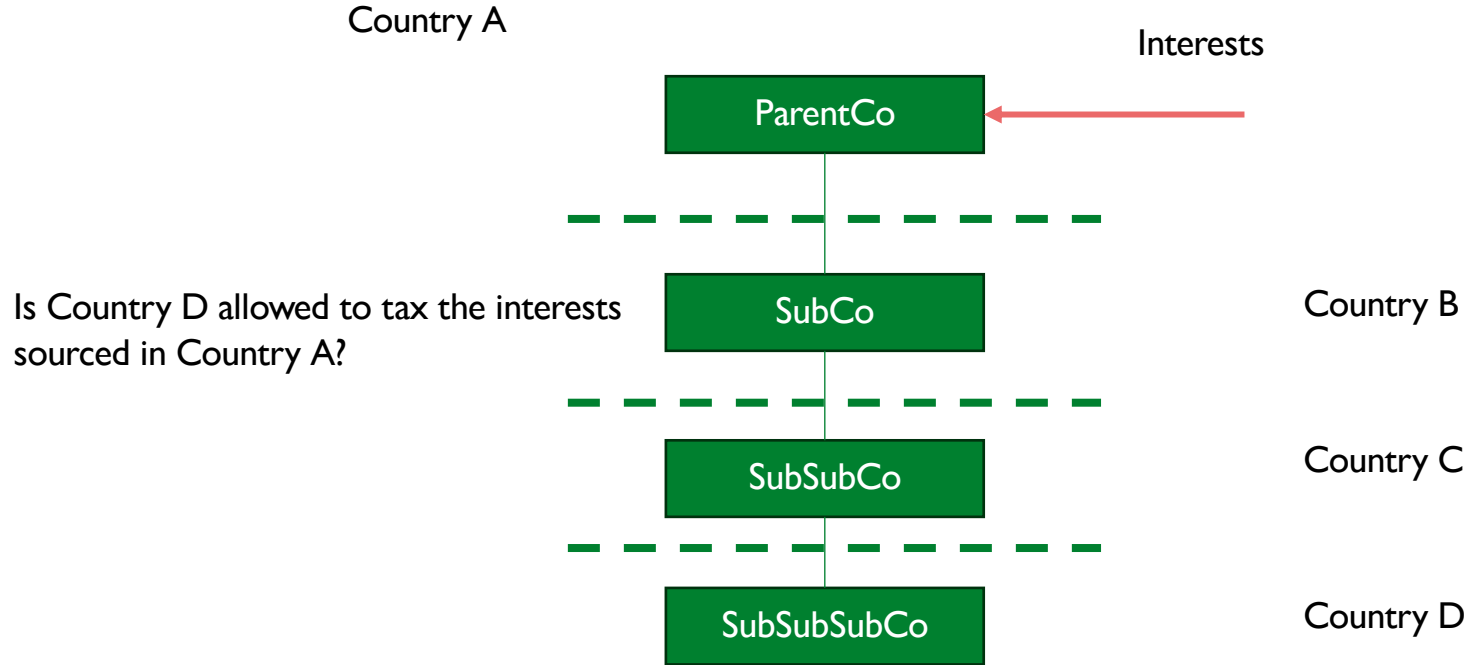
Country B

Interests

Example 4

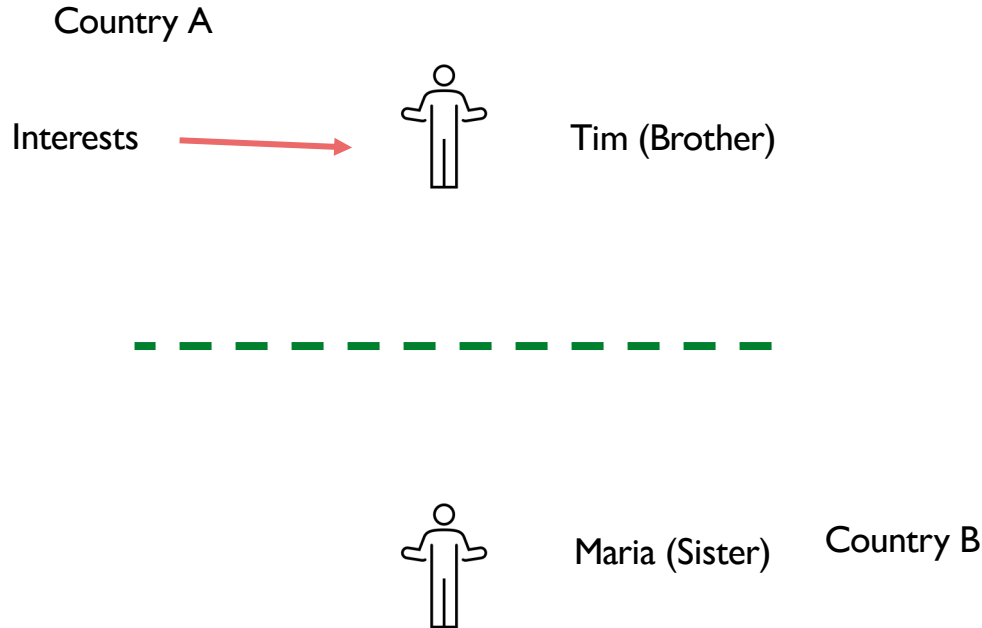


Example 5

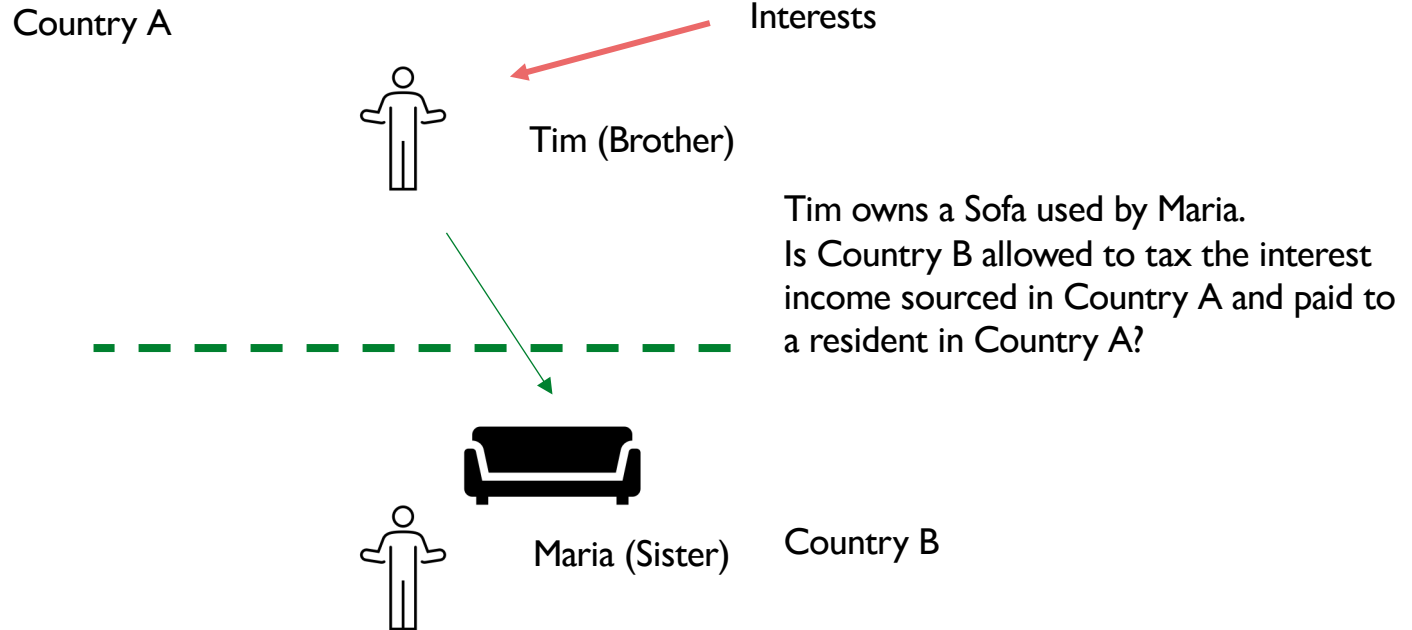


Example 6

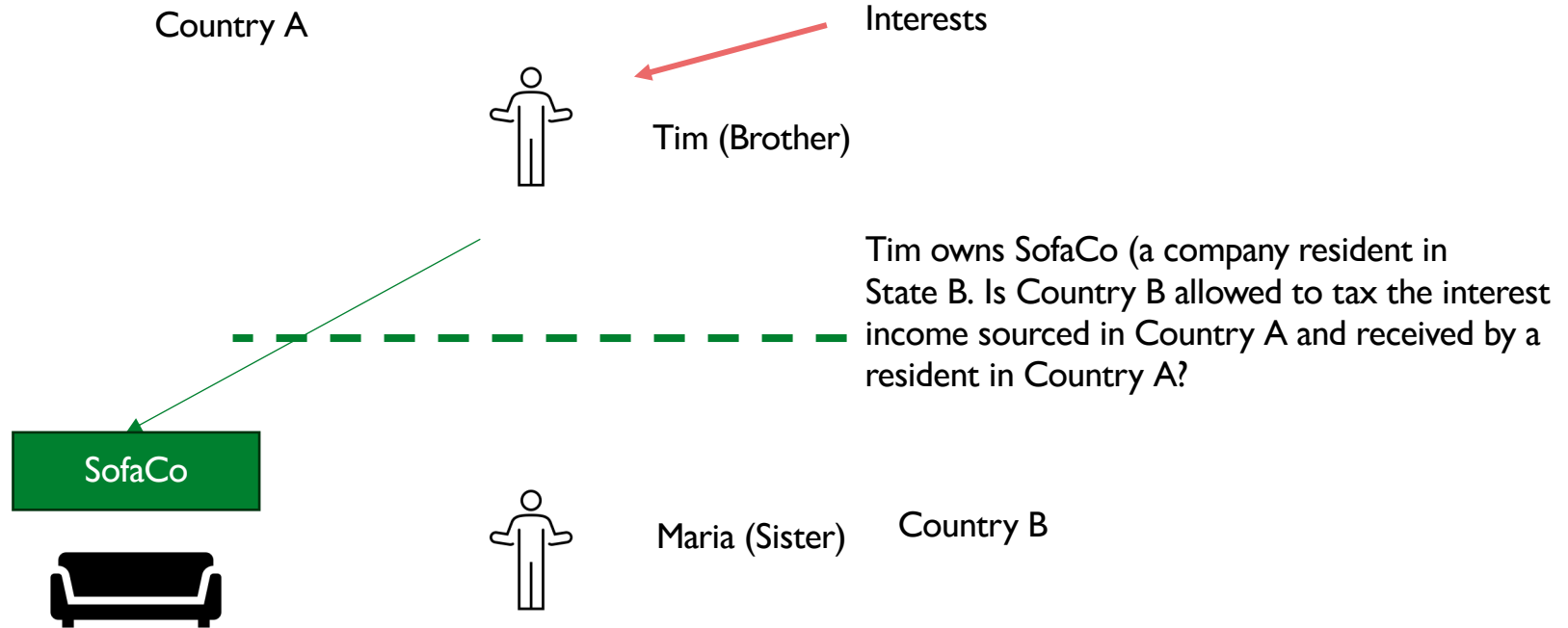
Is Country B allowed to tax the the interest income sourced in Country A and paid to a resident of Country A?



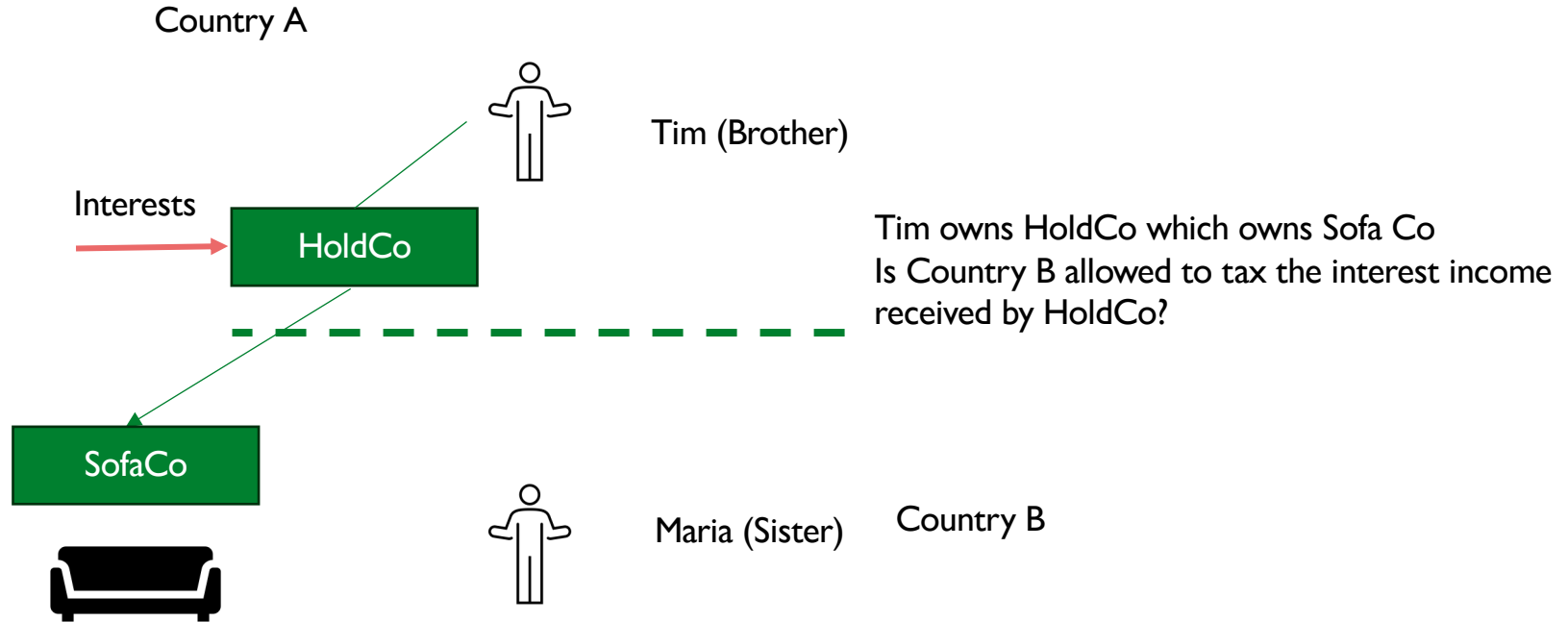
Example 7



Example 8



Example 9



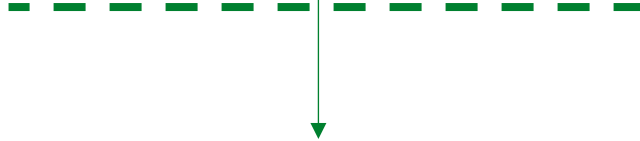
Example 10

Country A



← Employment income

Is Country B allowed to tax the employment income?



Country B

How to proceed?

Regarding Pillar 2

1. State practice?
2. *Opinio iuris*?
3. Diplomatic protest?
4. Level of intervention?
 - Comparison to FATCA?
 - Countries implement QDMTT and even worse, countries implement subsidies – high level of intervention

Both the IIR and the UTPR can be challenged in court – of course, there are easier ways (treaties!) to win the case!

Regarding other projects

- **Pillar 1** seems in line with international law – consumption is generally a sufficient link
- There is no protest – it is even the opposite – countries start to implement DSTs
- How is a **global wealth tax** enforced?
- The more global and the more interventionalist tax policy becomes, the more pressing is the need for defining the limits of jurisdiction
- Extraterritorial taxes are also undemocratic.
- It is time to further define the limits of jurisdiction

General law limits on state jurisdiction to tax

For fiscal policy making in a national setting, are there other legal sources and standards that are not confined to international law (but could also be present in international law)?

1. Proportionality as a universal legal norm.
2. The legal standard of reasonableness (but debated whether a general legal principle in international law)

Propositions of the General Report

- 1. The type of fiscal instrument, its purpose and its aim/s matter a great deal in the legal analysis.
- 2. The effects of a fiscal instrument are important in this analysis.
- Fiscal self-determination of states is key!

Thank you!

(and see you in Cape Town)

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