

University of St.Gallen

Institute of Public Finance, Fiscal Law
and Law and Economics

UTPR and International Law

Online, 31 March 2023

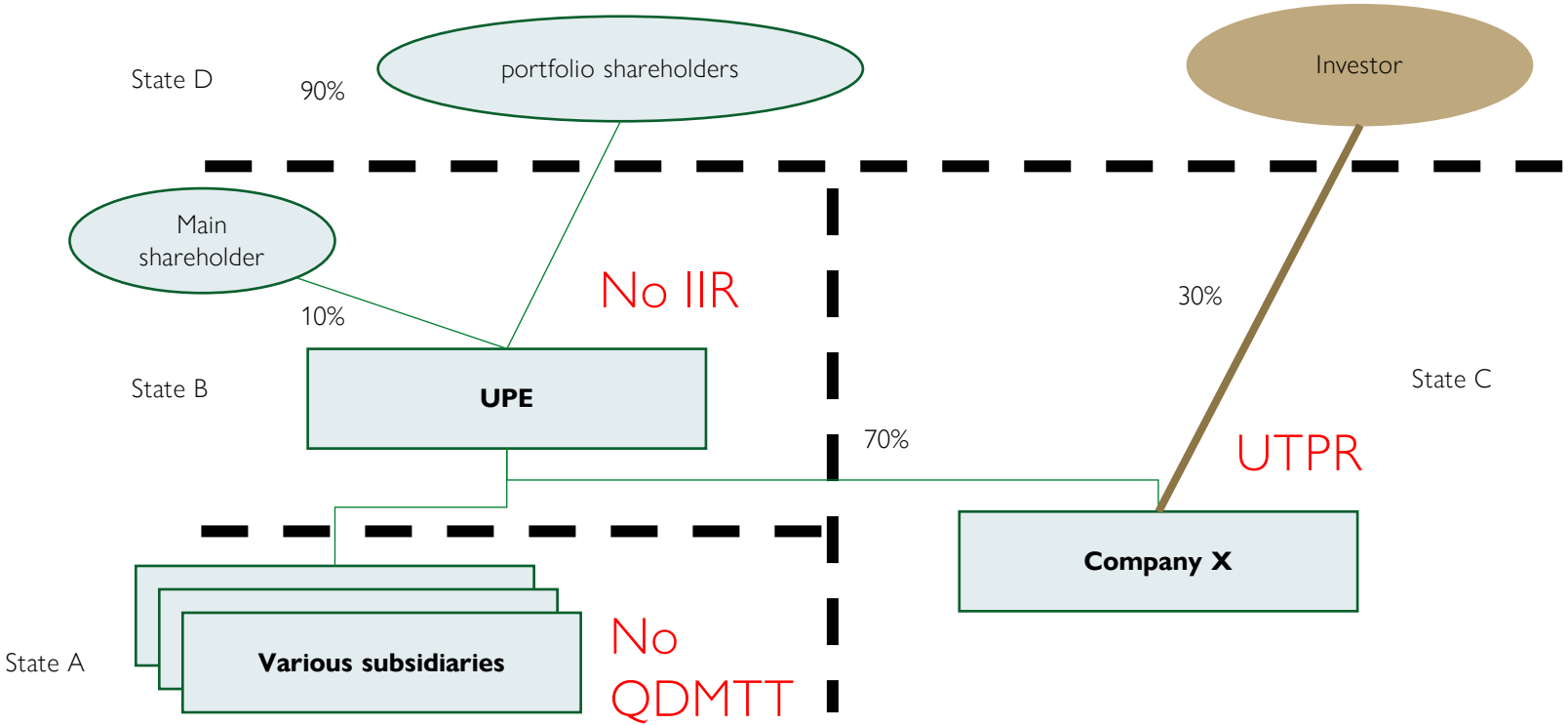
From insight to impact

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


State D
90%
portfolio shareholders
Investor
Main shareholder
No IIR
10%
30%
State B
UPE
State C
70%
UTPR
Company X
Various subsidiaries
State A
No QDMTT

	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

Indian case law

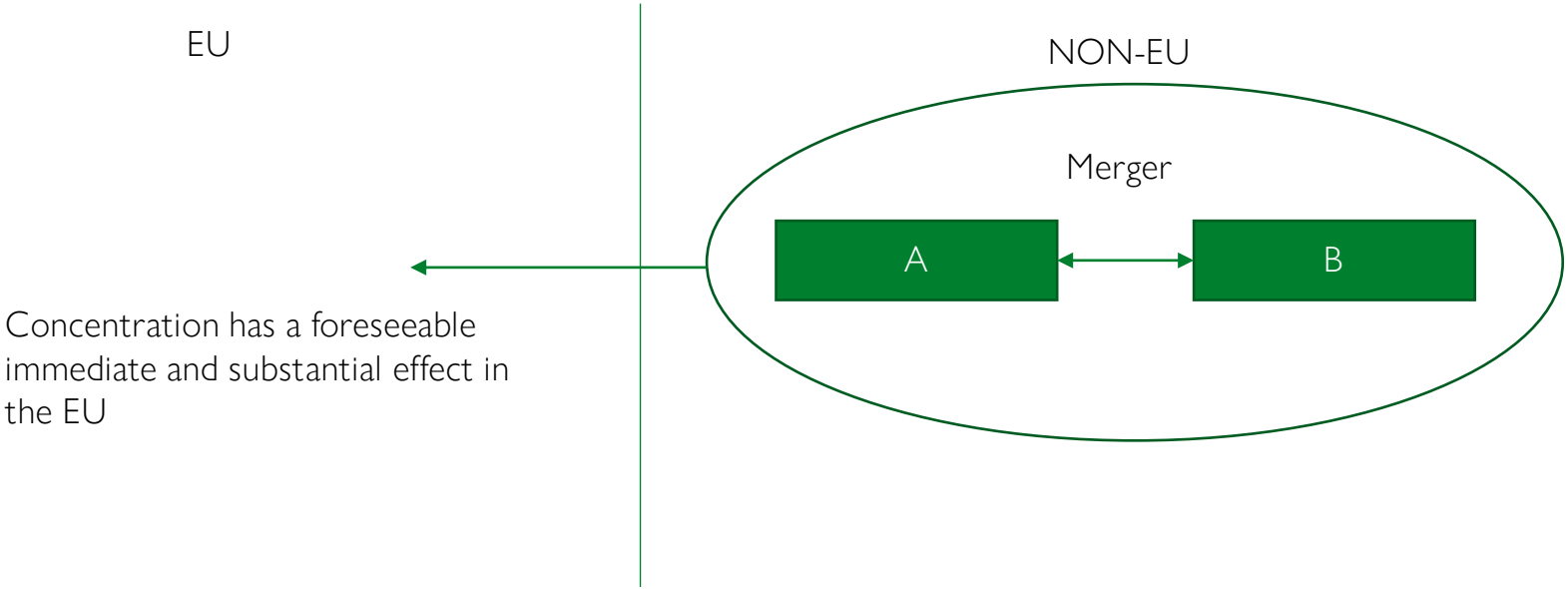
GVK Industries Ltd. & Anr. V. ITO

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**.

What is a sufficient link?

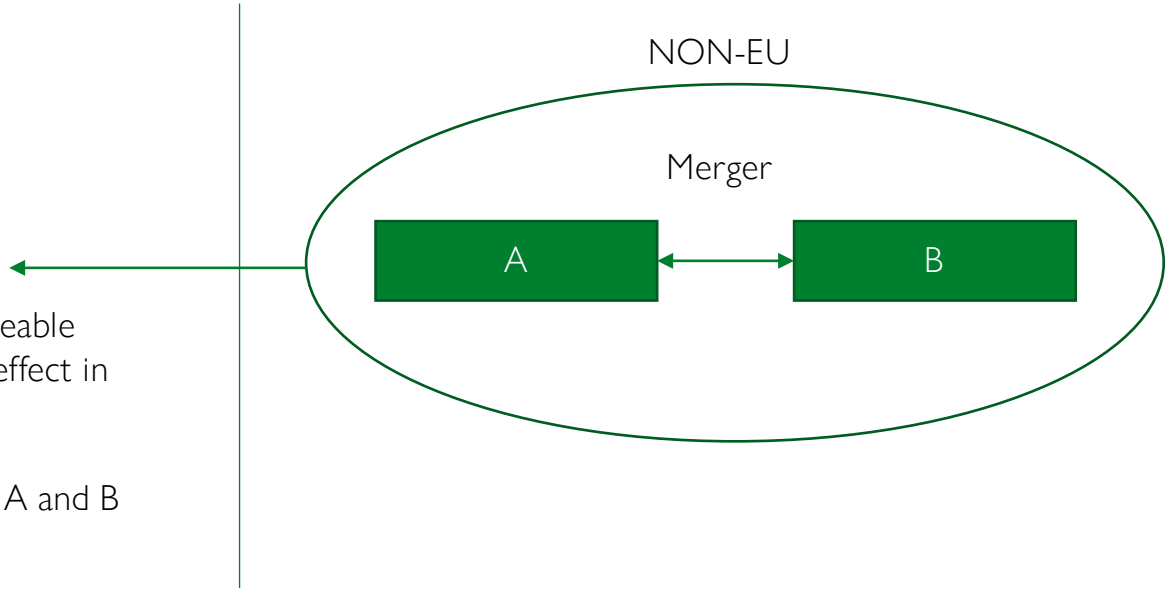
What is a sufficient link?

Example 1: Antitrust law



What is a sufficient link?

Example 2: Corporate income tax law

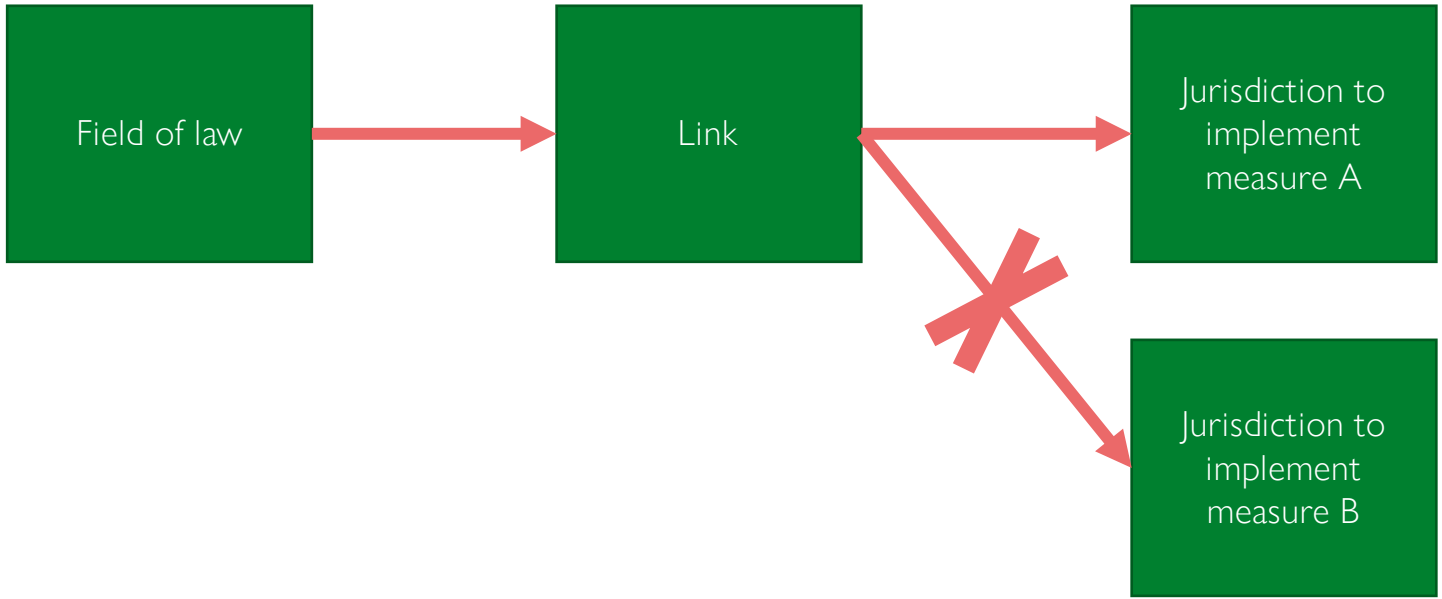


Concentration has a foreseeable immediate and substantial effect in the EU

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

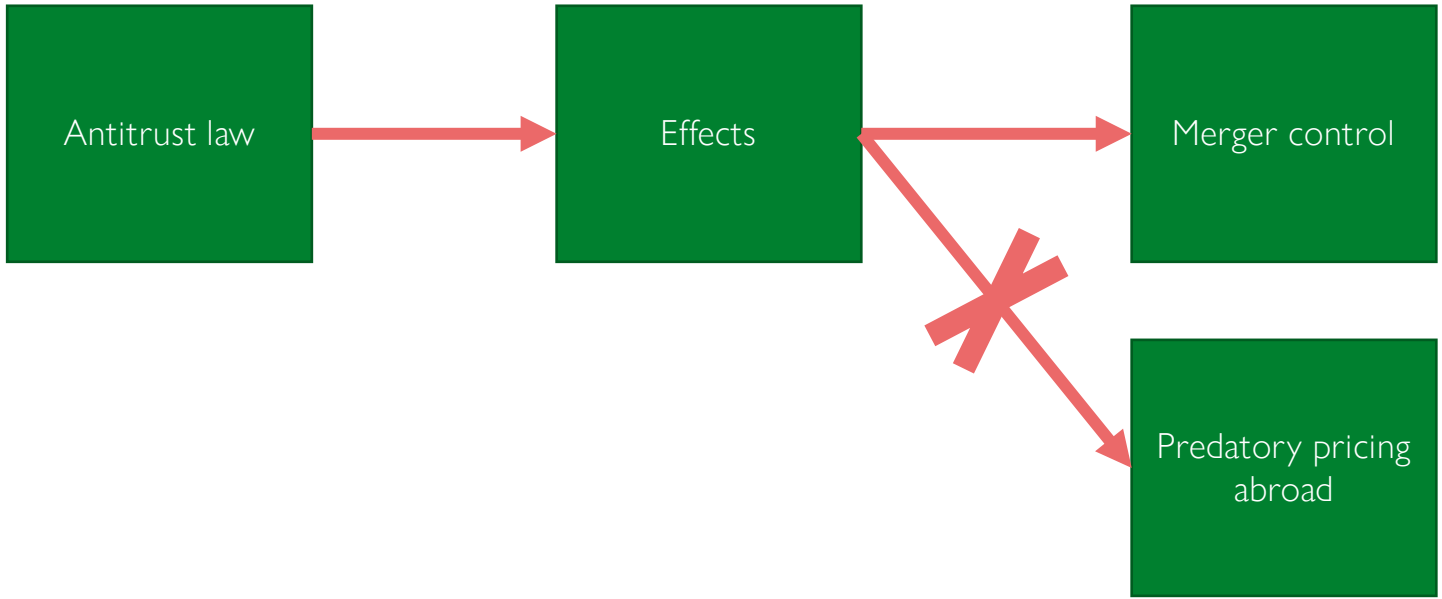
What is a sufficient link?

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



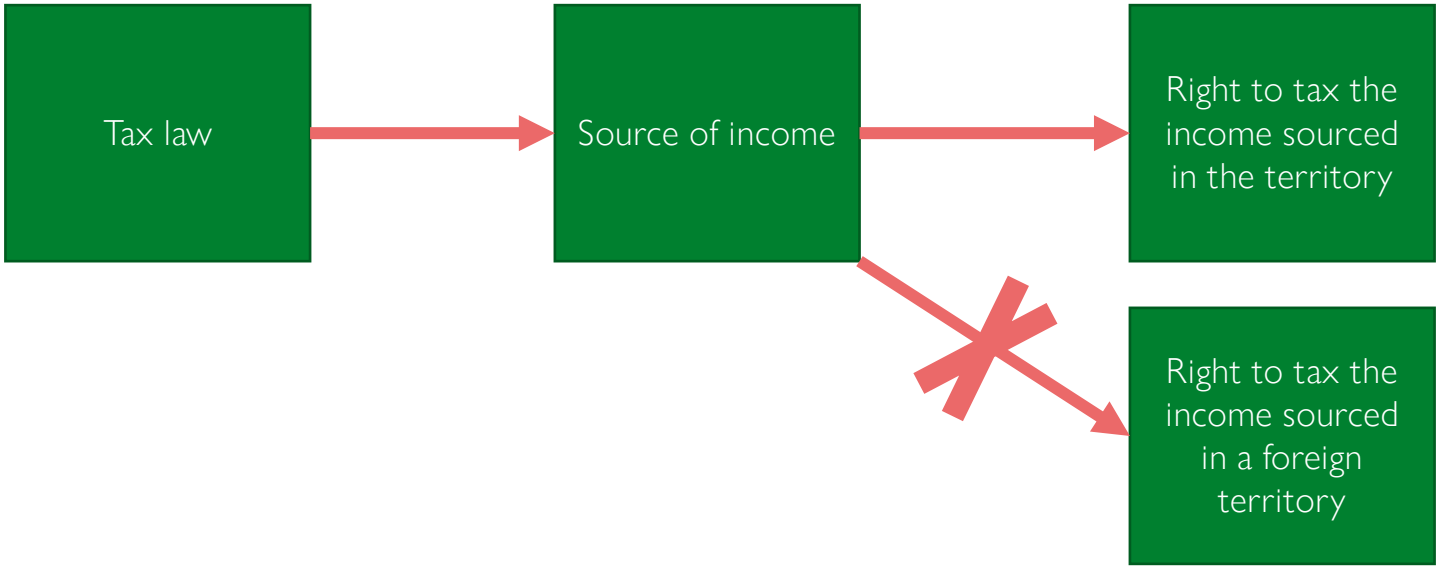
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Each link justifies jurisdiction **<u>to a certain extent</u>** in a **<u>certain field of law</u>**



What is a sufficient link?

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



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?

Two options:

1. Customary international law
    - Opinio iuris
    - State practice
2. Legal precondition of the international law regime

Zoom in: Opinio iuris

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

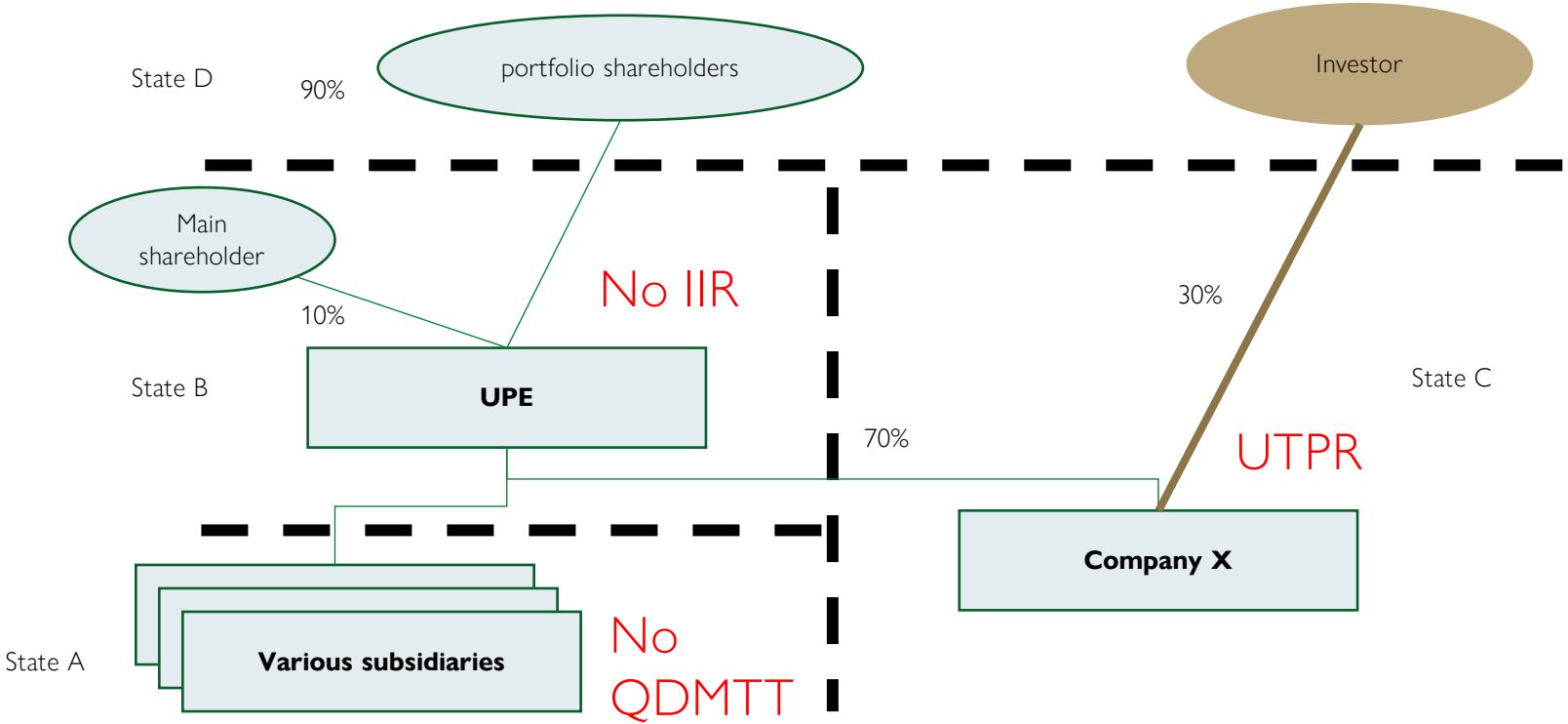
Three important obstacles to demonstrate that there is an opinio iuris regarding the UTPR:

1. ***There has not been a genuine agreement***
2. ***Is a state introducing an IIR, UTPR and/or a QDMTT because there is a 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 state 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

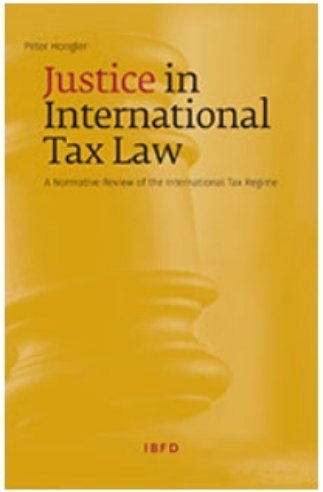

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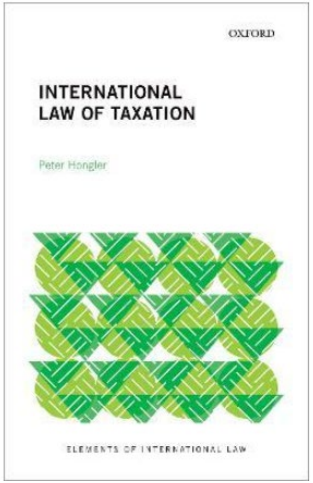
Conclusions

- **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**
- **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**
- **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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