**INTERNATIONAL LAW ASSOCIATION**

**VIENNA CONFERENCE (2026)**

**COMMITTEE ON INTERNATIONAL TAX LAW**

*Members of the Committee for INTERNATIONAL TAX LAW:*

Advocate General Professor Juliane Kokott (Germany): *Co-Chair*
Professor Pasquale Pistone (Italy): *Co-Chair*

Professor Philip Baker (Britain): *Rapporteur*
Professor Saïda El Boudouhi (France): *Rapporteur & Drafting Subgroup*
Professor Johann Hattingh (South Africa): *Rapporteur & Drafting Subgroup*
Professor Ashrita Prasad Kotha (India): *Rapporteur*
Professor Vincent Ooi (Singapore): *Rapporteur*

Dr Robert Stendel (Germany): *Drafting Subgroup*
Dr Céline Braumann (Austria): *Drafting Subgroup*

Dr John Abrahamson (Australia)
Professor Arif Hyder Ali (USA)
Professor Ahmed Altawyan (GCC)
Dr Federico Bertocchi (Italy)
Professor Yariv Brauner (USA)
Professor Svitlana Buriak (Belarus)
Professor William Byrnes (USA)
Dr Qiang Cai (UK)
Professor Maria Cecilia Fregni (Italy)
Professor Stjepan Gadžo (Croatia)
Dr Anthony Gafoor (Caribbean)
Professor Peter Hongler (Switzerland)
Professor Ursula Kriebaum (Austria)
Professor Błażej Kuźniacki (Poland)
Professor Yuri Matsubara (Japan)
Professor João Félix Pinto Nogueira (Portugal)
Ms Belema Obuoforibo (Nigeria)
Professor Ivan Ozai (Canada)
Professor Aikaterini Perrou (Greece)
Professor Alice Pirlot (Switzerland)
Ms Natalia Quinones (Colombia)
Dr Andrea Riccardi (Uruguay)
Professor Stephan Schill (Netherlands)
Mr Guillermo Teijeiro (Argentina)
Professor Matthias Valta (Germany)
Professor Hans van den Hurk (Netherlands)
Dr Sam van der Vlugt (Netherlands)
Professor Stef van Weeghel (Netherlands)

## Table of Contents

**DRAFT PRINCIPLES, OBSERVATIONS AND RECOMMENDATIONS OF PHASE II**

19 May 2026

## I. Introduction by the Co-Chairs

1. More recent developments in the global economy call for an adjustment of the rules on the taxation of cross-border trade. Those rules were developed in times of the brick-and-mortar economy. They are not fit for an increasingly digitalized and dematerialized economy with globalised business models and highly-mobile individuals.

2. The Committee has the aim of bringing international tax law and public international law together again: international tax law just cannot find its way into the future without a constructive dialogue with public international law. The rules underlying the network of bilateral double taxation conventions were developed in the 1920s by economists working together with experts of public international law. In 1938, the International Fiscal Association split the International Law Association, and international tax law developed as a sui generis technical matter for experts. This approach is problematic because (international) tax law deals with the distribution of wealth between nations and private actors; also, taxation is the prerogative of Parliaments. Therefore, international tax law touches upon the fundamentals of justice, of constitutional law and of public international law.

3. The Committee on International Tax Law was established by the ILA Executive Council in 2019 in response to a proposal submitted by the Co-Chairs; its mandate was extended in 2024 until 2028. The Committee's work builds upon the previous work of the ILA Study Group set up in 2016.

4. The Committee's working plan includes several phases each focusing on a specific area of public international law:

5. Phase 1 identified the international minimum standards for the protection of taxpayers' rights. When dealing with the sources of taxpayers' rights, the Committee drew on ILA's work on customary international law and on works concerning non-State actors in international law. Empirical work based on questionnaires distributed first within the study group and then the Tax Committee made it possible to conduct comparative research and draw shared principles and best practices on domestic law and the regional systems for the protection of human rights. For this purpose, research evaluated legislation and case law of jurisdictions on a worldwide basis, together with legal doctrine. The output of Phase 1 was published in 2022 in the book "Taxpayers in International Law, International Minimum Standards for the Protection of Taxpayers' Rights": https://www.bloomsbury.com/us/taxpayers-in-international-law-9781509954025/ and was presented at the 80th ILA Congress in Lisbon.

6. Phase 2 on the establishment of a fair international tax nexus started in 2022. Its results are submitted hereby in the form of recommendations for the 82nd ILA Congress, to be held in Vienna in August 2026.

7. Phases 3 and 4 will deal with the enforcement of international tax law, with extra-judicial settlement of tax disputes and arbitration. Their completion is expected by the end of the mandate of the International Tax Law Committee.

8. Considering the importance of grounding the recommendations on a large-scale empirical research, Phase 2 included different types of activities, which combined theoretical

research with practical implications and understanding of the status quo of the international tax nexus. During the works of Phase 2 significant developments materialised, including the revitalised involvement of the UN with the preparation of the Framework Tax Convention. The ILA International Tax Committee has followed and participated in those developments at the technical level through its members, who then contributed to outline critical issues and potential solutions to be incorporated in the materials of Phase 2 submitted for approval at the 82nd ILA Congress in Vienna.

9. Phase 2 started with a preliminary discussion of the concepts and identification of the foundational issues at the ILA Lisbon Congress. Research continued between 2022 and 2025 with an empirical methodology, involving the drafting and circulation of questionnaires. Answers to the questionnaires from over 70 countries in all continents were then integrated into the reports.

10. The five reports of Phase 2 of the works of the ILA Tax Committee were drafted by Philip Baker (British ILA Branch), Johann Hattingh (South African ILA Branch), Saida El Boudouhi (French ILA Branch), Ashrita Prasad Kotha (Indian ILA Branch), and Vincent Ooi (Singapore ILA Branch). The reports will be submitted for publication to a major international publishing house within a dedicated scientific series coordinated by the Co-chairs of the ILA Tax Committee.

11. Besides building on state practice, including judicial decisions and treaties, and the scientific work of selected public international lawyers and international tax lawyers from different nations, the Committee built up synergies with research conducted under the auspices of the International Fiscal Association (IFA, www.ifa.nl). In particular, IFA examined at its 76th and 77th annual Congresses (held in Cape Town, South Africa on 27-31 October 2024, and in Lisbon, Portugal on 5-9 October 2025) the status quo of objective and subjective international tax nexus. The General Reporters of those IFA Congresses were directly involved also in the works of the ILA Tax Committee, bringing in their technical expertise on the subject. In particular, Johann Hattingh (South African ILA Branch) and Peter Hongler (Swiss ILA Branch) - Co-General Reporters of the 76th IFA Congress and authors of the IFA report on "Finding the meaning of nexus for taxes – past, present, and future", published in Volume 108a of the IFA Cahiers) have served as Rapporteur and Members of the ILA Tax Committee. Their IFA report established normative standards to adjudicate limits on tax nexus—such as physical presence, economic ties, and the 'genuine link' theory found in public international law. This was a very solid basis for the ILA Tax Committee's work, which was further supplemented by what could be drawn from the answers to the questionnaires. Moreover, the ILA Tax Committee has invited João Nogueira (Portugal) - General Reporter of the 77th IFA Congress and author of the IFA report on "Residence for Corporate Income Tax Purposes") to attend one of its meetings and validate the ILA research findings, acting as discussant.

12. The technical dialogue with the international tax community has also benefitted from the support of the International Bureau of Fiscal Documentation (www.ibfd.org), which operates since 1938 as a non-profit research organisation for the dissemination of international tax law and hosts one of the world's largest libraries specialised in international tax law.

13. Work conducted in Phase 2 involved all members of the ILA Tax Committee. For this purpose, three meetings took place each year, in 2023, 2024 and 2025. In particular: In 2023 a full-day webinar (held on 11 January 2023) was the occasion to brainstorm in search for the critical issues to be covered by the ILA research; a hybrid event was hosted (on 3-4 April 2023) in New York (United States) by the New York University with reports on selected topics at the intersection between public international law, private international law and international tax

law; and a webinar took place (on 14 November 2023) in the framework of the 150th anniversary of ILA with the presentation of the ongoing work of the Tax Committee.

14. 2024 started with a half-day webinar (held on 12 January 2024) making a final selection of issues to be covered by the reports. At the 81st ILA Athens Congress (on 26 and 27 June 2024) the Tax Committee held an open session with the presentation of interim research findings and a closed session focusing on the preparation of questionnaires. The findings of the questionnaires were presented and discussed at a half-day webinar (held on 15 November 2024), followed by the appointment of the five rapporteurs.

15. In 2025 we held a webinar (on 7 March 2025) that facilitated a dialogue between the rapporteurs and a group of selected discussants. The session allowed commentaries on draft reports, including by the members of the Committee. Two in-person meetings followed. On 26-27 June 2025 the ILA French branch hosted a meeting at the University Paris-8 Dauphine, to discuss the preliminary content of the full draft reports. On 27-28 November 2025 a meeting was hosted by the Max Planck Institute for Public International Law in Heidelberg, Germany to discuss the final content of the five reports and outline the preliminary content of the recommendations.

16. Within the ILA Tax Committee, we always discussed the theoretical framework, the answers to the questionnaires and the preliminary findings, the draft and final reports, as well as the draft recommendations both during the hybrid and in-person meetings and by means of circulating documents via e-mail.

17. Once the draft content of the recommendations was discussed at the meeting held in November 2025, the Co-Chairs of the Committee invited some of its members to form a Drafting Committee to prepare the final wording of the recommendations to be submitted for approval at the 82nd ILA Congress, based on a document that also put together the observed principles and included some technical commentaries. The Drafting Committee consisting of the following Committee members: Johann Hattingh (ILA South African Branch), Robert Stendel (ILA German Branch) Céline Braumann (ILA Austrian Branch) and Saida el Boudouhi (ILA French Branch) prepared a document on the content of the five reports, extracting principles, making observations and formulating recommendations that shall be submitted for approval on the occasion of the 82nd ILA Congress, to be held in Vienna. This document, as before the reports, was circulated among the members of the committee which made comments which the Drafting Committee then integrated into the document. The Drafting Committee has also benefitted from the interaction with Severin Schragl (Austrian ILA Branch), who facilitated the coordination at secretarial level.

## II. Principles

### A. International law sets limits to States' exercise of jurisdiction to tax.

<u>Commentary [Principle A]</u>:

'Jurisdiction' is used here mainly with regard to 'jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court.'[1] Thus, 'jurisdiction to tax' means, for present purposes, States' competence to legislate tax matters.

The first principle flows from one of the fundamental principles of international law, State sovereignty. States' jurisdiction to prescribe is an emanation of State sovereignty.[2] As sovereignty is limited by international law, jurisdiction must be limited as well.[3] Sovereignty finds its limits in the sovereignty of other States (sovereign equality)[4] and in other restrictions, whether voluntarily accepted by States,[5] notably in treaties, or otherwise binding upon them, eg under customary international law or general principles of law within the meaning of Article 38(1)(c) ICJ-Statute. Exercising prescriptive jurisdiction outside these boundaries violates international law irrespective of any enforcement measures. While this issue has been controversial for a long time, the ICJ has confirmed this understanding of the rules on prescriptive jurisdiction.[6]

What is true for the exercise of jurisdiction in general, also applies to jurisdiction to tax.[7] As a consequence, a State's international tax law commitments may, if applicable, limit how a State can lawfully exercise its jurisdiction to tax.[8] In addition, general international law imposes further limits on the exercise of jurisdiction to tax as outlined in the Principles 2, 3, and 4 below.

State practice surveyed in the work of the Committee supports this principle.[9] Importantly, States have objected to what they consider to be excessive exercises of jurisdiction to tax,[10] thereby implying States' conviction that jurisdiction to tax is not unfettered, but subject to limitations under international law. As the study on double taxation conventions has

---

[1] § 401(a) Restatement (Third) of US Foreign Relations Law cited approvingly by C Ryngaert, Jurisdiction in International Law (2nd edn, OUP 2015) 9.

[2] See *Eastern Greenland* (Denmark v Norway) PCIJ Rep Series A/B No 53, 48; see also J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 440; C Ryngaert, 'Nexus and International Tax Jurisdiction' (2024) 108 *Cahiers de Droit Fiscal International* 103, 104.

[3] See generally *S.S. Lotus* (France v. Turkey) PCIJ Rep Series A No 9, 19; *Barcelona Traction* (Belgium v. Spain), [1970] ICJ Rep 3, 105 (Separate Opinion Fitzmaurice).

[4] See, eg, B Simma and A Müller, 'Exercise and Limits of Jurisdiction' in J Crawford and M Koskenniemi, *The Cambridge Companion to International Law* (CUP 2012) 134, 135-36.

[5] *Nationality Decrees in Tunis and Morocco* [1923] PCIJ Rep Series B No 4, 23.

[6] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v Colombia) [2022] ICJ Rep 266, paras 179 and 187; C Braumann, *Customary International Law and Tax Jurisdiction* (Wolters Kluwer 2025) 49.

[7] Ryngaert, 'Nexus' n 2, 105; see also P Baker, 'The involvement of the OECD and the UN in the establishment of a new tax order (in the context of a project on Nexus for tax purposes)' in J Kokott and P Pistone, *International Tax Nexus* (forthcoming) section "Nexus for tax purposes and IGOs".

[8] See Baker n 7, section "Nexus for tax purposes and IGOs".

[9] See also J Hattingh and P Hongler, 'Finding the Meaning of Nexus for Taxes – Past, Present, and Future' (2024) 108 *Cahiers de droit fiscal international* 11, 86-87.

[10] J Hattingh, 'Nexus, Global Minimum Tax, and the Legal Limits from the Perspective of International Law' in J Kokott and P Pistone, *International Tax Nexus* (forthcoming) section "11.2.11.3 Active protestor: The USA"; A Kotha, 'Trend Towards Taxation in the Country of Destination' in J Kokott and P Pistone, *International Tax Nexus* (forthcoming) section "4. Revenue".

highlighted, such treaties embody relevant State practice. It is, however, unclear whether any such treaty practice reflects *opinio juris.*[11]

**B. State's exercise of tax jurisdiction requires a sufficiently close connection (i.e., "adequate nexus") between the State and the taxable object or subject, whether a taxpayer, a transaction, or property. Connecting factors generally accepted in practice for purposes of taxation rely on the personality or territoriality principles for prescriptive jurisdiction.**

<u>Commentary [Principle B]:</u>

Principle B restates established principles of the law of jurisdiction. The Committee's studies on "nexus" confirm that these principles also apply in the context of international tax law.[12]

The terminology of the law of jurisdiction suffers from inconsistencies, both within the discipline of public international law and within the discipline of international tax law. These inconsistencies lead to terminological ambiguities and, in particular, the proliferation of various terms for essentially the same concepts. The Committee chose to adopt terminology as used by experts on the law of jurisdiction, rather than coining new terms.

In Cedric Ryngaert's words, '[t]he classical grounds of jurisdiction are all based on a link or contact with a State.'[13] With this in mind, and following a review of the terminology used in the classical literature on the law of jurisdiction, the Committee identified the term "connection" as the most widespread ("nexus" would be the synonymous term commonly used among international tax lawyers).[14] The literature and practice use a variety of terms for the *qualifier* of the "connection" – denoting what quality of connection between State and addressee is needed for the lawful exercise of jurisdiction. The lowest common denominator in literature and practice is that the connection must indeed be "qualified"; in other words, for the lawful assertion of jurisdiction, it is not enough for the State to just have *any* connection to the addressee of its legislation. Qualifiers used in literature and practice range from "substantial" or "sufficient" (referring to the *intensity* of the connection) to "genuine" or "reasonable" (referring to a certain *normative* quality of the connection). Yet, the Committee settled on the

[11] See V Ooi, 'The Practice of Double Taxation Agreements and Nexus' Destination' in J Kokott and P Pistone, *International Tax Nexus* (forthcoming) section "2.2. The Requirement of Nexus as a Rule of Customary International Law"; see for similar concerns regarding bilateral investment treaties *Ahmadou Sadio Diallo* (Guinea v. DRC) [2007] ICJ Rep 582, 615 (para. 90) ('The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection ; it could equally show the contrary.').

[12] Baker n 7, section "Nexus for tax purposes and IGOs"; Hattingh n 10, section "5 The model GloBE jurisdictional rules and the genuine/substantial link doctrine"; see especially FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *RdC* 9, who already used international taxation as one of his core case studies to discuss the international law of jurisdiction; Braumann on jurisdiction and tax.

[13] Ryngaert, Jurisdiction n 1, 145.

[14] See, e.g., FA Mann's writings in Mann n 12 and FA Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 *RdC* 14, 20; Ryngaert n 1, who also uses "connection", rather than "link"; Simma and Müller n 4 use different terms, but seem to use "link" more often than '"connection". The 2007 MPEPIL entry on jurisdiction uses the term "contact". Nevertheless, most authors do not consistently use one single term to refer to the "connection" between legislator and addressee; rather, various terms are used interchangeably. In the context of international taxation, for an in-depth study of "nexus", see generally, Hattingh and Hongler n 9.

qualifier ‘sufficiently close’, which is commonly used.[15] This qualifier entails a threshold requirement tied to a certain degree of objective “intensity” of connection between the State exercising jurisdiction and the addressee, rather than any particular normative quality of connection.

‘Connecting factors’, also sometimes called ‘jurisdictional links’ or ‘(jurisdictional) proxies’, are real-life manifestations of a ‘connection’ between the State and the addressee of legislation for jurisdictional purposes. In the context of cross-border income taxation, connecting factors that are widespread in practice – as confirmed in the studies of this Committee[16] and widely discussed in the literature[17] – are, *inter alia*, the taxpayer’s ‘residence’ (called “residence-based taxation” in the literature) and the ‘source’ of the income (called ‘source-based taxation’ in the literature). Both residence-based and source-based taxation are conceptually aligned with the “personality” and “territoriality” principles universally accepted in the law of jurisdiction.

Other connecting factors may exist or emerge in State practice (see Observation A below). In public international law literature, the ‘effects doctrine’ regularly features as another possible – albeit contentious – basis for a “sufficiently close connection” that may allow States to exercise prescriptive jurisdiction over certain extraterritorial activities or subjects.[18] The Committee did not identify any examples of State practice that clearly rely on the effects doctrine to establish tax jurisdiction over extraterritorial income of non-residents or other extraterritorial activities or subjects.[19]

**C. In their exercise of tax jurisdiction on the basis of a sufficiently close connection, States must take into account, in good faith, the interests of any State affected by the relevant tax measure.**

<u>Commentary [Principle C]:</u>

The exercise of jurisdiction flows from State sovereignty and is at the same time constrained by the sovereign equality of all other States (see Commentary Principle A). To reconcile a State's assertion of sovereign power with the legitimate interest of other States in not having

[15] FA Mann consistently used “close connection” in his writings in Mann n 12; he frequently extends it to “*sufficiently* close”; for State practice concerning this terminology, see, e.g., Austria, G15/98, V9/98, VfSlg. 15.395/1998, 17 December 1998; Germany, *Bundesfinanzhof*, 12 November 2020, V R 41/18, BFHE 271, 470, [27]; CJEU, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, Judgment of 30 April 2014, Case C-209/13, ECLI:EU:C:2014:283, para. 20, see also paras. 16-21; while the Indian Supreme Court also used the term “connection”, it employed the qualifier “real” (i.e., there must be a “real connection” for the exercise of jurisdiction)rather than “sufficiently close” in *GVK Industries Ltd v. Income Tax Officer* (2011) 332 ITR 130 (SC Const. Bench); see Kotha n 10, [chapter “5.2”].

[16] Baker n 7, section “Nexus for tax purposes and IGOs”; see S El Boudouhi ‘International Tax Law and Development Needs’ in J Kokott and P Pistone, *International Tax Nexus* (forthcoming) with respect to State practice of developing countries concerning source taxation; Hattingh n 10, section “11.2.12.1 Belgium”; Kotha n 10, section “1.1. Source and Destination”.

[17] Hattingh and Hongler n 9.

[18] Mann, n 14; Simma and Müller n 4, 140; Peter Szigeti, ‘The Illusion of Territorial Jurisdiction’ (2017), 52 *Tex. Int’l L.J.* 369, 372-381.

[19] For an in-depth analysis, see Hattingh and Hongler n 9, 60, 79-80.

their own sovereignty unduly encroached upon, the law of jurisdiction performs an essentially coordinative function,[20] which ultimately aims at ensuring mutual respect for sovereignty.

The existence of a sufficiently close connection in and of itself renders the exercise of jurisdiction lawful (see Principle B). Yet, the mere lawfulness under the law of jurisdiction does not vindicate all sovereignty concerns: the exercise of jurisdiction also needs to respect sovereignty and sovereign interests more broadly.[21] A sufficiently close connection is, for example, established when income of a non-resident entity is attributable to a permanent establishment located within the State exercising tax jurisdiction; yet, this connection does not necessarily justify the exercise of tax jurisdiction over the entity's or its parent's world-wide income.[22] Put differently, the establishment of a sufficiently close connection does not erase all concerns for other States' sovereignty. This is evident in more contentious tax measures discussed in the reports such as the undertaxed profits rule ('UTPR')[23] or taxation in the country of destination, eg by way of digital service taxes ('DST').[24] Such exercises of jurisdiction are undoubtedly grounded in some connection between State and the taxpayer, and yet they have been criticized, eg in the case of UTPR, for infringing other States' sovereign choice not to tax or to tax at a low rate certain income.[25] Even assuming that the connection between State and taxpayer reaches the threshold of being "sufficiently close" under the law of jurisdiction, these tax measures may still raise other sovereignty concerns.

As these examples highlight, the exercise of jurisdiction requires States to consider the effects on other States beyond the mere existence of a sufficiently close connection. To this end, States may conduct a case-by-case analysis of the effects of a particular tax measures vis-à-vis other States.[26] As the studies highlight, there is a trend in practice to conduct an impact assessment when enacting legislation (see Observation C). To be sure, any exercise of jurisdiction may have some effect on other States. Yet, not every effect needs to be taken into account. As the concern for such effects flows from sovereignty, only those effects that would infringe another State's sovereignty are relevant. Here, the prohibition of intervention provides a yardstick.[27]

To operationalize Principle C, States are recommended to conduct impact assessments and to balance their interests with other States' interests in line with the principles of reasonableness and proportionality (see Recommendation D).

[20] Simma and Müller n 4, 136.

[21] See Ryngaert, 'Nexus' n 2, 109; see also regarding development needs: El Boudouhi n 16, section "A. Linking international tax law and development policies: the developmental State or human rights obligations?".

[22] See already Mann n 12, 115; Hattingh and Hongler, n 9, 97; see for a survey of such practices Kotha n 10, section "3.1 Wide PE Rule / Interpretation".

[23] Hattingh n 10. See n 45 below for an explanation of the UTPR.

[24] Kotha n 10, section "6. Digital Services under VAT" .

[25] Hattingh n 10, section "5 The model GloBE jurisdictional rules and the genuine/substantial link doctrine"; see also Hattingh and Hongler, n 9, 97-98.

[26] Hattingh n 10, section "5 The model GloBE jurisdictional rules and the genuine/substantial link doctrine".

[27] See Ryngaert, *Jurisdiction* n 1, 158–59; but see for the ongoing discussions on the scope of the prohibition of intervention with regard to economic measures F Kriener, 'Intervention, Prohibition of', in A Peters and R Wolfrum, *Max Planck Encyclopedia of Public International Law* (online edn, 2023) paras 27 et seq.

**D. Within the limits under international law, States establish their own rules to determine what manifestations of a sufficiently close connection suffice to exercise tax jurisdiction.**

Commentary [Principle D]:

As explained above (Commentary to Principle A), jurisdiction (to tax) flows from State sovereignty. Thus, it is for States to exercise jurisdiction and determine when and whether they will exercise their tax jurisdiction. In this exercise, public international law does set limits (see Principle A). These are either set by generally applicable rules (see Principles 2 and 3) or by rules voluntarily accepted by a State in a treaty (see Commentary to Principle A). Yet, international law does not provide hard and fast rules on when to exercise jurisdiction,[28] but only provides a frame within which States may operate.[29]As a result, more than one State may be legally entitled to exercise tax jurisdiction over the same set of facts. Such situations of concurrent jurisdiction require international cooperation to alleviate adverse consequences of overlapping claims to jurisdiction (see Recommendation A).

[28] Hattingh n 10, section "5 The model GloBE jurisdictional rules and the genuine/substantial link doctrine"; Simma and Müller n 4, 147; Ryngaert, 'Nexus' n 2, 120.

[29] See already Mann n 12,10.

## III. Observations

**A. There is a trend of experimenting with new manifestations of a sufficiently close connection in current State practice and at international fora, for example to address tax avoidance concerns or societal and technological developments such as automation or digitalization. To this end, State practice and international fora rely on concepts such as the market or the country of destination to develop new connecting factors. These practices range across different tax measures such as consumption-based taxes, direct taxation of services in the digital economy, and novel taxes aimed at responding to other States' tax measures.**

Commentary [Observation A]:

The survey of State practice conducted by the Committee focused on the lawfulness under international law of various connecting factors used to exercise tax jurisdiction. In other words, the Committee studied whether such State practice, and any new trends in State practice, conceptually adhere to the requirement of a 'sufficiently close connection' for the exercise of tax jurisdiction. Conversely, the Committee did not analyse the technicalities and details of how individual domestic legal systems operationalize these (established or novel) connecting factors.

Currently, the 'international fora' that are particularly active in this regard are the OECD/G20 Inclusive Framework ('IF') and the UN General Assembly (which established the Intergovernmental Negotiating Committee for a UN Framework Convention on International Tax Cooperation, "UNFCITC"), the European Union, and the African Tax Administration Forum ('ATAF').[30]

The 'market'[31] as a concept that may underly the design of new types of connecting factors for taxation is a prominent notion in contemporary tax scholarship and often attributed to some nascent[32] – and contested[33] – State practice. For instance, the 'market' is invoked as justification[34] for a wide array of connecting factors used in DST and, relatedly, the OECD Pillar One Solution, value added or general sales taxes on e-commerce, and/or direct taxes levied as a result of a 'significant economic presence' ('SEP') even in the absence of the non-resident taxpayer's *physical* presence.[35] Market-based tax jurisdiction has been connected in

---

[30] For a detailed study of the role and involvement of some of these international organizations, namely the OECD and the UN, see Baker n 7.

[31] The literature uses the terms "market", "destination", and "marketplace". The Committee considers these terms to be synonyms does not attach any distinct, nuanced meaning to any of these terms.

[32] Kotha n 10, section "1.1. Source and Destination" and section "7. Conclusions".

[33] Hattingh n 10, section "11.2.11.3 Active protestor: The USA"; Kotha n 10, section "4. Revenue" and section "7. Conclusion".

[34] One possible justification may relate to contemporary discussions about what a fair allocation of taxing rights between countries might mean because value creation without physical presence in a territory is increasingly possible through digitalised business models. For example, the ongoing discussions under article 5 of the draft UN Framework Tax Convention concerning "Fair Allocation of Taxing Rights" refers to jurisdictions in which markets are located (see Co-Lead's Draft Framework Convention Template, Document A/AC.298/CRP.26, 22 January 2026) (https://financing.desa.un.org/unfcitc/backgroundandkeydocuments).

[35] For an in-depth study of State practice related to connecting factors tied to "market" or "destination"-based taxation, see Kotha n 10; El Boudouhi n 16, sections "A. Practice of developing countries relating to the

the literature and in the OECD Pillar One Solution to the imposition of direct taxes based on value creation within the territory of a State, for example, through so-called user participation in digital platform-based economic activity.[36] It is noted, however, that the market as a foundational concept to serve as the sole justification for new types of connecting factors is not yet clearly defined,[37] neither in the literature nor in practice, and that some tax scholars (including some members of this Committee) remain sceptical as to the concept *per se* and its legitimacy or lawfulness.[38] The notion of value creation as the sole basis for direct tax jurisdiction is also contested.[39]

States sometimes introduce tax measures in response to other States' tax practices.[40] Any such measures must conform to international law. This does not only pertain to the law of jurisdiction, but also to the law of State responsibility, for instance if States seek to justify a tax measure, which would otherwise constitute an internationally wrongful act, as a countermeasure (see Art. 22 and Chapter II of ARSIWA).[41]

**B. Jurisdictional conflicts may arise when tax measures using new manifestations of a sufficiently close connection exceed (or risk exceeding) the limits of international law. This may lead to defensive domestic tax or other measures by affected States, and/or to unresolved double or multiple levels of taxation for taxpayers. A coordinated approach among States, for instance within international fora, is more**

---

implementation of the global minimum tax", "1) Significant economic presence" and "3) Digital services taxes in the developing world".

[36] See OECD (2020), Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing, Paris) (https://doi.org/10.1787/beba0634-en.), at pp. 3, 19, 27 and 35; Cedric Ryngaert, Nexus and International Tax Jurisdiction, IFA 2024 Cape Town Congress Cahiers de droit fiscal international, volume 108 A: Finding the meaning of nexus for taxes – past, present and future, p.118; according to the OECD, the idea of a SEP seeks to "create a taxable presence in a country when a non-resident enterprise has a significant economic presence in a country on the basis of factors that evidence a purposeful and sustained interaction with the economy of that country via technology and other automated tools" (OECD/G20 Base Erosion and Profit Shifting Project Addressing the Tax Challenges of the Digital Economy Action 1: 2015 Final Report, p.107).

[37] Some of the practice relying on this connecting factor does not invoke the term "market" or "marketplace" at all, but rather uses a range of indicators that are assumed to identify the "market" of a given transaction, such as IP addresses and other geolocational tools; see Kotha n 10 [chapter "7. Conclusions"] ("The term market / destination is neither defined in the UNFCITC nor in domestic legal systems."); see also, however, Kotha n 10 [chapter "4. Revenue"] (which finds that DSTs "do have some similarity in terms of the scope of services being covered… A country levies a DST if the non-resident provides digital services to users residing in its country. The primary nexus is thus linked to the identification of users. Proxies for approximating user location are also very similar ...").

[38] See Kotha n 10, see "1.2 Normative Underpinnings" for views in the literature on this matter.

[39] For background and criticism of the concept of value creation see W.F. Richter, Aligning Profit Taxation with Value Creation, (2021) 13 *World Tax Journal*, 1; and R.M. Kysar, Value Creation: A Dimming Lodestar for International Taxation?, (2020) 74 *Bulletin for International Taxation* 4/5.

[40] For examples, see Hattingh n 10, sections "5 The model GloBE jurisdictional rules and the genuine/substantial link doctrine" and "11.2 Country-specific reactions of relevance for the international law analysis" (e.g., States enacting various tax measures in response to other States' implementation of the OECD-proposed Global Minimum Tax/Pillar Two, such as adopting the QDMTT or other minimum top-up taxes, or adjusting tax incentives).

[41] For State practice that has prompted scholarly debate about its possible qualification as a "countermeasure", see Hattingh n 10, section "11.2.11.3 Active protestor: The USA".

**likely to lead to outcomes that avoid or resolve these jurisdictional conflicts and reduce inefficiencies.**

Commentary [Observation B]:

Concurrent exercise of taxing jurisdiction by States and consequential jurisdictional overlaps have been a common phenomenon in international taxation. The negative impact caused by international double taxation on trade, and on investment, the movement of capital, and on the mobility of people have traditionally been mitigated through networks of model-based tax treaties or through unilateral domestic law measures. There is well-established practice for States to cooperate in a variety of multilateral and regional fora to develop, maintain and update model solutions for the avoidance of international double taxation of taxpayers under income taxes (and to some degree, estate duty and VAT).[42]

Uncoordinated jurisdictional claims arising from new tax measures may result in multiple layers of taxation, rather than classical double income taxation. Novel levies, such as the Global Minimum Tax or DST, are not necessarily income taxes in the traditional sense. Nevertheless, they are often calculated by reference to the same underlying economic activities that also form part of the base for corporate income taxes. As a result, these taxes typically fall outside the scope of the existing network of income tax treaties, which is designed to prevent juridical double taxation of income, rather than overlapping taxation arising from distinct tax measures. The economic effects and incidence of cascading taxes, imposed with reference to the same economic activity, is increasingly being examined in empirical studies, which point to harmful effects.[43]

It is notable that new tax measures operating on the basis of novel manifestations of a sufficiently close connection, which are being developed through inter-State cooperation in fora such as the G20 and OECD, do not always provide for treaty-based mechanisms to coordinate jurisdictional matters. Further, customary international law does not establish a hierarchy to resolve concurrent jurisdictional claims (see also Principle D). The result may be that a so-called ‘jurisdictional battle’ ensues, which may lead to ‘a consolidation or reallocation of the jurisdictional prerogatives of the states involved’.[44] One new type of fiscal measure, the OECD-

[42] See further, for example, the Introduction to the 2017 OECD Model Tax Convention on Income and on Capital, at p. 9, where it is stated that “it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries” and similarly, the Introduction to the 2021 UN Model Taxation Convention between Developed and Developing Countries, at p. iv: “The growth of investment flows between countries depends to a large extent on the prevailing investment climate. The prevention or elimination of international double taxation in respect of the same income—the effects of which are harmful to the exchange of goods and services and to the movement of capital and persons—constitutes a significant component of such a climate”. The Introduction to the 1982 OECD Model Double Taxation Convention on Estates and Inhertances and on Gifts, at p. 12, states that: “Although taxes on estates and inheritances and on gifts are imposed only on specific events, the burden of taxation resulting from the simultaneous levy of the taxes imposed under the domestic laws of several countries is certainly prejudicial to the development of economic relations and in particular to movements of private capital between Member countries”.

[43] R.R. Muddasani & D. Langenmayr, Navigating the Amazon: The Incidence of Digital Service Taxes (2025) WU Vienna; M. Barczay, S. Hebous, F. Sawadogo, and J-F. Wen, Taxing Mobile Money: Theory and Evidence (2025) IMF Working Paper WP/25/255.

[44] See Simma and Müller n 4, 153.

designed model Global Minimum Tax, operates on the basis of novel manifestations of a sufficiently close connection.[45] As a result, the Committee undertook a study of State practice.[46]

The review of country data undertaken by the Committee revealed that there is no harmonious global adoption of prototypical UTPR top-up taxes, nor is there uniform implementation among countries that support all or some of the goals of the Global Minimum Tax.[47] Various forms of rejection[48] or protest[49] against the jurisdictional effects of the UTPR are visible and discernible, such as the emergence of defensive domestic measures.[50]

The Committee therefore recommends greater coordination among States to mitigate the adverse economic consequences arising from these multiple layers of taxation. Furthermore, a coordinated approach between States may not only lead to better outcomes concerning economic effects and rights of taxpayers, [51] but also concerning sovereign equality of States. For instance, coordination may result in significant efficiency gains in terms of compliance costs in multiple jurisdictions, both for tax administrations and taxpayers, and the improvement of administrative workability.

---

[45] Under the prototypical Global Minimum Tax framework, a State may rely on one of three jurisdictional connections to levy a so-called top-up tax. One such connection arises under the under-taxed profits rule (“UTPR”). The UTPR requires top-up tax payment based solely on the presence of a tax-resident entity that is a member of a multinational group. This applies where that group has undertaxed corporate profits in another State. The jurisdictional connection for UTPR top-up tax is solely established through the entity being “related through ownership or control,” as determined by consolidated financial statements. The resident entity is not required to have any legal or factual connection to the activities or transactions that generated the foreign undertaxed profits. Nor is the entity required to be directly connected to the group member to which those profits legally belong, and it does not matter that such member is tax resident in another State with the jurisdiction to tax those profits. See further, Hattingh n 10, section “4 Overview of the tax nexus features of the model GloBE rules”.

[46] Summarised in Hattingh n 10, “Part B: Country Surveys and Observations”, based on data obtained from country questionnaires designed by the Committee, information shared during the committee’s meetings, the country data contained in Hattingh and Hongler n 9, and further research about national laws and related developments. The goal of the report was to interpret the customary international law requirement of a sufficiently close connection based on observing how State practice is aligning or diverging.

[47] The member countries of the European Union are spearheading implementation of the prototype Global Minimum Tax as a block. The same level of uniform approach is not discernible in other regions. The USA is an active protestor against UTPR top-up tax, as evidenced in enacted legislation designed to counter such top-up taxes by name, but which is being held in abeyance. In Belgium, the Constitutional Court has referred a case that challenges the constitutionality, including adherence to customary international law, of UTPR top-up tax to the Court of Justice of the European Union (pending case C519/25 *Amercian Free Enterprise*; see also Hattingh n 10, section “11.2.12.1 Belgium”).

[48] A range of country reactions to the prototypical Global Minimum Tax were noted, including acceptance of domestic minimum taxes (whether qualifying or not under the prototype rules of the OECD’s Global Minimum Tax framework) but also the rejection of the UTPR top-up tax mechanism (see Hattingh n 10, sections “11.2.1 Argentina”, “11.2.5 Colombia”, “11.2.7 South Africa” and “11.2.10 Vietnam”).

[49] The USA is an active protestor against UTPR top-up taxes (see Hattingh n 10, section “11.2.11.3 Active protestor: The USA”).

[50] This includes the enactment of domestic minimum taxes that retain maximum independence over fiscal sovereignty that will not “qualify” as a prototype, i.e. as Qualified Domestic Minimum Top-up Tax (“QDMTT”) under the OECD’s Global Minimum Tax framework. For examples, see Hattingh n 10, sections “11.2.1 Argentina” and “11.2.5 Colombia”.

[51] See P Baker, ‘Taxpayers’ Rights and Human Rights’ (2025) 53 *Intertax* 12, 822-825 for proposals how to integrate these rights in the negotiation of a UN Framework Convention on International Tax Cooperation.

**C. Some States are performing economic and tax policy impact assessments, studying the effects on taxpayers and other States of domestic tax measures that use new manifestations of a sufficiently close connection.**

Commentary [Observation C]:

Modern constitutional law requirements often include the estimation of revenue impacts, and the anticipated economic effects of any new tax proposals, but this is usually confined to the effects within the country concerned. The Committee observes that some States consider the revenue and/or economic impact on taxpayers and also on other States when evaluating new forms of taxes that are designed to address cross-border matters (for example, concerning effects of the Global Minimum Tax).[52] It can be reasonably assumed that more States already perform impact assessments of this nature but may not make this known or may not publish the results. Meanwhile, there are widescale calls from taxpayers for governments to assess the impact of new tax measures on foreign investment and competitiveness (eg: Global Minimum Tax, DST, income tax based on SEP, etc.).[53] These new types of taxes often employ new manifestations of a sufficiently close connection (see the commentary on Observations 1 and 4).

**D. There is a trend to consider the specific needs of developing countries in tax reform debates at international fora concerning new manifestations of a sufficiently close connection.**

Commentary [Observation D]:

Taxation, including of cross-border activities, has become an important means of domestic resource mobilization in support of development. The specific needs of developing countries are recognized in several multilateral fora dealing with taxation, such as the IMF, the UN and even the OECD.[54] While the link between taxation and development has often been established by focusing on the need to strengthen capacity-building, it is increasingly acknowledged that jurisdictional connecting factors, including new manifestations of a sufficiently close connection, may affect the revenue-raising-capacity of developing countries, and that these connecting factors should reflect development needs. There is a growing recognition that any new initiatives or measures in this area, particularly in developed economies, should not deprive developing countries of their tax sovereignty or erode their tax base, even in the context of the

---

[52] See Hattingh n 10, sections "8 Anticipated effects of the GloBE regime"; "11.2.7 South Africa"; "11.2.12.3 Poland" as well as announcements and explanations in technical toolkits developed by international and regional organizations such as the OECD and ATAF indicating how they are assisting unnamed governments to perform impact assessments. See, e.g., African Tax Administration Forums, Technical Note 13, "Changes to the Global Minimum Tax: The Side-by-side Package", February 2026, p. 2; OECD (2026), The Global Minimum Tax Implementation Toolkit, OECD Forum on Tax Administration, OECD Publishing, Paris, https://doi.org/10.1787/0ee66d84-en, at p. 29, where the OECD indicates that the World Bank, the International Monetary Fund and the International Institute for Sustainable Development have also been assisting governments.

[53] See, for example, in regard to Germany, Bundesrat, Minutes 1058. Session, 17 October 2025, at 374; and Bundesverband der Deutschen Industrie, "Globale Mindeststeuer: Entwicklungen gefährden Wettbewerbsfähigkeit", 7. März 2025, Dokumentennummer: D2057.

[54] In the OECD/G20 Pillar II context, two specific devices were designed to address development needs: the substance-based carve outs put forward in the Global Minimum Tax rules on the one hand and the adoption by the OECD/G20 Inclusive Framework of the Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule on the other. See El Boudouhi n 16.

fight against harmful tax practices.[55] This evolution can be understood more broadly as part of a shift in international tax cooperation towards greater sensitivity to development concerns.

## IV. Recommendations

**A. States should cooperate through international fora to coordinate concurrent jurisdictional claims to tax by way of multilateral or bilateral treaties in order to achieve a fair and balanced exercise of tax jurisdiction. The aim should be to develop treaty-based relief measures for taxpayers who suffer multiple tax claims, or to address tax avoidance concerns, especially if harm is caused to the economic and development goals of States.**

<u>Commentary (Recommendation A):</u>

The law of jurisdiction does not exclude multiple overlapping exercises of tax jurisdiction (see Commentary on Principle D); it also does not *require* States to exercise their tax jurisdiction. As a consequence, taxpayers may face multiple tax claims, or they may exploit the gaps left by States' exercises, or non-exercises, of tax jurisdiction. Both instances may harm States and taxpayers.[56] While the customary rules of the law of jurisdiction may further evolve in light of recent developments concerning tax jurisdiction, it is unlikely that the problems resulting from multiple (non-)exercises of jurisdiction will be settled by customary international law. Therefore, States should cooperate with a view to concluding bilateral and/or multilateral treaties where none exist.

Treaty negotiations should be guided by the aim to achieve a fair and balanced exercise of tax jurisdiction. Both standards are open-ended and it is for the States involved to decide whether the resulting allocation of taxing rights is fair and balanced. However, processes designed in line with the Principles (above) and Recommendations (below) formulated by the Committee, which duly consider the effects of the exercise of tax jurisdiction on the interests of other States, may be useful to ensure outcomes are conceived as fair and balanced.

Beyond treaty-based solutions, States may also achieve coordination by harmonizing relief measures within their respective domestic legal systems, potentially producing comparable outcomes.

**B. State practice concerning jurisdiction to tax should be comprehensively studied to inform cooperation between States (see Recommendation A). In particular, those studies should consider the structural effects and the definitions of commonly used manifestations of a sufficiently close connection, such as 'residence', 'source', 'market', 'place of consumption', 'place of supply' or 'place of pollution', etc.**

---

[55] For instance, at the UN level, the Intergovernmental Negotiating Committee of the UNFCITC devoted specific attention to "tax incentives", which were required to be "substance-based, linked to investment or performance, and not merely profit-based." However, this initial reference to tax incentives in a provision dealing with the fight against harmful tax practices was deleted in the new Article 8 concerning "harmful tax practices" which does not seem to carve out any specific tax regime for economic activities that contribute to development (Co-Lead's Draft Framework Convention Template, Document A/AC.298/CRP.26, 22 January 2026) (https://financing.desa.un.org/unfcitc/backgroundandkeydocuments); see El Boudouhi n 16 for further analysis.

[56] See, eg, OECD, *Addressing Base Erosion and Profit Shifting* (2013) 39-40.

Commentary (Recommendation B):

The development and common understandings of terms and concepts of international tax law are in a heightened state of flux. This is also due to the many novel tax measures that are unilaterally developed or being proposed through international fora. The Committee considers that these developments should be kept under review, with the aim of providing helpful input to these processes. As indicated in Observation B, the established connecting factors are equally lawful under the law of jurisdiction. The Committee thus recommends that they should all be taken into account in the development of any international tax law instruments.[57]

Further, there are terms and concepts that emerged, during the time of the Committee's studies, which remain unclear and/or worthwhile to study further. In particular, definitional clarity goes hand-in-hand with understanding the structural effects on the tax bases of States, and on taxpayers, of new concepts that are being used to express a sufficiently close connection.

Terms and concepts, which were not fully explored in topical studies, and which were not always viewed with unanimity within the Committee, include, for example:

- The adaptation of traditional jurisdictional tax concepts that establish a sufficiently close connection such as 'residence', 'source', and 'place of supply' or 'place of consumption' to societal developments such as the digitalization of the economy and global mobility of persons.

- The use of novel concepts such as the 'market' or 'place of pollution' to inform the design of tax rules that establish a sufficiently close connection.

- The concept of a split tax-base or formulary taxation which may remedy, at least in a transitory manner, the tax collection difficulties that some States may encounter (see also Recommendation E below).

- The interaction with and relevance of human rights instruments for tax concepts used to establish a sufficiently close connection (see also Recommendation E below).

While the monitoring and study of State practice does not in and of itself result in solutions to resolve the challenges faced by tax systems in a global context, it will significantly add to the quality of decision-making, ensuring effectiveness and authority of any decisions (see also Recommendation C).

**C. It is recommended that international fora adapt and improve working methods to coordinate concurrent jurisdictional claims to taxation through processes that produce and publish preparatory work. Such processes should be inclusive and sufficiently resourced. They could be led by independent expert bodies and experts, who should produce scientific analyses and assist in the drafting of any resulting legal instruments.**

[57] For example see the list of connecting factors in Art. 5 of the draft UN Framework Tax Convention concerning "Fair Allocation of Taxing Rights" (Co-Lead's Draft Framework Convention Template, Document A/AC.298/CRP.26, 22 January 2026) (https://financing.desa.un.org/unfcitc/backgroundandkeydocuments), which does not include connecting factors based on the personality principle.

Commentary (Recommendation C):

The recent push to reform international tax law through multilateral cooperation is a commendable development. Multilateralism and inter-State cooperation are crucial ingredients in a solution to the serious challenges that lie ahead of the international tax system.[58]

To ensure that these multilateral efforts are effective, the Committee encourages the relevant actors to consider adopting working methods that have proven successful in negotiations towards inter-State cooperation in other fields of international law. For instance, past experience affirms the wisdom of having preparatory work conducted by independent expert bodies prior to the commencement of treaty negotiations; examples for best practices may derive, *inter alia*, from the UN International Law Commission or the UN Intergovernmental Panel on Climate Change.[59] Any input by expert bodies must of course only be advisory in nature and may not undermine the democratic legitimacy of political processes at the international level.

One particular concern in the context of international tax policymaking relates to the transparency and inclusivity of multilateral negotiations. Any preliminary studies or preparatory work that may inform initial drafts or subsequent negotiations within international organizations commonly remain confidential and never become known by the public and the scientific community. Preparatory work of independent expert bodies concerning international tax policy could be published in line with best practices observed in other fields of international law.

Tax scholars have been calling for the establishment of an independent international tax organisation or even a global tax authority.[60] Calls of this nature are driven by the need to globally consolidate ever increasing complex cross-border tax administration, effectively deal with complex international tax evasion and avoidance activities, address transparency and independence concerns, and to ensure that the highest quality of evidence-based knowledge informs international tax reform proposals.

**D. It is recommended to conduct impact assessments about the effects of new manifestations of a sufficiently close connection on taxpayers and other affected States. On that basis, States are recommended to analyse whether the connecting factors chosen are reasonable and proportionate to the legitimate purpose and aim of the relevant tax measure. Thereby, States duly consider the potential effects of a tax measure on other States (Principle C). Publication of such assessments is**

---

[58] For a detailed study of the OECD's and the UN's role in international tax reform, see Baker n 7.

[59] Concerning the International Law Commission, see *Making Better International Law: The International Law Commission at 50* (United Nations 1998); O Dörr, 'Codifying and Developing Meta-Rules: The ILC and the Law of Treaties' (2006) 49 *German Yearbook of International Law* 129; O Sender and M Wood, 'The Work of the International Law Commission between 1997 and 2022: A Positive Assessment' (2022) 25 *Max Planck Yearbook of United Nations Law Online* 645; concerning the lead-up to the UNFCCC, see D Bodansky, 'The United Nations Framework Convention on Climate Change: a Commentary' (1993) 18 *Yale Journal of International Law* 451, 475; D Bodansky, 'Multilateral Environmental Treaty Making', in L Rajamani and J Peel (eds), *The Oxford Handbook of International Environmental Law* (2021, 2nd edn), 408.

[60] See, for example, V Tanzi, 'Forces that Shape Tax Policy', in H Stein (ed), *Tax Policy in the Twenty-First Century* (1988); P Shome, 'A 21st Century Global Carbon Tax' (1996) 50 *Bulletin for International Taxation* 11/12; V Tanzi, 'Lakes, Oceans, and Taxes: Why the World Needs a World Tax Authority', in T Pogge and K Mehta (eds), *Global Tax Fairness* (2016); and P Shome, 'The Absence of a Stable Core in the International Taxation Regime' (2021) 75 *Bulletin for International Taxation* 11/12, 568-569.

**recommended to demonstrate the lawfulness of jurisdictional claims under international law.**

Commentary (Recommendation D):

Considering the effects of a tax measure on other States (see Principle C) hinges on a State's knowledge of any such effects. As one of the studies has identified, some States have begun conducting impact assessments of their domestic tax measures (see Observation C above).[61] This practice is commendable as it provides a solid basis to take into account possible effects. Currently, State practice is not sufficiently widespread to conclude that such impact assessments are required under international law. But this may change if more States start conducting such assessments, as is illustrated by the development regarding environmental impact assessments. Because of the level of acceptance in State practice, the ICJ found that conducting environmental impact assessment 'may now be considered a requirement under general international law'.[62]

Publishing impact assessments may also help legitimize (or illustrate the legitimacy of) new tax measures vis-a-vis taxpayers. Such transparency supports the acting State's claim for the lawfulness of its exercise of jurisdiction and is not, or not in the first place, meant to inform international debates. A legal channel that can be used to share this kind of information between States already exists because of the obligation to notify any significant changes in taxation laws under the network of approximately 3,300 bilateral model-based tax treaties.[63]

To further operationalize the duty specified in Principle C, States may rely on the standards of reasonableness[64] and proportionality.[65] Uniform and widespread practice may be missing in this regard in the law of jurisdiction.[66] However, proportionality forms part of international law as per Art. 38(1)(c) ICJ-Statute[67] and is, just as the standard of reasonableness,[68] generally accepted as a limit to the exercise of rights under international law.[69] Such proportionality analysis requires to balance the interference with another State's sovereignty with the aim and

---

[61] See n 52.

[62] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) ICJ Rep 2010, 14, para. 204.

[63] The obligation arises under clauses patterned on article 2(4) of the OECD and UN Model Tax Conventions, which determines that "[t]he competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws".

[64] See for such an argument Ryngaert, *Jurisdiction,* n 1, 184; Hattingh and Hongler, n 9, 90-91.

[65] Hattingh and Hongler n 9, 90-91; Hattingh, n 10 section "12.2 An integrative application of customary international law and general principles of law"; see also Ryngaert, *Jurisdiction*, n 1, 182 et seq.

[66] See for proportionality Ryngaert, Jurisdiction, n 1, 158; but see for the application of reasonableness on the exercise of jurisdiction *Filleting within the Gulf of St. Lawrence between Canada and France* [1986] RIAA XIX, para. 54.

[67] See for proportionality E Crawford, 'Proportionality' in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia for Public International Law* (online edn, 2011) para. 1; see also Hattingh and Hongler, n 9, 90-91.

[68] See on the legal characterisation of reasonableness as a standard O Corten and R Kolb, 'Reasonableness in International Law' in A Peters and R Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (online edn, 2021), paras 5-6.

[69] See on reasonableness *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ICJ Rep 3, para. 93('On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably.'); see for an overview of the application of proportionality in different fields of international law Crawford n 67, paras. 9-23.

purpose of the tax measure. Building on how the principle is operationalized in international human rights law, the aim pursued must be legitimate.[70] Thus, the qualifier ‘legitimate’ is meant to exclude certain aims and purposes from the proportionality analysis. In particular, an aim may not be legitimate in that sense if a State adopts a tax measure for a non-revenue-raising purpose to interfere with other States exercise of sovereignty (in fiscal and other matters). In their General Report on nexus, Johann Hattingh and Peter Hongler have specified ‘[r]elevant factors to adjudicate whether a jurisdictional tax rule (nexus) is proportionate [...] as follows:

1. The nature of the fiscal instrument, its purpose and its aim.

2. The nature and the extent (incl. the impact on other countries) of the nexus.

3. The relation between the nature, aim and purpose of the fiscal instrument (1) and the extent of the nexus (2).

4. Are there less restrictive means to achieve the purpose?’[71]

**E. In shaping new manifestations of a sufficiently close connection, it is recommended that tax reform efforts adopt a holistic development perspective, with a focus on strengthening domestic resource mobilization, maintaining a policy environment conducive to investment, and promoting broader development objectives, notably those reflected in the UN Sustainable Development Goals.**

<u>Commentary (Recommendation E):</u>

Considering that fairness is not only about taxpayers paying their fair share of taxes but also about States sharing the available fiscal resources, and taking into account the practice in other areas of international law, development objectives, especially as reflected and assessed through the Sustainable Development Goals (‘SDGs’), should be explicitly and methodologically taken into account in tax reform negotiations. In particular, a sufficiently close connection establishing tax jurisdiction should not be exercised in a way that deprives developing countries of needed resources as identified through the SDGs.[72] This requires that development considerations are taken on board not only at the capacity-building stage, but also at the earlier stage of the establishment or definition of jurisdictional rules.

Development concerns should not be framed as open-ended claims, but as needs that can be benchmarked, targeted, and reassessed over time. International organizations and States engaged in international tax reform could agree on reference frameworks for identifying development needs – drawing, where appropriate, on internationally recognized indicators such as the SDGs or core economic, social and cultural rights. Development needs should therefore be assessed in the light of both the SDGs and existing commitments undertaken by States to

[70] See A Peters, ‘Proportionality as a global constitutional principle’ in AF Lang and A Wiener, *Handbook on Global Constitutionalism* (Elgar 2023) 346, 347.

[71] Hattingh and Hongler, n 9, 91.

[72] See El Boudouhi n 16, “Part I Conceptual perspective: ways in which development needs could shape international tax law (drawing on other areas of international law where relevant)” and “Part III Beyond nexus: capacity-building, international cooperation, and effective tax collection”.

employ resources to development objectives to the maximum extent possible, including, for example, Article 2 of the International Covenant on Economic, Social and Cultural Rights.[73]

However, development needs go beyond the effects of nexus rules and capacity-building measures aimed at strengthening domestic resource mobilization. More generally, challenges associated with tax collection in certain jurisdictions may call for a meaningful discussion about a split-tax-base approach (see also, Commentary on Recommendation B). This may be understood as a partial formula-based allocation of the tax base for multinational companies, without necessarily adopting full formulary apportionment, or other forms of formulary taxation.[74] Such approaches may offer a way forward, beyond nexus rules, especially in areas such as new technologies, where establishing a sufficiently close connection may be difficult.

[73] See El Boudouhi n 16, "Part I Conceptual perspective: ways in which development needs could shape international tax law (drawing on other areas of international law where relevant)". See also P Baker, 'Taxpayers' Rights and Human Rights' (2025) 53 *Intertax* 12, 822-825 for proposals how to integrate these rights in the negotiation of a UN Framework Convention on International Tax Cooperation; UN Committee on Economic, Social and Cultural Rights, "Statement on Tax Policy and the International Covenant on Economic, Social and Cultural Rights", E/C.12/2025/1 (17 March 2025); UN Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, UN Doc. E/C.12/GC/24 (10 Aug. 2017), 12.

[74] See El Boudouhi n 16, "Part III Beyond nexus: capacity-building, international cooperation, and effective tax collection". Without going as far as proposing a World Tax Authority (see Tanzi's proposal), several scholarly and non-scholarly proposals have been identified which rely on some sort of split-tax based approach.