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Subject 2: domestic and international taxation of data driven business

Chair: Prof. Dr. Dr. h.c. Wolfgang Schön

Date: 6th of September 2022





Introduction



Panel

- *Gary Sprague* Baker & McKenzie, US (General Reporter)
- *Veronika Daurer* Ministry of Finance, Austria
- *Xenia Legendre* Hogan Lovells, France
- *Lionel Nobre* Dell, US/Latin America
- *Reimar Pinkernell* Flick Gocke Schaumburg, Germany
- *Andreas Sattler* Munich University, Germany
- *Yan Xu* University of New South Wales, Australia

- *Gustavo Weiss de Resende* Brazil (Panel Secretary)
- *Wolfgang Schön* Max Planck Institute, Germany (Chair)

Agenda

- Introduction
- General Report
- Intellectual Property Law/Information Technology Law
- Case Studies (Case – IP/IT Law – Domestic Taxation – Treaty Principles – Deduction vs. Expensing – Transfer Pricing – VAT/GST)
 - Case Study 1: Data Brokers/Information Resellers
 - Case Study 2: Data Feeds
 - Case Study 3: Performance Data Analytics
 - Case Study 4: Analytics Based Consultancies
- Policy Issues
- Wrap Up





General Report

Gary Sprague

General Report

What is at Stake

- Most significant context: allocation between residence and market state taxing rights
- Traditional relevant definition
 - Withholding tax on royalties, know-how, technical services, use of equipment
 - PE
- More recent theories to enhance market state taxing rights
 - Digital services and similar taxes
 - Substantial economic presence PE
 - Expanded withholding tax base

General Report

National Law on Character of Cross-Border Payments

- Possible characterization categories
 - Provision of services
 - Sale of property
 - Lease of property
 - License of rights to use intangible property

General Report

Tax Treaty Principles - Character of Payments

- Relevant treaty provisions re character
 - Business profits vs. royalties
 - Provision of know-how
 - Use of or right to use industrial, commercial or scientific equipment
 - Provision of technical services
 - Provision of automated digital services

General Report

Fundamental Questions on the Character of Cross-Border Payments

- What is data?
- Does the customer acquire the use of an item of property from the supplier?
 - If so, is that property an intangible?
 - Is the difference between right to exploit and acquisition of a copyrighted article a helpful analogy?
 - If intangible rights are acquired, is it for use for internal purposes vs. for market exploitation?
 - If no property is conveyed, must the transaction be a provision of services?
- Are there relevant intangibles other than statutory intellectual property rights?
- How do the parties document the transaction?
- What essentially is the customer paying for?

General Report

Tax Treaty Principles - Nexus

- Can data transactions create income tax nexus for nonresident service suppliers?
- Fixed place of business arising from ownership of equipment
 - Sensors or other collection devices owned by the provider
 - Sensors or other collection devices owned by the user
 - Data centers to hold and support service provision
- When could any of these items be at the disposal of the service supplier?
- Is the supplier's business wholly or partly carried on through that fixed place of business?
- When would it be preparatory or auxiliary?

General Report

Special Regimes

- Are data transactions included within the scope of novel unilateral measures?
 - Digital Services Tax (DST)
 - Significant economic presence PE
- Limits on deduction for royalties
- Patent boxes
- R&D credit

General Report

Deduction vs. Expensing

- Who is the owner of the asset (e.g., databases)?
- Are the costs incurred in the creation of the structured and optimized database and analytics tools immediately deductible?
 - Database software development
 - Algorithm development
 - Maintenance
 - Data acquisition
- Period for amortizing capitalized costs?

General Report

Transfer Pricing

- What creates the value in compiled and structured data?
 - The individual data points
 - The software that aggregates and structures the data
 - Algorithms that use data to produce a result
 - Factors external to the database
- What are the relevant DEMPE functions in “big data” development and transactions?
- What are the critical assets and risks in “big data” enterprises?
- Issues in the accurate delineation of the transaction between the parties?
- Any special issues in choice of tested party or choice of most appropriate method?

General Report “*Barter Transactions*”?

- Are barter concepts useful or practical in transactions involving data?
- Significant challenges in transactions involving consumers
 - Is there a direct link between a supply and the consideration?
 - Can the consideration be expressed in monetary terms?
 - Under what circumstances should income be recognized under personal income tax rules?
- Any different parameters for B2B transactions?

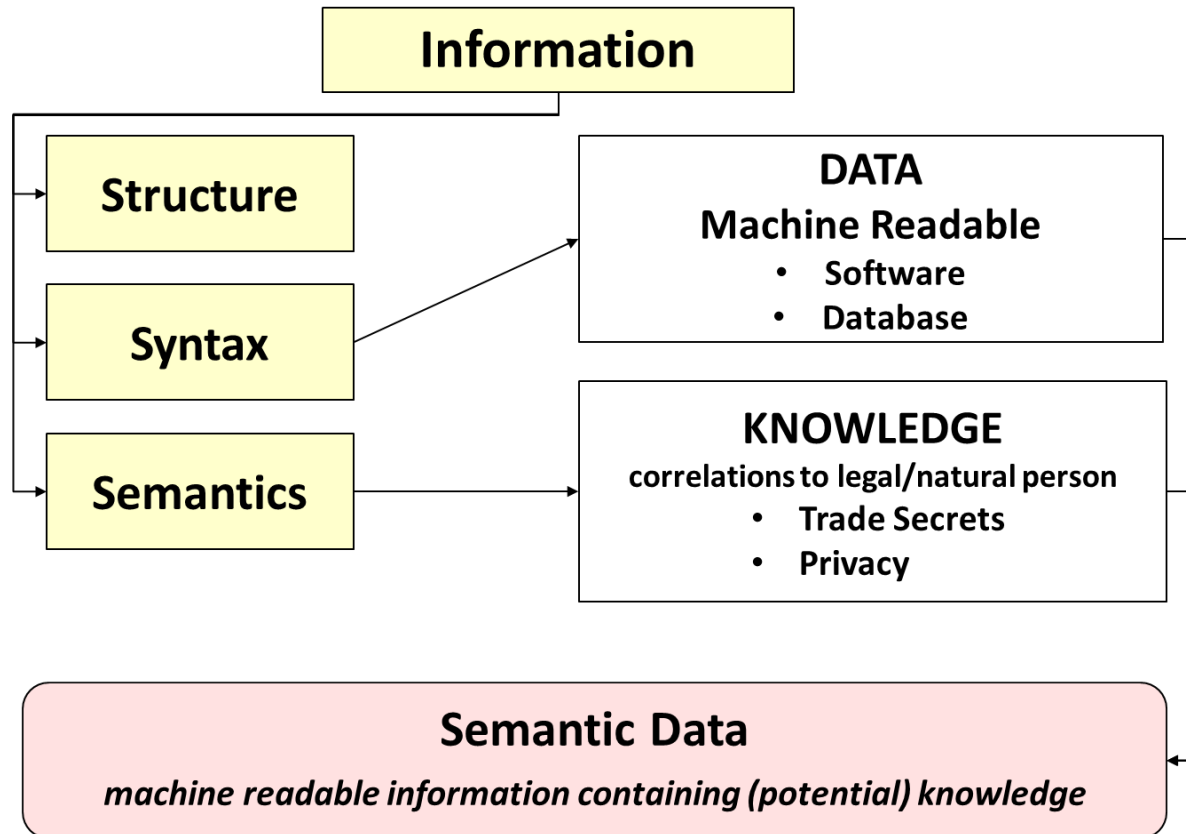




Considerations on IP/IT Law

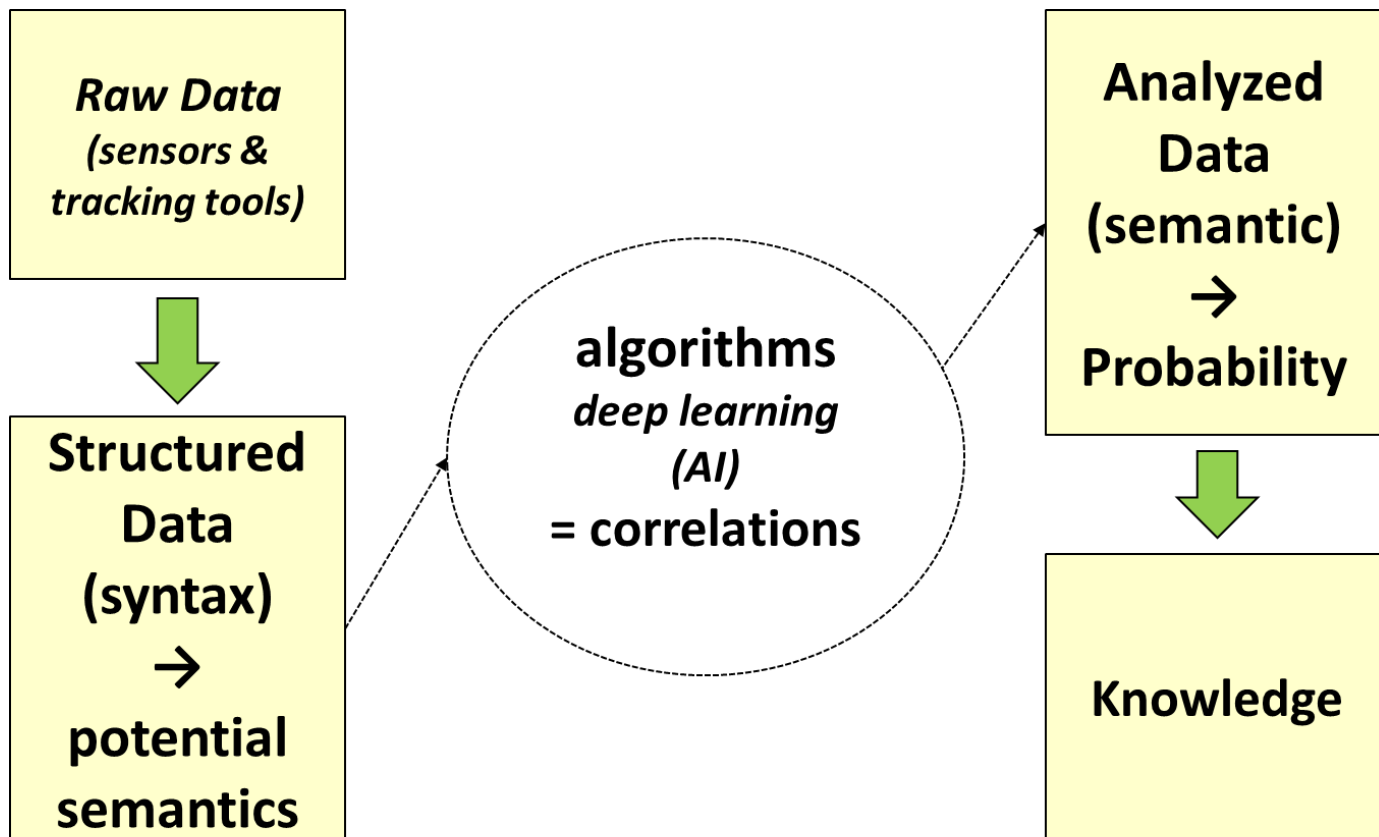


IP/IT Terminology



IP/IT

Data Processing and Creation of Value



Instruments of Protection

IP-RIGHTS



copyright (US)



database (EU)

- (-) data as such
- (-) protection of “spin-off”
- (-) investment in sensors
- (+) investment in obtaining, structuring and organizing of data
→ no protection of “sole-source data base”



trade secrets

1. information of economic value
2. valuable because kept secret
3. appropriate technical & organizational measures (TOM) to keep secret

Instruments of Protection

Privacy

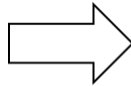


personal data as consideration

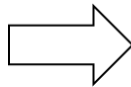
- no transfer/sale of tangible or intangible property (no IP right and no “right to one’s data”)
- do multi-sided platforms offer “free” services?
- royalties and license to use personal data?
 - EU (-), Art. 7 III GDPR (withdrawal of consent)
 - US (+/-) right to publicity
- barter?
 - intangibles as object of a barter?
 - no enforceable title to access or use data

Instruments of Protection

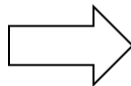
**Trade Secrets
&
Contract Law**



**Technical & Organisational
Measures (TOMs)**



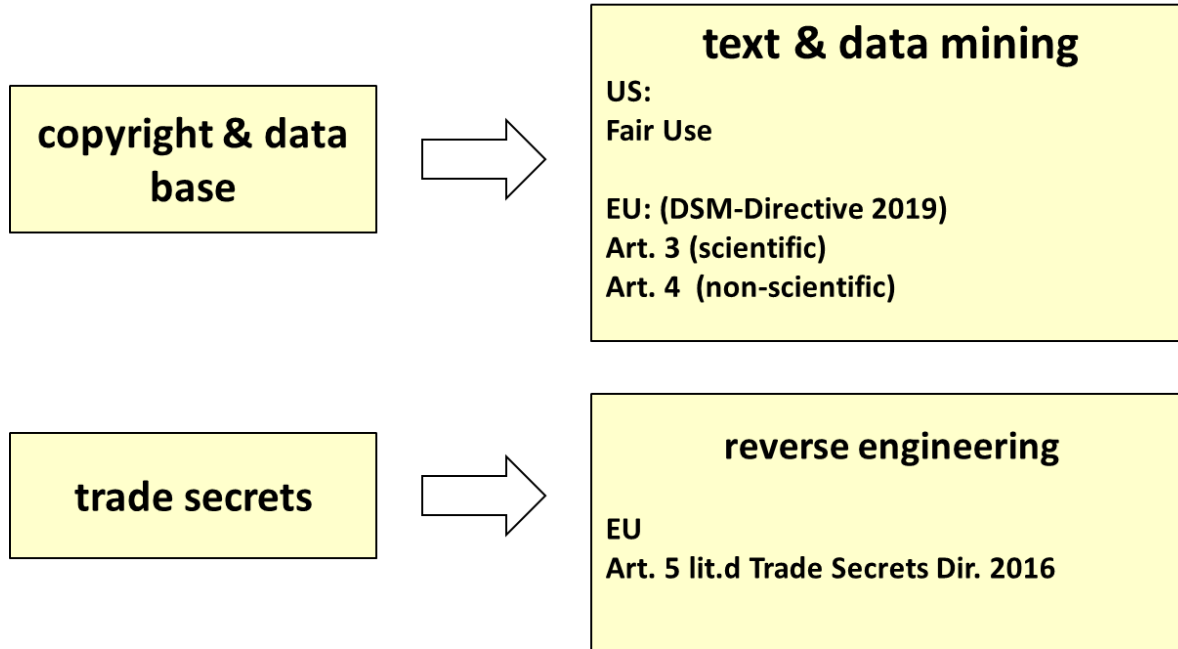
**Non-Disclosure Agreement
(NDA)**



**„Data License“
(Law of Obligation)**

Instruments of Protection

Exception & Limitation

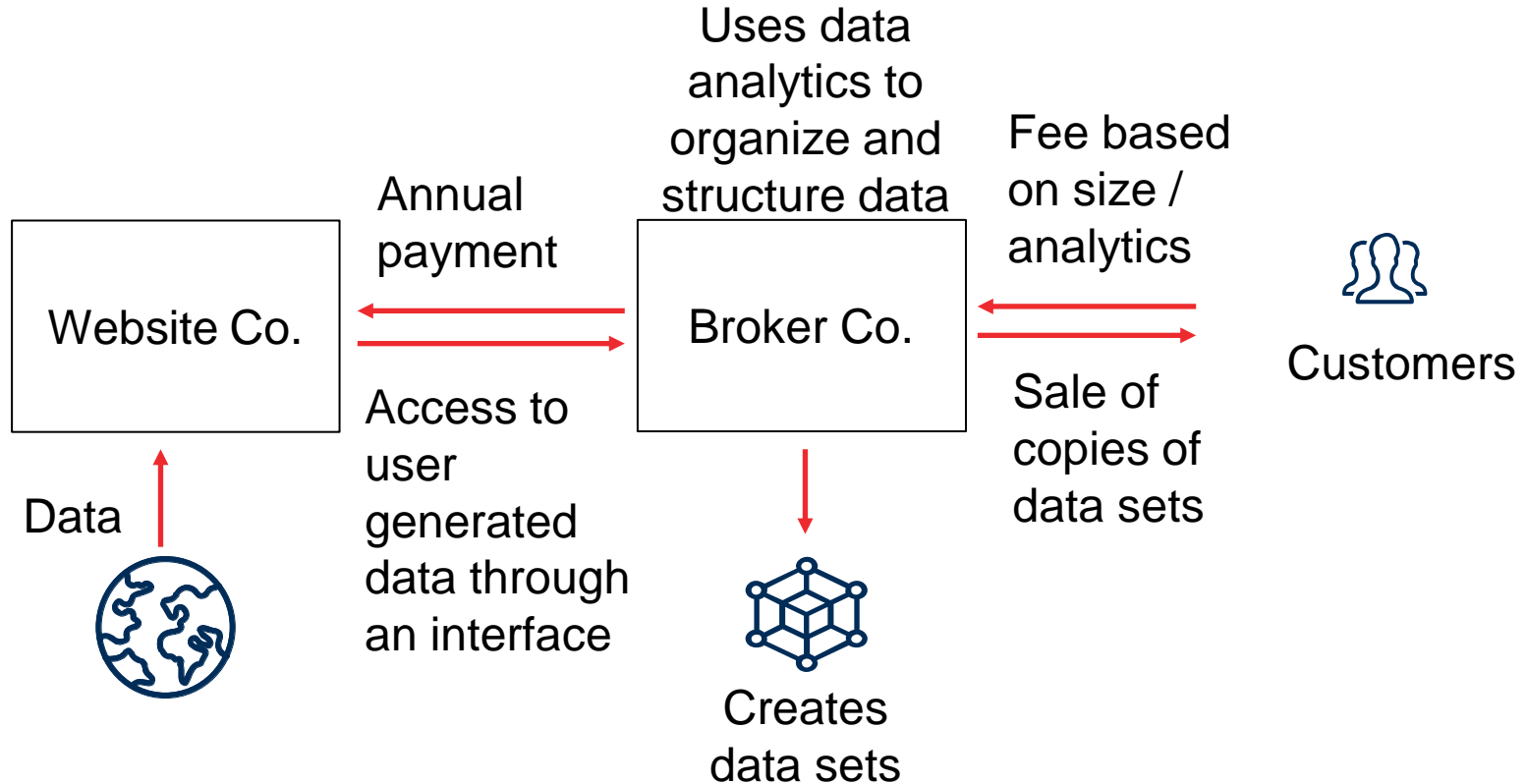




Case 1 – Data Brokers

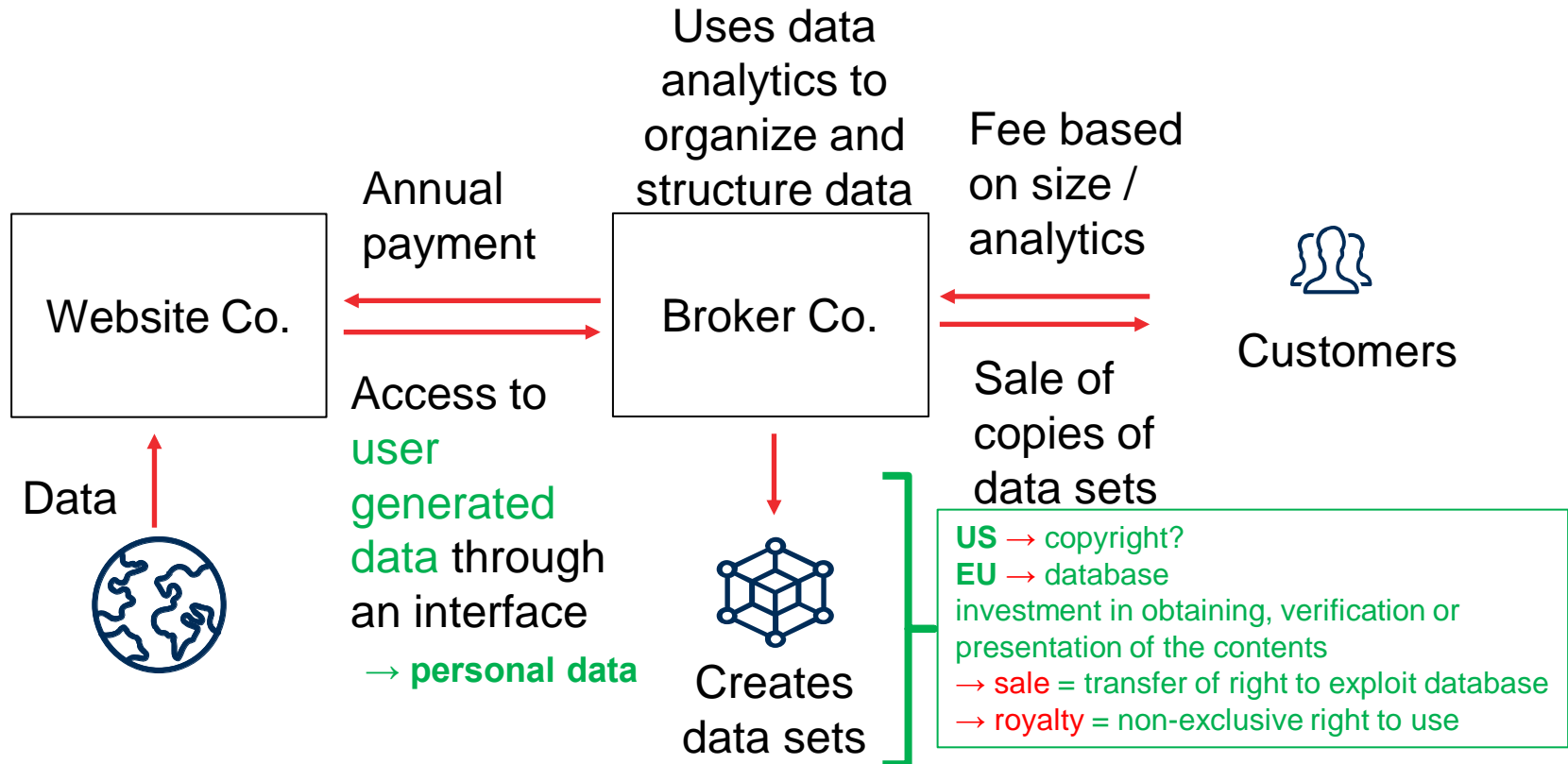


Data Brokers / Information Resellers



Data Brokers / Information Resellers

IP/IT Law



Data Brokers / Information Resellers

IP/IT

- **Annual payment of Broker Co. to Website Co. for user generated data**

Privacy/personal data

→ consent required?

- **Fee by Customer to Broker Co.**

Database

→ sale, if database (+) & customer receives exclusive right to exploit

→ royalty, if database (+) & customer receives non-exclusive right to use

Trade Secrets

Data Brokers / Information Resellers

Character of Payments under Tax Treaties

- Payment by Broker Co. to Website Co. likely business profits under art. 7(1) OECD-MTC
 - Services, not sale of raw data or grant of rights in an intangible (AR)
- Broker Co. is engaged in two types of transactions: customized analytics and transfer of standardized data sets
 - Performance of customized analytics to Customer – even if fully automated – should give rise to business profits under art. 7(1) OECD-MTC
 - By contrast, payments for transfer of standardized data sets might be characterized as royalties under art. 12(2) OECD-MTC
 - ❖ Minority view: right to use a copyright-protected database; right to use know-how, e.g “information concerning commercial behavior” (BRA)
 - ❖ Majority view: sale of pre-defined data sets is similar to sale of copyrighted articles (software) => business profits

Data Brokers / Information Resellers

Source of Income / Nexus

- Sourcing of income from data transactions is determined under general income tax rules
- In particular, no jurisdiction attempts to source payments made by Broker Co. to Website Co. and payments made by Customer to Broker Co. at the location of the persons who are the data sources (<=> DST, SDP)
- If income is characterized as business profits, no direct tax nexus exists outside the countries of residence of Website Co. and Broker Co.
 - Access to data through an interface doesn't create a PE for Broker Co. under art. 5(1) OECD-MTC
- However, royalties would be sourced in country of residence of payor
- Novel concept "Significant Economic Presence (SEP)", also draft legislation on taxation of Indian data

Data Brokers / Information Resellers

Deduction vs. Expensing

- Broker Co. is owner of self-created database (intangible asset)
- Costs incurred by Broker Co. to create database are immediately deductible in most jurisdictions (self-created intangible)
- Customer is generally subject to capitalization and amortization requirement if useful life of acquired data sets is more than one year

Data Brokers / Information Resellers

Transfer Pricing: General Considerations

- Addressing very new and novel areas from a business, legal and operational perspectives;
- Very hard for international or local laws/rules to closely follow developments with Big Data transactions – many rules can “seem outdated” including transfer pricing ones;
- Little or no precedent regarding transfer pricing in any of the jurisdictions analysed;
- General consensus that existing Transfer pricing principles are robust enough to be applied to Big Data transactions;

Data Brokers / Information Resellers

Transfer Pricing: Main Issues

- Legal nature: data as an intangible or a service?
 - Dutch approach: Chapter 6 OECD Guidelines (2017) qualifies data as an intangible asset under certain circumstances
 - BEPS and OECD TPG definitions of an intangible do not limit the scope to items protected under property law
 - ❖ not a physical or financial asset capable of being owned or controlled for use in commercial activities or in use or transfer would be compensated between independent parties for a comparable transaction

- Question: how any additional value or profits generated by digitalising business models can be allocated to the different members of a MNC?
 - How to best separate the value of the data? Raw data, processed data, analysed data etc.

Data Brokers / Information Resellers

Transfer Pricing: DEMPE Swiss Analysis

➤ DEMPE Swiss analysis:

Functions	Activities
Development	<ul style="list-style-type: none"> • Research activities, such as: <ul style="list-style-type: none"> • Definition of big data strategy • Analysis how to digitalize value chain • Search for data sources and systems for data collection • Drafts in connection with IT architecture or cloud computing • Development activities, such as: <ul style="list-style-type: none"> • Implementation of big data strategy including cloud computing services • Construction of IT architecture • Data collection
Enhancement	<ul style="list-style-type: none"> • Test runs in connection with IT architecture and data processing • Search for alternatives
Maintenance	<ul style="list-style-type: none"> • Measures for keeping data pool up to date • Application management
Protection	<ul style="list-style-type: none"> • Draft and implementation IT security concept • Implementation of data security measures • Licensing or accessing rights
Exploitation	<ul style="list-style-type: none"> • Decision making process regarding data exploitation (e.g., sale, licensing, processing data)

Data Brokers / Information Resellers

Application of TP Principles to Case 1

- If Website Co (uses data) and Broker Co (collects data) are related parties
- Main activity: provision of services
- Appropriate TP method: cost plus

Data Brokers / Information Resellers

VAT/GST

- Location matters: the destination principle under VAT/GST
 - Exports of goods and services not subject to tax, with input tax credits allowed
 - Imports of goods and services subject to tax at the same base and same rates as domestically supplied goods and services
- Distinction between goods and services may matter
 - Some jurisdictions apply different VAT/GST rates to supply of goods and supply of services
 - Reduced VAT/GST rates adopted in some jurisdictions apply to certain goods and/or services
 - Distinction does not matter if one single rate applies

Data Brokers / Information Resellers

VAT/GST

- Transactions between Broker Co. and Website Co.
 - ❖ Locations not specified
 - ❖ If located in different jurisdictions, Website Co.'s sale to Broker Co. is zero-rated
- Transactions between Broker Co. and Customers
 - ❖ Most would be zero-rated
- Location of persons to whom collected and processed data relates does not matter
- Collection of tax by importing jurisdiction
 - ❖ May refer to existing rules (e.g. reverse charge in the EU or ignored in Australia where importer is a registered business)
- Classification of transactions
 - ❖ Is the supply of access to user generated data through an interface a supply of goods?
 - ❖ Is the sale of data sets a supply of goods?

Data Brokers / Information Resellers

DST

➤ The DST (and Similar Taxes)

- Original idea proposed by the European Commission in 2018
- Some European and other countries have proposed or enacted a DST or a similar tax
- May apply to some of the big data transactions in the case studies
- Commonly limited to several types of transactions (incl. placement of advertisement targeted at users, online intermediation services, and online data transmission), and taxed on turnover

Data Brokers / Information Resellers

DST

➤ DST Implications

- Two transactions
 - ❖ Website Co. sells data access to Broker Co.
 - ❖ Broker Co. sells structured datasets to customers
- “Transmission of data” in both cases?
 - ❖ Seems yes
- The taxing jurisdiction applies the DST to the transactions
 - ❖ What is the taxing jurisdiction?





Case 1 Discussion



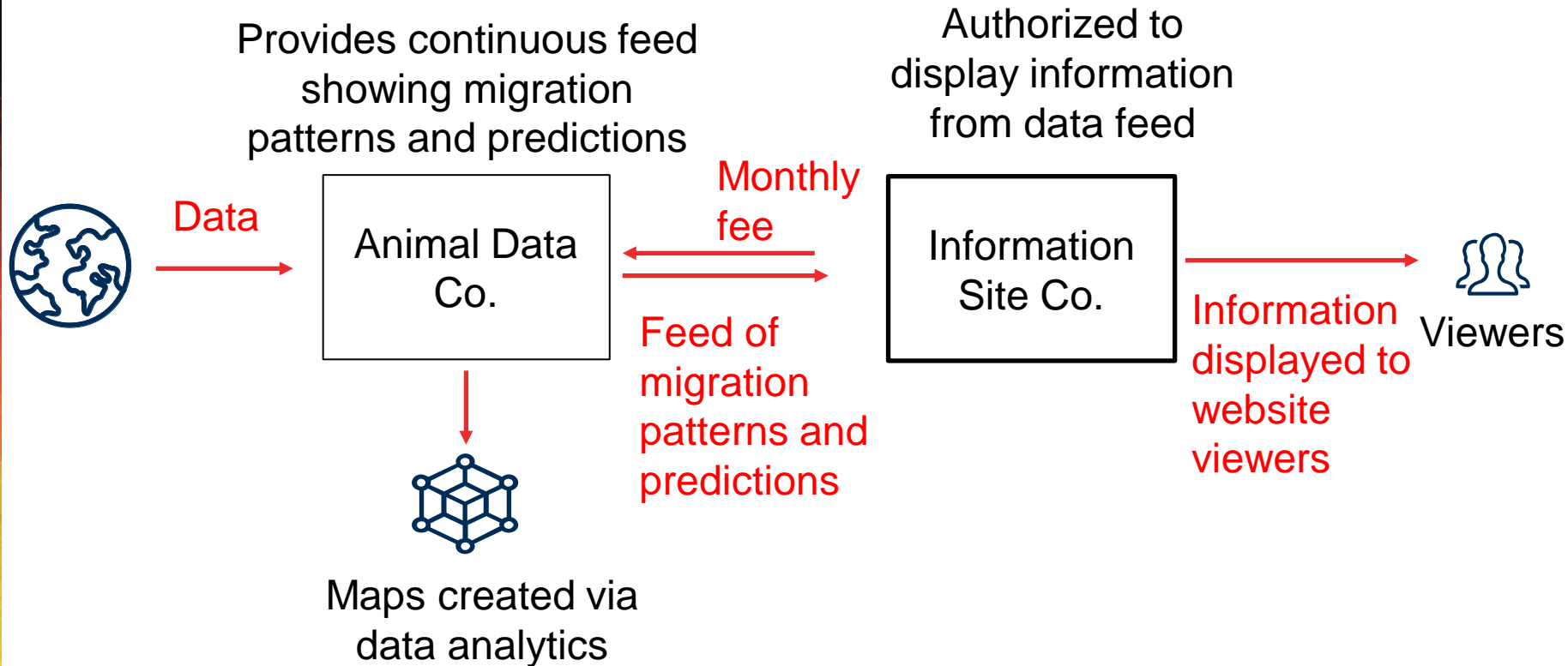




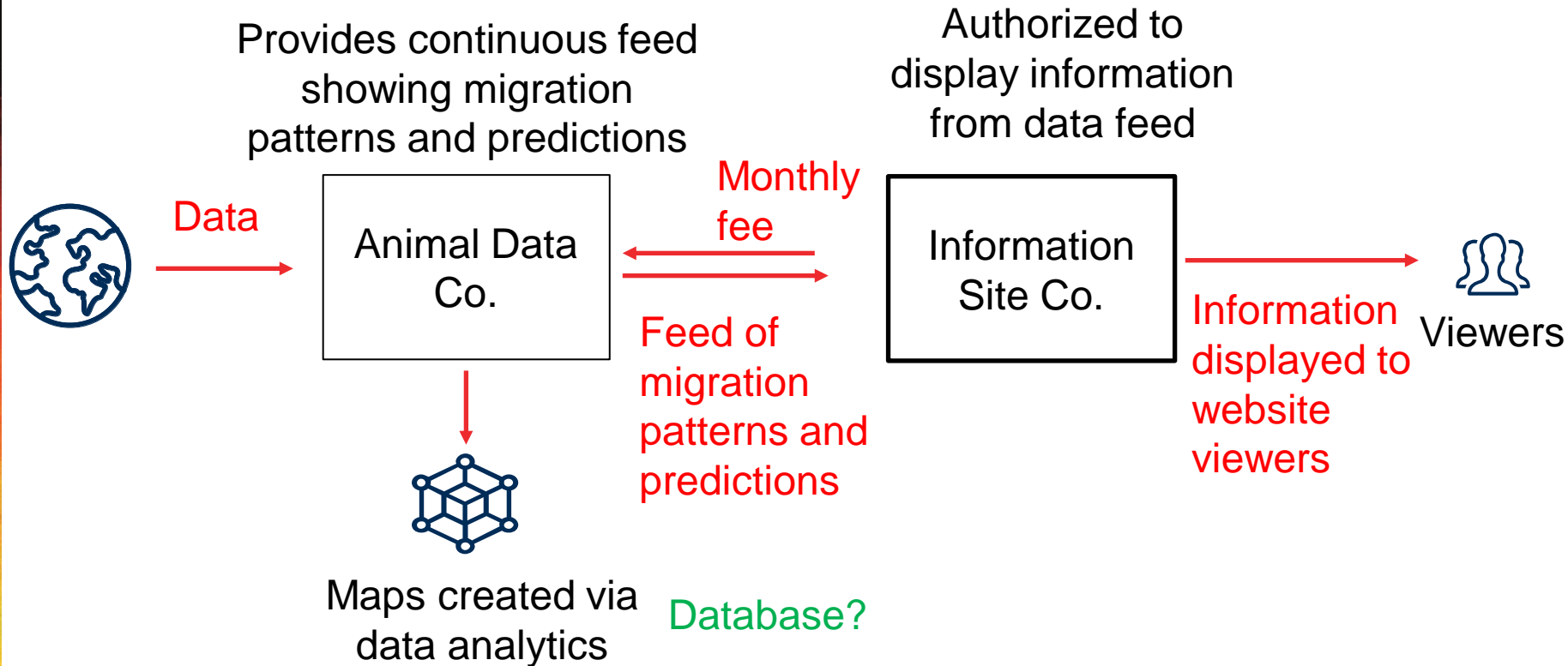
Case 2 – Data Feeds



Data Feeds – Alternative 1



Data Feeds – Alternative 1



Data Feeds

IP/IT Law

Monthly Fee for Feed of Migration Patterns and Predictions based on Maps

➤ **US**

- copyright
- trade secret

➤ **EU**

- database (investment in obtaining, verification or presentation)
 - sale = transfer of exclusive right to exploit database: (-)
 - royalties = non-exclusive right to use database (“feed”): (+/-)
- trade secret

Data Feeds – Alternative 1

Character of Payments under Domestic Tax Law

- Animal Data Co. derives fee for provision of data feed (migration patterns and predictions)
 - Data is structured and analysed; not merely raw data like in Case 1
- Character: What type of income is derived?
 - Purchase or lease of property, licence of intangible property, transfer of know-how, provision of service?
 - Different concepts under domestic tax law: professional vs. moveable income (BEL), royalties (IND), source taxation of service fees (BRA), property or services transaction (US), service or other type of business (CAN), etc.

Data Feeds – Alternative 1

Character of Payments under Treaties

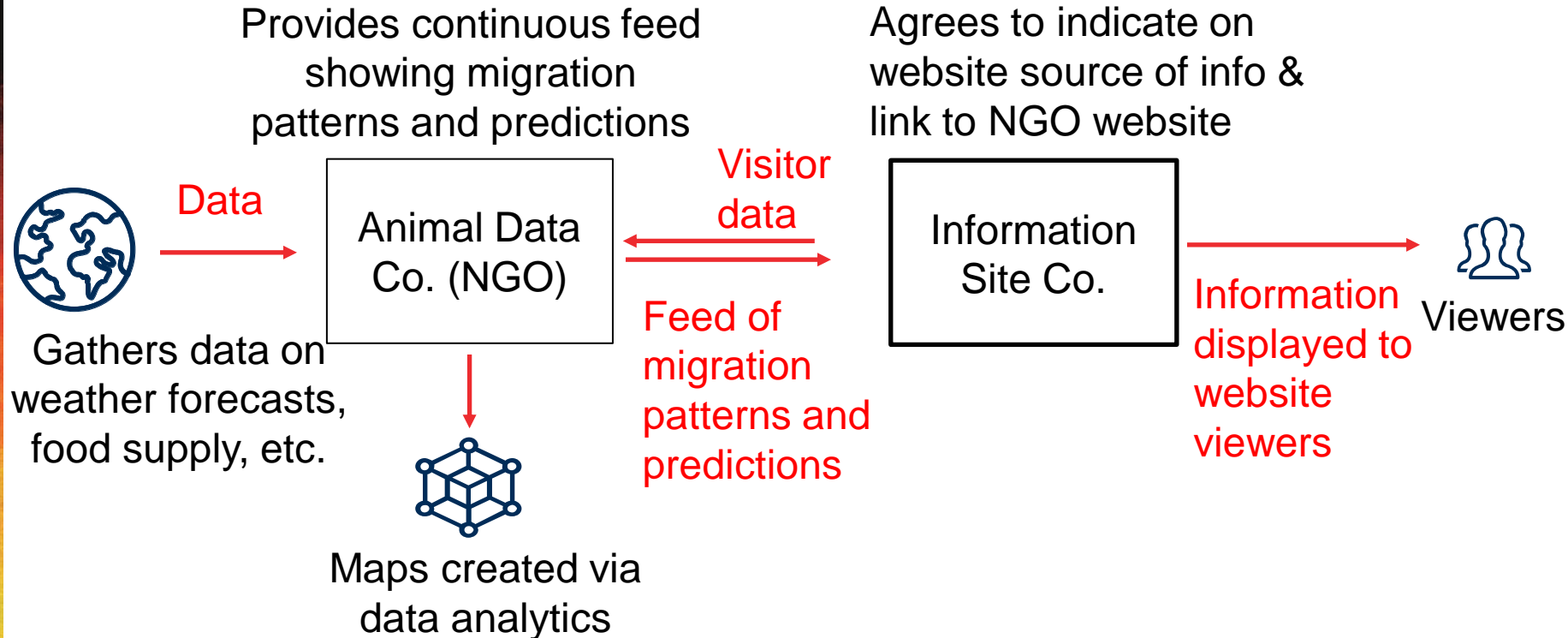
- (Right to) use copyright, patent, trade mark, design or model, plan, secret formula or process?
 - Most commonly no, even if data is structured and analysed;
 - absence of property right in data (however, databases can be protected – **FIN, GER**)
 - no exploitation right in property but only right to use a copyrighted article (software analogy – **GER, US**)
- Information concerning industrial, commercial or scientific experience (knowhow)?
 - Most commonly no;
 - Distinction between using knowhow as opposed to transferring knowhow (**IT**); preexisting information vs. new information gathered in connection to a service (**MEX**)
- Leasing of equipment (UN Model)?
 - Most commonly no, because data is not a tangible asset;
 - May also include intangible assets, e.g. software (**AT**)

Data Feeds – Alternative 1

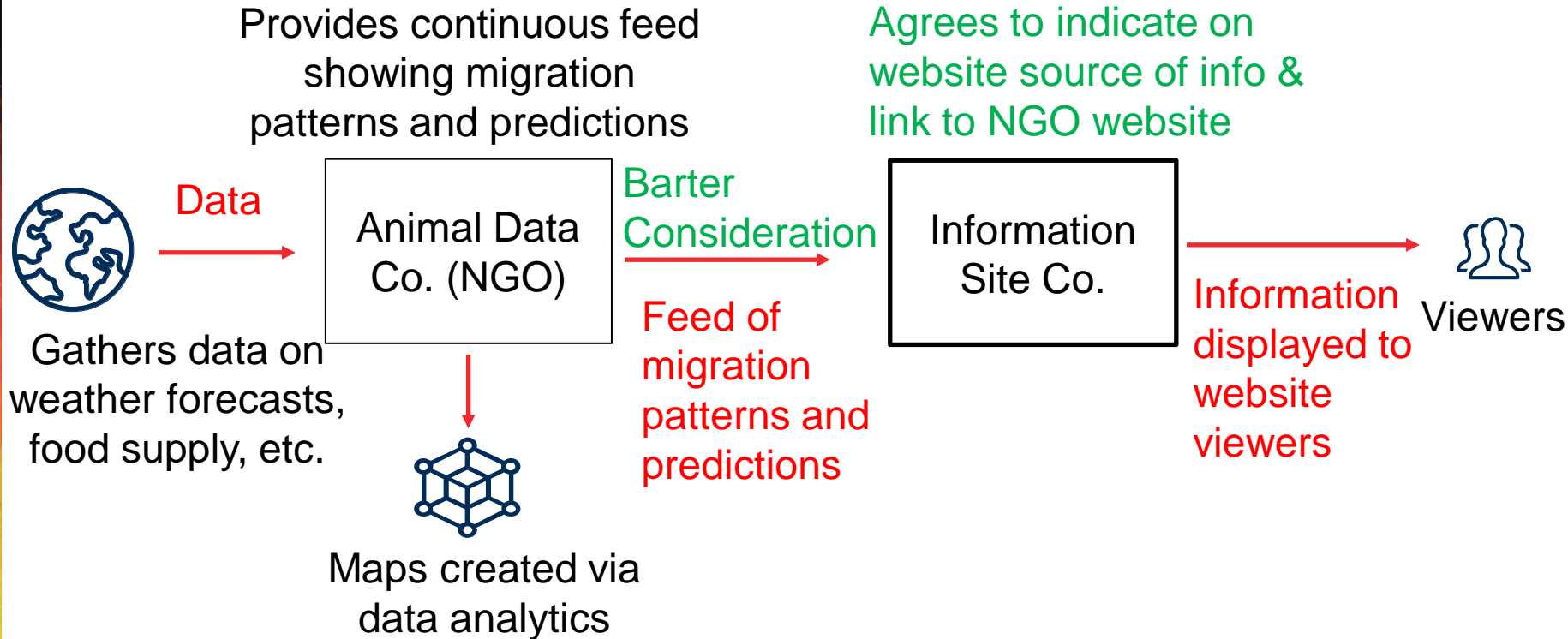
Character of Payments under Treaties

- Alienation of property – Capital gains (Article 13)?
 - Generally no, because no sale of property / no transfer of full ownership
 - Sometimes transfer of ownership of anonymized and structured data possible (FR)
- Provision of services
 - Article 7 OECD Model as a fall-back rule includes services
 - Specific services articles in the UN Model (and bilateral tax treaties)
 - ❖ Technical services (Article 12A): “any service of a managerial, **technical** or consultancy nature”
 - ❖ Automated digital services (Article 12B): “any service provided on the Internet or another electronic network, in either case **requiring minimal human involvement** from the service provider”; especially supply of user data, cloud computing services etc.

Data Feeds – Alternative 2



Data Feeds – Alternative 2 Contract Law



Data Feeds – Alternative 2

Direct Taxation (domestic and treaty law)

- Animal Data Co. derives consideration in kind for provision of data feed
 - Barter transaction – different views if treated in the same way as cash consideration (+ AUS, BRA, CAN, IND, IT, LUX, POR, RUS, SWE, TUR; ~ BEL, DEN, GER, POL, RSA, ESP, SUI; - COL, CZ, FR, KOR, MEX)
 - Tax treaties: other income (AUS), business profits (DEN)
- Animal Data Co. = NGO
 - Special regimes for direct tax purposes
 - ❖ Possibly exemption for (registered) charities (AUS, SWE);
 - ❖ Taxed as part of its commercial enterprise (TUR)

Data Feeds – Alternative 1

Transfer Pricing

- If Animal Data Co (collects data) and Information Site Co. (shares data) are related parties
- Main activity: provision of services
- Appropriate TP method: cost plus

Data Feeds

VAT/GST

- Once again, the destination principle
 - Zero rating exports with input credits allowed
- Collection of tax by importing jurisdiction
 - A practical issue in cross-border digital supplies
- Definition of supply
 - Broadly a supply made for consideration
 - The term “consideration”

Data Feeds

VAT/GST

- VAT/GST Issues in Case 2
 - Barter transactions
 - ❖ Two supplies in either side (i.e. supplies between Animal Data Co. & Information Site Co.)
 - ❖ Data transfers as a barter transaction
 - ❖ How to value the two supplies and impose VAT to them by each of the two relevant jurisdictions?
 - ❖ Arguments for and against applying VAT/GST to barter transactions

Data Feeds

DST

➤ DST Implications

- Transactions involve data about animal behavior
 - ❖ Data transferred by Animal Data Co. to Information Site Co.
 - ❖ DST: out of scope
- But if Animal Data Co. is an NGO
 - ❖ Data about visitors transmitted by Information Site Co. to Animal Data Co.
 - ❖ Animal Data Co. then uses the data to solicit potential sponsors
 - ❖ DST liabilities?
 - Within the scope of user data transmission
 - How to impose the DST?





Case 2 Discussion



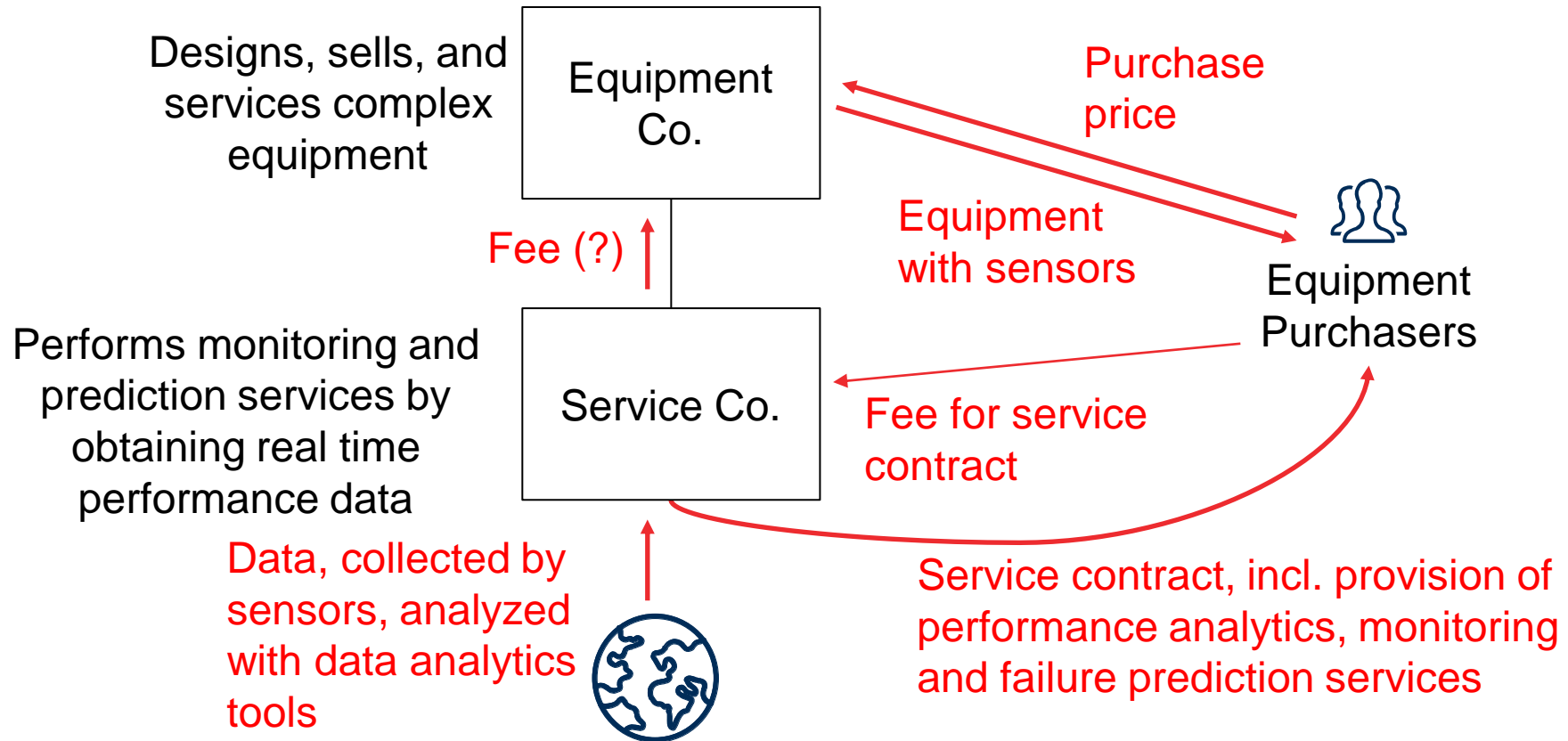




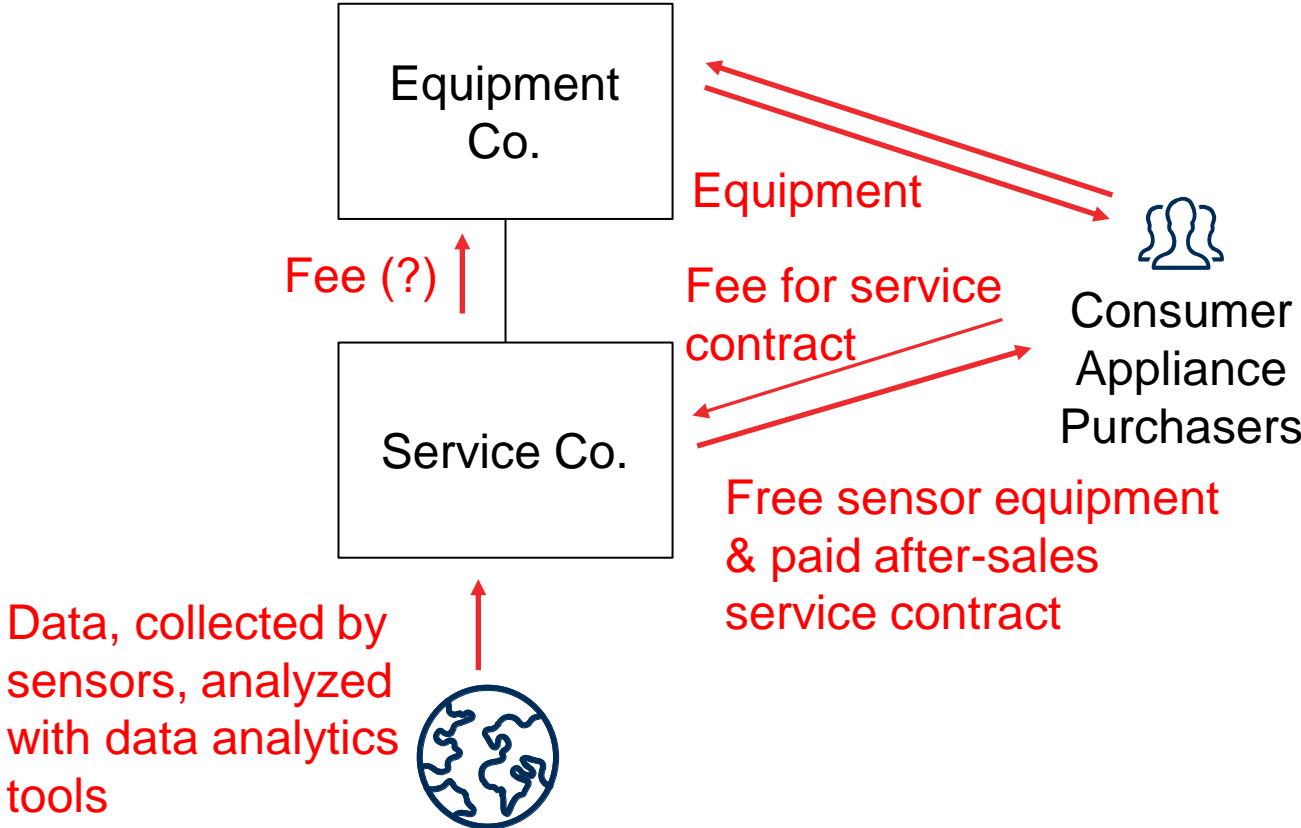
Case 3 – Performance Data Analytics



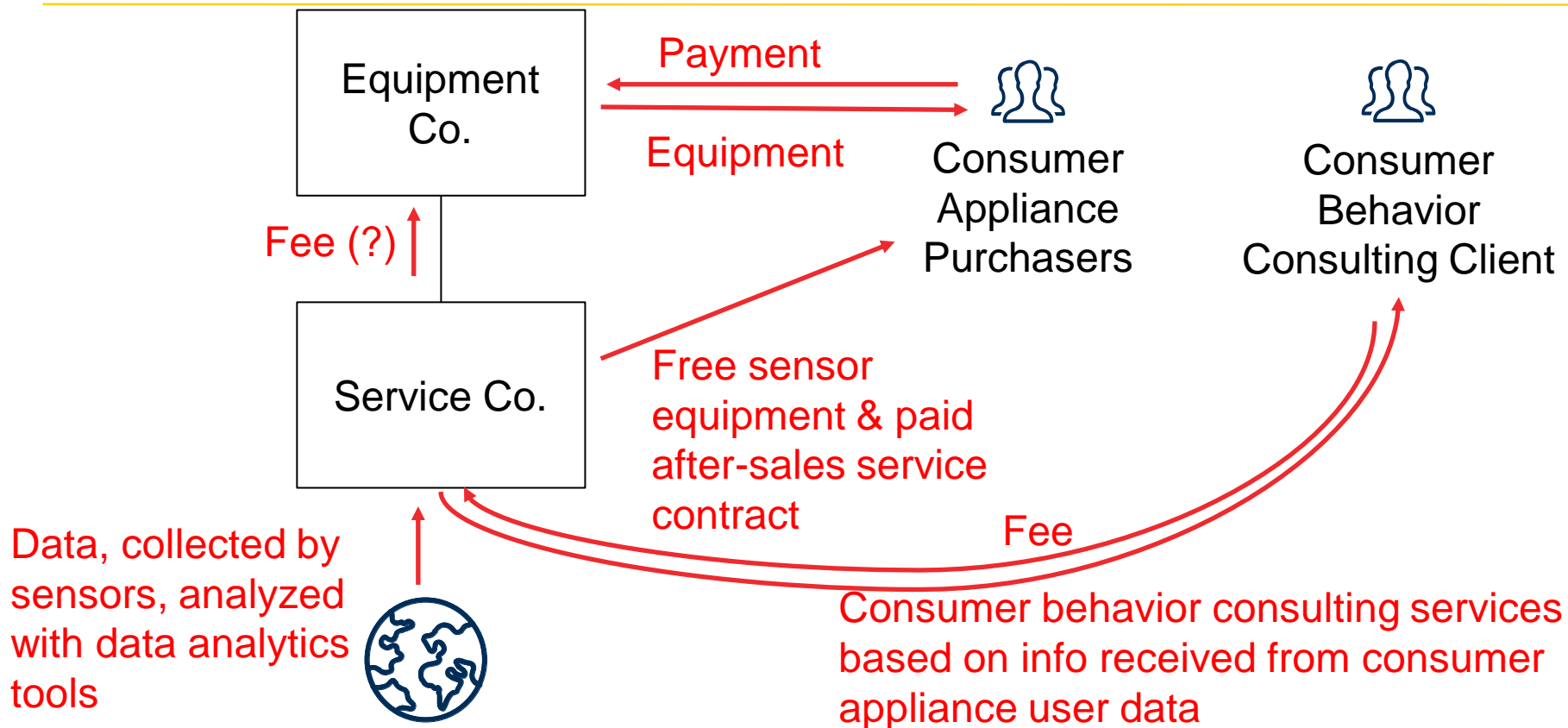
Performance Data Analytics (Heavy Equipment)



Performance Data Analytics (Consumer Appliance)

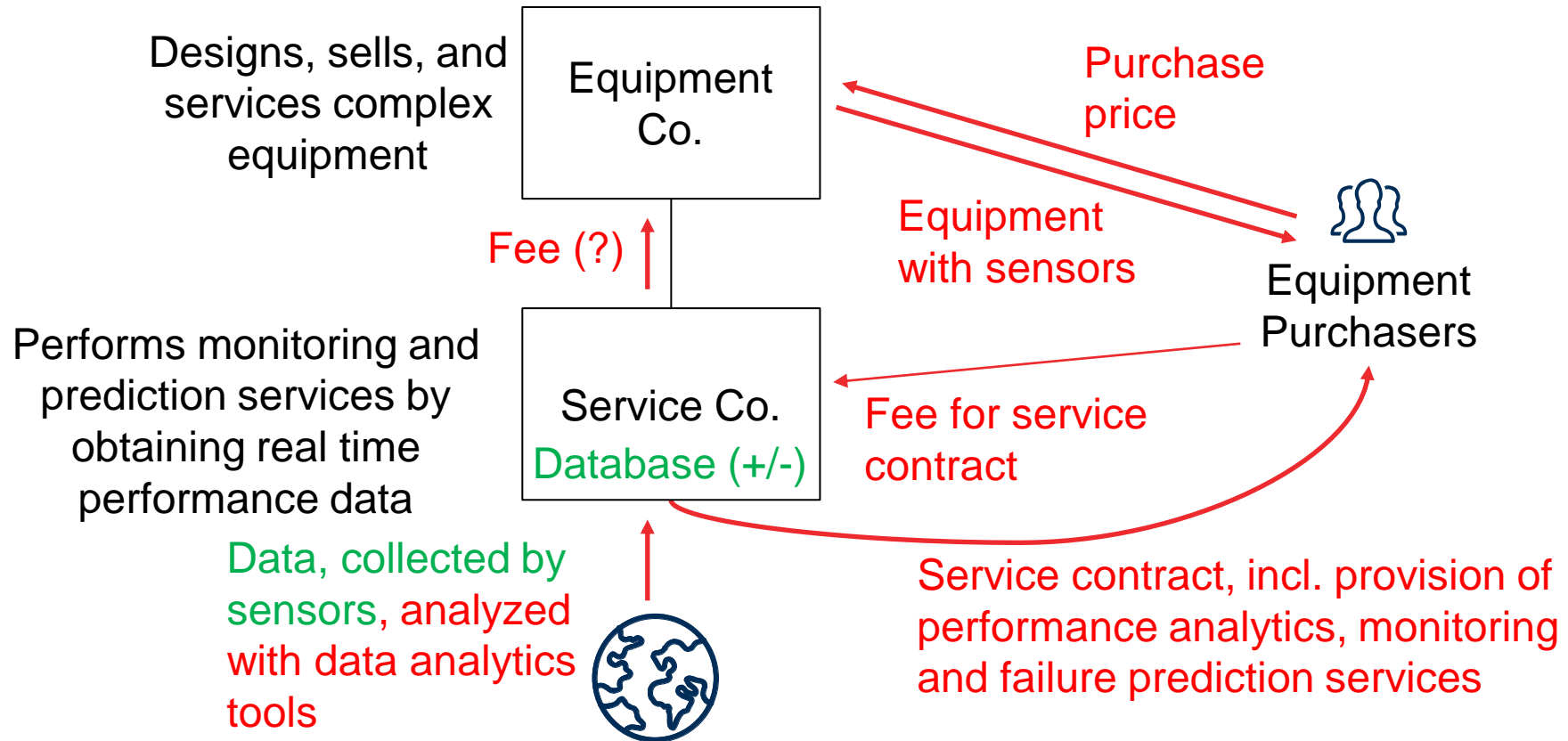


Performance Data Analytics (Consumer Behavior Consulting Services)



Performance Data Analytics (Heavy Equipment)

IP/IT Law



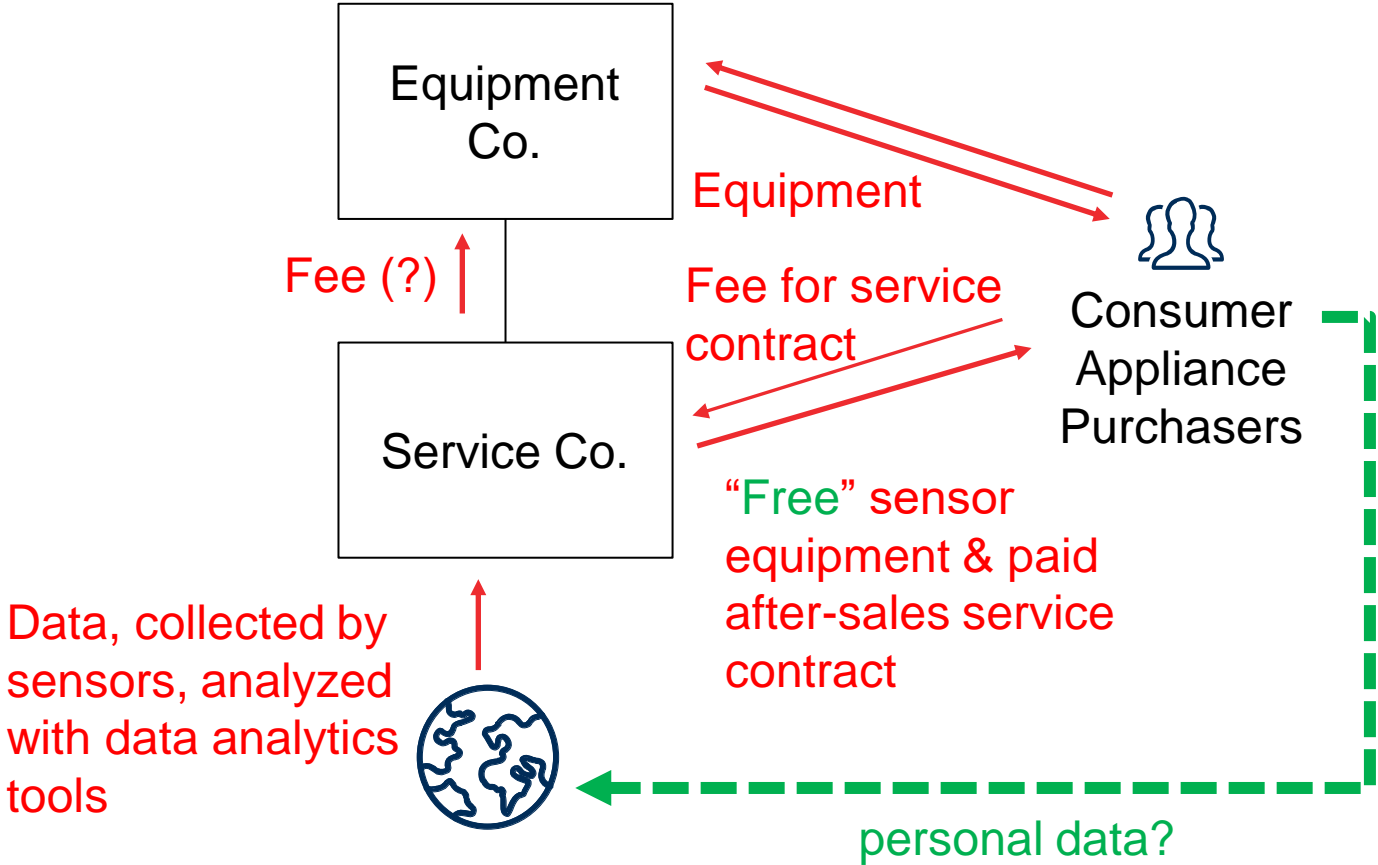
Performance Data Analytics (Heavy Equipment)

IP/IT Law

Character

- **Fee paid by Service Co. to Equipment Co.**
 - no sale
 - no royalties for database or trade secret
- **Fee paid by Equipment P. to Service Co. (no access to database)**
 - no sale
 - no royalties for database or trade secret

Performance Data Analytics (Consumer Appliance) IP/IT Law



Performance Data Analytics (Consumer Appliance) *IP/IT Law*

➤ **Fees paid by Consumer Appliance Purchasers to Service Co.**

→ no sale

→ no royalties for database or trade secret

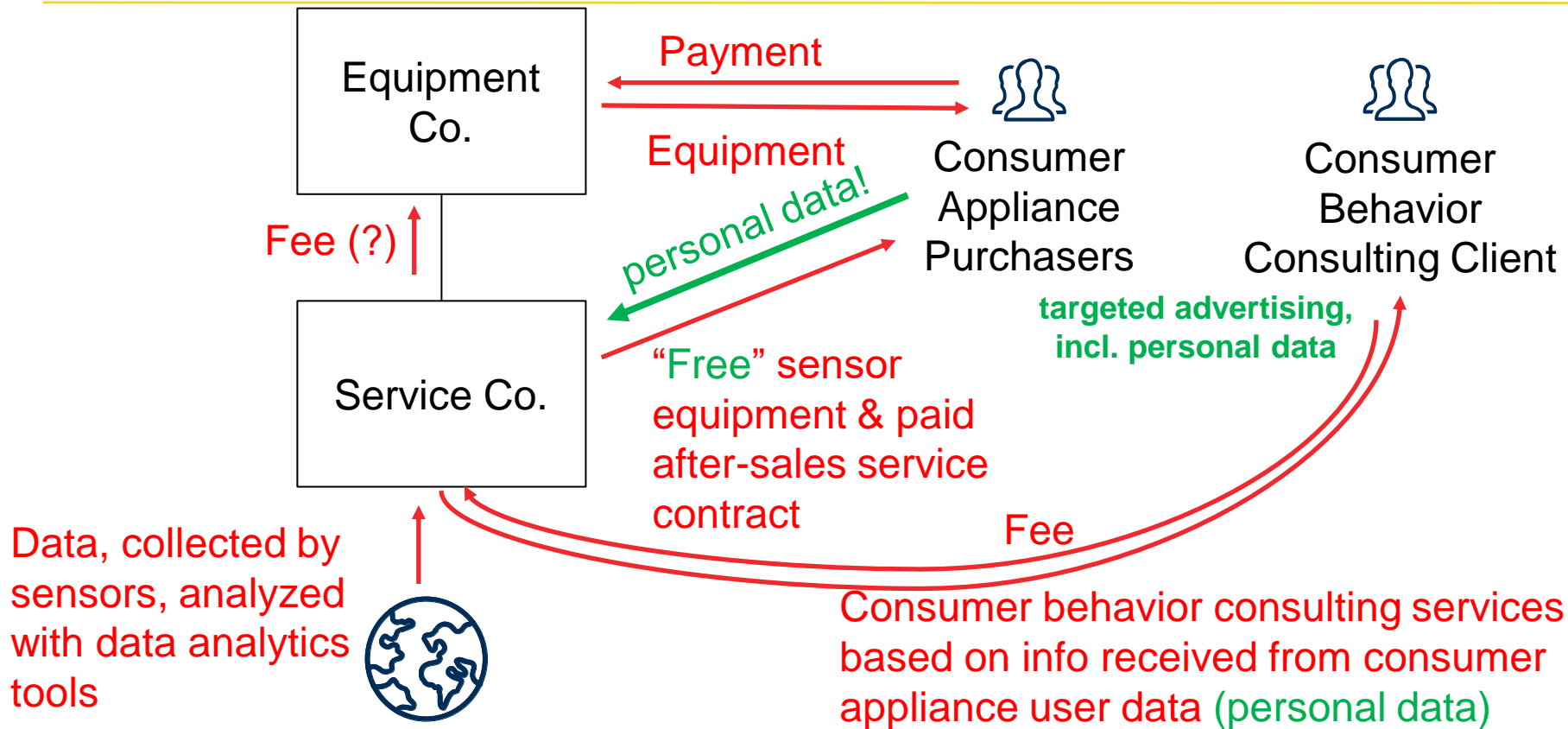
➤ **However, “free” sensors?**

→ ”no such thing as a free lunch” – typically: personal data/privacy

→ consent and access to personal data / customer data as consideration

→ barter (value?)

Performance Data Analytics (Consumer Behavior Consulting Services) IP/IT Law



Performance Data Analytics (Consumer Behavior Consulting Services)

IP/IT Law

- **Fee paid by Service Co. to Equipment Co.**
No IP involved (Control over API by Equipment Co.)?
 - no sale
 - no royalties for database or trade secret
- **Fee to Service Co. paid by Consumer Behavior Consulting Client**
Partly for personal data (profiling)/privacy
 - no sale (withdrawal of consent at any time without cause)
 - no royalties for access to personal data / privacy (analogue?)
 - merely data-derived services?

Performance Data Analytics (Heavy Equipment)

Character of Payments under Tax Treaties

Character of payments:

- Payment by equipment users to Service Co. are business profits under art. 7(1) OECD-MTC
 - Services, not sale of raw data or grant of rights in an intangible
- Service Co. is engaged in three types of transactions: access to sensors installed by Equipment Co., collection of data from individual equipment users and provision to some equipment users (who signed the services contract) of performance monitoring and failure prediction services
 - Service Co. developed its own proprietary analytics tool.
 - Collection of data is free.
 - Delivery of performance and failure prediction data – even if fully automated – should give rise to business profits under art. 7(1) OECD-MTC
 - ❖ Minority view: consulting and technical services treated as royalties.
 - ❖ Majority view: service = business profits

Performance Data Analytics (Consumer Appliances)

Character of Payments under Tax Treaties

Character of payments:

- Payment by customers to Service Co. are business profits under art. 7(1) OECD-MTC
 - Services, not sale of raw data or grant of rights in an intangible
- Service Co. is engaged in two types of transactions: collection of data from customers and provision to the same customers of the performance monitoring and failure prediction services
 - Service Co. developed its own proprietary analytics tool.
 - Collection of data is free.
 - Delivery of performance and failure prediction data – even if fully automated – should give rise to business profits under art. 7(1) OECD-MTC
 - ❖ Minority view: consulting and technical services treated as royalties.
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Performance Data Analytics (Heavy Equipment)

Nexus under Tax Treaties

Source of income / nexus:

- Sourcing of income from service transactions is determined under general income tax rules.
- Collection of data through data sensors provided by Service Co. falls into the category of “preparatory and ancillary activities” for Service Co. and does not create the PE for Service Co. in the jurisdictions where the equipment is located.
- The server of the Service Co. creates the PE.
- Jurisdictions with data server will tax the PE on the basis of the profit generated by the activity.
But what is the profit?
- Some jurisdictions (in particular, those following the UN tax treaty model) qualify the payment as “technical and consulting fees” falling into royalty article and will apply the local WHT but the administration of this will be quite unpractical as the payors are individuals.

Performance Data Analytics (Consumer Appliances)

Nexus under Tax Treaties

Source of income / nexus:

- Sourcing of income from service transactions is determined under general income tax rules.
- Collection of data through data sensors falls into the category of “preparatory and ancillary activities” for Service Co. and does not create the PE for Service Co. in the jurisdictions where the consumer appliances are located.
- The server of the Service Co. creates the PE.
- Jurisdictions with data server will tax the PE on the basis of the profit generated by the activity.
But what is the profit?
- Some jurisdictions (in particular, those following the UN tax treaty model) qualify the payment as “technical and consulting fees” falling into royalty article and will apply the local WHT.

Performance Data Analytics (customer behaviour consulting services)

Character of Payments under Tax Treaties

Character of payments:

- Payment by customers to Service Co. are business profits under art. 7(1) OECD-MTC
 - Services, not sale of raw data or grant of rights in an intangible
- Service Co. is engaged in two types of transactions: accumulation of data on customers buying consumer appliances and provision to unrelated third parties of market search services
 - Service Co. developed its own proprietary analytics tool.
 - Collection of data is free.
 - Delivery of market search and customer behaviour consulting services – even if fully automated – should give rise to business profits under art. 7(1) OECD-MTC
 - Minority view: consulting and technical services treated as royalties.
 - Majority view: service = business profits

Performance Data Analytics (customer behaviour consulting services)

Nexus under Tax Treaties

Source of income / nexus:

- Sourcing of income from service transactions is determined under general income tax rules.
- Collection of data through consumer appliances servicing contracts falls into the category of “preparatory and ancillary activities” for Service Co. and does not create the PE for Service Co. in the jurisdictions where the customers are located.
- The server of the Service Co. creates the PE.
- Jurisdictions with data server will tax the PE on the basis of the profit generated by the activity.
But what is the profit?
- Some jurisdictions (in particular, those following the UN tax treaty model) qualify the payment as “technical and consulting fees” falling into royalty article and will apply the local WHT .

Performance Data Analytics

Expensing vs. Deductions

- Service Co. is owner of self-created database (intangible asset)
- Costs incurred by Service Co. to create database are immediately deductible in most jurisdictions (self-created intangible).
- Many jurisdictions provide special incentive regimes for IT-related activities (input- or output-based), development partially driven by international tax competition
- Equipment users will generally expense the payments to the Service Co.

Performance Data Analytics

Transfer Pricing (Heavy Equipment)

- Application of the DEMPE analysis to data intensive businesses plus the application of residual profit split method to data intensive transactions.
 - ❖ Ex: How to allocate value between Equipment Co. (that installs the sensors) vs. Service Co. (that creates the data analytics)
 - Data collection and storage are low value activities
 - Data processing, interpretation and analysis have more value;
 - Control over the development and maintenance of relevant data processing software has even more value

Performance Data Analytics: *Transfer Pricing (Heavy Equipment)*

- If Equipment Co (installs the sensors) and Service Co. (creates data analytics) are related parties the granting of access to the sensors by Equipment Co. to Service Co. has to be tested
- Main activity: provision of services/use of an intangible
- Appropriate TP method: transactional profit split or cost plus

Performance Data Analytics

VAT/GST

- Once again, the destination principle
 - The principle applies where the supplier and the customer are located in different jurisdictions
- Supplies for the first year on a bundled basis (heavy equipment)
 - The services provided by Service Co. are included in the original price; VAT is payable when the original products are sold
 - No further supplies
- Supplies where sensors are provided by Service Co. for free to the customer (consumer appliance)
 - The services would be zero-rated where the customer is located in another jurisdiction
 - What happens on the recipient/customer side?

Performance Data Analytics

DST

➤ DST Implications

- Transactions involving data analysis
 - ❖ Service Co. provides services to equipment users through data generated from the equipment
 - ❖ Sensors installed by the Equipment Co. or provided free by Service Co.
 - ❖ Data collected by the sensors
- DST consequences
 - ❖ Out of the scope under the European Commission proposed DST





Case 3 Discussion





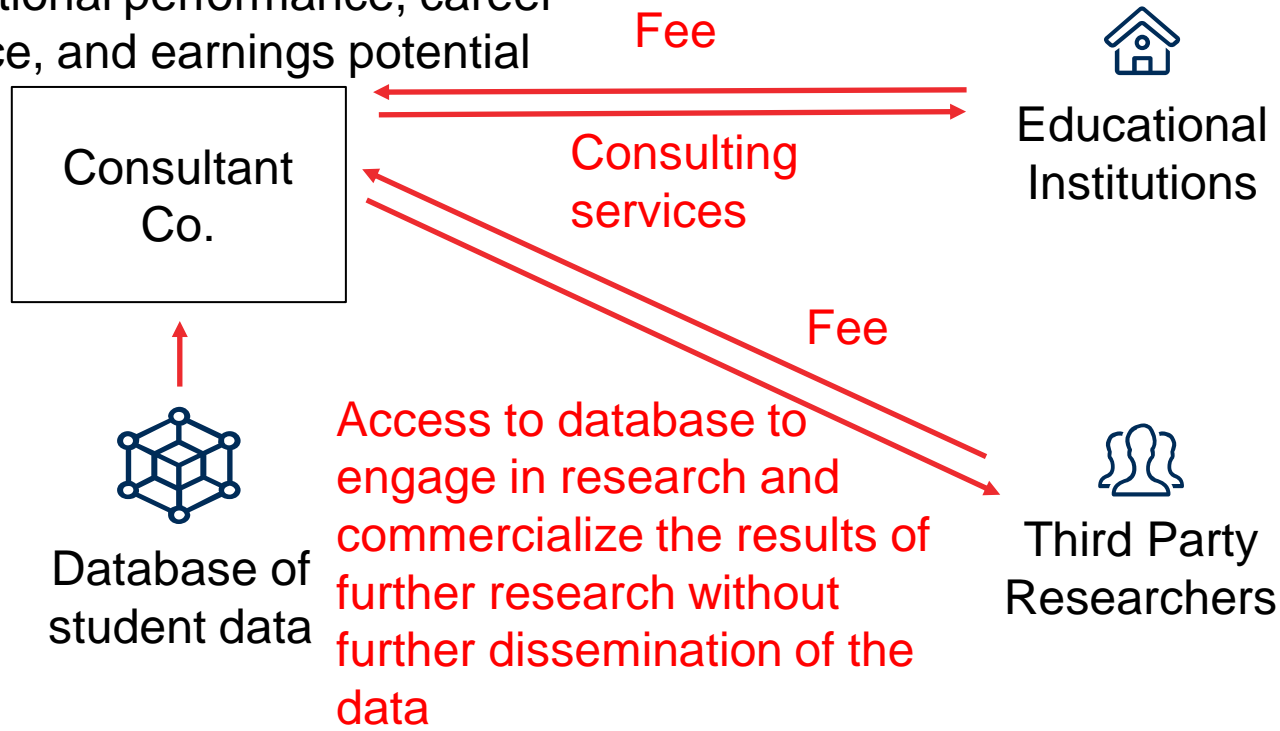


Case 4 – Analytics Based Consultancies



Analytics Based Consultancies

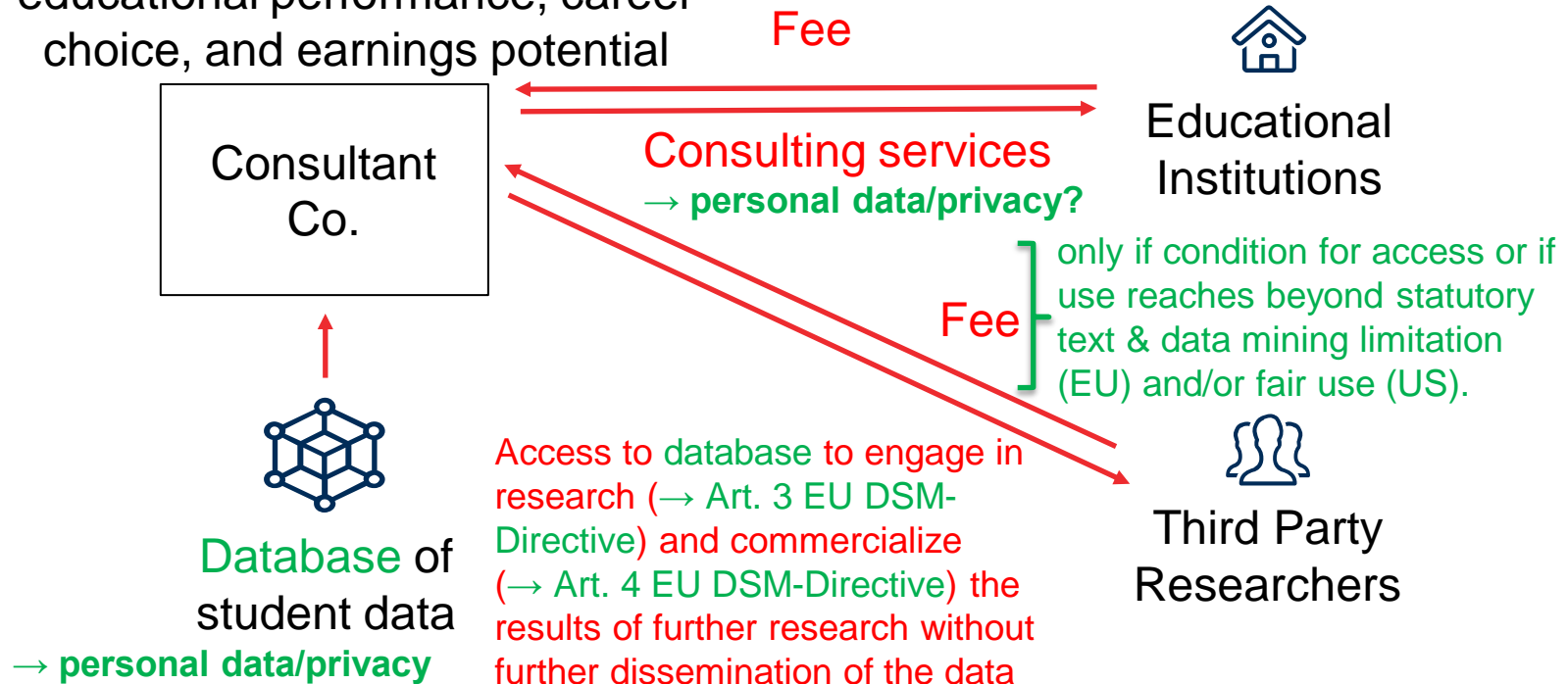
Accumulates database to capture and analyze data to predict educational performance, career choice, and earnings potential



Analytics Based Consultancies

IP/IT Law

Accumulates **database** to capture and analyze data to predict educational performance, career choice, and earnings potential



Analytics Based Consultancies IP/IT

➤ **Fee to Consultant Co. paid by Educational Institutions**

a) use of database

→ no sale

→ no royalties for use of database (no access)

b) provision of data-derived services

c) access to personal data/privacy (profiling)

→ royalties (analogue)?

➤ **Fee to Consultant Co. paid for by Third Party Researchers**

a) non-personal data

→ no sale (no further dissemination of data)

→ royalties for access to database beyond text & data mining/fair use

b) personal data/privacy (profiling)

→ no sale (withdrawal of consent at any time without cause)

→ royalties (analogue)?

Analytics Based Consultancies

Character of Payments under Tax Treaties

- Fee for consulting services likely characterized as business profits under art. 7(1) OECD-MTC
 - Consultant Co. performs services that are based on data and know-how but doesn't grant any right to use the know-how to Educational Institutions
 - Countries whose domestic law or treaties allow for source-based taxation of technical service fees may impose withholding tax
- Fee for database access raises two issues:
 - Some countries may impose withholding tax under art. 12(1) of a tax treaty based on “grant of access rights” to a database; however, Third Party Researchers are “end users” and have no right to commercially exploit the data
 - It could also be argued that access to data involves a transfer of know-how (“scientific experience”), but Third Party Researchers only receive results and are not advised on how to generate similar data

Analytics Based Consultancies

Character of Payments under Tax Treaties

EU Directive on the Protection of Trade Secrets and art. 12 OECD-MTC:

- Under Directive (EU) 2016/943, the owner of trade secret enjoys protection against unlawful use of the information by other persons
- Scope of protection is comparable to traditional intellectual property rights such as patents and copyrights
- Commercial data providers who do not qualify for database copyright protection often require their customers to keep confidential all data provided under the contract, e.g. third party researchers may not disseminate the data (NDA)
- Result is new type of “data license” that is not only rooted in legal protection but also relies on secrecy, which is a typical element of unprotected know-how
- How do source rules under domestic law and art. 12(2) OECD-MTC apply to this type of data license? IP right or know-how?

Analytics Based Consultancies

VAT/GST

- The distinction between B2B and B2C supplies under VAT/GST
 - Registration issues
 - Recovery of input VAT differs
- Cross-border transactions: B2B or B2C?
 - Collection methods may differ
 - Reverse charge, foreign vendor registration, or other method

Analytics Based Consultancies

VAT/GST

- Services provided by Consultant Co. to educational institutions
 - ❖ B2B: taxable; input VAT may be recovered by educational institutions (depending on tax-exempt status and nature of activity)
- Services provided by Consultant Co. to researchers
 - ❖ B2C: taxable; input VAT may or may not be recovered by researchers
 - ❖ Collection issue where researchers as end consumers are located in a different jurisdiction
 - ❖ The need to develop rules to catch the type of the services

Analytics Based Consultancies

DST

➤ DST Implications

- Transactions involving individuals
 - ❖ Data collected and structured by Consultant Co. regarding data of individual users
 - ❖ Data sources from all around the world
- DST consequences
 - ❖ Could the data or part of it be considered data generated from user activity on a digital interface (European Commission proposed DST)?
 - ❖ If yes, taxable
- Transaction between Consultant Co. and third-party researchers
 - ❖ May not necessarily constitute transmission of data





Case 4 Discussion







Policy Issues



Data Brokers / Information Resellers

Character of Payments (National Reports)

➤ Data Brokers / Information Resellers

- Payment by Broker Co. to Website Co.
 - ❖ 25 of 37 Branch reporters concluded that this leg of the transaction likely would be characterized as the provision of a service.
- Payment by Customer to Broker Co.
 - ❖ 25 of 37 Branch reporters concluded that this leg of the transaction likely would be characterized as the provision of a service.

Data Feeds

Character of Payments (National Reports)

- Payment by Information Site Co. to Animal Data Co.
 - 18 of 37 Branch reporters concluded that under domestic law this leg of the transaction likely would be characterized as the provision of a service.
- No-cash payment by Information Site Co. to Animal Data Co.
 - A plurality of Branch reporters stated that this leg is not subject to tax or there is not sufficient guidance to conclude on the proper characterization.
 - A number of Branch reporters noted that barter principles may apply.

Policy Issues: Common Misunderstandings

- Treat individual raw data as an asset – data only get value when data has been aggregated and worked out through the algorithms for each particular question (the same set of data can generate different answers and interest depending on what question has been pushed through them).
- Treat payments for structured data as a royalty – data are consumable, they are not acquired as an *intangible* in the first sense of this term – the entire interest of data is their movement and evolution over time. Therefore, the access to data is a service – DaaS (data as a service).

Policy Issues: Common Misconceptions of Tax Policy Makers

- Data-collecting activities result in an accretion to wealth or taxable “value creation”
=> inconsistent with the realization principle utilized by most income tax systems
- Giving away “free beer” in order to attract “eyeballs” must be a taxable barter transaction
=> ability-to-pay principle requires consideration that can ultimately be used to pay taxes (e.g. money, income in kind)
- Data is the “crude oil of the 21st century”
=> personal data is not a commodity and cannot be traded freely on a market due to privacy law constraints
- Data-driven business models generate “excess profits” that warrant imposition of additional taxes
=> excess profits are indicative of a monopoly and should be addressed by competition law
- DSTs are not in violation of income tax treaties => art. 2(2) OECD-MTC “elements of income”

Policy Issues: Nexus and Revenue Sourcing under Amount A

- Tax challenges of the digitalisation of the economy
 - Traditional international tax rules not fit for new business models
 - Nexus: permanent establishment (business profits), source of payment (royalties, technical services)
- Two-pillar solution of the Inclusive Framework on BEPS
 - Amount A: new allocation of taxing rights based on revised nexus and sourcing rules
 - ❖ Profits are taxed from where revenues are derived, final consumption decisive
 - Rather limited scope – very large and profitable MNE groups
- How would data transactions be taxed under Amount A?
 - Similar categorization issues – provision of a service, sale of digital content (incl. databases), licencing of intangible property?
 - Specific revenue sourcing rule for user data transactions

Policy Issues – Transfer Pricing – Food for Thought

- Traditional transfer pricing methods can be applied but we need to re-evaluate the transactional profit split method;
- Very difficult to tie income from data transactions to a geographical location;
- Raw data has little value because monetization requires data processing thus there is little value creation in the country of residence of the users;
- Profit splits should not be based on sales but on R&D expenses
- Principal value creation happens through the development and application of the software and hardware tools that perform the structuring and analytical functions

Policy Issues - VAT

- Is there a need for international VAT harmonization?
 - For or
 - Against?

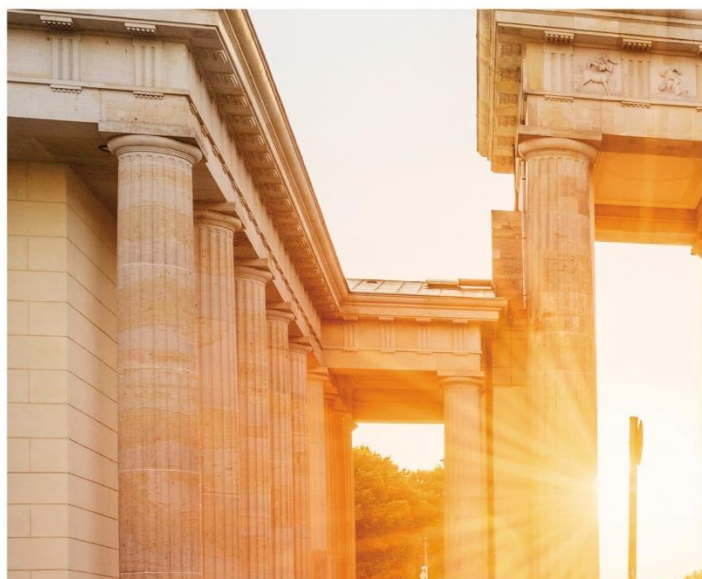
- The role of developing countries
 - International tax policy making and development are still mainly driven by developed countries
 - Could this trend be changed?





Conclusions





Subject 2: domestic and international taxation of data driven business

Chair: Prof. Dr. Dr. h.c. Wolfgang Schön
Date: 6th of September 2022