Peter Hongler

Justice in International Tax Law

A Normative Review of the International Tax Regime

IBFD

Justice in International Tax Law

Why this book?
The main purpose of this book is to review the most fundamental design principles used in international tax policy and some of the most important rules of the current international tax regime. The benchmark for such review is justice as understood in recent theory of political philosophy. The book is structured into three main parts.

The first part outlines the international law framework in which the international tax regime operates. It looks at the different sources of international law, such as treaties, customary law, general principles of international law and soft law, in order to demonstrate how these sources are (or are not) influenced by moral theory in general and by the notion of justice in particular. This part aims at demonstrating that the international law framework does not provide for detailed guidance on how to improve the international tax regime. This represents an important contrast with domestic tax systems in which a constitution sets certain orientation lines for the legislator.

Based on an in-depth understanding of the international law framework, the second part looks at the recent debate concerning justice in political philosophy. It refers to the existing theories of global justice in order to analyse whether these theories contain elements that can be used to improve the international tax regime. The author concludes this part with his own position on a theory of global justice.The third part reviews some of the most important principles and rules of the international tax regime in respect of their normative validity. That is, the author reviews whether a given principle or rule indeed helps to design a just international tax regime – or whether its application could even lead to injustice. Such analysis is based on the results developed in the second part of the book. The author reviews the following principles: inter-nation equity, ability to pay, efficiency, and the source and benefit principles. In addition, the author discusses the following rules: the arm's length principle, anti-abuse provisions, mandatory arbitration, fiscal transparency and CFC rules.

Title:	Justice in International Tax Law
Subtitle:	A Normative Review of the International Tax Regime
Author(s):	Peter Hongler
Date of publication:	October 2019
ISBN:	978-90-8722-569-8 (print/online), 978-90-8722-570-4 (ePub), 978-90-8722-571-1 (PDF)
Type of publication:	Book
Number of pages:	608
Terms:	Shipping fees apply. Shipping information is available on our website
Price (print/online):	EUR 120 / USD 145 (VAT excl.)
Price (eBook: ePub or PDF):	EUR 96 / USD 116 (VAT excl.)

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www.ibfd.org

ISBN 978-90-8722-569-8 (print)
ISBN 978-90-8722-570-4 (eBook, ePub); 978-90-8722-571-1 (eBook, PDF)
NUR 826

Table of Contents

Part II
The International Tax Regime

Preface

This book is the result of a postdoctoral research project conducted from 2014 to 2017, during which time I was a research fellow at IBFD and the University of Zurich. I am deeply indebted to all supporters of the project.

I am particularly grateful to Prof. Dr Pasquale Pistone, Academic Chairman of IBFD, and Prof. Dr Madeleine Simonek, who supported the study in various ways. Special thanks go to Prof. Dr Walter Kälin, Dr Katerina Perrou, Dr Laurens van Apeldoorn and Dr Cees Peters for reviewing earlier drafts of the manuscript and for all their very helpful inputs. I would also like to thank the Center for Ethics at the University of Zurich for allowing me to use their facilities and to participate in several seminars. I would also like to thank my colleagues at Walder Wyss, who supported the project as well.

A further thank you goes to the entire Academic Team at IBFD for taking the time to discuss some of the most fundamental questions in international tax law. Moreover, I greatly appreciated the inputs of all the participants in round tables hosted at the Max Planck Institute in Munich, at IBFD in Amsterdam and at the University of Zurich.

My most special thanks must go to my loving family – Eva and Basil, you are simply the best! – and to my parents, who have supported me all these years.

Chapter 1

Introduction

1.1. International tax law at a crossroads

The starting point of modern international tax cooperation lies in the early 20th century and late 19th century. The double tax treaty[1] between Prussia and Austria and Hungary is generally known as the first double tax treaty ever signed.[2] The aims of international tax cooperation have, since the beginning of such international (and in the meantime, not only bilateral) cooperation, changed significantly. The work of the League of Nations in the early 20th century and the later work of the UN and the OECD in the second half of the 20th century had a focus on the avoidance of juridical double taxation. In particular, the consecutive publications of the OECD Model Convention (OECD MC) and the UN Model Convention (UN MC) have been of major importance when it comes to the allocation of taxing rights between two or more states and, therefore, the avoidance of international juridical double taxation. Hundreds – even thousands – of double tax conventions have been signed mainly based on these model agreements.[3]

Aggressive tax planning of multinational enterprises and cross-border tax evasion by individuals have led to intensified international tax cooperation. However, countering aggressive international tax planning is a quite recent phenomenon, as international tax planning, per se, is still a young discipline.[4] Only since the publication of the Report on Harmful Tax Competition by the OECD in 1998[5] has there been increasing cooperation among member countries of the OECD and other states in order to counter harmful tax practices and aggressive international tax planning. Such cooperation has been led by the OECD and the G20 and has found its (temporary) end in the Base Erosion and Profit Shifting (BEPS) Project and the foundation of the

1. In the following we will use the terms "double tax conventions", "double tax treaties" and "double tax agreements" simultaneously, even though the term "convention" often indicates that an international agreement is a multilateral agreement and not only a bilateral agreement. Nevertheless, in international tax law the term "double tax conventions" is commonly used to describe bilateral agreements as well.
2. For further details about the development of the current network of double tax treaties, *see* Braun & Zagler, p. 243 et seq.
3. Currently, more than 3,000 treaties have been signed. For further details *see* sec. 4.2.3.1.
4. *See*, with further references, Happé, p. 538.
5. OECD, Report on Harmful Tax Competition (OECD 1998).

Inclusive Framework.[6] Moreover, in order to prohibit cross-border tax evasion, many double tax conventions providing for an exchange of information provision and a number of other tax-related bilateral agreements, such as Rubik agreements, TIEAs and FATCA IGAs, with the same or similar aims have been signed.

Not only have the goals of international tax law changed, but also the legal instruments. Most of the aforementioned tax coordination has been and still is rendered by signing double tax agreements and other bilateral tax agreements. Recently, multilateral conventions have more often been employed. Moreover, compared to the early work of the OECD and the League of Nations, the most recent BEPS Project by the OECD and the work of the Inclusive Framework not only suggests model provisions for double tax conventions, but recommendations on the design of domestic tax rules have also been published.

The OECD BEPS Project has indeed shifted international tax coordination to another level. States are generally still sovereign regarding the levy and enforcement of taxes; however, the BEPS Project seems to lead to a certain degree of harmonization with regard to domestic rules, and not only with regard to the allocation of taxing rights according to double tax treaties. Therefore, international tax policy is at a crossroads, as international tax cooperation has reached a new stage and, depending on the success,[7] policymakers might further follow such a path toward (partial or full) tax harmonization or refrain from further cooperation projects. Enhanced tax cooperation, however, requires that international tax policy considers the interests of all involved and affected individuals and states. In this respect, terms such as "justice" and "fairness" must be at the forefront of an international debate.[8]

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6. There is much literature about the BEPS Project, but it is best to refer to the website of the OECD, which provides all necessary documents for an in-depth understanding of the content of the BEPS Project (*see* http://www.oecd.org/ctp/beps.htm, last visited 29 Nov. 2018). For further details about such recent developments, *see also* sec. 4.2.3.2. For an intermediate analysis of the impact of the BEPS Project, *see* Christians & Shay, p. 17 et seq.

7. The term "success" here should not indicate that harmonization is, per se, a wishful result from a normative perspective. The latter question will be addressed in Part IV of the present study.

8. The present study, as indicated in the title, mainly refers to the term "justice", but the terms "fairness" and "justice" are intertwined as, for instance, according to the Oxford Dictionary (https://en.oxforddictionaries.com/, last visited 11 Feb. 2019), fairness means "impartial and just treatment or behaviour", whereas justice means "the quality of being fair". There is an intense debate among philosophers on the difference between the two terms. An important discussion was, for instance, triggered by the fact that Rawls in his

The present study should be understood as a jigsaw piece of this very complex debate about justice in international tax law at a crucial moment in the potential crystallization[9] of a more integrated international tax regime.

1.2. Justice – Terminology and origin

The term "justice" is on the one hand society-related, as justice considerations are needed to allocate (limited) goods in a specific society, but on the other hand, justice is demanded in all human relations.[10] From a legal perspective, justice has been an important anchor in order to achieve a legal system that is considered valid and legitimate among its members.[11] Some scholars, however, have questioned the normative value of the term "justice" as, for instance, Kelsen highlights that many different understandings of the term "justice" have been developed, which might be a sign of the unsubstantial content of the term "justice".[12]

Although the term "justice" might not directly provide for very concrete guidance on how a certain policy should be drafted, a debate about justice is essential, particularly one that considers the various (contemporary) philosophical studies about justice within a global world order and their fascinating findings. Moreover, such debate is vital, considering the lack of reference to demands of justice within (international tax) law in general.[13] As

masterpiece *A Theory of Justice* (Rawls, 1999a, p. 1 et seq.) uses the subtitle "justice as fairness". In sec. 6.2.1. we will briefly outline the reasons why Rawls uses the term "justice as fairness" in his theory of justice. For more details on the different aspects to be considered when rendering a comprehensive distinction between the two terms, *see also* Sen, 2009, p. 72 et seq. One reason for using the term "justice" instead of "fairness" in the title of this work is that fairness in international law is sometimes used in a broad manner with reference to procedural fairness. However, as the focus of the present study is on the substantive content of fairness (*see* sec. 2.1.6.), the term "justice" better suits our needs (*see*, for example, Franck, 1997, p. 7, who distinguishes between two aspects of fairness – i.e. the substantive [distributive justice] and procedural [right process]).

9. This term is owed to Brauner, 2003, p. 259 et seq., who of course used it for other purposes at a different development stage of the international tax regime. However, it seems that the term is more useful than ever to describe the stage of the current international tax regime, which is about to become more integrated and even harmonized. For a more recent perspective, *see* Brauner, 2016, p. 1 et seq.

10. *See generally* Höffe, p. 26 et seq.; Finnis, p. 161.

11. *See*, for example, Radbruch, 1945. The interaction between legitimacy and justice has triggered an entire debate in international law and will not be fully explored in the present study (*see generally* Buchanan, 2004, p. 1 et seq.).

12. Kelsen, 1957, p. 1 et seq. and p. 43. *See also* Kelsen, 1960, p. 57 et seq.

13. *See also* advocating for an enhanced use of justice considerations within legal studies and legal education Thürer, 2015, p. 357.

we will demonstrate, notwithstanding the presumed deficiencies, it is still possible to draw certain very precise lines on what "just" means and what is considered to be "unjust".[14] Even with this possibility for classification, there is indeed no "algorithm" that might help us to resolve the different questions of justice in international tax law.[15] However, history has shown that the understanding of what "just" means deviates among societies and different times and, therefore, the results of the present study must also be understood in the context of the current international tax world.[16]

It is indeed true that the available theories on defining a just global (tax) order are manifold and can also be misused by policymakers in order to achieve (unjust) results under the protection of justice. While justice may not have a universal appearance, it is still essential to try to understand its content and impact on tax policy. Tipke, with reference to Kant, has rightly stated that if justice should not play any role in tax law, we should give up our profession as tax lawyers or academics, respectively.[17] The same must be true for international tax law. The present study is not the beginning of such a debate,[18] but should provide new ways of thinking about justice within the international tax regime.

Many law-related studies on justice or specific accounts of justice as a starting point refer to the distinction between commutative and distributive justice (*iustitia commutativa* and *iustitia distributiva*), as used by Aristotle in his Nichomachean Ethics.[19] Often cited is the following quotation by Aristotle:[20]

> Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution (for in these, it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man.[21]

14. Mahlmann, p. 202 et seq.
15. Singer, 2009, p. 910.
16. *See generally* Koller, 2014, p. 11 et seq.
17. Tipke, 1981, p. 4.
18. *See* the authors mentioned in sec. 1.4.
19. *See*, for example, Oesch, p. 31 et seq. Aristotle seems not to be the actual origin of the distinction between *iustitia commutativa* and *iustitia distributiva* (*see*, with further references, Arnold, p. 26 et seq.). Cf. Finnis, p. 161, who argues that Aristotle first treated justice as an "academic topic".
20. The English translation might deviate depending on the editor.
21. Aristotle, 1130b para. 30 et seq.

The distinction between *iustitia commutativa* and *iustitia distributiva* is still of major relevance and usefulness,[22] although these two accounts of justice have been understood in various manners and have developed over time.[23] A certain amount of reluctance is necessary to translate the Aristotelian understandings into modern times without any reflections of more recent theories of justice that consider the specifics of our societies and the globalizing or globalized world.

First of all, it is crucial to understand that Aristotle drafted his ideas of justice with reference to various areas of relations.[24] Commutative justice in the Aristotelian understanding is often understood as justice between equal parties,[25] whereas distributive justice refers to subordination and, therefore, justice among unequals.[26] Commutative justice could, for instance, mean a "victim of wrongdoing to be compensated equally, regardless of merits."[27] Nowadays, however, it is often referred to in order to claim justice or injustice in an exchange process, such as a contract or a physical barter.[28] In this respect (i.e., in a situation of exchange), the "just is intermediate between a sort of gain and a sort of loss."[29] Therefore, commutative justice "ignores the differences in rank and worthiness [footnote omitted] of the persons involved [footnote omitted]."[30]

It is sometimes argued that *iustitia commutativa* is of interest in order to achieve *iustitia distributiva* as *iustitia commutativa* is concerned "with preserving each citizen's share."[31] Therefore, *iustitia commutativa* should apply if the distribution among citizens is not just and in line with *iustitia distributiva*. However, this does not mean that *iustitia commutativa* has only

22. *See*, inter alia, Mahlmann, p. 204 et seq.; Radbruch, 2006, p. 36; Senn, p. 54 et seq. From a tax perspective, *see*, with further references, Tipke, 2000, p. 260 et seq. *See also* Koller, 2014, p. 14, who outlines in detail the core elements of the term "justice", which have not changed over time and seem to be valid in very different societies.
23. For more details about the historical development of the term "distributive justice", *see* Fleischacker, p. 1 et seq.; Koller, 2014, p. 11 et seq. On the different varieties in terminology, *see* Arnold, p. 32 et seq.
24. *See generally* Böckenförde, p. 113 et seq.
25. *See*, for example, Radbruch, 2006, p. 36. On these two terms, *see* Koller, 2014, p. 17 et seq.
26. *See*, with further references to the work of Aristotle, Chroust, p. 140.
27. Fleischacker, p. 19.
28. *See*, for example, Senn, p. 55; Wiederkehr, 2008, p. 394. *See also* Gordley, p. 1590, with further details on the application of commutative justice on both tort and contract in the understanding of Aristotle.
29. Aristotle, 1132b para. 18 et seq.
30. Chroust, pp. 120 and 136.
31. Gordley, p. 1589.

a secondary relevance. The latter has been intensively discussed in contract law.[32] From a domestic tax law perspective, in particular, the term "distributive justice" has been of interest as it seems to relate to the interaction between the state and its citizens or the members of the community or a society.[33] In this sense, for instance, the Swiss Federal Supreme Court held that justice in tax law is mainly a question of distributive justice (and not commutative justice) in the sense of the Aristotelian *iustitia distributiva*:

> *Gerechtigkeit im Steuerrecht ist vor allem eine Frage der Verteilungsgerechtigkeit im Sinne der aristotelischen iustitia distributiva.*[34]

However, such distributive justice should not be misunderstood as a just distribution in a basic structure, such as a society, or, in more general terms, as justice in a society.[35] Aristotle's analysis in his Nichomachean Ethics is not concerned with the question of distribution in a coercive framework, as it was in the focus of Rawls' work. Or, as held by Torrione:

> *Cette notion aristotélicienne de justice distributive à laquelle renvoie le TF* [i.e. the Supreme Court] *ne correspond pas non plus au sens qu'elle a quand l'expression est utilisée par un philosophe politique comme John Rawls.*[36]

Distributive justice in an Aristotelian understanding means, in more general terms, what is just between too much and too little in respect to a specific regulatory or interpretive question. Or, as held by Aristotle: "for in any kind of action in which there is a more and a less, there is also what is equal."[37] To review whether a certain action is just, such action must be tested against the existing options and be justified in an individual case. The just is, according to Aristotle, a "species of the proportionate".[38] Therefore, it is regularly argued that equals should be treated equally and unequals should be treated differently as it would be disproportionate if different situations were treated equally and vice versa.

The understanding of justice applied in the present study is not in opposition to Aristotle's definition, but it rather deals specifically with the particularities attached to the term "justice" in a societal framework (i.e., a basic

32. *See*, with further references, Arnold, p. 1 et seq.
33. *See*, for example, from a tax perspective Matteotti, 2007, p. 16; Tipke, 1981, p. 10 et seq.; Tipke, 2000, p. 260 et seq. With a focus on non-discrimination from a tax perspective, *see*, for example, Bammens, p. 1 et seq.
34. CH: SC, BGE 133 I 206, 1 June 2007, cons. 7.4.
35. Torrione, p. 142 et seq.
36. Id., p. 142.
37. Aristotle, 1131a para. 10.
38. Id., 1130a para. 29.

structure).[39] In other words, we will not refer in detail to Aristotle's understanding of justice as a virtue, as the focus of this study is on specific justice considerations in an institutional framework, such as the international world order.[40] This also means that we will not review what justice requires from individuals and corporate representatives in relation to specific actions. However, we are concerned with what justice requires from the international tax regime.[41] We will not discuss whether tax planning is morally wrong from the perspective of the taxpayer or his advisors. We will also not test whether existing value-based guidelines for corporations, such as the OECD Guidelines for Multinational Enterprises[42] or the UN Global Compact,[43] are in line with normative thinking or whether justice would require different obligations from corporate representatives.

In the following two introductory sections, we will provide an overview on different discussion points concerning both justice in domestic tax law and justice in international tax law in order to frame the content of and the idea behind the present study before we further discuss the structure and the methodology.[44]

1.3. Justice as a domestic tax policy guideline

Studies about tax justice generally aim at answering the question of what the appropriate allocation of tax burdens within a society is or how much each member of a society should contribute. Different views have been developed that have been based on different philosophical and political concepts, such as libertarian approaches, including the proposal of Nozick,[45] liberal ideas, such as the idea of justice as fairness according to Rawls,[46] more egalitarian views, such as the theory of Marx or socialism in general, or utilitarian

39. This is influenced by the introduction of Rawls on the subject of justice. He argues that his understanding of justice is related to the basic structure in a society, whereas Aristotle did not deal with the specific requirements, but this means that there is not a conflict between their understanding of the term, as they applied it to different accounts (Rawls, 1999a, p. 9 et seq.).
40. *See*, with further references on the understanding of justice as a virtue, Arnold, p. 27 et seq. We will also not deal with the interaction of justice with interpretation.
41. *See also* the persuasive introduction of Rawls, 1999a, p. 6 et seq.
42. OECD, OECD Guidelines for Multinational Enterprises, 2011 Edition (OECD 2011), p. 1 et seq.
43. For more information about the ten principles of the UN Global Compact, *see* https://www.unglobalcompact.org/what-is-gc/mission/principles, last visited 19 Jan. 2019.
44. *See* chapter 2.
45. Nozick, p. 1 et seq.
46. For more detail *see* sec. 6.2.

undertakings, as proposed by Mill[47] or Bentham.[48,49] As an example and in simplified terms, a socialist[50] might be in favor of a strong welfare state with a significant distributive tax system, whereas a libertarian might support a state with very limited competences and few taxes in general.[51] Aristotle argued that there is not a single principle that would lead to the ideal distribution according to *iustitia distributiva* but that it would depend on the political regime of a certain society. Or, as summarized by Gordley:

> Aristotle noted that there is no one correct principle for determining the share each person should receive. Rather, a particular society will adopt a principle consistent with its political regime.[52]

Depending on the underlying political or philosophical concept, the design of the domestic tax system deviates. In other words, the ideal structure of a political order, such as a state or a community, depends on the underlying understanding of justice of each member of the society, which might deviate depending on the political ideal. The idea of what a just domestic tax system should look like might also change over time, as the underlying idea of political institutions, such as the state, might change.[53] Therefore, the design of the domestic tax system and its justice conception highly depends on the underlying political or normative viewpoint, although some general considerations are acknowledged as being valid nowadays in nearly all societies or states. For the purpose of the present introductory section, and before referring to justice in international tax law, it is important to

47. Mill, 2004, p. 85 et seq.; Mill, 2016, p. 1 et seq. Even though a consequent utilitarian understanding is difficult to align with justice considerations as the final aim of maximizing the utility of all, as intended by utilitarian ideas, does not answer the question of how to allocate the utility among all members of a society (Höffe, p. 39). In sec. 11.4.3.2. we will deal with some of the critics of utilitarian views.
48. Bentham, p. 14 et seq.
49. For an overview on the different normative underpinnings of the domestic tax system, *see* Leviner, p. 95 et seq.
50. The term "socialist" is intentionally used instead of the term "Marxist" because it is unclear whether Marx was indeed a defender of distributive duties or whether he believed an abolishment of capitalism would automatically lead to an abundance of goods and the needs of distribution. For further details of the different understandings of Marx in terms of distributive justice, *see* Fleischacker, p. 96. Of course, there is no clear definition of what socialism means, but for the limited purpose of the present comparison, using the term without further defining its content seems justified.
51. *See*, for example, Nozick, p. 1 et seq.
52. Gordley, p. 1589.
53. *See* Tipke, 2000, p. 241, who states that the understanding of tax justice is neither absolute nor definitive. On fairness and tax law and the variations depending on the underlying philosophical understanding, *see* Holmes, 2000, p. 14 et seq. For a historical overview *see* Koller, 2014, p. 11 et seq.

highlight two elements of justice in domestic tax systems that are currently agreed on by persons in most states.

First of all, there is wide agreement that in domestic situations, i.e. in a certain basic structure,[54] taxation should follow equality considerations.[55] This means that members of a society should be treated equally to one another. To be more precise, this means that if two citizens have the same income and if they are in the same social situation (i.e., marriage, children, etc.) there seems to be wide agreement that they should be treated identically from a tax perspective. The latter understanding is often based on constitutional principles of (horizontal) equality or equal taxation,[56] but it seems at first glance also valid from a normative perspective, following the idea that human beings are to be treated equally by state institutions. In Part IV we will deal further with this equality principle from a normative perspective and its scope of application at an international level.[57]

Second, in a domestic situation, most people would agree that certain distributive measures are required as the market, following a libertarian approach, would lead and has led to unjust inequalities.[58] Currently, many countries have implemented progressive income tax rates in order to achieve a certain distributive effect. However, the extent of the need for redistribution highly depends on the underlying political concept. Furthermore, as highlighted by Matteotti with reference to Murphy & Nagel, even progressive taxation does not guarantee a distributive effect, as the distributive effect highly depends on the spending policy of a state.[59] The work of Murphy & Nagel is indeed a seminal example of how justice considerations and tax policy interact. Their approach follows the idea that ownership or pre-tax income is a myth in the sense that pre-tax income or ownership is not generated and secured without any help from the government. Therefore, discussions about justice and tax law should focus on the question of the distribution of

54. The term "basic structure" will often be used in the following. Our understanding of what a basic structure means will be defined in sec. 8.3.
55. *See*, for example, with further references Matteotti, 2007, pp. 14 and 38. *See also* the many citations in Tipke, 2000, pp. 284 and 290 et seq. The equality principle is sometimes referred to as the prototype of justice (Wiederkehr, 2006, p. 40, with further references to Kaufmann, Richli and Tschentscher).
56. *See*, for instance, article 14 of the Spanish Constitution or specifically regarding taxation article 127(2) of the Swiss Federal Constitution.
57. *See* sec. 11.2.
58. *See*, with references to the theories of Nozick and von Hayek, Matteotti, 2007, p. 41 et seq.
59. Matteotti, 2007, p. 43 et seq. *See*, on the interaction between the distribution of income and equal taxation based on the ability-to-pay principle, Kaufman, 1998, p. 159 et seq.

the after-tax income within a society, i.e., about the outcomes and not the burdens.[60] Or in other words, according to Murphy & Nagel, the distribution of welfare by the market is not per se just, and, therefore, "we can no longer offer principles of tax fairness apart from broader principles of justice in government".[61] This means that tax justice cannot be separated from the more general discussion about the distribution of governmental benefits.[62]

As we will see, the remarks on justice in the international tax regime are not limited by these two demands, as the term "justice" might also contain further components or elements that are crucial when rendering a normative review of the international tax regime.[63]

1.4. Justice and the international tax regime – Some preliminary remarks

Besides the mentioned debates about justice and domestic tax law, a further component of complexity is added at an international level, since the inter-state relation needs to be taken into consideration, not simply the relation between the state and its citizens or between the citizens themselves.[64] It is crucial that an analysis of justice in a certain legal regime considers the specific societal features that are regulated by such a regime.[65] Societal differences trigger different justice-related questions. In other words, the international realm requires specific analysis on the question of whether its regulative framework (such as the international tax regime) is just for its purpose.

We have already referred to the question of distribution and its importance for domestic tax policy, but at an international level, a focus should also be

60. Murphy & Nagel, p. 98 et seq.
61. Id., p. 30.
62. With a more detailed argument in this respect Kordana & Tabachnick, p. 652 et seq. Triggered, inter alia, by the work of Murphy & Nagel, an interesting discussion about the normative value of the principle of (horizontal) equality has evolved in the United States (*see*, with further reference, Repetti & Ring, p. 135 et seq.; *see*, already before the publication of Murphy & Nagel, Kaplow, 1989, p. 139 et seq.).
63. This is a general limitation of the present study that it is impossible to cover all the different theories of justice or different understandings of the term. For instance, we will not deal further with Kant's moral philosophy or with religious views on what justice means (for instance, from a legal philosophy perspective, *see* Kelsen, 1960, p. 357 et seq., regarding a bouquet of different concepts).
64. *See* Graetz, p. 306 et seq.; Kaufman, 1998, p. 167. On the demands of justice at an international level, *see* Koller, 2009, p. 188 et seq.
65. Koller, 2014, p. 35.

on considerations on commutative justice. The latter is an important aspect of justice in international law, as we should also be able to judge whether the relationship between states – which often are in contractual relation – is just, and not only whether the distribution of the tax burden or the outcome of the levy of taxes in a society or globally is just. Commutative justice or similar demands[66] are also critical, as these refer to a relation among equal parties such as states.

Therefore, in an individual case, it might be necessary to further develop which demands of justice are discussed. From an international tax law perspective, the great German tax law scholar Klaus Tipke stated in 1981 – i.e. only 38 years ago – that the term "justice" has rarely been mentioned in writings on international tax law:

> *In der Literatur zum internationalen Steuerrecht stösst man kaum je auf das Wort „Gerechtigkeit."*[67]

However, later in his book on tax justice, Tipke states that international tax law should also be based on consequent and appropriate rules in order to qualify as law.[68] Yet, Tipke does not further develop how such rules would look and whether the international tax regime in place in the early 1980s actually followed these principles. Things have changed significantly in the last 38 years, as states are not the only entities to claim just treatment with respect to cross-border tax issues, but international organizations, such as the OECD, also render projects based on fairness and justice considerations.[69] Furthermore, NGOs have played an important role by running awareness campaigns on injustices within the international tax regime.[70] However, the term "justice", as we will develop it in the present study and

66. *See* Koller, 2009, p. 188, who uses the terms "transactional justice" and "corrective justice", which are both linked to the term "commutative justice", depending on the understanding. The term "corrective justice" is sometimes used as a synonym – especially in the Anglo-American discussion – but there is no common understanding of the term (*see*, for example, Arnold, p. 32 et seq.).
67. Tipke, 1981, p. 120.
68. Id., p. 186.
69. *See* the introduction to the BEPS Action Plan, OECD, Action Plan on Base Erosion and Profit Shifting (OECD 2013), p. 7 et seq.
70. *See*, inter alia, Christian Aid, The Shirts off Their Backs, How tax policies fleece the poor, September 2005, available at http://www.christianaid.org.uk/images/the_shirts_off_their_backs.pdf, last visited 12 Jan. 2019; Oxfam, Tax Havens, Releasing the Hidden Billions for Poverty Eradication, 2000, available at http://www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version__06_00.pdf, last visited 19 Dec. 2018; Tax Justice Network, tax us if you can, 2nd ed., 2012, available at http://www.taxjustice.net/cms/upload/pdf/TUIYC _2012_FINAL.pdf, last visited 14 Sept. 2017.

as we have already indicated above, must be understood in a much broader manner and must include all different demands of justice.[71]

A bevy of questions is, therefore, related to the term "justice" in international tax law.[72] These questions are not limited to tax burden considerations within state and market justice, but concern whether justice should also refer to justice among states as the core agents in international tax law (i.e., inter-state justice). Reference should moreover also be made to global justice[73] or international distributive justice, i.e. whether the international tax regime is just to the poorest on the planet.[74] Therefore, various demands of justice have to be considered.

We will further deal with these different demands of justice in Parts III and IV, and we will try to align these different demands of justice with the existing philosophical theories and ideas of justice.

1.5. Why is the international tax regime considered to be unjust?

Before we focus further on the structure and methodology of the present study, it is vital to first outline some actual claims on why the international tax regime is perceived to be unjust. This is necessary in order to justify the method and the necessity of the present study, per se. If the international tax regime was considered to be just, one could question the need for a normative review of the international tax regime. In this case, there would not be an obvious scientific problem that would require a detailed scientific analysis.[75]

We first need a perception of why the international tax regime is considered to be unjust in order to suggest, in a second step, some potential amendments

71. Koller, 2009, p. 192.
72. *See* Matteotti, 2015/2016, p. 57, who speaks of a bouquet of questions of fairness in (mainly domestic) tax policy.
73. Global justice in this sense focuses more on the moral importance of states and the inter-state relation, and not simply how justice can be achieved among individuals (*see*, with further references, Ratner, 2015, p. 45).
74. *See*, with further references, id.
75. But even if the international tax regime would be considered to be just, it could still be questioned by research, or the next generation could perceive it as an unjust system. Therefore, even if a legal regime is considered to be just, research about the normative validity of such a regime seems justified.

Peer Review Process and Statement by the Publisher

This manuscript was subjected to a rigorous internal and external single-blind peer review. For the external single-blind peer review, two international academic experts in the field and topic area were tasked with reviewing the manuscript. In particular, the reviewers were asked to comment on whether the manuscript (i) achieved original research results and (ii) is based on thorough knowledge of the existing literature on the topic(s).

After the review process was completed, the author was required to make changes in accordance with the reviewers' recommendations. Once the changes were satisfactorily made, the editorial and publishing teams made the final editorial, stylistic, grammatical, typographical and typesetting amendments.

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