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International Tax Justice – Why the EU Should and the Inclusive Framework Should not Harmonize Corporate Income Tax Systems

In memory of Prof. Dr. Klaus Tipke

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Peter Hongler, **Draft August 2022**

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1. Introduction – terminology¹

I am somewhat hesitant to interpret the term “tax justice” as something subjective. Too often we read in judgments or articles that, in the end, it is a subjective position what constitutes a fair or just tax system.²

I agree with Klaus Tipke, who states the following: “*However, the term justice acquires a scientific value only if one succeeds in concretizing it in the most secure way possible.*”³ In the following, I will try to give this debate, as far as international tax law is concerned, a little more rationality and objectivity.

The question of tax justice is ultimately to be answered through arguments, and so the supposedly subjective position degenerates to a legitimate dispute about the better arguments. The question of international tax justice is finally an epistemological one and therefore, in the following, we will try to make a contribution to this truth finding.⁴

In doing so, I follow a pragmatic approach.⁵ Finally, the point is to explicitly explain why I represent a certain position and to provide arguments for this position, while at the same time being open to accepting counter-arguments and to even being convinced by counter-arguments. The goal is not to achieve the supposedly ideal and perfectly fair taxation, rather, I aim for a discourse that is as rational and open as possible.⁶

Confrontation with other arguments leads us to question our own normative position.⁷ As lawyers, this is also our task in this discussion. Therefore, we should stop thinking in terms of, *e.g.*, perfect allocation of taxing powers in international tax law, and instead focus primarily on the arguments in favor and

¹ This is a slightly amended version of a speech held in Cologne in May 2022 on the occasion of *Klaus Tipke Gedächtnissymposium, “Steuergerechtigkeit”*. I would like to thank B.A. Delia Lohmann for her support in developing this translation.

² See *e.g.* Judgment of the Federal Supreme Court of Switzerland of 1 June 2007, BGE 133 I 206.

³ Own translation, Klaus Tipke, *Die Steuerrechtsordnung, Band 3, Steuerrechtswissenschaft, Steuergesetzgebung, Steuervollzug, Steuerrechtsschutz, Steuerstrafrecht*, Second Edition, Otto Schmidt (2012), p. 1248.

⁴ Special references should be made here to the work of Robert B. Brandom, who deals extensively with the truth of normative statements (see *e.g.* Robert B. Brandom, *Making It Explicit*, Harvard University Press (1998)).

⁵ See in particular Willard V. O. Quine, *The Two Dogmas of Empiricism*, *Philosophical Review* (1951), p. 20 et seq.

⁶ This is consciously influenced by the discourse theory of Jürgen Habermas or the inferentialism of Robert B. Brandom.

⁷ With further comments from a tax point of view see Reto Gubelmann/Peter Hongler, *How NLP Can Improve the Quality of Arguments in Legal Studies, A Study on the Capabilities of Natural Language Processing*, *AJP* (2022), p. 351 et seq.

against a certain allocation key. Only then will we be able to achieve scientific progress.⁸

In the light of the above, I will focus on two particular aspects in relation to international tax justice that are central to the discussion but occasionally forgotten. This should provide a more stringent argumentative structure to the debate on international tax justice. The focus is on the need for **cross-border tax harmonization** as a possible way to achieve tax justice and its connection with **cross-border fiscal equalization systems, i.e., transfer payments between states.**

2. Status quo of the international tax regime

It is well known that international tax law has been subject to major changes in the past century. Initial cooperation in the 20th century aimed at avoiding double taxation and thus to improve cross-border investments. In the 2000s of the 21st century, the focus was on preventing cross-border tax evasion, in the 2010s it was a matter of putting a stop to aggressive tax planning, and the 20s of the 21st century have finally been marked by attempts to cross-border tax harmonization up until now.

Currently, the focus is on the harmonization of corporate tax systems, although it has already been announced that there's also to be expected an inclusive framework on CO2 taxes understood in the widest sense⁹ and possibly an extension to individual taxation (starting with questions of gender neutral taxation).¹⁰ In both areas tax harmonization is also expected in the future.

However, I do not want to bore the reader with generally known facts and, moreover, this is a highly simplified and exaggerated. I am rather interested in the question whether cross-border tax harmonization will lead to increased tax justice. There is a short and a long answer. The short answer is that we cannot

⁸ Furthermore, we should also be prepared to admit that we were wrong. Far too little do we read that a legal doctrine explicitly deviates from an earlier opinion of the same author.

⁹ See on this OECD, Effective Carbon Rates 2021, Pricing Carbon Emissions through Taxes and Emissions Trading, <https://www.oecd-ilibrary.org/taxation/effective-carbon-rates-2021_0e8e24f5-en>; OECD, Tax and the Environment, <<https://www.oecd.org/tax/tax-policy/tax-and-environment.htm>>; OECD, OECD Establishes New Carbon Tax "Inclusive Framework", <<https://answerconnect.cch.com/document/gdn01140943/news/oecd-establishes-new-carbon-tax-inclusive-framework>>.

¹⁰ See on this <https://www.oecd.org/tax/presentation-oecd-tax-talks-february-2022.pdf>.

know for sure, since tax justice ultimately means distributive justice, and we cannot control distributive justice solely through the revenue side, *i.e.*, through the tax system. The long answer is the same, just a little more detailed. Let me present the long answer in the following.

3. The term “tax justice”

I cite a quote from Klaus Tipke published in 1981:

“In the literature on international tax law, one hardly ever comes across the word “justice”.”¹¹

This is a convincing statement considering the context back then. However, the framework conditions have changed. Tax justice in international situations has also become a much-discussed concept in the meantime. As is well known, it has many components.¹² Central are the following two elements:

- The first element is the consideration of the individual, *i.e.*, if from the individual's point of view, the international tax system is fair. The main concern here is the question of the fair distribution of the tax burden among citizens in a cosmopolitan context.
- The second element is whether there is a fair distribution of the tax base or the tax revenues between the states.¹³ The term “Inter-Nation Equity” is often used in this context.

The addressees of the justice questions are thus different: the individual or the state as a whole. Sometimes, however, the arguments are mixed.¹⁴ Both discussions are shaped by the underlying question of the **basic structure**.

The expectations of justice are known to be different inside and outside a basic structure. *E.g.*, a natural person intuitively demands equal treatment with other

¹¹ Own translation, Klaus Tipke, *Steuergerechtigkeit in der Theorie und Praxis, Vom politischen Schlagwort zum Rechtsbegriff und zur praktischen Anwendung*, Otto Schmidt (1981), p. 120.

¹² Peter Hongler, *Justice in International Tax Law*, IBFD (2019), p. 14 et seq. (https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf).

¹³ Critical to this delimitation in particular Johanna Stark, *Tax Justice Beyond National Borders – International or Interpersonal?*, *Oxford Journal of Legal Studies* (2022), p. 133 et seq.

¹⁴ On the mixing of arguments see Cees Peters, *On the Legitimacy of International Tax Law*, IBFD (2014), p. 105.

natural persons within the basic structure, but not with persons outside it. Let me illustrate this with an example:

A German resident does not expect to be treated equally by the German tax authorities as a Singapore resident. *E.g.*, the German resident will not expect to receive the same level of child deductions as a Singapore resident.

Let me give you an even more relevant example. In the next few years, the German Federal Constitutional Court will have to decide whether the principle of equal treatment requires that capital income is taxed in the same way as income from an employment or not.¹⁵ However, it seems unproblematic – at least outside the application of the European Union's fundamental freedoms – that capital income is taxed differently in the Netherlands and in Germany.

These remarks on the principle of equal treatment also apply to the principle of distributive justice. Thus, intuitively, inequalities are problematic primarily within a basic structure, and tax law, if at all, should provide for redistribution primarily within a basic structure, *e.g.*, in the sense of Rawls's difference principle.

4. What is a basic structure?

The basic structure is in general the state.¹⁶ Basic structures are characterized by a coercive framework, shared institutions and cooperation among members, *e.g.*, through the free movement of persons within the basic structure.¹⁷ The focus of this article is the main fiscal elements of such basic structures.

From a fiscal perspective, the residents of a basic structure are usually within the same tax system and also within an expenditure framework that is intended to lead to distributive justice, *i.e.*, the applicable principles of justice are also different within and outside a basic structure.

For the present presentation, however, it should be emphasized that basic structures are subject to dynamic developments, so that basic structures can

¹⁵ See Judgment of Lower Saxony Finance Court of 18 March 2022, 7 K 120/21.

¹⁶ The term is prominently used by John Rawls, *A Theory of Justice*, Revised Edition, Harvard University Press (1999), p. 7.

¹⁷ From a tax perspective see already Peter Hongler, *Justice in International Tax Law*, IBFD (2019), p. 346 et seq. (https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf).

expand or contract geographically. This becomes obvious in supranational structures like the EU. Such institutional entities are subject to constant change and, consequently, the answer to the question of the basic structure is also a changing one.¹⁸ This also leads to the fact that the applicable principles of justice can develop in accordance with the development of the basic structure. Once again, the advantages of pragmatism as the epistemological basis of the debate become apparent. We should not strive for perfect tax justice, but always judge tax justice in light of the actual circumstances, which requires above all taking into account the institutional framework within which we are to judge tax justice.

Thus, it should be noted that the question of distributive justice or tax justice is different whether we are simply talking about the national tax system or the international tax system, because the underlying basic structure is different. This seems obvious.

5. Central fiscal law elements of a basic structure

This brings me to the key fiscal elements of a basic structure.

- **Firstly - tax harmonization:** Usually, tax systems within a basic structure are harmonized or at least partially harmonized. This means that local tax authorities are forced to harmonize their tax system with that of the entire basic structure. It is well known that there are fully harmonized tax systems (same tax base and same tax rates) and partially harmonized tax systems (same tax base but different tax rates).¹⁹
- **Secondly – harmonized expenditure side (incl. fiscal transfers):** Usually, persons in the same basic structure are entitled to a share of the social surplus, *i.e.*, of the social distribution mass. This is particularly obvious in the case of fiscal equalization between wealthier and less wealthier regions in a basic structure

¹⁸ On the author's own position see Peter Hongler, *Justice in International Tax Law*, IBFD (2019), p. 349 et seq. (https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf).

¹⁹ See *e.g.* the income and corporate tax system in Switzerland (see *e.g.* Madeleine Simonek, *Tax Coordination between Cantons in Switzerland – Role of the Cantons*, in: Michael Lang et al. (Eds.), *Horizontal Tax Coordination*, IBFD (2012), p. 221 et seq.

such as the fiscal equalization system in Germany (“*Länderausgleich*”) or the intercantonal fiscal equalization in Switzerland (“*Finanzausgleich*”). Therefore from a fiscal point of view, basic structures regularly also contain a fiscal equalization system. In centralized basic structures fiscal equalization does not take place between the single regions, *i.e.*, horizontally, but through the central state organs. As a rule, a more or less comprehensive fiscal equalization system can be found in every state or state-like basic structure, *i.e.*, also in central states. Of course, the exact form also depends on how much authority is transferred to local government units in a basic structure.

Whether a basic structure is fair cannot be judged solely on the basis of the structure of the revenue collection side, but requires a comprehensive analysis. This is often forgotten in single-tax-related discourses on justice.

In the following, let me address these two elements in order to add a little more practical relevance to what has so far still been a very theoretical discussion. For this, I will refer in various ways to the current basic structure in the EU and in Switzerland. These two state structures are ideally suited to visualize the problem at hand.

6. Tax harmonization

Let's start with tax harmonization. We are currently witnessing the first significant²⁰ international tax harmonization efforts, with the Inclusive Framework agreeing on a minimum tax rate of 15% and at least a rudimentary common tax base under Pillar 2. In a second step, it would be conceivable to agree on a formulaic distribution of profits. As is well known, this has also been proposed in the EU as part of the CCCTB project.²¹

It is important to remember, however, that the more tax harmonization we demand, the more we move into a cross-border basic structure that triggers comprehensive moral duties (*e.g.*, equal treatment of all inhabitants of this basic

²⁰ Also the work of the Forum on Harmful Tax Practices has already led to partial harmonization by eliminating certain particularly harmful forms of tax competition through the international work.

²¹ See for the scientific discussion Stefan Mayer, *Formulary Apportionment for the Internal Market*, IBFD (2009); see also Peter Hongler, *Justice in International Tax Law*, IBFD (2019), p. 457 et seq. (https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf).

structure; application of the ability-to-pay principle to cross-border situations; distributive justice between poorer and richer areas within this basic structure).

I.e., whoever demands to cut the cake into perfectly fair pieces should keep in mind that this will presumably only appear to be fair if the division of the cake is integrated into a greater whole that appears to be a “fair” basic structure. In other words, a tax harmonization will always have winners and losers, and insofar a tax harmonization will only work in the long run if the losers receive other advantages. Within a basic structure, this is regularly the membership in this basic structure, which potentially brings advantages. Let us put this into the historical context of Switzerland and the EU.

A hundred years ago, each canton in Switzerland had its own tax system. Only intercantonal double taxation was already prohibited at that time.²² *I.e.*, the negative integration of the ECJ through the application of the fundamental freedoms took place in Switzerland through the application of a prohibition of intercantonal double taxation by the Federal Supreme Court.²³

Tax harmonization, *i.e.*, the alignment of cantonal tax laws, took place in Switzerland over several decades. Strictly speaking, it took almost 75 years from the first scientific ideas in the 1920s²⁴ to the actual tax harmonization of income and corporate income tax. The Tax Harmonization Act, for the time being the last important stage of tax harmonization, finally came into force only on January 1, 1993. Such Tax Harmonization Act led to an almost complete harmonization of the income and corporate income tax base.²⁵

In Switzerland, there were several reasons in favor of a tax harmonization:

- Large state projects could no longer be financed by the financially weak cantons.
- Increasing economic integration across cantonal borders
- Necessity for rationalization

²² For the history see Madeleine Simonek, Tax Coordination between Cantons in Switzerland – Role of the Cantons, in: Michael Lang et al. (Eds.), Horizontal Tax Coordination, IBFD (2012), p. 221 et seq.

²³ See Art. 129 (3) Federal Constitution of Switzerland of 18 April 1999 (SR 101).

²⁴ Ernst Blumenstein, *Ein schweizerisches Steuersystem*, ASA 1 (1920), p. 25.

²⁵ Dispatch of the Federal Council on Federal Laws on the Harmonization of Direct Taxes of the Cantons and Municipalities and on Direct Federal Taxes (Dispatch on Tax Harmonization) of 25 May 1983, BBl 1983 III, p. 1, 4.

- Greater mobility of the population

Interestingly, justice considerations were not the driving force behind tax harmonization.²⁶ Rather, the focus was on increased institutional integration of the federal state, *i.e.*, on changes in the basic structure. In my view, there are two reasons for this:

- Firstly, intercantonal double taxation has always been prohibited by the constitution. This means that the equal treatment of cross-cantonal and intra-cantonal situations was at least guaranteed in this regard and at least partially solved from the taxpayer's point of view.
- Secondly, there have always been equalization measures between the cantons, but most of them were controlled by the federal government and did not take place directly between the cantons. In other words, the cantons were aware that tax harmonization would have winners and losers, but that Switzerland already had a system that could provide for equalization.

Usually, tax harmonization only works in such a framework, in which the question of winners and losers of tax harmonization loses importance, since tax harmonization is part of a comprehensive basic structure, whose fair design must ultimately be taken into account from the perspective of the cantons or the participating states.

This brings me to the EU. Interestingly, the Swiss tax scholar Ernst Höhn, who noted the following in the early **1970s**:

*"While the harmonization of cantonal tax law is still in the preparatory stage, the institutions of the EEC could already look back on considerable successes in the implementation of tax harmonization. The experience gained in the EEC should also be used to a greater extent in Switzerland."*²⁷

It is indeed the case that the EU was the role model for Switzerland in the area of tax harmonization 50 years ago. As a reminder, it was not until the 1990s that comprehensive harmonization took place in Switzerland, *i.e.*, only 30 years ago.

²⁶ This is of course a difficult statement to make retrospectively. At least there is nothing to the contrary in the dispatch.

²⁷ Own translation, Ernst Höhn, *Die Steuerharmonisierung in der EWG und die Schweiz*, ASA 40 (1971), p. 383.

I will be very brief on the tax harmonization steps in the EU as it is not my field of expertise. The following three points are worth noting:

- Firstly, the negative integration of the ECJ has certainly led to harmonization.²⁸ However, it also has its limits, since, to put it simply, it is only possible to state what is not possible. The ECJ, however, has little room for maneuver, as the Federal Supreme Court of Switzerland, *e.g.*, had. As is well known, the ECJ cannot decide which state must tax an income, but only who may not.
- Secondly, tax harmonization of direct taxes continues to progress very slowly. CC(C)TB has been a very controversial project for years, and the harmonization of income tax has not yet been successful either, apart from a few directives in the area of direct taxation.²⁹ Of course, the unanimity requirement is an important obstacle (in Switzerland, only a majority of the cantons is needed for tax law revision, which can limit the tax sovereignty of all cantons). However, to come back to the basic structure, there are also logical reasons why tax harmonization in the EU has not yet progressed so far. One reason is the lack of comprehensive fiscal equalization, or already the lack of a central monetary policy.³⁰
- Thirdly, there are other areas, such as value-added tax, which are already harmonized, but which are very much related to the common market, *i.e.*, to one element of a basic structure.

²⁸ See *e.g.* Hanno Kube/Ekkehart Reimer/Christoph Spengel, Tax Policy, Trends in the Allocation of Powers Between the Union and Its Member States, Tax Review (2016), p. 247 et seq.

²⁹ Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

³⁰ Switzerland knows a full-fledged monetary union since 1907 when the Swiss National Bank was incorporated and local (*i.e.* mainly cantonal) emission banks were abolished.

7. Fiscal equalization system

This brings me to the fiscal equalization system, the second central fiscal element of a basic structure. As mentioned above, fiscal equalization can compensate for any unequal distribution of the tax revenues in the context of tax harmonization.

Again, I would like to begin by briefly discussing developments in Switzerland. Switzerland has developed a finely balanced system of fiscal equalization between richer and poorer cantons in the meanwhile. However, this system was also introduced very late after decades of discussions. Here are a few milestones:

- It was not until 1958 that fiscal equalization between the cantons was incorporated into constitutional law.
- In the following years, a system of equalization was pursued that was characterized by earmarked and non-earmarked payments from the federal government to the cantons in order to counteract the strong economic disparities between the cantons. As a result, the cantons became more and more dependent on the federal government – indeed, tasks were centralized at the federal level.³¹
- This, in turn, led to discussions at the end of the 20th century about giving the cantons back more decision-making competence.
- Finally, this led to the introduction of a comprehensive system of fiscal equalization, which in turn strengthened the cantonal decision-making competences. This did not take place until the implementation of the Federal Act on Fiscal Equalization and Cost Compensation on January 1, 2005³² This new fiscal equalization, which involves direct transfer payments from the richer to the poorer cantons in significant amounts, could only be implemented

³¹ For the whole see Dispatch of the Federal Council to the Federal Assembly on the Draft Federal Law on Fiscal Equalization among the Cantons of 23 January 1959, BBl 1959 I, p. 145 et seq.

³² Federal Act on Fiscal Equalization and Cost Compensation of 3 October 2003 (SR 613.2).

through tax harmonization, as it is based on the so-called resource potential, *i.e.*, on the taxable profit per capita and the taxable income per capita in a canton. This resource equalization requires a harmonized tax base and is the core of the Swiss fiscal equalization.

The EU has as well always known instruments that lead to transfers between the member states. However, this is mostly in the form of vertical equalization, *i.e.*, in the form of payments from the EU authorities to the member states and not directly between the member states themselves. This includes redistribution through the general EU budget but also European grants. There is no comprehensive direct fiscal equalization between the member states (yet).

However, the recent and the most recent actions of the ECB do have the features of a fiscal transfer system. It is evident that new governmental bond emissions by the Italian government, for instance, are largely bought by the ECB.³³ It is also evident that the balance sheet of the ECB has extremely grown in the past years and parts of such increase was necessary to stabilize interest differentials between the member states. Moreover, the Target 2 system has also a significant imbalance between the Member States. Of course, I am not in a capacity to finally assess how the behaviour ECB is comparable to an equalization levy, nevertheless, my argument is that the closer the behaviour of the ECB is to an equalization system from richer to poorer member states, the better are the chances that tax harmonization will be successful.

Of course, the existing vertical compensation (incl. the recent and most recent behaviour of the ECB) between the EU and its member states can in monetary terms also not yet be compared with the numbers in Switzerland. This is already due to the significantly lower "EU state quota" and the very different distribution of tasks between the EU member states compared to the distribution of tasks between the cantons and the federal government. As far as the financial equalization between the member states is concerned, the EU as a basic structure is, in other words, (still) less integrated than Switzerland. However, this is not to be understood in a judgmental way.

In conclusion, there seems to be an interdependency between tax harmonization and fiscal equalization. **A successful, *i.e.*, legitimate tax harmonization**

³³ Tagesschau, *Nervöse Notenbank, Die EZB und ihr Italien-Problem*, <<https://www.tagesschau.de/wirtschaft/finanzen/ezb-italien-anleihen-101.html>>.

seems to require an effective fiscal equalization and probably *vice versa*. It seems as if there is a correlation between tax harmonization and fiscal equalization in dynamic basic structures, as Switzerland and the EU are one.³⁴ However, it is not a chicken or egg debate, *i.e.*, a question of whether we need tax harmonization or comprehensive fiscal equalization first. Rather, these two areas seem to be developing in parallel. If we demand more tax harmonization, this seems to demand an integrated fiscal equalization and *vice versa*.

In the following, I will briefly explain what these remarks on the "basic structure" have to do with the current discussion on the structure of the international tax system. In advance, it should be noted that outside the EU or Switzerland, this basic structure does not even exist in a rudimentary form. *E.g.*, there is no intergovernmental financial support comparable to a fiscal equalization system. The only exceptions are development aid or investments in humanitarian cooperation.

8. What does this mean for the international tax system?

These previous remarks served to show that the question of justice in international tax law depends very much on whether and to what extent countries are part of a basic structure. *I.e.*, also the question whether the current proposals of the OECD or the Inclusive Framework lead to more tax justice or not has to be assessed comprehensively.

Here are some of my positions:

- I highly doubt that the increased tax harmonization will, at the international level, lead to an international tax system that is considered to be fair *per se*. In particular, international tax law will not become fairer if all countries are obliged to impose a corporate tax of 15% according to Pillar 2. We do not even know the exact distributional impact of such an approach, so how can we judge whether it is a justice-enhancing proposal? Some states will benefit greatly from this harmonization, while others will lose out. In a basic structure, the fiscal gains from the introduction of

³⁴ Of course, this is not the case in historically already centrally organized basic structures such as France.

Pillar 2 could at least be shared among the participating states.³⁵ Internationally, such legal framework does not exist. Thus, the, in my opinion, very artificial territorial allocation of taxes under the IIR and the UTPR cannot be corrected by compensation payments, so that everyone would benefit from the additional tax revenues.³⁶

- In my opinion, the goal of international tax policy does not necessarily have to be that the tax systems are structured in the same way and that the profit or income of legal entities or natural persons can be divided into perfect individual parts. A brief look at the successful tax harmonization in Switzerland and the partially successful tax harmonization in the EU leads to the conclusion that tax harmonization is only considered legitimate (and thus finds genuine political majorities) if the remaining framework conditions make the entire basic structure appear to be a coherent as a whole. The division into perfect units of income and profit is the last step in this process. There is no other explanation for the fact that tax harmonization of direct taxes took decades in Switzerland and is still ongoing in the EU after decades.
- When assessing whether a tax system appears to be fair or not, the entire basic structure must always be evaluated. Fiscal equalization and tax harmonization are only two, but two important elements of such a basic structure, which, moreover, influence each other.
- It can further be concluded that in international tax policy we should again pay more attention to the fact that states can tax whatever happens within their territory. That being said, the focus of international cooperation should be on the protection of tax self-determination understood in this rudimentary form.³⁷ In this respect, I am and have been an advocate for Pillar 1 since the

³⁵ See already Thomas Berndt et al., *Umsetzung der globalen Mindeststeuer (Pillar 2) in der Schweiz*, IFF-HSG Working Paper No. 2022-13 (2022).

³⁶ Maybe this allocation is even in violation of international law – see Peter Hongler, *Is the Pillar 2 Agreement Infringing International Law Obligations?*, GLOBTAXGOV (2021).

³⁷ See in more detail Peter Hongler, *Justice in International Tax Law*, IBFD (2019), p. 354 (https://www.alexandria.unisg.ch/257972/1/030FT_Justice_International_Tax_Law%20%28003%29.pdf).

beginning.³⁸ Digitalization in combination with the requirement of a fixed business facility in the DTAs has made it impossible for countries to tax profits generated within their own territory, *i.e.*, to tax what happens within a country. This interference in fiscal self-determination, as understood in this way, should be corrected. This core cause of the BEPS project remains unsolved!

- The situation is only different if a tax problem can uniquely be solved globally, *i.e.*, through a harmonized approach. In this respect, it seems convincing to tackle cross-border tax evasion or even the most harmful form of tax competition through global measures.³⁹ Thus, there are also reasons for the global and harmonized regulation of CO2 levies. A new inclusive framework will deal with this in the near future. However, Pillar 2 does not deal with a problem that can only be solved globally.
- The fact that there is competitive pressure on a tax system is not yet a problem that necessarily requires a global solution. Otherwise, competitive pressure on employee protection or social systems would also require a global solution. Heretically, we could even argue that competitive pressure on tax systems is a good thing, since government quotas have grown reliably in recent years, causing the Economist to publish an article last year entitled "The Triumph of Big Government".⁴⁰ Pillar 2 consolidates this development towards higher state quotas and does so without a democratic mandate. The argument that aggressive tax planning has eroded state sovereignty is a false statement of fact. The ratio of corporate tax revenues to GDP has been constant in OECD countries for more than 20 years. What has increased are the state quotas.

³⁸ See Peter Hongler/Pasquale Pistone, Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy, IBFD Working Paper (2015), p. 1 et seq.

³⁹ See OECD, Action 5 Harmful Tax Practice, <<https://www.oecd.org/tax/beps/beps-actions/action5/>>.

⁴⁰ The Economist, The Triumph of Big Government, <<https://www.economist.com/leaders/2021/11/20/the-world-is-entering-a-new-era-of-big-government>>.

9. Conclusions

This already brings me to the conclusions.

- If we consider the integration of different states into one basic structure, it seems very likely and probably also reasonable that the tax systems within this basic structure should align.
- However, full or partial tax harmonization requires that the tax system be embedded in a fair whole. In particular, fiscal equalization systems can serve as a corrective to compensate for an unequal distribution of taxable income and profits.
- It is not surprising that in Switzerland tax harmonization and fiscal equalization have developed almost dialectical. It may very well be that this will be the case in the EU in the coming years. The recent most recent behaviour of the ECB even suggest that the time is right for further tax harmonization. Perhaps we should even take it as a warning that tax harmonization in basic structures that have grown organically has taken decades and not take it for granted that EU tax systems will converge very quickly.
- At the same time, however, it is very surprising that at the global level there should already be partial tax harmonization for corporate tax purposes, even though there are only very rudimentary elements of a basic structure.
- For these reasons, I do not think that the implementation of Pillar 2 will make the international tax system any fairer. Ultimately, this is a specific answer to a very abstract question.