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Book Review: International Tax Policy: Between Competition and Cooperation

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BOOK REVIEW: *INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION*

by

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ABSTRACT

International Tax Policy: Between Competition and Cooperation. By Tsilly Dagan. Cambridge Tax Law Series, 2018. Pp. x, 251. $116.00

The desirability of cooperation among nations in coordination of their tax rules and policies has occupied the minds of many tax scholars, supporting positions from close cooperation formalized in a world tax organization to tax competition with only minimal coordination of the "rules of the game," relying on market theories.[1] This theoretical discourse appears to have contributed, however, very little to the evolution of the international tax regime, which has struggled with the same questions since its launch, almost a century ago, to no avail, risking

1. *See, e.g.*, Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 TAX L. REV. 259 (2003); Tsilly Dagan, *The Costs of International Tax Cooperation*, *in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW 49 (Eyal Benvenisti et al. eds., 2004); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000); Wolfgang Eggert & Bernd Genser, *Is Tax Harmonization Useful?*, 8 INT'L TAX & PUB. FIN. 511 (2001); Julie Roin, *Taxation Without Coordination*, 31 J. LEGAL STUD. S61 (2002); Frances M. Horner, *Do We Need an International Tax Organization?*, 24 TAX NOTES INT'L 179 (Oct. 8, 2001).

deterioration and even destruction. The disagreement among nations about the optimal extent of cooperation in tax matters is not unexpected when more cooperation is viewed as a surrender of sovereignty—sovereignty that seems to be under increasing threat on many levels—beyond tax, and when less cooperation threatens to result in a loss for all nations, especially the least powerful.[2] Against this background of increasingly divergent positions, Tsilly Dagan's new book, *International Tax Policy: Between Competition and Cooperation*,[3] is a breath of fresh air, purposefully breaking with the binary approach to the question at hand and attempting to reconcile the various views with a concrete direction for the international tax regime to take if it is to survive and preserve the significant benefits it provides the world.

Published on the heels of the Base Erosion and Profit Shifting (BEPS) project, Dagan's book is both important and timely after the global financial crisis included some of the most extensive collaborations on tax policies ever.[4] Dagan has been over the years the most sober voice in favor of tax competition, yet in this book, although not giving up on her defense of the merits of competition, she methodically explains the benefits and disadvantages of all approaches to international tax policy, admitting that no pure approach could be seriously helpful in the guidance of policymaking. Dagan's methodology, like her earlier writing, is dominated by market theory and game theoretical exercises, however with unique sensitivity to the importance of fairness and legitimacy for the betterment of all in society.

Dagan's book is divided into three main parts. First, it presents the various choices that nations face in the making of policies, emphasizing the constraints on policymaking that the open, and constantly globalizing economy imposes on such nations.[5] One of the key contributions of the book is the observation about what Dagan calls the "marketization" of taxation,[6] where countries operate as players in the

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2. *See, e.g.*, Laurens van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, 21 Critical Rev. Int'l Soc. & Pol. Phil. 478 (2018).

3. Tsilly Dagan, International Tax Policy: Between Competition and Cooperation (2018).

4. *See International Tax Co-Operation: Key Indicators and Outcomes*, OECD, http://www.oecd.org/tax/beps/international-tax-co-operation-map.htm (last visited June 2, 2019).

5. Dagan, *supra* note 3, ch. 1.

6. *Id*. at 24–26.

competition for investment and revenue, and as participants in the competition game rather than rule makers for the private market competitors as they used to be in the closed economies framework. In such a world, decisions that used to be domestic in nature, made by the sovereign subject to the single authority of democracy or whatever political regime applicable, are now constrained by international standards and the interdependence of most economies.

The second part of the book, perhaps its key contribution, pulls apart the quite dominant notion that international cooperation in tax matters is both feasible and desirable.[7] Dagan's analysis particularly targets bilateral tax treaties, the building blocks of the international tax regime, arguing that their importance and contribution to the general welfare is questionable. Most importantly, Dagan demonstrates that tax treaties are not necessary to achieve the most important goal of international taxation: the elimination of double taxation. Consequently, tax treaties must serve a different purpose. According to Dagan, that purpose is the solidification of the power of the richest nations and the Organisation for Economic Co-operation and Development (OECD), the rich countries club. She is particularly concerned about the cartelization effects of the universality of tax treaties fashioned after the OECD Model convention. The critique of cooperation goes beyond tax treaties, however, and extends to the theory behind the notion that tax cooperation is superior to competition in general. Again, Dagan warns about the cartelization effects and the ensuing inefficiency of the actual and likely solution to international tax policy dilemmas, especially due to the power asymmetry between the most and least powerful nations in the process.

The third part of the book presents Dagan's proposal.[8] It promotes a balanced approach—hence, "between cooperation and competition"—to the dilemma, an approach that would take fairness into account and reject blind adherence to seemingly cooperative solutions such as multilateral legal instruments. The key message is to doubt and reduce expectations from collaborative efforts and channel the energies to the perfection of tax competition, perhaps towards a system of polite, civilized competition that would be less exposed to manipulations by the most powerful players. This could be done through improvement of information sharing, for example, and in that Dagan uses the progress

7. *Id*., mainly in chs. 4–5.
8. *Id*. ch. 7.

already made by the "Global Forum"[9] to demonstrate her point. Her most dramatic idea perhaps is taken from classic competition law: the perfection of competition through regulatory control. Since a global government does not exist and is not expected soon to impose such regulation, Dagan proposes to establish an international antitrust-like authority that would control the behavior of nations and limit their ability to limit (positive) competition. This proposal is certainly new and innovative, yet it is also very preliminary, setting the stage for future scholarship to pour content into the idea.

Dagan is to be lauded for her advancement of the international tax discourse beyond the binary approach. Dagan's book skillfully challenges the dogmatic arguments on both sides. That is very important, yet problematic, because currently we have an international tax regime that appears stable, but it is based on a myth. This Review agrees with that contention. Dagan's approach also challenges the dogmatic analysis of international tax policy by adding different aspects, such as the aspects of community and identity, to the traditional, and questionable, trifecta of efficiency, equity, and administrability, which have roots in domestic economic policy analysis.

A key insight about cooperation is that it is not one-dimensional; as a long-time supporter of more international cooperation in tax matters, I often lament the contention, promoted by opponents of cooperation, that international tax cooperation necessarily means harmonization. We live in a tribal world, where nuanced, truly scholarly inquiries are rarely welcomed. Such approach is avoided in this book and that is a good thing. The book asks the right question. That is, what kind of world do we want to live in? How do the international tax rules correspond with the way we would like to see this world? The current discourse often uses the term equity as a measure for tax policy; we would like to think that it means fairness, or justice, but it does not. Equity is analyzed in tax policy scholarship in purely economic or pseudo-economic terms. This immediately removes moral, or ethical, considerations from the discussion. The current international tax regime is based on a deal that was struck among the richest countries in the beginning of the last century, to promote their own interests using the façade of economic efficiency and taking advantage of their coercive power at the time. Once

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9. *See Global Forum on Transparency and Exchange of Information for Tax Purposes*, OECD, https://www.oecd.org/tax/transparency/ (last visited June 3, 2019).

that was established, it became a discourse of "desert." The residence countries "deserve" the revenue they collect under that scheme. The source country does not "deserve" to tax beyond whatever it gets pursuant to the deal. Tax treaties, first and foremost, operate to limit source taxation. Dagan is willing to break the mold of "more competition is better in order to increase the global pie" because she understands that we can increase the pie as much as we wish, but at the end of the day there is no mechanism for redistribution among countries. So, one cannot analyze international tax policy in the same way that one analyzes domestic tax policy (of course, even at the domestic level every country faces issues with true redistribution).

Dagan also acknowledges that some coordination is really needed. All her solutions are, in fact, based on coordination or exchange of information, standardization of tax norms, a peer review mechanism, and an antitrust governance structure. The problem is that the coordination she proposes is not less vulnerable to cartelization and abuse by the powerful nations than the more traditional forms of coordination that she criticizes (bilateral tax treaties and the multilateral instrument).

One can observe that Dagan's particular concern is not with competition or coordination. It is with coercion, because she is worried that coordination is consistently coercive. So, the question becomes what worries one more: coercion via coordination or the application of power in the competitive market. It is not clear that there is a distinct, valid answer to this question. One must first better understand cooperation to evaluate its inherent coercive properties. Dagan relies on Thomas Nagel in this context to view cooperation as bilateral in essence: negotiation is risky because one party may have more power than the other party.[10] Multilateral negotiations are merely accumulations of these bilateral, undesirable agreements.

The difficulty with this argument is that it does not provide an alternative and instead argues that the powerful would dominate no matter what, which is not advancing the discourse. Can the weakest nations really rise above that threshold of development without any cooperation? The solutions proposed by Dagan resemble the solutions employed by the OECD in BEPS in the most notorious manifestation of de facto coercion. When countries show some resistance, it is trying to appease them. But who is it trying to appease? China and India, not the truly

10. DAGAN, *supra* note 3, ch. 6.

weak nations that still have no voice and were not part of the agenda-making process in BEPS.

The current regime includes no "true" cooperation. The only exceptions are, in some cases, in dispute resolution processes. But even they de facto work only among friendly jurisdictions. Probably unintentionally, Country-by-Country (CbC) reporting presents the most hope from this perspective. It is not a cooperation regime, yet its transparency will have to eventually result in an opportunity for the poorest country in the world to collect some corporate tax revenue at source.

Another important contribution of Dagan's book is its inclusion and analysis of the various players in the international tax policy game.[11] In particular, Dagan mentions the roles of multinational enterprises, some of which clearly are more powerful than some Nation States, and the non-governmental organizations, an analysis that is not new to general international law literature, yet is absent from tax scholarship. Dagan's reference and discourse with the international law literature opens a new and valuable channel for international tax scholarship. It would be too simplistic to view countries as the sole players in this game. The BEPS project exposed that. Moreover, one should not forget that tax authorities are political institutions within a state. They are not one-dimensional and viewing them as simply supportive of the interests of the states that they represent would be a mistake. Note what they did in the BEPS project. Politicians came to the OECD, thrashed its entire past work, declaring it a failure, yet ended up granting it the widest mandate ever to do whatever it can to fix it. The repeated promises (and interim declarations) of success with no changes in the modes of operations and in the ideas promoted simply cannot do it. It is not surprising therefore that BEPS ended with no progress, and no real reform except for a tremendous increase in uncertainty for taxpayers and individual governments. CbC reporting provides a good demonstration of this dynamic.[12] At the launch of BEPS, the tax authorities were against it. They argued that they already had all of the information needed (true, especially true in rich countries with sophisticated and well-funded tax administrations). They further argued that they did not want the information to become

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11. *Id*., particularly in ch. 2.

12. OECD, *Transfer Pricing Documentation and Country-by-Country Reporting: Action 13: 2015 Final Report* (Oct. 5, 2015), https://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm.

public. It was their task to fairly enforce the laws and collect taxes from multinational enterprises, which they had not been doing as is apparent from the launch of the BEPS project. The tax authorities won this game and CbC information is not supposed to be publicly available, but of course it will eventually become public since they simply do not have the tools to stop leaking and exposure by foreign tax authorities. Nonetheless, the OECD now promotes this idea as empowering tax authorities in their fight against abuse, under-taxation, and double non-taxation.

Another example of the problematic outcome of the current discourse for developing countries is the debate over the taxation of the digital economy.[13] A key challenge of BEPS was to revise the above-mentioned deal and increase source taxation. Residence countries, including all the most powerful nations, argued against source taxation based on past agreements. Yet, the original deal was based on the tie between physical presence and activities and the taxing rights, a tie that is simply irrelevant in the case of the digital economy. Not only do the developing countries want to revise the original deal that had been struck without their input, but they argue that that original deal could not be relevant for the digital economy where physical presence is irrelevant. The OECD was able to conclude the BEPS project with no new substantive deal. Yet, that resulted in nations simply doing whatever they wanted and could do—even India and China, both signed the BEPS agreement—and the next day writing new rules or applying new rules that are against the new agreement. The European Union also deviated from BEPS with the Digital Services Tax idea, as have multiple other countries. Why? They want a piece of the action and do not want others to get it; they are first movers. Jumping the gun in this manner is impossible for the least developed countries, which further weakens their position in the international tax regime. Dagan is right therefore to observe that the current state of tax cooperation includes many aspects that reflect coercion, yet her critique cannot help the argument that further tax competition could have improved this situation.

The post-BEPS discourse focuses on anti-abuse. This focus will never be in favor of the source country. Poor countries obviously have less ability to use their enforcement powers than richer countries. Their relative position is likely to be worse off after BEPS. The CbC reporting

13. *See, e.g.*, Andrés Báez & Yariv Brauner, *Taxing the Digital Economy Post BEPS . . . Seriously* (Univ. of Fla. Levin Coll. of Law Research Paper No. 19–16, 2019), https://ssrn.com/abstract=3347503.

requirement may slightly even the odds, as mentioned, as will, hopefully the Multilateral Instrument (MLI). But the latter's effect on standardization, which is good for developing countries (and fairness) depends on the actual legal developments and the details of the MLI in action. However, the agenda, structure, and rules of the MLI were all set by the OECD, and other countries were invited to join. It is not difficult to see the imbalance embedded in the process. Another worrying indicator is that the commitments of countries to the MLI significantly diverge. Some countries make commitments that are rather rash, without much "homework," a conclusion easily made when comparing the amount of reservations made by the more powerful MLI members in comparison to the less powerful nations. Which are the countries that made the most reservations? The United Kingdom, France, Germany, Canada, and China.[14]

Dagan's power-based analysis of the evolution of the international tax regime and her concern about coercion in the development of the international tax institution created at the present are therefore very timely and important for the future of the regime, because one should be skeptical that such unbalanced, unfair processes could proceed to dominate without reaction. This Review is, however, less convinced by her specific proposals, including the innovative proposal to establish a global antitrust authority for accountability. This proposal looks very much like the peer review system that the OECD is trying to establish as a best practice in areas where it fails to make progress (e.g., dispute resolution).[15] Some obvious questions must be answered, however, before one could seriously discuss this proposal, including: Who is going to decide? And, who is going to sit on that board? Such a discussion should be helpful even if one does not believe that it would indeed lead to a concrete, feasible proposal, because it would surely enrich our understanding of the dynamics of existing and potential solutions for the challenges facing the international tax regime.

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14. *See Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD, https://www1.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (last updated May 28, 2019) (constantly updated organizing table with links to country commitments and ratification instruments).

15. *See, e.g.*, OECD, *Making Dispute Resolution Mechanisms More Effective: Action 14: 2015 Final Report* (Oct. 5, 2015), https://www.oecd.org/ctp/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm.