

LSE GLOBAL TAX SYMPOSIUM –

PROFESSOR TSILLY DAGAN, INTERNATIONAL TAX COMPETITION AND COOPERATION

26 OCTOBER 2018

Introduction by Host: Professor Eduardo Baistrocchi, LSE

The question is how international tax regimes should look in the decades ahead. I have seen this book grow since TD published her article *The Tax Treaties Myth* in 2000. I am impressed by her passion, her rigour and determination to make a difference in the real world.

Panellists:

SESSION 1: Chair, Professor Ian Roxan, LSE (selected comments)

Professor Edoardo Traversa, UC-Louvain, Belgium

I have the opportunity to introduce you to this wonderful and very thorough book. To help you to enter this challenging journey in the outer space of international taxation, to guide you through the take off phase, summarising the focal points of the book. ... [we will then be into] exploration of space and to decide what to explore and which asteroids and planets should be avoided. International tax is a dangerous world.

The book comes at the right time. It has been 5 years now since the OECD, G20 and European Union has started the most impressive collaborative rounds of approximation of domestic tax systems ever. Fuelled by the financial crisis and by media leaks, the BEPS Action Plan and its parallel area of international exchange of information has yielded results that could hardly be imagined a decade ago. That is not to say that it cannot be criticised.

The book is written in this perspective. It helps in understanding that even the apparently best solutions have drawbacks that need to be taken into consideration. I quote: "Ideas and initiatives commonly endorsed in the international tax arena often sound irrefutable. Upon closer scrutiny it emerges that even noble causes can yield ignoble results." To better unveil these ignoble results, the book builds upon previous research and expands it.

At the core of the book lies the traditional opposition between competition and coordination at the international tax level. Professor Dagan bases her analysis on market analogies and game theory in order to analyse the role and behaviour of states in designing their domestic and international tax policy. In the first chapters she presents the dilemmas faced by apparently sovereign and free states in framing their domestic tax policies in a globalised economy. In a closed economy, tax policy mainly embodies a commonly controlled dimension of regulation and pursues goals such as financing of public goods and services, redistribution and economic efficiency, in particular neutrality, in line with the collective preferences of the community of resident citizens. But as individuals and companies become mobile and share simultaneous connections with several states at the same time, they are in a position to pick and choose the best goods and service package at the most convenient prize, the "marketization" of taxation, or even opt for an a la carte solution created by unbundling tax regimes and tax planning, what is referred to in the book as "fragmentation". States thus compete for residents, investors and investment, being the most attractive considering state interests. Tax policy accordingly transforms itself from a coercive to a recruitment tool and this transformation affects its goals and pursuit of traditional functions.

As Professor Dagan says, “policy makers are induced to trade democratic traditional matters of voice with exit and to prioritise mobility over loyalty as a relevant factor, though by no means the only one in setting economic rights and benefits.” This view point may appear quite outrageous from a political philosophical perspective but it allows to balance ideal representation of domestic tax policy as based on the pursuit of commonwealth with what happens in most parts of the world, in the design of domestic taxes and in particular corporate taxes.

The dilemmas of tax policy in the international context as further described in Ch 2 through the lens of international double taxation. Professor Dagan goes back to the work of the League of Nations in the 1920s which led to the first international model convention and the compromise to acknowledge the predominance of economic ties over political ones but Professor Dagan notes at a substantial cost. “Treating political allegiance, residence and income production as comparable and measuring them by their economic value reduces personal community affiliation to purely instrumental terms. This can transform the individual perception of political participation as well as the state perception of individual ... also leads states to prioritise policy options that will provide economic benefit to their constituents that will establish their affiliation to the jurisdiction.”

Professor Dagan questions the dominance of the objective of international neutrality which tends to have dominated the political debate in the last decades, for example in the EU. She considers that in the absence of international coordination to maximise global welfare, there is no compelling reason to pursue such a goal of neutrality, which is moreover impossible to fully achieve. Therefore as an intermediate conclusion she argues that domestic interests of states should be taken as a starting point rather than international goals in framing a theory of international taxation.

The core of the book aims at deconstructing the idea that international cooperation in tax matters is the best solution that can be achieved and the only one that serves the general interest of all participating states. To begin, she analyses bilateral solutions in DTAs and deconstructs the tax treaty myth. She confronts it first with a hypothetical world without tax treaties. She questions the necessity of bilateral solutions by at first formulating an extensive efficiency analysis of classical unilateral solutions to relieve double taxation eg exemptions, credits and deductions.

Professor Dagan further discusses the real effect of DTAs being less the prevention of double taxation than the distribution of taxing powers between states and the creation of administrative tools in order to prevent avoidance and evasion. Such effects in turn do not necessarily have the expected positive consequences on FDI while they have a negative impact on revenues collected by host countries. This holds especially true in the case of asymmetric relations such as between developed and developing countries as the host country. DTAs, in that case rather than implementing tax justice can reinforce existing inequalities between states. This critique echoes those of other scholars such as Thuronyi, Brooks, Kreyer, Christians.

The inefficiency of multilateral solutions are debated in Ch 4. She argues that although competition may trigger a race to the bottom this does not necessarily render multilateral cooperation ... a desirable alternative. Cooperation has its own flaws. International negotiations to set common standards between states require participation by all states to the negotiation despite the fact that those states may have contradictory interests and preferences and bargaining power asymmetries among states are often overlooked. She illustrates these particular shortcomings through the example of developing countries. As a result of cooperative mechanisms such as entering into DTAs or participating in the work of international organisations, those countries could be tempted to raise their tax rates in order to increase public spending and redistribution. This could have the consequence that foreign investment is less profitable, negatively affecting their labour markets.

This could in turn reduce the tax revenues in developing countries despite, in the beginning, by raising the rate having pursued the opposite objective.

You could also envisage the situation that by aiming for tax treaties, developing countries would be forced to lower even further the tax rate on mobile factors and to compensate that loss with increased taxation of less mobile factors. Therefore she calls for another solution to contain the adverse effects of tax competition.

Professor Dagan maintains first that tax competition does have some advantages. It creates diversity of governmental and tax regimes, allowing for better satisfaction of individual and collective preferences instead of a 'one size fits all' analysis. It favours a reduction of governmental waste and finally removes the pressure resting upon governments to necessarily meet the interests of some groups in society.

Ch 5 continues the reasoning in a more balanced context, of current cooperative effort. Professor Dagan warns that adherence to multilateral instruments does not ineluctably indicate that such instruments are widely desirable. A reminder of the history of tax cooperation including the latest BEPS project allows her to stress the common premises this history unveils and its erroneous assumption that cooperation provides benefits to all, which is not true in the sense that states are not equally interested in the goals. Since states do not all share the same problems, the solution does not work equally well for all participants. She then tackles the delicate question of why states do engage in cooperation, especially developing states, despite their controversial results, and how cooperation does actually serve their interests. (Quote re "joining the treaty club" by developing countries). "cooperation, not just competition, creates winners and losers."

Professor Dagan then takes on the task of discussing the concept of global justice. The book has so far left this aside. She especially highlights the role played by competition in delegitimising the state. "The shift away from political participation and towards market norms in formulating regulation calls into question the state's ability to give equal consideration to all its constituents in regulation." She expresses doubt as to whether cooperation solves this legitimacy issue by achieving justice. This may depend on how we conceive cooperation, whether it is a bargaining process, or a leap made to the creation of a collectively authorised sovereign authority. In the latter case, multilateral cooperation represents in other terms a collective, coercive power substituting the domestic coercive power, as a more powerful means to achieve justice at the domestic level for all constituent parties. This in turn brings back the question of how to address the possibility that some multilateral agreements may harm certain parties more than others.

It appears that the stance taken by Professor Dagan allows us to lower excessive expectations of multilateral cooperation between states. Yet, her purpose is not to convince the reader that tax competition can be a remedy to all the problems of international tax, as she is well aware of its limits in particular as regarding its impact on self determination power of states. But she aims to convince the reader that tax competition is not something that should be avoided at all cost and that tax cooperation may indeed in some cases be even less desirable.

This rather grim picture, as she points out herself, is followed by a positive outlook. Having demonstrated throughout the book the incapacity of multilateral effort to form a systemic solution to the problem of international taxation, she refers to the market metaphor to enlighten the reader in respect to appropriate policy responses. The existing competitive context of international taxation does present issues comparable to traditional market failures. By reminding us of the potential of information sharing in countering tax evasion and avoidance, or advocating the rather

unconventional idea of an anti-trust agency for states, Professor Dagan points out that those failures could be corrected and tax competition, instead of being set aside and tamed by coordination, could be seen as part of the solution.

Interestingly, even if some of the recommendations are made on totally different premises than the justification given by international organisations to justify some supranational solutions, the measures she proposes are to a certain extent similar to the reforms that have recently occurred. The setting up of information sharing systems; a certain type of convergence between tax norms and a regulatory authority to counter unilateral strategies which are deemed harmful to the other state could be justified by both competition and cooperation arguments, which allows us to conclude on a more optimistic note that in international taxation, as in other areas, no matter the roads taken what matters is that they lead to Rome.

Prof Roxan (Chair)

That is a very comprehensive outline, thank you. It demonstrates the complexity of Professor Dagan's argument and the challenges that it poses in reaching a solution which we are heading towards in this. It is a masterful outline of the opposing arguments and dichotomy, and the fundamental argument about challenges of cooperation because of the different interests that states have, that it is not simply cooperation between states undefined, a simple mass of states.

This relates to the economic idea of competition and cooperation, that economic competition is based on the competition of actors who are identical or sufficiently numerous to be effectively undifferentiated. Professor Dagan is highlighting that we are dealing with numbers of states which, although the number has grown, is small enough that individuality is important; it is not an undefined mass but identified actors. As Edoardo was saying about the relationship between economic interests and political interests, the challenges are aligning the two.

Professor Yariv Brauner, University of Florida

My role is that of the skeptic in this show. I want to begin with the very appropriate title for the book: International tax policy is "between" international competition and cooperation. This means that everything we discuss is really not binary but on a certain continuum. I like this book because it tries to look at the granular level of what we really mean by "competition". I like it because it challenges the dogmatic arguments on both sides.

The book is based on prior work including the tax treaties article. That is very important, as we have today an international tax regime which appears stable, but it is based on a myth. I agree with that contention. The primary goal that we are taught is the goal of tax treaties, that they are the building blocks of international taxation with the aim of eliminating double taxation, but we don't really need treaties to eliminate double taxation, if that is really what we want to do. It also challenges the dogmatic analysis of international tax policy by adding different aspects, such as the aspects of community and identity. Whereas, in the past, we are used to the almost boring analysis of efficiency, equity and administrability.

It also, to an extent, accepts that cooperation does not necessarily mean harmonisation. A lot of the literature that discusses these issues is predetermined. We live in a world of tribalism, and we almost never hear truly scholarly inquiries into issues, so a harmonisation person is attacking competition as being evil and a competition person is attacking cooperation as trying to achieve a global government that is either evil or impossible to achieve. So, all of that is avoided in this book and that is a really good thing.

The book also immediately removes, or gets away from, the discourse of cooperation in a market context as a pure removal of obstacles. This is important because the removal of obstacles is a very important part of the neutrality and efficiency argument. It is tainted by both a pseudo-economic façade and, more recently, in the European version – the non-discrimination aspect – masks a lot of the discussion. It has nothing to do with efficiency within Europe.

Most of all, I like this book because it asks the right question. That is, what kind of world do we want to live in? How do these rules correspond with the way in which we would like to see this world: Us, human beings, flesh and blood. It also attempts to propose solutions, or pathways for reform., summarised by Professor Traversa. I agree with his last comment: They very much look like what we have in the BEPS project. Is that a good thing? Probably not, I think. We will get to that.

The book breaks the mould of dogmatic argumentation. Like Professor Dagan, I believe that we live in a bad world, difficult, hard times. The rule of law is suffering; international politics and tribalism colour most policy debates. But, this is not just a recent phenomenon. This religious reliance on market and pseudo-economic tax policy analysis has really prevented a serious debate even before these factors that became more important post the GFC. The dogmatic analysis confounds efficiency and equity. It then uses this additional prism of administrability, but if you look at it seriously, this is usually used to get out of a corner when someone does not like the outcome of the original analysis. It is not a serious look at the issue of administration. So we end up in this world of efficiency and equity.

When we say equity, we would like to think that it is fairness, it is justice. But its not! This is because the way in which equity is analysed is in purely economic or pseudoeconomic terms. This immediately removes moral, or ethical, considerations from the discussion. These views of mine may look like a conspiracy theory, that does not like the big countries that win the game because they produce more and therefore they deserve more taxes. I accept that criticism because this is really what I think. The deal of international tax today is a deal that was struck among the richest countries, historically that is what happened, to promote their own interests using the façade of economic efficiency, and taking advantage of their coercive power at the time.

Once that is established, it became the discourse of desert. The residence countries “deserve” tax. The source country will not deserve to tax beyond whatever they get in the tax treaty network. Remember, what do tax treaties do? The number one thing: They remove the complete right of taxing from the source country. Prof Dagan is willing to break the mould of “more competition is better in order to increase the pie” because she understands that we can increase the pie as much as we wish, but at the end of the day we do not have a mechanism for redistribution among countries. So we cannot look at international tax policy in the same way that we look at domestic tax policy; and even at the domestic level we have lots of problems, every country faces with true redistribution.

A demonstration, anecdotal. Today, I saw the release of the Tax Competitiveness Index of 2018, Tax Foundation; a group of economists. Fantastically, they make the statement that the first, number one in the index in international tax rules, Luxembourg; number 2, Hungary; number 3, The Netherlands. When you read this, overall, of course if you are number 1 in international tax: your rules are better than others. Obviously, people who are serious will read this skeptically and try to generate other insights from it. But it has, politically, been extremely influential. The competitiveness discourse has dominated the tax debate. It is not just an issue of Trump.

In fact, Prof Dagan acknowledges that some coordination is really needed. All of her solutions are based on coordination: Exchange of information that is real, standardisation of tax norms; to establish a peer review mechanism or anti-trust, some kind of governance structure. She even acknowledges that ... rich countries can come together and coerce the others even without a general effort. We can see this happening these days. Her particular concern is really not with competition or coordination. It is with **coercion**. That is the problem: that she is worried that coordination is coercive. In that sense, I admit that we all live in the shadow of our fears. What do you fear more? She identifies coercion embedded in the current regime that I just described, rejecting the ability of the current structure based on bilateral treaties, to achieve the efficiency result.

We have seen this again in the recent position of the US: What do we need? We need to lower withholding taxes, increase the amount of information because we can use information better than the others, and we would like qualitative adjustments, because then we need all kinds of sophisticated analysis that we can do better than others. We can then maximise our collection abilities. Why? Because in the chaos in which we live today, even the rich countries cannot collect tax.

Her suspicion is that every coordinating effort will eventually result in coercion. I exaggerate a bit, but that is the main point. What we need, therefore, is a better understanding of cooperation.

I have a bit of a problem with that dichotomy. She relies on Nagel in this context to view cooperation as either bilateral, in essence, negotiation – which is risky because one party may have more power than the other party – and this supranational governance or sovereignty structure, where some solution is negotiated but it is unlikely, again, that the weak will contribute sufficiently to the solution, so it will not benefit them as well or sufficiently.

But I ask, what is the alternative? Can the weakest country really rise above that threshold of development without any cooperation? We said before, the solutions proposed are very similar to what the OECD is doing now. The OECD is playing exactly this game of representing the coercion of particular countries. When it shows some resistance, it is trying to appease. But who is it trying to appease? China and India, a little bit. That is it. Those countries do not represent the whole of the world. This does not mean that what China and India do is not the right thing for them.

To me it is important that the current regime has no “true” cooperation in it. The only slight exceptions are in some cases, dispute resolution processes. But even they really work only among friends. Probably unintentionally, country by country reporting, attempted by the OECD, which is not a cooperation regime. But its transparency will have to eventually result in forcing, or giving the opportunity, to the poorest country in the world, to collect some revenue at source. In any event, the current regime prevents entering and giving real voice to all countries.

The other interesting thing that the book does, and it is way overdue, is it starts looking at the various players in the international tax policy game. In particular, Professor Dagan mentions the MNEs and the NGOs including by reference to international law literature. That is really important. I want to add that it would be too simplistic to view countries as players in this game. The BEPS project exposed that. To forget that tax authorities are institutions within a state is a big mistake. Remember what they did in the BEPS project. The politicians came to the OECD and said, everything you did up to this date is bad, it does not work, and you the tax authorities failed to collect the revenue. But now we are giving you the mandate to really do it. The OECD says now we are really going to succeed. The end result is, essentially, nothing except for creating tremendous chaos in our world.

The problem here is demonstrated by the issue of CbC reporting. Remember when it started, the tax authorities were against it. They said, well we already have all of the information and it is true that they have the power to collect all of the information that they need especially in rich countries, and second, we don't want this information to go out to the public. Eventually they won this game, CbC information is not supposed to be publicly available but of course it will be, there is no question about that. But nonetheless, the OECD now promotes this idea as empowering tax authorities in their fight against abuse, under-taxation, double non-taxation.

We ask ourselves, will the weaker countries be better off without this structure of cooperation, even if it is a pretext? I don't think so. I think even a façade of cooperation gives a platform to promote tax collection; without this, countries would be worse off. It is better to perfect the OECD than to perfect competition! And of course, to acknowledge the new world today, which also results in consequences of redistribution among countries in the wrong direction. All the problems that we face today demonstrate that.

The digital economy: What happens with this? Source countries want to tax something. Residence countries say, no, the rules are, if the only thing we do is sell stuff into your country, we get everything. The source countries say, well, we just don't agree anymore with this deal. That was the former deal but we don't like it. So what do they do? They do whatever they feel like. Even India and China, both signed the BEPS agreement and the next day, wrote new rules or applied new rules that are against the new agreement. The EU now comes with the Digital Services Tax idea, as do multiple other countries. Why? They want a piece of the action and don't want others to get this, they are first movers. This can be discussed in another forum.

The current discourse focuses on anti-abuse. This focus will never be in favour of the source country. Why? It sounds counter-intuitive. Seems like it grants substantial powers to the revenue agencies, multiple tools, etc. But of course, poor countries have less ability to use this power than richer countries. Their relative position is likely to be worse off. The only light I see here is, unintentionally, the CbC element, because the OECD just won't be able to keep it secret, it is going to go public and be used for whatever reasons and end up resulting in less cooperation rather than more cooperation. If I am a developing country and I get information from a foreign country and I am being pressed to get them those foreign MNEs, what am I going to do? I want 10%. I want 50%. Its clear that this will happen, and is already happening to some extent.

There is some benefit also in the Multilateral Instrument. We can't discuss it here, but just mentioning, the agenda, structure and rules were all set by the OECD and other countries were invited to join. Already we see an unbalanced process. But later, when you see the commitments of countries in the MLI, we see that some countries make commitments that are rather rash, not a lot of homework being done. Eg reserved on things in their domestic law, committed to things that are unconstitutional domestically, this sort of stuff, including every treaty in existence in the commitment list. Who are the countries that made the most reservations? The UK, France, Germany, Canada and China. It demonstrates this grim picture.

I am going to close with only one specific point, the idea of an anti-trust authority or accountability. To me it looks very much like the peer review system that the OECD is trying to establish. In this case, I have a concern with this because, who is going to decide? Who is going to sit on that board? I don't think it will be helpful in this context. Thank you.

Professor Roxan (Chair)

Thank you. That has advanced our understanding of the nature of the balance between competition and cooperation, and gives us more insights into when cooperation is not, really, cooperation. Implicit in what you are saying is that many of the forces that can make competition unattractive are the same forces that can make cooperation unattractive. The dilemma that we are facing is perhaps not about the difference between competition and cooperation but about their similarity.

We move onto our third contribution from Ana Paulo.

Professor Ana Paula Dourado, University of Lisbon

I am very happy to be here on skype and I would like to congratulate Professor Dagan on this provocative book that will have a big impact. Professor Dagan describes in the book, by way of analogy between tax policy and market players, a tragedy that affects the international tax system and its coercive powers. I would like to select some aspects in the book relating to international tax justice, and I will try to challenge some of them to make a contribution to further thinking and research.

Professor Dagan makes it very clear that international cooperation will not necessarily serve the best interests of all people. She uses some examples such as the unbalanced abilities to cooperate, the network effects, cartelistic behaviour, and underlying all this, the role of the OECD.

Respecting Professor Dagan's proposal in light of international tax justice, I would recall that global justice has occupied philosophy as Professor Dagan addresses in the book; many who address this topic include Rawls, Sandel, Habermas, Murphy and Nagel. There is no consensus on whether international justice, including international tax justice, should be statist, communitarian or cosmopolitan. Dagan's position relies first on Nagel, where she argues that tax competition eroded state sovereignty by undermining the coercive power of states. Dagan then develops this based on the suggestion that tax competition fragments and marketizes tax sovereignty. So, a multilateral regime would be legitimate if it would ensure domestic justice for the constituents of all cooperating states. Dagan also relies to some extent on the Rawls maximin principle.

Dagan then criticises statist, according to whom all states will keep their power as long as all cooperating states are subject to the multilateral agreement. She is in favour of global justice, as I understand her. But she argues that states should work together in an effort to perfect tax competition, as we heard before, by targeting market failures such as free riding, transaction costs, information asymmetries and areas not subject to competition. Furthermore she argues that constraining competition is not a solution, but there should be an accord to improve competition based on an anti-trust agency. Taking this position into account, I would say that such an agency still requires, or at least pursues, cooperation. Otherwise the role of the state is lost, such that its law is not coercive anymore in the current global scenario.

My question is whether this agency would ensure domestic justice for the constituents of all cooperating states? Furthermore, would it ensure the welfare of the weakest segments in poor countries? Is this antitrust agency enough to ensure global justice? Or does it happen that Dagan abandons, after all, the concept of global justice which she seems to favour.

I would suggest that instead of Rawls, the concept of justice from Axel Honneth, e.g. *The Fabric of Justice* (2009), would best support Dagan's reasoning. Honneth rejects the Rawlsian idea that we reason from the original position in redistributive justice. Honneth is instead based on the recognition of individual autonomy. Justice is an expression of a common desire of individual freedom of action of each of us, including the right to make a community of values and interests. Put

in this context, justice results first from inter-subjective relations and cooperation and it is not determined by the original position of Rawls. In turn, justice is based on liberal democratic relations which means equality in decision-making and mutual recognition. Mutual recognition implies not only equality of right, belonging to a community and being included in it, but also redistributive justice. This is the criticism of Honneth and Nancy Fraser: Even before equal rights there are social inequalities. Honneth argues that recognition of the other state, in the international arena, does not imply redistribution until equality of resources.

Taking this framework into account, I would ask whether the antitrust agency, is recognising states by means of ensuring competition is enough for the notions of belonging and inclusion. Nation states are a condition for equality of rights, which in turn leads to global justice. Is this agency enough to produce the goods which in turn are a condition for equal freedom and in turn they are also a basis for recognition of citizens and mutual recognition of states? Still following Honneth and trying to think about Dagan's book in light of his concept of justice, I would think that Honneth's recognition of states would go beyond the role of an antitrust agency. Recognition of states in the international sphere and of equal rights in deliberation are a condition for international tax justice. This would also be the condition to be taken into account for an antitrust agency to address international competition.

Exchange of information, as a big and important example selected by Dagan, as a need for international competition is indeed a condition for communication and equal rights of deliberation. But we do not know whether this occurs. In other words, exchange of information as such is not enough to guarantee international mutual recognition. We cannot forget the weakness of the state that exercises pressure in international instances to achieve global justice. If we accept that human rights, international humanitarian assistance, free trade, freedom of movement of persons and capital are international public goods, then these would also have to be taken into consideration in order to achieve international tax justice. And that implies resources from taxes to achieve these goals.

So, a fair distribution of tax revenue would also imply agreement on what to tax and the rules for the allocation of taxing rights. I heard Yariv Brauner's presentation, discussing some of the current problems being debated in the international arena: digital economy, future of international tax system and so on. All of these aspects would have to be taken into account to reach a concept of fair distribution of tax revenue, or in other words, a concept of international tax justice. We could even go further, although this would be more problematic. We could ask whether international tax justice would not also require the recognition of ability to pay in the international sphere, as coinciding with a single tax principle as suggested by Reuven Avi-Yonah.

In any case, redistributive justice should continue to be promoted by nation states, and I think this is the conclusion of Dagan. However, I am not sure that she argues or is convinced that distributive justice should be based on a statist approach or whether some other global concept could also be applicable. Thank you, that is my contribution, and congratulations again.

Ian Roxan (Chair)

Thank you, Ana Paula, that was very interesting, you picked up what Yariv Brauner commented at the beginning of his talk, about the importance of the moral, and you bring in this wider issue which is needed to balance and extend the debate. It is very relevant to the issues that the tax system faces today, particularly regarding the digital economy. Despite the irresolution on this topic in the BEPS project, we are seeing states starting to act even if we don't have a theory on which to act. So

this shows the importance of the sort of analysis of principle that Professor Dagan has offered to us and that we are discussing today.

SESSION 2: Chair, Professor Judith Freedman (Oxford University)

I am from Oxford University but I did teach here at the LSE for 18 years, although this is a wonderful new building. At the end of the last session, I commented to Professor Dagan that I don't know how she can keep still and quiet while people are discussing her work. She assured me that she is fine with it, we will carry on with our speakers and I will give her a chance to speak before we open up the discussion more generally.

Professor Miranda Stewart (University of Melbourne)

I did not come from outer space, only from Australia. I was honoured to be invited, I have for a long time thought that Professor Dagan's work has been inspirational, and provocative in the best way, forcing one to think deeply about the principles and structures that one is trying to analyse.

The comments that I make now are more a series of questions – when I got to ten questions, I thought, that is too many, I need to stop. Some have been identified by previous speakers. I agree with the comment of Professor Brauner about the title of the book, the idea of being “between” competition and cooperation. I suggest that this is better understood as hybridity, that we really are between these, but not in the sense that there is a choice of one or the other - that is not possible. Rather, we are navigating these two interspersed modes in taxation, the market mode and the coercive governmental mode. These are not separable: they co-evolve or co-construct each other.

I have been trying to think of the collective noun for tax sovereigns or tax governments – one talks of a Murder of Crows, or a Mob of Kangaroos in Australia. So I thought maybe a Squabble of States, or perhaps a Confusion of Sovereigns. It does seem that international tax is quite confusing at the moment. One of the contributions of the book is to tease out that confusion. It is particularly interesting to think about confusion when you think that the BEPS Action Plan has, as one of its stated goals, coherence and that coherence is one of the themes or tropes of international tax discourse. The very idea that we might have a “system” of international tax implies that there is some coherence. But as has been identified already, we have this marketisation, fragmentation, bundling of choices of tax regimes. I think all of that is completely plausible, as Professor Dagan has identified in the book. In the current debate, it is implied that coherence requires at least one level of taxation in one jurisdiction. So Ana Paulo refers to the “single tax principle” or theory of Reuven Avi-Yonah – eliminate double non-taxation, perhaps. And it is also implied in that language that we need more coordination, or that coordination is the solution, but that is contestable.

When I say that competition and cooperation are happening together, I think that we have both market failure and government failure operating at the same time in this system. Both governmental coercion and the market of tax states fail to deliver fully on efficiency and redistribution of the tax system. Further, we know that governments are doing both things at once, they are simultaneously cooperating and competing along different trajectories or on different planes. Governments simultaneously vacate the tax jurisdiction: create a patent box, create a tax incentive, enact a participation exemption; and assert and extend the tax jurisdiction in other contexts: establish a withholding rate, discuss a digital tax on turnover or expand the definition of permanent establishment. Governments are simultaneously initiating tax and trade wars, competing down while also raising barriers, but also deeply integrating even to the level of zeros and ones, this increasing automatic data sharing, deeply interconnecting the administrative structure of states in a way that means we are no longer really talking about two different entities perhaps.

One question I have is about the scope of the book in terms of the tax system. Dagan is focused on income tax as she explains in the book. Income tax concerns both personal income tax and corporate income tax and this comes through in the book as well: competition of states for residents, or the recruitment of states for actors is about both individuals and about corporate investment. But having said that, a lot of the analysis in the book, and this is partly because of the BEPS world we are operating in, is about corporate tax. So, the analysis really is about corporate tax and not about other forms of tax. I don't think that is entirely true but there are a lot of other parts of tax systems that are not affected in the same way as the corporate income tax is, in the current era. It is true that all tax bases are affected by digital economic globalisation, by this competition and mobility of people and investment and consumption and labour. But they are not affected in the same way. And the capacity of states to cooperate to deal with the challenges that globalisation poses for them differs, depending on the tax base.

The problems addressed in the book are serious problems. But this leads me to wonder how serious are they, really, if we think about tax systems as a whole. By far the greater part of the revenue raised by rich countries, and to a lesser extent by poor countries comes from tax bases that are not the corporate income tax and are not even the personal income tax on capital. They are the personal income tax on wages, the social security tax structures or other forms of social security, retirement savings (a percentage of wages) and of course consumption taxation – VAT. These tax bases are all threatened in different ways by competition but the ability of states to address competition is different for these different taxes, and we see that in the reality of what we see states doing. States actually are taking action, either together or unilaterally but in ways that are more or less harmonised to address, for example, cross-border consumption. You can see, even though we have not yet brought to fruition the solutions, you can see that one could achieve an assertion of taxing jurisdiction there, or better taxation of wages and individual residence. What is the overall scope of the problem when you think of the tax state as a whole?

Another question is even if we are thinking about corporate income tax, obviously it is important –in Australia, for example, corporate income tax raises a lot more revenue than in many countries in Europe or the UK – what is the competition about? The old “neutralities” of corporate tax policy: capital export neutrality, capital import neutrality, national neutrality are no longer useful. As is known by most international tax scholars, they were never fully descriptive of the challenges governments face. In a way, we are all both capital importers and capital exporters now. I don't want to over-generalise: That is not true for all poor countries, but it is true for many more countries in the world now than in the past.

Is this competition really between states, or is it a competition between states and multinational corporations, or are states really – Yariv Brauner asked the question – is it right to call states actors in this competition, or not? I did not ask it that way but I am asking the same question. Who are the actors, here, that we are really interested in?

If one looks “through” states, one could do a much more fundamental analysis of this tax negotiation, or competition, in terms of revenue and redistribution. That is a competition between capital and labour, or between getting the return to workers whether that return is in wages, or in revenues that are redistributed, and the return to capital that is contained within the corporation and by high income individuals. If you are interested in people and wellbeing, and Ana Paulo raised the issue as well, that is what we should want to understand. This question of what is the role of government in achieving the outcomes for capital and labour is interesting. So I have tried in other work about transnational tax regimes is that it is sometimes difficult in this rather fragmented international tax world to tell the difference between one government and another, and one

government and corporations. Corporations are operating, in a sense, like states, and establishing their own jurisdictional boundaries and enriching themselves. Really what we mean by that is that they are capturing value out of other jurisdictional boundaries, of governments, or extracting value out of workers, people, labour.

Its true, though, that we operate in this international tax “statist” world, and so this question of how states can harness revenues in order to achieve the redistribution, as Professor Dagan frames it in the chapter on global justice still is the problem we have to wrestle with. One might point out that some of this competition between tax sovereigns that we are worrying about now is produced by a really high level of harmonisation between sovereigns over the last 100 years, and that is in the establishment of the globally recognised corporation. It is the corporate form in its particularly flexible, mobile, ability to be segmented form of the MNE that is producing the challenge. But that form is uniformly agreed upon, it would appear, between states. We have harmonised a regime that has produced tax competition which is a combination of our tax jurisdictional rules and the legal entity rules about the corporate form. We produced it; we might still decide that now is the time to change it. When I say “we”, governments produced it.

As others have said, tax competition is not new. Was this tax sovereignty competition always already there... and, of course, is BEPS really new? The answer is, no; see, for example, Sunita Jogarajan’s work on the League of Nations. I would argue that we have had this fragmentation, this set of regimes that has allowed MNEs to harness revenue or rents for private use, as a result of pre-existing stable settings. This has been there in the system all along. Perhaps because we had an era of tax secrecy, that is one reason we did not see it as clearly as we do now.

A final comment that I would like to raise about tax justice. The book focuses on income tax, and an assertion of the role of income tax in redistribution, which is an important role at state level and internationally. Of course, that is true, but as I already mentioned, there are other tax bases that are also funding the social state. We could think more fundamentally about what we mean by redistribution and financing it, but I want to suggest that we can also think more carefully about what we are demanding of global justice.

What is the threshold of justice needed in multilateral cooperation? Dagan places the threshold rather high. Implicit is a Rawlsian concept of the Maximin idea of global distributive justice. To quote, Professor Dagan suggests that “not only cosmopolitanism but also the statist theories of political justice mandate, that is they require, that for a multilateral regime established through cooperation to be justified it must improve or at least not worsen the welfare of the least well off citizens in all the cooperating states”.

Now that is a very high bar to ask of a multilateral tax cooperation regime, that it would bring up, or at least not descend the welfare of the least well off of all states. I don’t think we have to go that far and I don’t think that is the function of multilateral tax cooperation. We do not have to think about global tax justice in that way. We could instead, for example, define the global justice goal to be to ensure that we meet a minimum standard for all: That idea that no-one in the world will live in absolute poverty, to eliminate poverty, and then leave it to states to determine redistribution. The reality is, that is what the current regime is, in the Sustainable Development Goals. That is our current global justice goal. Moreover, that goal of a floor of social protection, and then an increase of wellbeing for all – that is economic growth globally - is what people actually agree on when they come together in deliberative experiments about distributive justice. They don’t usually agree on the Maximin standard (Brocks). I think we can advocate for some form of multilateral design of

cooperation or sharing and still maintain a demand that rich countries, and rich people in all countries, must ensure that the minimum standard is met for everybody.

As others have already observed – Professor Dagan does not leave us floundering in this negative situation of tax competition, she suggests proposals for the future. I have a specific question for Professor Dagan: Do you support the BEPS project, or not? The spirit of that specific question is the same as that of Yariv in making the remark that Professor Dagan’s recommendations look rather like some of the recommendations of the BEPS project.

Thank you.

Professor Eduardo Baistrocchi, LSE

Thank you very much for this wonderful opportunity. I will focus my attention on the last chapter, in which Professor Dagan is suggesting it is now time to perfect tax competition. What I will do, today, is argue something different. I will argue that it is now time to perfect tax cooperation. In order to ground my position, I will focus on these two topics. First, I would say that the book’s key assumptions are grounded on evidence of the G20 and beyond. The work that I have been doing about tax treaty networks, shows that Professor Dagan’s key assumptions are correct in terms of the last 92 years of development and case law.

It is now time to identify a model that may hopefully encapsulate what Professor Dagan is talking about. What sort of interaction exists between taxpayer and tax officials, what is the logic of this multilateral tango? It is fundamental, not to overlook something that is quite important, this is the emerging fourth industrial revolution, which will change things in the next few decades. This will be a dramatic increase, of both global tax competition and inequality. Tax bases will be critically mobile: eg 3D printers producing cars in Malaysia that can be moved overnight to Thailand because the business was not able to agree on a tax regime with the local authority. My concern is that perfecting tax competition in this context may imply the demise of corporate income taxation and that, I think, would be very bad news for humanity and taxation.

I think we need to protect cooperation, rather than competition, to save the corporate tax. Not all cartels are bad. There are benign cartels, “good” cartels. If we assume that the international tax regime is a cartel, we could assume it is a good cartel, and the question is how to improve it? How to make it more stable? How to deter bad behaviour by countries? Finally, my last comment is, what international tax may learn from international environmental law.

Professor Dagan is mapping the options available. Option 1 is perfecting tax cooperation, Option 2 is perfecting tax competition. She identifies three building blocks for perfecting tax competition: first, information sharing; second, streamlining states’ tax rules and third, an antitrust agency for states. Regarding the anti-trust agency for states, Professor Dagan says that this agency should ban any coordinated action by states which affects the internal settings of tax rates, prevents abuse of market dominance and barriers for taxpayers.

What Martin Hearson and I have concluded is that a new logic has emerged in the interaction between G20 countries and non-G20 nodes in the last century. G20 countries increasingly compete against each other for capital just as companies compete for market share. So we can see that countries are increasingly behaving like companies.

What sort of model can explain the behaviour of companies. The structure of this game could be seen as a co-opetition game, in which elements of both cooperation and competition are mixed. The two sided platform, a concept invented by a French economist a few years ago, is a good way of

understanding this game. The fundamental structure of Google and the international tax regime are similar. Both are two-sided platforms.

[illustrations in slides].

Google has a two sided platform. Users on side one are people who are searchers, on side two are advertisers, companies. We can see a number of same-side network effects and cross-side network effects. An example of a cross-side network effect is the following: The more people are on side 1, the more companies are happy to join the platform on side 2 because this will increase their market share. An example of a same-side network effect is: If coca cola joined this platform, pepsi cola arguably will also have an incentive to join as well in order not to grant coca cola a competitive advantage. Here the competition is at the platform level.

What is the metaphor with international tax regimes? I argue that the key structure of an international tax regime is the two sided platform like google. On one side are the G20 countries, the largest countries involved in international trade. They have the incentive to cooperate in the creation of the technology – the platform, the OECD Model Convention, that will allow countries to collect taxes, without distorting too much, international trade. So after the feedback from international tax advisers, etc, this platform is improved on an ongoing basis, and we can see 2 types of users. Who are the players of these games? On side 1, we can see all the international taxpayers in the world, who are looking where to invest, how to do it, to maximise their after-tax income. On side 2, literally all countries in the world are using this new technology to maximise the attraction of capital.

One example of a cross-side network effect would be the following. The more that the taxpayers on side 1 are happy with the model, the more countries on side 2 will be willing to use the OECD model as a basis or template for their tax treaties. An example of a same-side network effect. Consider the global wine industry. Chile and Argentina are both players in that industry. So if Chile joins the OECD legal technology, Argentina will probably have an incentive to do the same, in order not to grant Chile the competitive advantage. Here the competition is not at the platform level but it is at the component level. For example, Chile may select some element from the OECD Model or the UN Model, so the competition is at that level, the component level.

The beauty of this model is that it shows both the cooperative element of the game and the competitive element of the game, in which countries have the incentive to transplant the OECD model to add to tax treaties based on strategic considerations.

Martin Hearson and I have collected data from 38 countries, from all continents; this is, to use the language of Dagan, the market of international taxation. [illustration]. The size of the nodes represents the volume of the disputes involving, for example, the US tax treaty network. In 2000, the most litigated tax treaties in the world were US treaties, in non-US courts. There are other nodes, for example the Indian node, the German node, the American node, the UK node. The size of the line represents which tax treaty is most litigated.

At the centre of the galaxy there are fundamentally three non-G20 nodes: Switzerland, Netherlands and Belgium. All G20 countries are circulating these three countries. This is the Copernican revolution. Low tax jurisdictions are not circling around G20 countries; it is the opposite, the regime centres on those three low tax nodes. In bilateral tax treaties in the G20, these are the outlets. Investors are increasingly using these countries, as consumers, so international investors are seen by countries as consumers. That is why we can see this process of marketisation. A component of their value is the tax treaty network in its interaction with the relevant domestic laws, which serves as the

way to minimise taxation. The fundamental assumption made by the book is supported by our empirical research into the G20 tax treaty network in the last 90 years. There is a reinforcing feedback between supply and demand. On the supply side, these countries have increasing market power because new players are joining this game. On the demand side, MNEs have increasing purchasing power, they have more places to invest. Decreasing MNE tax entry and exit cost applies for tax planning involving these countries.

What form therefore has the international tax regime? My understanding is that the evolution of the tax system has taken the form of spiral. The first stage was standard-based. The diagram maps the emergence, decline and collapse of stage 1. From 1933 until the BEPS reports, the system was fundamentally rule-based rather than standard-based. Since about 2015 BEPS report, the system has returned to a standard-based format; the reports are a constellation of standards, although much more complex and opaque than before. This is because of the mutation from standards to rules to standards. One potential explanation of this evolution is global political shifts: from the UK to the US, and subsequently, from the West to China and India. The legal technology was transformed to standards, in order to be able to persuade China and India to keep following these legal technologies.

So we need now to consider the fourth industrial revolution: robots, automation and what is the impact on international taxation. We see increased global tax competition and inequality. Tax bases are mobile: We can have drones to change technological activity and labour; in this world of very mobile tax bases, applying a model of full tax competition, the system will collapse. How can we deter this from happening? I would argue for perfecting tax co-operation, rather than competition. So, not all cartels are bad. Benign cartels, good cartels, do exist.

We may learn here from international environmental law. There is a credible risk of environmental change or disaster, so countries have been willing to cooperate on environmental regulation. The credible risk of global environmental change can induce countries to cooperate. All other countries are willing, on paper, to cooperate.

If there is a credible risk of global political instability induced by increased inequality, this could induce countries to cooperate in international taxation, as in environmental law. Trump, Brexit, Bolsonaro are products of inequality (these political shocks). Cooperation, for example to “save” corporate income taxation, could result. Here, I am using two fundamental elements proposed by Professor Dagan in aiming to perfect international tax cooperation. These include information sharing, and streamlining international tax rules.

A third option is that we could aim to perfect the OECD Model, as proposed by Yariv Brauner. In language, for example, can we consider a new dimension to the OECD Model? So far, the evolution of the Model has been controlled by a top-down driving force. It is now time to supplement it with a bottom-up element. This could be grounded, for example, in customary international law or tax treaty interpretation transplanted on a regular basis to the OECD and UN Models. For example, as soon as there is customary international law or consensus on how an aspect of the OECD or UN model should be construed, that consensus should be transplanted into the OECD Model in order to crystallise this bottom-up dimension. All countries of the world should send their MAPs (Mutual Agreement Procedure decisions), tax treaty case law, APAs (Advance Pricing Agreements) to the OECD and UN and these organisations will see if there is an emerging consensus on how an Article should be construed, and then transplant that element to the Commentary. These options are inspired by Dagan’s book.

Dagan is very concerned about the lack of expertise in developing countries on how to analyse big data; one approach could be sharing intelligence from the OECD to developing countries in order to support this. Regarding streamlining tax rules, we need to examine law in action, not just law on the books. This includes case law, MAPs and APAs to help us understand how the tax treaties actually work and this would help give more legitimacy to the OECD Model.

In conclusion, the key assumptions in Professor Dagan's book are grounded on empirical evidence from G20 countries and beyond. It would be convenient to model the international tax regime competition game, and my proposal is that the two-sided platform is useful to understand this strategic game. This could help answer the question from Professor Stewart, who are the players in this game. Regarding the application of anti-trust to tax competition, this would be risky, it may bring political instability. The comparative element of the competition game should be perfected but at the end of the day, the fundamental problem we are facing is increasing global inequality. The big question that Dagan focuses on in her landmark book is how the international tax regime could be improved to deal with this.

Professor Judith Freedman (Chair)

Thank you for that discussion, using the rich set of data that you and Martin Hearson have compiled and analysed. An optimistic presentation, if I may say! One point that could be made is that your discussion assumes that the demise of corporation would be a disaster, rather like environmental change or global warming; that is a point that is disputed; I am not sure that everyone would accept that analogy. As Professor Stewart says, there are other tax bases. There could be other ways to address global inequality than through corporation tax. The pressure on countries may not be as great as the pressure of global warming which may actually kill us all.

We must give Professor Dagan an opportunity to speak.

Right of reply: Professor Dagan, Bar Ilan University

First of all, thank you. I want to say how humbled and privileged I feel through this event to have such a panel of commentators and chairs, who are not only colleagues and friends but a group of high powered deep thinkers and reflective scholars which you don't often see in any session. Although a group of tax geeks, we have had a rich discussion of issues of sovereignty, network theory, competition, belonging-ness, and the distinction between market and government, and also understand [what is] a permanent establishment, patent box and the Multilateral Instrument.

My general comment is not really a reply, but to reframe the project. The book is my effort to put together a convincing theory and analytical discussion of the theory of international taxation, the contemporary situation followed by the discussion of institutions and potential solutions. I am the first to admit that the solutions that I advocate for in the book, previously rewritten and rewritten again, are only a preliminary attempt to outline some proposals to keep people thinking and set an agenda for future research, for myself and for others. I am happy to negotiate on any of the solutions and do not religiously support any of them. Each solution has its problems, there is a question about what you balance and what you prioritise.

Focusing on some of the points that were highlighted, Professor Brauner put his finger correctly on my motivation for this book. which is, that the problem is coercion. To put a one-liner on the book: I am seeking ways to defuse power. This goes way back to my own beliefs. People ask me if I am a libertarian or pro-distribution. My core motivation is that I am suspicious of concentrations of power of any sort, whether domestically or internationally: institutional power or market power. They all

intimidate me equally. Second, there is a strict distinction between the book between my first-best solution and second-best solutions.

Chapter 6 about global justice makes the greatest effort to discuss the first-best solution, and what it should look like in an optimal Utopian world: what would be a truly just system. The rest of the book is about second-best systems in the real world, and we need to make decisions about institutional design. The big question, as pointed to by Professor Baistrocchi: Are we heading towards more or less competition, or more or less harmonization? My main goal is to raise doubts, to make everybody suspicious of any solution that is put on the table. The question could be, how do we cooperate or how do we compete? For either question, we should consider this with suspicion, this is a good thing.

As to complexity: Do we want more complexity, that is, more voice for people, for developing countries, educate representatives to push their opinions, more actors, NGOs, others to join the party: Sure. Do we need a more nuanced analysis of how institutions work on a global level? Absolutely. There is a great body of work on international law discussing these issues we are already discussing here, fragmentation of international institutions, organisations and law; how strong countries are structuring international institutions to benefit them; when it starts working against them, they shift away to a different regime. There is important work by Eyal Benvenisti and others about that. We see a lot of that in the international arena; it is no surprise that this should be the case, as in other regimes in international law. I am trying here to expose a similar phenomenon in international tax.

How could we go about improving this? I don't claim to have "the" or an optimal solution. The idea of the anti-trust agency for states is really a mind-teaser, a provocative regime. I don't mean peer review or harmful tax competition practices. I see this as a key mechanism to defuse power. I went in this direction regarding the classical anti-trust rules that are seeking to reduce concentrations of market power.

I want to acknowledge the limitations of my market analogy. For me, this is a helpful way to think about competition, strategies and margins. But the analogy is not perfect, and even if we consider the market (it is a great institution, I give it a lot of credit) there are some things that the market cannot do, even if we take away all the market failures. Two of these cardinal things that the market cannot do are first, redistribution and second, the market tends to commodify. In this context, the market commodifies the relationship between the state and its citizens. It tends to reduce everything to market currency, which we cannot tolerate when we discuss political institutions. These tensions are inherent in the international tax regime under competition. So if international tax cannot do redistribution, then maybe we should look at other solutions. But other taxes, like social security taxes or wage taxes, are not necessarily as redistributive as corporate or income taxes. This is something we need to consider.

I am not optimistic about redistribution; my own take on this is that we should try to force it wherever we can. As national states on the domestic front, not as an international community, we need to focus precisely on where resources and people are less mobile. We need to look at the places where we can attach a resource to a territory and get redistribution there. Everything that can move will move, if it cannot be locked down in the territory.

On the political aspects, as Professor Brauner indicated about the miserable times we are in now. Competition will not fix the political arena. Tax in general, or international tax specifically, definitely cannot do this. I am taking the blame off my shoulders here!

FINIS