

6-2021

International Tax Law Between Loyalty, Exit, and Voice

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Recommended Citation

Tarcísio Diniz Magalhães, "International Tax Law Between Loyalty, Exit, and Voice" (2021) 44:1 Dal LJ 49.

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Discourse on the merits and pitfalls of multilateral cooperation for advancing justice in international tax law have recently re-emerged in the literature. Some tax scholars, even while criticizing global projects like the OECD/G20 initiatives on base erosion, profit shifting and the tax challenges arising from the digitalisation of the economy, insist that cooperative efforts herald a step in the right direction. Others contest the feasibility of international cooperation or its value for developing countries. Drawing on Albert Hirschman's oft-cited framework for actor behaviour under institutional malperformance, this article shows that there are three alternatives for those discontented with the status quo: to remain loyal despite disagreeing (cooperation); exit and perhaps form a competing regime (competition); or try to change the existing rules by speaking up (un-cooperation). The article concludes that the interaction of these options (contested cooperation) is an integral part of today's transnational tax law order.

Le discours sur les mérites et les écueils de la coopération multilatérale pour faire progresser la justice dans le droit fiscal international a récemment refait surface dans la littérature. Certains fiscalistes, même s'ils critiquent des projets mondiaux comme les initiatives de l'OCDE/G20 sur l'érosion de la base d'imposition, le transfert de bénéfices et les défis fiscaux liés à la numérisation de l'économie, insistent sur le fait que les efforts de coopération constituent un pas dans la bonne direction. D'autres contestent la faisabilité de la coopération internationale ou sa valeur pour les pays en développement. S'appuyant sur le cadre souvent cité d'Albert Hirschman pour le comportement des acteurs en cas de mauvaise performance institutionnelle, cet article montre qu'il existe trois alternatives pour ceux qui sont mécontents du statu quo : rester loyal malgré le désaccord (coopération); abandonner le régime et peut-être en former un nouveau (concurrence); ou essayer de changer les règles existantes en les dénonçant (non-coopération). L'article conclut que l'interaction de ces options (coopération contestée) fait partie intégrante de l'ordre juridique fiscal transnational actuel.

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Introduction

- I. *Hirschman's framework*
- II. *The pro-competition option: loyalty*
 1. *Avi-Yonah's position*
 2. *Brauner's position*
- III. *The pro-competition option: exit*
 1. *Dagan's position*
 2. *Other positions*
- IV. *A complementary third option: voice as un-cooperation*
- V. *Analogy to new federalism and new multilateralism*

Conclusion

Introduction

International tax laws create conflict among governments because they are ultimately responsible for how much each jurisdiction gets, in tax revenue terms, from global economic interaction.¹ Historically, the avoidance of

1. See Allison Christians, "The Importance of Tax in International Economic Law" in Thomas Cottier & Krista Nadakavukaren Schefer, eds, *Elgar Encyclopedia of International Economic Law* (Cheltenham: Edward Elgar, 2017) ("what we may colloquially refer to as 'international tax law' is really more accurately described as a transnational legal order than an international legal regime. This is because states have never created a binding multilateral regime (such as a world tax organization) to resolve international tax overlaps, nor have they done so to date to solve the gaps. Instead, they have come to rely on 'soft' methods for coordinating income taxation as a general policy matter" at 507). On the distributive nature of international tax, see Allison Christians & Laurens van Apeldoorn, "Taxing Income Where Value Is Created" (2019) 22:1 Fla Tax Rev 1; Kim Brooks, "Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation" (2009) 21:2 CJWL 267; Kim Brooks, "Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Value," in John G Head & Richard Krever, eds, *Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave* (Alphen aan den Rijn: Kluwer International Law, 2009); Kim Brooks, "Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?" (2009) 34:2 Queen's LJ 505; Adam H Rozenweig, "Defining a Country's 'Fair Share' of Taxes" (2015) 42:2 Fla St U L Rev 373; Ilan Benshalom, "How to Redistribute? A Critical Examination of Mechanisms to Promote Global Wealth Redistribution" (2014) 64:3 UTLJ 317; Ilan Benshalom, "The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law" (2010) 85:1 NYUL Rev 1; Alexander Ezenagu, "Faltering Blocks in the Arguments against Unitary Taxation and the Formulary Apportionment Approach to Income Allocation" (2017) 17 Asper Rev of Intl Bus & Trade L 131; Miranda Stewart, "Redistribution Between Rich and Poor Countries" (2018) 72:4/5 Bull Intl Taxn 297; Alexander W Cappelen, "National and International Distributive Justice in Bilateral Tax Treaties" (1999) 56:3/4 FinanzArchiv/

double taxation, as well as the opposite effect of double non-taxation, has depended upon cooperative efforts to achieve political compromises, the first of which was forged in the 1920s–1930s by Europe and the United States via the League of Nations.² From the 1960s onward, the “international consensus” has been managed and updated by the same key players, but through an even more exclusive networked structure, namely the Organisation for Economic Co-operation and Development (OECD).³ The upshot, as acknowledged by experts, policymakers and civil society members, is that the global set of norms for the taxation of cross-border activities has tended to favour the revenue needs of OECD states over the rest of world.⁴

Under these circumstances, what are the options, if any, for countries outside the OECD that feel they are being inadequately compensated and deprived of their fair share of revenues? This question has divided scholars into two main camps: those who insist that non-OECD countries should continue to cooperate, notwithstanding the system’s distributive biases, because tax competition leads to a worst-case scenario; and those who either turn to competition as a strategic response or who cast doubt on the promises of multilateral cooperation.

This article proposes a reconceptualization of this dilemma into a trilemma, by using Albert Hirschman’s famous framework on mechanisms to promote change in politics, economics and social orders in general: “exit, voice, and loyalty.”⁵ In doing so, it reveals a novel third way,

Public Finance Analysis 424; Peter Hongler, *Justice in International Tax Law: A Normative Review of the International Tax Regime* (Amsterdam: IBFD, 2019); Martin Hearson, “When Do Developing Countries Negotiate Away Their Corporate Tax Base?” (2018) 30 *J Intl Dev* 233; Ivan Ozai, “Two Accounts of International Tax Justice” (2020) 33:2 *Can JL & Jur* 1; Oladiwura Ayeyemi Eyitayo-Oyesode, “Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unraveling Efforts and an Argument for Reform” (2020) 13:1 *L & Dev Rev* 193.

2. See Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge: Cambridge University Press, 2018).

3. See e.g. Allison Christians, “Networks, Norms, and National Tax Policy” (2010) 9:1 *Wash U Global Stud L Rev* 1; Allison Christians, “Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20” (2010) 5:1 *Nw J L & Soc Pol’y* 19; Hugh J Ault, “Some Reflections on the OECD and the Source of International Tax Principles” (2013) 70:12 *Tax Notes Intl* 1195; Hugh J Ault, “Reflections on the Role of the OECD in Developing International Tax Norms” (2009) 34:3 *Brook J Intl L* 757; Ruth Mason, “The Transformation of International Tax” (2020 forthcoming) *AJIL*; Linda Brosens & Jasper Bossuyt, “Legitimacy in International Tax Law-Making: Can the OECD Remain the Guardian of Open Tax Norms?” (2020) 12:2 *World Tax J*.

4. See Tarcisio Diniz Magalhaes, “What is Really Wrong with Global Tax Governance and How to Properly Fix It” (2018) 10:4 *World Tax J* 499.

5. Hirschman’s insights had been previously used for understanding international and European law, or even to analyse interjurisdictional conflicts, including tax-related ones, within a federal state. However, this is the first time that his theory is systematically applied for discussing big picture questions about the future of international tax law. See e.g. Eyal Benvenisti, “Exit and Voice in the Age of Globalization” (1999) 98:1 *Mich L Rev* 167; JHH Weiler, *The Constitution of Europe: “Do the*

beyond cooperation and competition, which has not yet been theorized in the international tax literature.⁶ This consists in a route that only recently became possible, due to the rise of new geo-political and economic powers.⁷

The article proceeds as follows. Part I presents Hirschman's theoretical model for analysing the behaviour of members of an institutional arrangement who, at some point in time, become unsatisfied with the outputs. Parts II, III and IV each apply one of Hirschman's analytical categories to refine the scholarly debate on whether cooperative tax undertakings among nations ought to be considered a general goal worth recommending and pursuing. The driving argument is that there are in fact three alternatives, even if not every country has at the moment enough political leverage to exercise all of them. Theoretically, they can: (1) stay quiet despite their discontent (the "pro-cooperation or anti-competition option"); (2) quit the system, and go it alone or maybe create a parallel one (the "anti-cooperation or pro-competition option"); or (3) raise their voices, individually or collectively, and complain (what we can call the "un-cooperation option").⁸

New Clothes Have an Emperor?" and *Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); Miguel Poiars Maduro & Marlene Wind, eds, *The Transformation of Europe: Twenty Five Years On* (Cambridge: Cambridge University Press, 2017); Nancy A Welsh, Andrea Kupfer Schneider & Kathryn Rimpfel, "Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties" (2014) 45:1 Wash UJL & Pol'y 105; Edward A Zelinsky, "Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause" (2008) 28:1 Va Tax Rev 1.

6. Regarding international financial law, see Camila Villard Duran, "Voice and Exit: How Emerging Powers are Promoting Institutional Changes in the International Monetary System" (2018) 15:1 Braz J Intl L 71.

7. Some works have addressed rising powers and international tax, but they have been rather descriptive. See e.g. Yariv Brauner & Pasquale Pistone, eds, *BRICS and the Emergence of International Tax Coordination* (Amsterdam: IBFD, 2015) [*BRICS Tax Coord*]; Peter Antony Wilson, *BRICS and International Tax Law* (Alphen aan den Rijn: Kluwer International Law, 2017); Danil Vinnitskiyi, "BRICS and Developing Countries Legal Expert Forum: Emergence of International Coordination in Economic and Tax Law" (2018) 5:1 BRICS LJ 1; Dries Lesage, Wouters Lips & Mattias Vermeiren, "The BRICs and International Tax Governance: The Case of Automatic Exchange of Information" (2019) 25:5 New Political Economy. Two exceptions are Eduardo Baistrocchi and João Marcus Rigoni, but the former assumes that emerging countries are converging to international standards and the latter builds on this assumption to argue that these countries could either converge or create their own regime, without, however, taking a clear stance on which outcome is normatively preferable. See Eduardo A Baistrocchi, "The International Tax Regime and the BRIC World: Elements for a Theory" (2013) 33:4 Oxford J Leg Stud 733; João Marcus de Melo Rigoni, "The International Tax Regime in the Twenty-First Century: The Emergence of a Third Stage" (2017) 45:3 Intertax 205.

8. The use of the term "un-cooperation," instead of "non-cooperation," is meant to signal an affirmative expression of disapproval, as opposed to just refusing to cooperate, which could actually reflect an exit behaviour.

These classic categories reflect situations where participants are honest about their positions, instead of trying to deceive others,⁹ and Hirschman's three-option model has been used as a framework to explain modern dynamics within federal orders as well as among nation-states in international relations.¹⁰ As such, part IV draws on these new theories of federalism and multilateralism to argue that the interaction of loyalty, exit and voice is similarly reflected in today's pluralistic transnational tax law order, giving rise to dynamics of contested cooperation (or cooperating by dissenting).

I. *Hirschman's framework*

Albert O. Hirschman (1915–2012)¹¹ was a worldly recognized social scientist, who contributed major intellectual works, key among them to

9. An option pointed out by one of the anonymous reviewers is when states formally sign up, or even stay quiet and just play along, but then decide not to comply, acting in contradictory ways. This fourth dimension could be the subject of future study, as it seems to capture a reformulation of Hirschman's trilemma found in the literature. From the perspective of federalist relationships, Heather Gerken refers to the idea of "disloyalty," as a strong form of agency that involves rebellion, resistance, and disobedience. See Heather K Gerken, "Exit, Voice, and Disloyalty" (2013) 62:7 Duke LJ 1349 ("It's one thing for dissenters to speak against the center; it's quite another for them to use power the center gave them to thwart its wishes.... We have a firm sense of what the "loyal opposition" is supposed to do—speak out (voice) or get out (exit). That's why activities that don't fit neatly within the exit/voice paradigm—like civil disobedience—can cause us to turn analytic cartwheels" at 1371). Also in international tax, "mock cooperation" has been observed as a tactic employed by many nations (developed and developing). See e.g. Allison Christians, "Putting the Reign Back in Sovereign" (2013) 40 Pepp L Rev 1373 ("In taxation, the tendency toward this 'agree in form, defect in practice' behavior is manifested in the means by which states create and manipulate for their own benefit an evolving set of international standards and norms (sometimes but not always of their own making) around a global flow of information about economic resources and their owners" at 1376).

10. On the relevance of international relations theory to international law, see Beth A Simmons & Richard H Steinberg, eds, *International Law and International Relations* (Cambridge: Cambridge University Press, 2006); Thomas J Biersteker et al, eds, *International Law and International Relations: Bridging Theory and Practice* (London: Routledge, 2007); Jeffrey L Dunnof & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013). For tax perspectives, see Diane Ring, "International Tax Relations: Theory and Implications" (2006) 60:2 Tax L Rev 83; Dirk Broekhuijsen & Henk Vording, "The Multilateral Tax Instrument: How to Avoid a Stalemate on Distributive Issues?" [2016] 1 Brit Tax Rev 39; Keigo Fuchi, "Unilateralism, Bilateralism, and Multilateralism in International Taxation" (2016) 59 Japanese Yearbook Intl L 216; Ritaf Azam, "Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS" (2017) 50:4 Suffolk UL Rev 517; Marcus Livio Gomes, "International Taxation and the Challenges for Multilateralism in the Context of the OECD Multilateral Instrument" (2018) 72:2 Bull Intl Taxn 87; Ricardo García Antón, "Multilateral Dynamics in Bilateral Settings: Back to Realpolitik" (2019) 4 Brit Tax Rev 483; Elizabeth Gil García, "The Single Tax Principle: Fiction or Reality in a Non-Comprehensive International Tax Regime?" (2019) 11:3 World Tax J 305; Ivan Ozai, "Institutional and Structural Legitimacy Deficits in the International Tax Regime" (2019) 12:2 World Tax J 53.

11. Originally named Otto-Albert Hirschman, he was a Berlin-born child to a well-to-do Jewish family, who studied law, administrative sciences, statistics and economics in Germany, France and the UK, before fleeing to the US due to the Nazi expansion. See Jeremy Adelman, *Worldly Philosopher: The Odyssey of Albert O. Hirschman* (Princeton: Princeton University Press, 2013).

the field of development economics.¹² He is probably best known for *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, where he laid down a simple but original explanatory paradigm of individual or collective reactions to discontent in the economic, political and cultural spheres.¹³ The book focused on situations where members of an association, such as consumers in relation to companies or citizens in relation to their government, find themselves unsatisfied with products, policies and laws. Given these unsatisfactory outcomes, three possibilities surface: (1) participants can remain loyal and do nothing about their frustration, hoping something might change in the future (loyalty); (2) they can simply withdraw altogether from the grouping (exit); or (3) they can express their unhappiness by way of criticism, demanding improvements (voice). While loyalty embodies a form of disgruntled attachment, either out of moral commitment or because of a lack of other options, exit and voice signify two different kinds of action taken against deterioration of organization performance.

Focusing on exit and voice as the main activist mechanisms of structural change, Hirschman would differentiate them by reference to the realms of economists (focused on competition) and political scientists (focused on political contestation).¹⁴ Exit is a typical strategy adopted by consumers in a market, when they simply stop buying poor-quality products, forcing firms to adapt in order to remain competitive. Voice, in turn, is more commonly exemplified by citizen behaviour in a democracy, where voting, protests, legal actions or mobilization of public opinion is

12. His ideas reshaped the way to think about the developing world and the conditions of underdevelopment. See e.g. Albert O Hirschman, "The Rise and Decline of Development Economics" in Jeremy Adelman, ed, *The Essential Hirschman* (Princeton: Princeton University Press, 2013) (criticizing the dominant trends in development economic thinking, represented by neoclassical/orthodox and neo-Marxist approaches). While working for the US government for the reconstruction of post-war Europe, Hirschman was also a strong advocate for European federalism, as a means to control the oppressive and expansionist tendency of national sovereignties. See Seyla Benhabib, "Exile and Social Science: On Albert Hirschman" in *Exit, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton: Princeton University Press, 2018).

13. Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970). See also Albert O Hirschman, "'Exit, Voice, and Loyalty': Further Reflections and a Survey of Recent Contributions" in *Essays in Trespassing: Economics to Politics and Beyond* (Cambridge: Cambridge University Press, 1981) [*Essays in Trespassing*].

14. See Albert O Hirschman, "Exit, Voice, and the State" in Adelman, ed, *supra* note 12 ("One of my main contentions was that economists, with their emphasis on the virtues of competition (ie, exit), had disregarded the possible contributions of voice just as political scientists, with their interest in political participation and protest, had neglected the possible role of exit in the analysis of political behaviour") at page xxx. See also Albert O Hirschman, "Exit and Voice: Some Further Distinctions" in *Essays in Trespassing*, *supra* note 15; Albert O Hirschman & Richard R Nelson, "Discussion: 'Political Economy: Some Uses of the Exit-Voice Approach'" (1976) 66:2 Am Econ Rev 386.

used to push for changes. But in the same way that voice can also manifest in the marketplace (for example, when customers opt to complain to a company's manager, instead of looking for a similar product somewhere else), exiting families, religious communities and countries, as hard as this may sometimes be, represents, at least in principle, a path for action.¹⁵

Undoubtedly, capacity to exercise any of these options, let alone all of them, and whether changes can be achieved will depend on factors including the type of association and the power of participants. Yet these behavioural patterns serve to analyse the interactions of any actors, their attitudes towards the status quo and how institutional changes might take place. Hence, this paper applies this framework to the behaviour of states within the transnational tax order.

II. *The pro-cooperation option: loyalty*

In considering how Hirschman's loyalty option might apply to global tax governance, prominent pro-cooperation perspectives in the tax literature provide insights. This section therefore analyses the views of the two main critics of tax competition in international legal scholarship: Reuven Avi-Yonah and Yariv Brauner. Each of them has in the last decades not only supported the existence of a principled, coherent international tax regime based on customary or treaty law but also defended its continuance and improvement. In this sense, they both represent a position that asks countries to remain loyal and focus on trying to correct systemic flaws, instead of abandoning the established order.

1. *Avi-Yonah's position*

Among tax scholars, Reuven Avi-Yonah was a pioneer in fleshing out a strong case against international tax competition. In a thorough and widely cited paper from 2000, he argued that pressure to compete for both passive and active income was leading the world into a "race to the bottom" that ultimately puts modern welfare states at risk.¹⁶ Under conditions of globalization and capital mobility, states are no longer able to effectively maintain progressive income tax systems at the risk of losing investments, residents or both. To remain attractive, they have to shift the burden of

15. See, in this sense, his reconsideration of the theory, in light of the complications brought about by the separation of Germany into West and East. Albert O Hirschman, "Exit, Voice, and the Fate of the German Democratic Republic: An Essay in Conceptual History" in *A Propensity to Self-Subversion* (Cambridge: Harvard University Press, 1995).

16. Reuven S Avi-Yonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" (2000) 113:7 Harv L Rev 1573. See also Reuven S Avi-Yonah, "Tax Competition, Tax Arbitrage and the International Tax Regime" (2007) 61:4 Bull Intl Taxn 130.

taxation away from capital, towards less mobile economic factors such as labour and consumers.

According to Avi-Yonah, the rich and industrialized economies of the North were not the only states in danger. Developing countries too, he claimed, were also seriously affected.¹⁷ In response, Avi-Yonah insisted on curbing tax competition via multilateral action, pointing to the OECD as the best forum for the moment, but admitting that the World Trade Organization (WTO) or an international tax organization under the United Nations (UN) would be ideal in the long-run.¹⁸

Two decades have passed since Avi-Yonah first put forward this proposal. His advice seems to have been, at least partially, taken seriously, as the OECD came up with the now well-known Base Erosion and Profit Shifting (BEPS) project.¹⁹ Despite the BEPS project's intentions to curb tax avoidance and evasion globally, it has been extensively criticized for not allowing developing countries a real voice in the decision-making process.²⁰ This is something Avi-Yonah recognizes as a problem,²¹ but his overall recommendation is that countries remain loyal and work together to continue improving the international tax regime, since to do otherwise would be to abandon the progress made to date to reduce tax base erosion worldwide.²²

17. See Reuven S Avi-Yonah, "Globalization and Tax Competition: Implications for Developing Countries" (2001) 74 CEPAL Rev 59.

18. Reuven S Avi-Yonah, "Bridging the North/South Divide: International Redistribution and Tax Competition" (2004) 26:1 Mich J Intl L 371 at 382-387. See also Reuven S Avi-Yonah, "Hanging Together: A Multilateral Approach to Taxing Multinationals" (2016) 5:2 Mich Bus & Entrepreneurial L Rev 137.

19. See OECD, *Addressing Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2013); OECD, *Action Plan on Base Erosion and Profit Shifting* (Paris: OECD Publishing, 2013).

20. See, eg, Allison Christians, "BEPS and the New International Tax Order" [2016] 6 BYUL Rev 1603; Allison Christians & Stephen Shay, "Assessing BEPS: Origins, Standards, and Responses" (2017) 102-A Cahiers de droit fiscal international 17; Sérgio André Rocha & Allison Christians, eds, *Tax Sovereignty in the BEPS Era* (Alphen aan den Rijn: Kluwer International Law, 2017) [*Tax Sovereignty*]; Irene Burges & Irma Mosquera, "Corporate Taxation and BEPS: A Fair Slice for Developing Countries?" (2017) 10:1 Erasmus L Rev 29; Martin Hearson, "The Challenges for Developing Countries in International Tax Justice" (2017) 54:10 J Dev Stud 1; Laurens van Apeldoorn, "BEPS, Tax Sovereignty and Global Justice" (2018) 21:4 Crit Rev Intl Soc & Pol Phil 478; Cees Peters, "Global Tax Justice: Who's Involved?" in Robert F van Brederode ed, *Ethics and Taxation* (Singapore: Springer, 2020).

21. See Reuven S Avi-Yonah & Haiyan Xu, "Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight" (2016) 6:2 Harv Bus L Rev 185; Reuven S Avi-Yonah & Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits" (2018) 39:2 Mich J Intl L 155.

22. See Reuven S Avi-Yonah, "'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State': A Twentieth Anniversary Retrospective" (2019) U Mich L & Econ Research Paper online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367340> [perma.cc/V84Q-F7QP] ("While more needs to be done, we have made significant progress in curbing tax competition in the last decade" at 10).

2. Brauner's position

Siding with Avi-Yonah, Yariv Brauner has also been a long-time supporter of more cooperation as a solution to the revenue problems associated with tax competition. But even more ambitiously, Brauner believes incremental harmonization towards a standardized world tax regime is not only viable, it is justified on the grounds of efficiency-based arguments such as simplicity and ability to fairly tax international income.²³ At the same time, Brauner disagrees with Avi-Yonah that the WTO would be preferable to the OECD as the institutional structure for global tax governance. Despite the OECD's limited membership, Brauner still thinks that the 36-member organization is "the most appropriate and practical institution around which a tax harmonization effort could be built, due to its expertise and experience in coordinating international tax cooperation."²⁴

In relation to BEPS, Brauner has similarly maintained an ambivalent position, criticizing the project for not paying enough attention to the concerns of developing and emerging countries, while defending adherence (in terms akin to Hirschman's loyalty category) to the OECD-built system against what he sees as a worse alternative: individual countries exiting by means of uncoordinated measures.²⁵ In this sense, he laments that the BEPS project has not gone far enough,²⁶ and that recent unilateral actions are dealing a serious blow to the international tax regime, leading to its disintegration—something that clearly runs against the achievement of his desired outcome ("crystallization" of common standards).²⁷ Evidence that countries have been adopting exit-based instruments include uncoordinated measures by both OECD and non-OECD countries such as patent boxes, equalization levies, digital services taxes, and the like.²⁸

23. Yariv Brauner, "An International Tax Regime in Crystallization" (2003) 56:2 Tax L Rev 259 [Brauner, "Regime in Crystallization"]. See also Yariv Brauner, "Integration in an Integrating World" (2005) 2:1 NYUJ L & Bus 51 (arguing that tax competition led to the abolishment of imputation—which used to assure that corporate international earnings were not taxed at the level of the corporation and the shareholders—and that enhanced coordination could revive such regimes).

24. Brauner, "Regime in Crystallization," *supra* note 26 at 263.

25. Yariv Brauner, "BEPS: An Interim Evaluation" (2014) 6:1 World Tax J 10 ("The BEPS project's most fundamental insight to date has been that international coordination of tax policies is a condition for the success of any substantial reform; and that by definition, unilateral action, regardless of its substance, cannot succeed" at 12); Yariv Brauner, "What the BEPS?" (2014) 16:2 Fla Tax Rev 55 ("If this is indeed a multilateral project intended to provide useful solutions through coordination, it is the coordination and multilateralism that must be emphasized from the beginning and not bilateralism as such" at 93).

26. See Yariv Brauner, "Transfer Pricing in BEPS: First Round—Business Interests Win (But, Not in Knock-Out)" (2015) 43:1 Intertax 72.

27. See Yariv Brauner, "Treaties in the Aftermath of BEPS" (2016) 41:3 Brook J Intl L 973.

28. See e.g. Reuven S Avi-Yonah, "Three Steps Forward, One Step Back? Reflections on "Google Taxes" and the Destination-Based Corporate Tax" (2016) 2 Nordic Tax J 69; Allison Christians,

To counter these trends, Brauner has turned to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the so-called “multilateral instrument” or MLI), a product of Action 15 of BEPS, arguing that it presents a unique opportunity to foster the coordination of international tax rules and policies.²⁹

III. *The pro-competition option: exit*

Swimming against the tide, Tsilly Dagan has been a solitary voice in advocating for more competition as a way to improve international tax law. But she is not the only one to hold a critical perspective towards cooperation. Others’ positions, as described below, can be placed alongside Dagan’s, not because they necessarily support competition, but because they take issue with cooperative initiatives.

1. *Dagan’s position*

As a representative of the exit option, Tsilly Dagan stands virtually alone in endorsing, against the conventional narrative, international tax competition.³⁰ She does not deny that interstate disputes to attract global capital pose challenges to the exercise of national taxing powers,³¹ but argues that cooperation cannot be seen as an end in itself.³² Dagan claims

“Digital Services Taxes and International Equity: A Tribute to Peggy Musgrave” (2019) 95:7 Tax Notes Intl 589; Ruth Mason & Leopoldo Parada, “Digital Battlefield in the Tax Wars” (2018) 92:12 Tax Notes Intl 1183; Georg Kofler and Julia Sinnig, “Equalization Taxes and the EU’s ‘Digital Services Tax’” (2019) 47:2 Intertax 176.

29. See Yariv Brauner, “McBEPS: The MLI—The First Multilateral Tax Treaty That Has Never Been” (2018) 46:1 Intertax 6; Yariv Brauner, “The Multilateral Instrument as a Platform for Co-Ordination of International Tax Policies” (2019) 4 Brit Tax Rev 437. For another perspective, see Tarcisio Diniz Magalhaes, “The OECD Multilateral Instrument: Challenge or Opportunity of Multilateralism in International Tax?” in Johanna Wheeler, ed, *The Aftermath of BEPS* (Amsterdam: IBFD, 2020) (arguing that the MLI can only achieve true multilateralism through the egalitarian mechanism of the Conference of the Parties). Interestingly, Brauner’s co-authored solution for the digital economy, namely a withholding tax, could arguably be implemented either unilaterally or multilaterally. See Andres Baez Moreno & Yariv Brauner, “Taxing the Digital Economy Post BEPS... Seriously” (2019) 58:1 Colum J Transnat’l L 121.

30. See Tsilly Dagan, “Tax Sovereignty in an Era of Multilateralism” in Dennis Weber, ed, *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (Amsterdam: IBFD, 2017) (“There are two very different (and mutually exclusive) ways in which states could try to improve the current regime. One is a centralized approach: to have states cooperate in a multilateral regime that would curtail tax competition allowing them to collect enough taxes to sustain their welfare states. The other is a decentralized approach: to endorse tax competition and have the international community maximize the gains of such competition”).

31. See Tsilly Dagan, “Competing for Business” (2008) 36:6 Intertax 201; Tsilly Dagan, “The Tragic Choices of Tax Policy in a Globalized Economy” in Yariv Brauner & Miranda Stewart, eds, *Tax, Law and Development* (Cheltenham: Edward Elgar, 2013); Tsilly Dagan, “The Global Market for Tax and Legal Rules” (2017) 21:1 Fla Tax Rev 148.

32. See Tsilly Dagan, “Community Interests in International Taxation” in Eyal Benvenisti & Georg Nolte, eds, *Community Interests Across International Law* (Oxford: Oxford University Press, 2018)

that the problem with cooperative measures in a highly pluralistic and divided world, dominated by a multiplicity of contingent policy choices and preferences, disparate levels of development and an uneven distribution of resources, is that they can never be costless or neutral in relation to all states.³³ As history has shown over and over again, collaborating with each other is surely beneficial to some (developed countries), but for others (developing countries) there are hidden costs.³⁴

Dagan's strongest example is what she calls the "tax treaties myth," that is, the illusive narrative that international agreements are necessary to solve double or multiple tax overlaps, when in reality they end up "redistributing tax revenues from the poorer to the richer signatory countries."³⁵ If there is no win-win situation that satisfies players in the international tax game, her conclusion is that cooperation discourses are rhetorical or, at best, overrated.³⁶

Dagan relies on economics-based theories to defend her position. Using network theory, she claims that the basic structure of cross-border taxation creates, on the one hand, incentives to cooperate, even when cooperation is not in the best interest of all participating states.³⁷ To put it in Hirschman's terms, loyalty arises as a product of the network due to what Dagan calls the lock-in effect.³⁸ On the other hand, networking allows the initiators or first-movers to form a cartel for the extraction of monopolistic rents, which is something that had been previously noted by Hirschman as an obstacle for consumers to exit a specific market (that is, when it is dominated by monopolies). Using game theory, Dagan invites us to look at the global tax system as a decentralized and fragmented competitive

(stating that "cooperation is an instrument, not a goal").

33. See Tsilly Dagan, "The Costs of International Tax Cooperation" in Eyal Benvenisti & Georg Nolte, eds, *The Welfare State, Globalization, and International Law* 49 (Berlin: Springer, 2004).

34. See e.g. Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge: Cambridge University Press, 2018) ("While countries do gain administrative, economic, political, and social benefits from signing treaties, the costs of these benefits differ for developed countries and developing countries. Developed countries do not have to bear any costs for the benefits of the treaty beyond what they would pay if they were to act unilaterally to reduce double taxation. Developing countries, in contrast, sacrifice more to become members of the treaty club." at 119).

35. See Tsilly Dagan, "The Tax Treaties Myth" (2000) 32:4 NYU J Intl L & Pol 939. See also Kim Brooks & Richard Krever, "The Troubling Role of Tax Treaties" in Geerten MM Michiels & Victor Thuronyi, eds, *Tax Design Issues Worldwide* (Alphen aan den Rijn: Kluwer International Law, 2015).

36. See Tsilly Dagan, "BRICS: Theoretical Framework and the Potential of Cooperation" in Brauner & Pistone, eds, *BRICS Tax Coord*, *supra* note 7.

37. See Tsilly Dagan, "Tax Treaties as a Network Product" (2016) 41:3 Brook J Intl L 1081.

38. *Ibid* (explaining that "the lock-in effect of networks makes a spontaneous shift to an alternative standard unlikely" and "obstructs the network's internal updating," because "when a dominant network exists, there is an inclination to join and stay in it—to prefer it over other, less dominant, even if evolving networks, at least until a critical mass of states join the latter" at 1101, 1103, 1106).

market. Through this analogy, Dagan places attention on the strategic interactions played by states, in pursuing their own national interests.³⁹

Dagan additionally engages with political philosophy to show that harmonization is only morally justified if it is just,⁴⁰ meaning that “it must improve (or at least not worsen) the welfare of the least well-off citizens in all the cooperating states.”⁴¹ In the end, it is her scepticism of cooperation that leads her to see a multilateral, centralized approach to international taxation, such as the ones defended by Avi-Yonah and Brauner, as unrealistic and undesirable.⁴² As such, the best we could do is try to improve the conditions for competition.

In her recently published book *International Tax Policy: Between Competition and Cooperation*, she further develops this view, arguing in favour of perfecting a form of structured competition, possibly through an “antitrust agency for states.”⁴³ She recommends that non-OECD countries depart from the established order (resembling Hirschman’s exit option), by refusing to stop competing strategically with their tax systems regardless of OECD calls to do otherwise.

It is easy to see how Dagan’s approach, with its heavy reliance on market theories and metaphors, fits into Hirschman’s concept of exit, situated as it is within the domain of economics. Hirschman’s work is indeed not unfamiliar to Dagan, as it is referenced in her book’s index and throughout.⁴⁴ But she mentions his categories in discussing the possibilities opened by global competition for wealthy and sophisticated taxpayers to escape national regimes (that is, choosing exit over voice).⁴⁵ This is not the same sense in which Hirschman’s theory is applied here, where the goal is to elucidate the dynamics of states’ actions within the

39. See Tsilly Dagan, “National Interests in the International Tax Game” (1998) 18:2 Va Tax Rev 363.

40. See Tsilly Dagan, “Just Harmonization” (2010) 42:2 UBC L Rev 331.

41. See Tsilly Dagan, “International Tax and Global Justice” (2017) 18:1 Theoretical Inq L 1. For a critique, see Laurens van Apeldoorn, “A Sceptic’s Guide to Justice in International Tax Policy” (2019) 32:2 Can J L & Jur 499.

42. See e.g. Yariv Brauner, “Book Review: International Tax Policy: Between Competition and Cooperation” (2019) 22:2 Fla Tax Rev 571 (“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.” at 575).

43. Dagan, *supra* note 37 (“As opposed to supporters of multilateral cooperation toward more centralization, the solutions I endorse here support competition as a vehicle for promoting the normative goals of international taxation. Thus, rather than strive for a more comprehensive multilateral regime that curtails tax competition, I argue, a multilateral accord should seek to improve—indeed, perfect—competition. Competition, if properly calibrated and notwithstanding its dubious reputation, is conducive, rather than detrimental, to global welfare as well as global justice.” at 1-2).

44. *Ibid* at 6, 14, 30, 38, 40-42, 188, 198, 202, 215, 223, 227, 228-229.

45. See e.g. *ibid* (“Taxpayer mobility leads to greater emphasis being placed on exit over voice and thereby elevates the one form of democratic participation over the other.” at 40).

transnational taxation order. Viewed at the global level, it becomes clear that governments, and not only individuals, can participate in strategies of loyalty, exit, and voice.⁴⁶

2. *Other positions*

Many other authors have expressed doubts that cooperation is viable or even as good as it might intuitively seem.⁴⁷ Soon after Avi-Yonah published his piece on tax competition, Julie Roin argued that both tax rate and tax base harmonization proposals were misguided.⁴⁸ For Roin, the real issue is tax evasion and not avoidance, and there is no compelling argument that justifies restricting the right of source countries to use their tax systems to attract businesses in favour of the right of residence countries' to tax their own residents.⁴⁹ The use of tax incentives to bring in more investment was subsequently defended by Yoram Margalioth, as a growth strategy for developing countries.⁵⁰ Margalioth argues that competition between rich nations and poor nations or among poor nations themselves should be restricted (but not competition generally). Moreover, developed

46. One of the anonymous reviewers raised the issue of agency, that is, who do states represent when they choose between loyalty, exit, or voice? Although it is true that governments are not their people, they still serve as a medium for political representation in international relations, much like member states represent minorities within a federal state, allowing them to influence national policy, as explained further in Part V *infra*. See e.g. Gerken, *supra* note 9 (“at some level of generality, agency promotes minority influence in much the same way as voice and exit do: it allows minorities to signal dissent and model an alternative approach” at 1364); Heather K Gerken, “Federalism and Nationalism: Time for a *Détente*?” (2015) 59:4 Saint Louis ULJ 997 (proposing an agency model for cooperative federal regimes where state power is cast as the “power of the servant”). See also Heather K Gerken, “Of Sovereigns and Servants” (2006) 115:9 Yale LJ 2633.

47. See e.g. Michael J Graetz, “Bringing International Tax Policy into the 21st Century” (2016) 83:4 Tax Notes Intl 315 (“Nations will continue to compete—especially for good jobs—and will offer low rates and special tax breaks in an effort to get them” at 317); Ana Paula Dourado, “May You Live in Interesting Times” (2016) 44:1 Intertax 2 (“multilateral coordination, as if there were an international tax system valid as an international standard of interest to each and every jurisdiction, is a myth” at 4); Ricardo Garcia Antón, “The 21st Century Multilateralism in International Taxation: The Emperor’s New Clothes?” (2016) 8:2 World Tax J 147 (“the current multilateral efforts conducted by the OECD consecrate the traditional “status quo” anchored in the division between developed and non-developed countries” at 148); Allison Christians, “Spillovers and Tax Sovereignty” (2017) Tax Notes Intl 831 (“curbing tax competition is not (and will never be) a win-win scenario for all jurisdictions” at 833); Arthur J Cockfield, “Shaping International Tax Law and Policy in Challenging Times” (2018) 55:2 Stan J Intl L 223 (“global political trends, including anti-globalization, nationalism, and populism—along with the rise of countries historically left off the bargaining table—make progress through international cooperation even more elusive” at 233).

48. See Julie Roin, “Competition and Evasion: Another Perspective on International Tax Competition” (2001) 89:3 Geo LJ 543 [Roin, “Competition and Evasion”]; Julie Roin, “Taxation without Coordination” (2002) 31:1 J Leg Stud S61.

49. Roin, “Competition and Evasion”, *supra* note 51 (“Source countries should remain free to use tax policies to attract business investment, just as residence countries should have the right to tax their residents to support the social services and social climate that they enjoy.” at 603).

50. See Yoram Margalioth, “Tax Competition, Foreign Direct Investment and Growth: Using the Tax System to Promote Developing Countries” (2003) 23:1 Va Tax Rev 161.

countries would do better in helping developing ones through forgone tax revenues instead of foreign aid, by allowing multinationals to benefit from tax incentives when investing in the developing world.⁵¹ Finally, Steven Dean has proposed a new concept: “de-harmonisation,” as an alternative approach aimed at incentivizing (administrative and base) cooperation and harmony, while avoiding uniformity.⁵²

Others have been even more critical. Andrew Morriss and Lotta Moberg describe the OECD as acting like a global bureaucratic cartel, limiting tax competition to the benefit of its members.⁵³ Lilian Faulhaber brings to the fore the limits of cooperation itself with the example of the recent spread of tax incentives for innovation across the developed world.⁵⁴ She also emphasizes the rhetoric(al) nature of anti-tax-competition discourse: (1) the expression “levelling playing field,” very much part of the OECD vocabulary, is strategically used by governments to tilt the game to their benefit; (2) there is a strong interdependence between tax competition (fueled by multinationals) and tax avoidance (allowed by governments); (3) anti-competition and anti-avoidance measures are used by countries as competitive-enhancing tools in their own favour, not just as a way to stop others from competing.⁵⁵ While concerned with tax competition, Ivan Ozai has identified a fundamental flaw in cooperation proposals: their lack of explicit acknowledgement that, since there will always be winners and losers, the latter need to be compensated somehow.⁵⁶ Finally, Allison Christians and Marco Garofalo discuss the difficulties in distinguishing healthy and acceptable tax competition from harmful and anti-competitive practices, even when taxes are used as an investment-promoting competitive tool to capture global market share by luring investment from others.⁵⁷

51. *Ibid* (“Instead of contributing only money, I propose that some aid take the form of foregone tax revenues. This forgone revenue goes not to the governments of developing countries, but instead to those who invest in developing countries. ...My proposal transfers revenue from the treasuries of developed countries to developing countries, but it does so indirectly and with targeted money. It is equivalent to giving the governments of developing countries money that can be used only to attract FDI [foreign direct investment].” at 170, 201-202).

52. See Stephen A Dean, “More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime” (2009) 84:1 Tul L Rev 125.

53. See Andrew P Morriss & Lotta Moberg, “Cartelizing Taxes: Understanding the OECD’s Campaign against Harmful Tax Competition” (2012) 4:1 Colum J Tax L 1.

54. See Lilian V Faulhaber, “The Luxembourg Effect: Patent Boxes and the Limits of International Cooperation” (2017) 101:4 Minn L Rev 1641.

55. See Lilian V. Faulhaber, “The Trouble with Tax Competition: From Practice to Theory” (2018) 71:2 Tax L Rev 311.

56. See Ivan O Ozai, “Tax Competition and the Ethics of Burden Sharing” (2018) 42:1 Fordham Intl LJ 61.

57. See Allison Christians & Marco Garofalo, “Tax Competition as an Investment Promotion Tool”

With respect to BEPS, Sérgio André Rocha criticizes the project for neglecting the interests of non-OECD countries. His response is to call on developing countries to exit the existing OECD-based regime and establish their own.⁵⁸ Mindy Herzfeld goes even further, building a “case against BEPS,” partially on the observation that “[a]ttempts at coordination led by developed countries—of which BEPS represents the most obvious example—are doomed to be unsuccessful because they lack full participation from non-OECD global economic players.”⁵⁹

III. *A complementary third option: voice as un-cooperation*

Beyond cooperating without agreeing or completely withdrawing from the current system, there is a third option for dissatisfied actors. This is what Hirschman called voice, which embodies a form of political contestation (un-cooperation). Only recently, this option came to the surface, with the emergence of new players like the BRICS (Brazil, Russia, India, China and South Africa) countries and a few others. In recent years, these countries have become increasingly critical of the way global rules for the taxation of cross-border transactions have favoured developed countries, at their expense.⁶⁰

To be sure, BRICS members have for the most part opted for a combination of loyalty and exit, following BEPS recommendations, but implementing measures in their own manner.⁶¹ At other times, they have openly exercised their exit powers, as illustrated by their approaches to allocating multinationals’ profits between group entities for tax purposes, in contrast with the OECD’s preferred method of arm’s-length prices.⁶² But

in J Anthony VanDuzer & Patrick Leblond, eds, *Promoting and Managing International Investment: Towards an Integrated Policy* (London: Routledge, 2020).

58. See Sérgio André Rocha, “The Other Side of BEPS: ‘Imperial Taxation’ and ‘International Tax Imperialism’” in Rocha & Christians eds *Tax Sovereignty*, *supra* note 23. See also Rigoni, *supra* note 7 (arguing that the international tax regime has reached a third stage with the inclusion of emerging powers, where it could either consolidate the position of OECD countries or morph into a source-based regime).

59. See Mindy Herzfeld, “The Case Against BEPS: Lessons for Tax Coordination” (2017) 21:1 Fla Tax Rev 1.

60. See Kim Brooks, “International Tax Policy: The Counter-Story Presented by the BRICS” in Brauner & Pistone, eds *BRICS Tax Coord*, *supra* note 7; Eva Eberhartinger & Matthias Petutschning, “The Dissenting Opinion of BRICS Practitioners on the BEPS Agenda” (2017) 32:1 Austl Tax Forum 1.

61. See e.g. João Marcus de Melo Rigoni, “A Brazilian View on Base Erosion and Profit Shifting: An Alternative Path” (2014) 42:11 Intertax 730; Reuven Avi-Yonah & Haiyan Xu, “China and BEPS” (2018) 7:1 Laws 1; Diheng Xu, “The Convergence and Divergence between China’s Implementation and OECD/G20 BEPS Minimum Standards” (2018) 10:3 World Tax J 471.

62. See e.g. Jinyan Li, “China and BEPS: From Norm-Taker to Norm-Shaker” (2015) 69:6/7 Bull Intl Taxn 355; Martin Hearson & Wilson Prichard, “China’s Challenges to International Tax Rules and the Implications for Global Economic Governance” (2018) 94:6 Intl Aff 1287; Sérgio André Rocha,

at the same time that they refuse to follow OECD standards to the letter, they have also chosen to publicly voice their political discontent with the current transnational legal architecture.⁶³ One consequence was that the United Nations included in its *Practical Manual on Transfer Pricing for Developing Countries* individual chapters dealing with the divergent practices of Brazil, China, India, Mexico and South Africa.⁶⁴

China and India, in particular, have been the most critical, exercising their newly acquired geopolitical powers “from the inside.” Notably, they have explored their participation in the OECD-BEPS framework to challenge the division of taxing rights among countries,⁶⁵ pointing out that solving the “BEPS issue” is not possible without also solving the “allocation of taxing rights issue.”⁶⁶ From the perspective of the developing world, those two things go hand in hand. For example, Jinyan Li cites remarks by Chinese officials that China’s view is that the BEPS phenomenon unpacks the central unfairness at the core of international tax law: “developed countries have obtained most of the benefits generated by MNEs [multinational enterprises] by relying on their dominant position in formulating the rules and superiority in technology and intangible

Brazil’s International Fiscal Policy (Rio de Janeiro: Lumen Juris, 2017); Tatiana Falcão, “Brazil’s Approach to Transfer Pricing: A Viable Alternative to the Status Quo?” (2012) 20:20 Tax Mgmt Transfer Pricing Report 1; Marcelo Ilarraz, “Drawing upon an Alternative Model for the Brazilian Transfer Pricing Experience: The OECD’s Arm’s Length Standard, Pre-Fixed Profit Margins or a Third Way?” (2014) 2 Brit Tax Rev 218; Marcus Lívio Gomes & Débora Ottoni Uêbe Mansur, “The Brazilian ‘Sixth Method’ and BEPS Action 10: Transfer Pricing Control on Commodity Transactions” (2018) 25:2 Intl Transfer Pricing J 116; Reuven S Avi-Yonah & Ajitesh Kir, “India’s New Profit Allocation Proposal and the Arm’s-Length Standard” (2019) 94:12 Tax Notes Intl 1183.

63. In this regard, Brazil might become an exception if it fully aligns with the OECD’s transfer pricing guidelines. Previously a critic of OECD standards and of the lack of effective participation in the BEPS project, Brazil had a recent shift in its position—away from exit and voice, towards loyalty—due to a new government in power, which is more interested in making the country a member of the organization. See OECD, *Transfer Pricing in Brazil: Towards Convergence with the OECD Standard* (Paris: OECD Publishing, 2019). See also Tatiana Falcão, “Is Brazil’s Tax System Ready for OECD Accession?” (2018) 89:2 Tax Notes Intl 181; Tatiana Falcão, “Ask Not What the OECD Can Do for Brazilian Transfer Pricing...” (2019) 96:2 Tax Notes Intl 163; Rogerio Abdala Bittencourt Jr. & Antonio José Ferreira Levenhagen, “Brazil’s Road to OECD Accession: Tax Transparency and BEPS Standards” (2019) 95:9 Tax Notes Intl 851; Phelippe Toledo Pires de Oliveira, “Brazil’s Entry into the OECD: State of Play, Tax Challenges and Potential Outcomes” (2019) 1 Brit Tax Rev 55; Luís Eduardo Schoueri & Ricardo André Galendi Júnior, “Challenges to Brazilian Transfer Pricing Rules Upon Accession to the OECD” (2019) 26:6 Intl Transfer Pricing J.

64. See UN, *Practical Manual on Transfer Pricing for Developing Countries* (2nd ed, New York: UN, 2017).

65. Herzfeld, *supra* note 62 (“China and India in particular viewed the [BEPS] project as a way to revisit fundamental principles of the international tax system.” at 27).

66. See e.g. DP Sengupta and RK Rao, “Base Erosion and Profit Shifting: An Indian Perspective” (2015) 9:6/7 Bull Intl Taxn 383 (showing through economic analysis and case law that BEPS in India “occurs as a result of the scheme of distribution of taxing rights that favours residence countries” at 385).

property.”⁶⁷ China blames developed countries for allowing BEPS to happen, in order to benefit their own multinationals, thus serving their own national economic interests.⁶⁸ Likewise, in a recent report on profit allocation to permanent establishments, India opted to voice its opinion against the authorized OECD approach, in combination with an exit-based proposal. Accordingly, the report proposes the unilateral adoption of new rules on the basis that the international standard is “highly detrimental to the interests of developing countries (source countries).”⁶⁹

Criticisms were also voiced through the UN Subcommittee on BEPS Issues for Developing Countries by Singapore, India, Bangladesh as well as non-governmental organizations like Christian Aid and Action Aid in their respective responses to a questionnaire elaborated by the United Nations.⁷⁰ For example, India and Bangladesh underscored the existence of a state of dependency between how developing countries are affected by BEPS and the international tax policies carried out by developed countries.⁷¹ Both expressly state that rules were historically designed to give greater taxing rights to rich nations and that developing countries, including low-income ones, had to accept these rules due to “their limited ability to bargain with developed countries.”⁷² Owing to this situation, and under harsh criticisms of OECD countries, the Indian government called upon the United Nations to take action, claiming:

In view of the inherent vulnerability of these countries in their bilateral treaty negotiations with developed countries, the United Nations needs to take a position that protects the sovereign taxation rights of the developing countries and LICs [low-income countries] and prevent the international taxation rules from getting unjustly skewed in favour of the developed countries. In particular, the United Nations needs to take the interest of the developing countries and the base erosion and profit

67. Jinyan Li, *International Taxation in China: A Contextualized Analysis* (Amsterdam: IBFD, 2016).

68. *Ibid.*

69. Government of India, Ministry of Finance, *Public Consultation on Proposal for Amendment of Rules for Profit Attribution to Permanent Establishment*, (New Delhi: Income Tax Department, 2019) at 48.

70. See online: <<https://www.un.org/esa/ffd/tax-committee/tc-beps.html>>.

71. Bangladesh, *Answers from Bangladesh to the Questionnaire set by the UN About Base Erosion and Profit Shifting*, online: <www.un.org/esa/ffd/wp-content/uploads/2015/04/ta-BEPS-CommentsBangladesh.pdf> [perma.cc/Y6T2-MLRB] (“Base erosion and profit shifting are intricately linked and dependent upon the international taxation rules and procedures adopted by the developed countries, in particular, the OECD member countries.” at 1); India, *Questionnaire: Countries’ Experiences Regarding Base Erosion and Profit Shifting Issues*, online: <www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-BEPS-CommentsIndia.pdf> [perma.cc/PF6A-43ZM] (identical statement at 1).

72. Bangladesh, *supra* note 74; India, *supra* note 74.

shifting faced by them into account while carrying out work on BEPS. ...In many of the discussions and decisions at the OECD, India gathers the impression that the real issues are being swept under the carpet and the superficial ones are sought to be addressed. ...Besides, the approach of expecting developing countries to implement all the decisions made by the developed countries appears to be somewhat patronising and should be avoided. Steps must be taken to involve the developing countries in all decisions that are made.⁷³

The impact of these uprisings against the established order was captured in a comment by a former US treasury official, who “expressed concern that countries such as India and China are seeking to use the OECD’s BEPS project to ‘recalibrate the global paradigm’ on source and residence-state taxation that has been in place since the 1920s.”⁷⁴ What followed, however, was that the OECD reopened this discussion in response to countries’ exit-based threats of unilaterally introducing digital services taxes.⁷⁵ Among the three proposals considered for a consensus solution, one came from a group of developing countries that includes China, India and Brazil.⁷⁶ Although this proposal was not the one chosen in the end,⁷⁷ the fact that it was taken into account, even just to be rejected, is unprecedented in the history of international tax law. This shows that these countries’ voices can no longer be simply ignored, and that political un-cooperation might become a more useful strategy in the future.

V. *Analogy to new federalism and new multilateralism*

The expanding voice option is notable because it is already extensively exercised in other spheres where political units bargain over rules. In the context of intergovernmental relationships within a federal system, for

73. India, *supra* note 74 at 2, 8.

74. Jim Fuller & David Forst, “US Inbound: The US Position on BEPS” (2014) 24:10 Intl Tax Rev 98.

75. See Allison Christians & Tarcisio Diniz Magalhaes, “A New Global Tax Deal for the Digital Age” (2019) 67:4 Can Tax J 1153.

76. See the “significant economic presence” proposal: OECD, OECD/G20 Base Erosion and Profit Shifting Project, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy* (Paris: OECD, 2019); OECD, Centre for Tax Policy and Administration, *Public Consultation Document—Secretariat Proposal for a “Unified Approach” under Pillar One* (OECD, October 2019).

77. See OECD, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy: As Approved by the OECD/G20 Inclusive Framework on BEPS on 29-30 January 2020* (Paris: OECD, 2020); Christians & Magalhaes, *supra* note 78 (predicting “a new global tax deal that looks much like the old global tax deal, with a relatively modest redistribution of taxing rights among a few key states” at 1157). See also Allison Christians, “A Unified Approach to International Tax Consensus” (2019) 96:6 Tax Notes Intl 497; Vidushi Gupta, “How Unified is the OECD’s Unified Approach?” (2019) 96:12 Tax Notes Intl 1143.

example, states and local authorities constantly disagree with the federal union, which is seen as good for democracy. Such practices have been denominated “uncooperative federalism” and “uncooperative localism” in recent legal scholarship.⁷⁸ As Jessica Bulman-Pozen and Heather Gerken put it, “[t]o borrow from Albert Hirschman, uncooperative federalism values a state’s voice options over its exit options.”⁷⁹ Gerken claims that this new version of federalism (“not your father’s federalism”) differs from that of the past in that it is not a vehicle for only reactionary conservatism but also can equally serve progressive causes.⁸⁰ When states oppose the federal government, while retaining their status as members of the polity, they compel responses that might result in power-sharing and contribute to public debate.⁸¹

Such a view resembles a pluralist conception of democracy that is more appropriate for contemporary complex and diverse societies, especially at the international level.⁸² This is because this conception puts stronger emphasis on pluralism, disagreement, and conflict as healthy and ineradicable elements of a democratic regime. Following this line of thought, Chantal Mouffe has argued for a form of political contestation grounded on the idea of “engagement with” existing institutional structures, as opposed to simply exiting them—or what she calls a practice of “withdrawal from.”⁸³

78. See Jessica Bulman-Pozen & Heather K Gerken, “Uncooperative Federalism” (2009) 118:7 Yale LJ 1256.

79. *Ibid* at 1259. See also Ernest A Young, “Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate” (2014) 85:4 U Colo L Rev 1133.

80. See Heather K Gerken, “A User’s Guide to Progressive Federalism” (2017) 45:4 Hofstra L Rev 1087.

81. *Ibid* (“just as we value dissent for a variety of reasons (it creates a vibrant marketplace of ideas, it is a form of self-expression, and so forth), we might value state contestation for a variety of reasons (it creates a more vibrant political discourse, it diffuses power, and so forth)” at 1309).

82. On the pluralist character of international law and politics today, see Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007) (“International society is characterized by a complex plurality of ideas, views, and values. It is also characterized by a plurality of political identities in search of recognition, some relatively secure within established states, many others standing in ambiguous or highly conflictual relation to existing institutional and political structures” at 287); Amitav Acharya & Barry Buzan, *The Making of Global International Relations: Origins and Evolution of IR at Its Centenary* (Cambridge: Cambridge University Press, 2019) (proposing a theory of Global International Relations that embraces “pluralistic universalism” due to the unstoppable trend towards a world structured on deep pluralism). See also Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012); Gráinne de Búrca, Robert O Keohane & Charles Sabel, “New Modes of Pluralist Global Governance” (2013) 45:3 NYUJ Intl L & Pol 723.

83. For her perspective on world politics, see Chantal Mouffe, *Agonistics: Thinking the World Politically* (London: Verso, 2013).

In the same way that, in the context of federalist orders, member-states are invited to contest the union, nation-states at the international level should also be welcomed in playing a role of contestation. A view of international tax law should not be grounded exclusively on traditional practices of loyalty or exit, nor on political contestation (voice) alone. Some level of interaction among these options provides a much-refined picture of today's norm-building battles among states, which are becoming increasingly embedded in exercises of contested cooperation.

This view is relatedly upheld by new perspectives on international relations, such as the one put forward by Julia Morse and Robert Keohane under the rubric "contested multilateralism."⁸⁴ This expression describes a novel phenomenon in global politics where "states and other actors increasingly challenge existing multilateral institutions through formal or informal multilateral practices designed to promote policy and institutional change."⁸⁵ According to Morse and Keohane, "[i]n terms made famous by Albert O. Hirschman, contested multilateralism seems to combine 'exit' and 'voice.'"⁸⁶

Viewing international tax law developments from the perspective of contested cooperation offers not only a better description of recent events, but an equally better foundation for normative assessments of state behaviour, as to what should be done to improve the transnational tax order. Through the combination of loyalty, exit and voice mechanisms, it is possible to envisage a world where governments can challenge the current global system of tax norms without either completely withdrawing from multilateralism or constantly turning to unilateralism.

Conclusion

Albert Hirschman's theory demonstrates that the "competition versus cooperation" debate among legal scholars is insufficiently theorized: in reality, there are three courses of action available to some, if not all, countries that are or become displeased with the existing world tax order. These countries can continue to cooperate, expressing a core preference for loyalty, they can refuse to cooperate, expressing a core preference for exit, and they can politically oppose the status quo, expressing a core preference for voice. However, they can also engage more directly in contested

84. See Julia C Morse & Robert O Keohane, "Contested Multilateralism" (2014) 9:4 *Rev Intl Orgs* 385.

85. See the special edition of the *Journal Global Constitutionalism* dedicated to discussing Morse and Keohane's paper: Editorial Board, "Contested Multilateralism and Global Constitutionalism" (2016) 5:3 *Global Constitutionalism* 295.

86. Morse & Keohane, *supra* note 87 at 389.

cooperation, articulating their discontent and demanding procedural or substantive changes as an expression of voice (un-cooperation) in connection with loyalty (cooperation) and exit (competition).

Recognizing the possibility of contested cooperation (cooperating by dissenting) is important because it helps us better understand how global tax norms are evolving today and will likely continue to do so in the near future, as a reflection of our pluralistic international society. Under conditions of deep diversity of opinions, interests, and values, take-it-or-leave-it approaches, such as one that asks countries to choose between cooperating or engaging in competition, should be avoided. Loyalty, exit and voice are not always mutually exclusive, in the sense that countries do not have to pick only one of them for all situations.

In sum, this article argues for reframing international tax analysis in a way that considers the complex dynamics involving these three possibly complementary forms of reaction. Far from one single uniform regime, it is expected that, as more countries rise in power, there will be an increase in plural practices of political, normative and institutional contestation, sometimes accepting the establishment, sometimes searching for alternative paths, either individually or as groups. More than a natural feature of 21st century international taxation, this should be seen as a desirable development, in terms of expanding participation in law-making processes beyond the state.

