The recent emergence of a truly interdisciplinary debate among lawyers, economists, political scientists, philosophers and sociologists about global tax governance, in which all participants learn from the diversity of perspectives, is an exciting development.\footnote{This forum provided by the editors of Intertax is a most welcome opportunity to continue the conversation. We are honoured to have our work discussed by three distinguished legal scholars well-known for their willingness to bridge disciplinary boundaries. Their comments raise very important issues, providing us with much appreciated food for thought. We are grateful for the insights offered and learnt a lot from them.}

All three comments on our article contain significant praise and/or raise additional points supporting our line of argument. But of course, these fair and balanced assessments also contain criticism. We focus our short response on the latter. As all three comments raise very distinct issues with little overlap, we discuss each of them in turn.

1 Reuven Avi-Yonah

Avi-Yonah raises four critical questions. First, he observes that our article does not provide a full account of the genesis of the OECD’s common reporting standard (CRS). Indeed, our contribution focuses on the consequences rather than the causes of multilateral automatic exchange of information (AEoI). We are, however, in full agreement with Avi-Yonah that the adoption of the Foreign Account Tax Compliance Act (FATCA) by the US congress was a necessary condition for this important change. One of us has extensively discussed the importance of the USA’s hegemonic role in global tax governance. Its unilateral adoption of the FATCA was indeed key to reaching multilateral agreement on AEoI both within the EU and the OECD\footnote{While the Obama administration’s defense of the status quo during negotiations over base erosion and profit shifting (BEPS) explains why more fundamental reforms have not materialized until now.}, while the Obama administration’s defense of the status quo during negotiations over base erosion and profit shifting (BEPS) explains why more fundamental reforms have not materialized until now.\footnote{Second, Avi-Yonah argues that (top) statutory rates of dividend taxes at the shareholder level are not the right indicator of personal capital taxation, suggesting that effective rates on interest and/or capital gains would be more appropriate. Beyond the issue of data availability that he himself notes, we want to defend our indicator choice for three reasons. First, while it would indeed be desirable to have effective rates, we think that statutory rates are a reasonable approximation. In order to calculate effective tax rates, one would have to know the true extent of tax base lowering evasion, which is impossible since tax evaders hide it from view. Thus, the closest indicator to effective rates would be average tax rates on declared capital income. However, since most tax evasion is committed by the very wealthy\footnote{Second, we chose taxes on dividends rather than interest as our indicator because we assume that those investing in shares rather than bonds are more sophisticated investors, who should be more likely to react to tax differentials. Therefore, competitive pressure on dividend taxes should be more intense than on interest taxes, making the former a harder test for our theory. Third, we nevertheless agree that an analysis of tax rates on interest and capital gains is desirable. In additional unpublished analyses, we find that rates on interest follow a very similar pattern to those on dividends. A recent OECD study also suggests that the development of capital gains taxes is in line with our findings.} – and these individuals will remain in the top income bracket even after deductions and expenses have been claimed -- their average tax rates will be virtually equal to the (top) statutory rates.}

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Third, Avi-Yonah argues that our charge of non-reciprocity against the US is out of date. We agree that the Corporate Transparency Act (CTA) and the Biden administration’s tax policy agenda are encouraging developments. According to our reading of the CTA, however, many types of trusts are still exempted from mandatory registration and do not have to identify their beneficiaries.[6] Moreover, bilateral FATCA treaties do not oblige the US to share beneficial ownership information that becomes available domestically.[7] Accordingly, the level of reciprocity remains at the discretion of the Treasury Department. The EU could of course copy the US approach and threaten US financial institutions with prohibitive withholding taxes if they do not report beneficiaries of US trusts who are EU residents. But introducing such withholding taxes would require unanimity in the Council, which is probably just as hard to achieve as a two-thirds majority in the US Senate in favour of joining the multilateral AEoI regime.

Fourth, we agree that very recent developments in corporate taxation, particularly with respect to the digital economy, are encouraging. But international agreement on profit allocation and minimum taxes within the OECD’s inclusive framework has not yet been reached and its exact shape will determine whether the risk of corporate profit shifting will be effectively curbed or not.

2 STEVEN DEAN

Steven Dean takes issue with our perspective on international tax cooperation. His criticism mainly deals with the emergence of the AEoI regime. As we have already stated above, our focus lies on the effects of financial transparency rather than its causes. Nevertheless, Dean raises several issues of pressing concern that we are happy to discuss in more detail.

First, Dean extends his recent criticism of the OECD’s approach to tackling financial secrecy outside its own membership to our contribution.[8] He suggests that we advance a worldview in which the main threat to rich countries’ tax bases comes from poor countries in the Global South, citing Panama as an example. However, we consistently refer to secrecy jurisdictions in our contribution, not associating any particular country but the United States with this label. When we use the term ‘secrecy jurisdiction’, which we borrow from the Tax Justice Network (TJN), we actually have the countries in mind that top the list of the TJN’s financial secrecy index: the Cayman Islands, United States, Switzerland, Hong Kong, and Luxembourg.[9] That is, four countries from the Global North and one British Overseas Territory. Accordingly, we consider international cooperation to be relatively effective in the context of the AEoI because of concessions wrestled from countries in the Global North, which account for the bulk of global financial services exports.

Second and relatedly, Dean suggests that we heroize the OECD at the expense of the Congressional Black Caucus (CBC), which gave the decisive input during the drafting of the FATCA by urging policymakers to focus sanction threats on financial institutions instead of jurisdictions. From our perspective, the article takes note of the G20 and OECD’s mixed success in fighting tax evasion by households and tax avoidance by corporations and studies the consequences this mixed record has on national tax policymaking in OECD countries. But delivering on a G20 mandate half of the time hardly makes the OECD a hero in our view. At the same time, we do not dispute that the CBC’s input was decisive for getting the FATCA through the US congress and that the act was the template for the OECD’s AEoI standard.[10] In our view, Dean’s account of the act’s adoption fills in some important blanks by providing new insight on micro-developments in US international tax politics.[11]

At the same time, we are not convinced that focusing the FATCA on financial institutions is actually what the US Treasury did after the act had been adopted. Because many international banks did not want to enter into a direct privity of contract with the Internal Revenue Service (IRS), they actually urged their home governments to lobby the Obama administration for an intergovernmental approach to the FATCA, in which national tax administrations instead of private banks cooperate with the IRS.[12] In response, the US Treasury struck bilateral FATCA agreements with governments across the world.[13] These agreements provided the EU and OECD with the decisive precedent, enabling the organizations to request equivalent cooperation from the likes of
Austria, Luxembourg and Switzerland. As we know from field research in these countries, their governments and important parts of their populations interpreted the FATCA not as an attack on financial institutions but as an attack on their national identity. Accordingly, the decisive change between 2000 and 2009 was not the focus on financial institutions but the focus of the enforcement effort on OECD members. This was a direct response to criticism from the CBC and others of the OECD’s failure to target its own members during earlier transparency campaigns. But it is an aspect of the CBC’s advocacy that plays second fiddle in Dean’s argument because it does not chime well with his claim that the current AEoI regime reserves all the benefits for the Global North and all the costs for the Global South.

Indeed, Dean’s third point of criticism is that the AEoI came into place because the regime concentrates the benefits with OECD members while imposing the costs on the rest of the world. In our view, the impact of the AEoI regime on global inequality is an exciting empirical question, which we are likely to tackle in future research. To reach a reliable answer, three subquestions need to be settled. First, how much of the profit from offshore financial services provided in countries of the Global South actually reaches the general population? The answer will most likely vary with these countries’ domestic politics and colonial history. Second, what share of the assets under management in secrecy jurisdictions from the Global South is beneficially owned by households from other parts of the Global South? Recent research and industry publications suggest this share is increasing. Third, what is the impact of the AEoI on portfolio investment routed through secrecy jurisdictions in the Global South relative to secrecy jurisdictions in the Global North? Our own work shows that the value of cross-border deposits in secrecy jurisdictions from the Global North and South declined after the adoption of multilateral AEoI. But further analyses are needed to determine whether losses were systematically greater in countries from the Global South or not.

Our hunch is that secrecy provided in the Global North and South increasingly hurts countries from the Global South; not necessarily by facilitating income tax evasion, but by abetting corruption and kleptocracy. For the time being, the main secrecy jurisdictions listed above share very little information with countries from the Global South. Accordingly, we criticize the G20 and OECD in the main article for not doing more to ensure that a maximum number of countries also receives information via the AEoI regime. In contrast to Dean, however, we do not see their attempt to access information from the Global North and South as their main failure. The organizations rather fail to ensure that information from the Global North and South also reaches those countries in the Global South that are hurt by financial secrecy. We agree with Dean that this goal could probably be better achieved in a more inclusive institutional setting than the OECD, where all affected countries are represented but decisions are taken by qualified majority voting. One of us recently made a proposal for an international tax organization that could provide such a setting.

3 Cees Peters

Cees Peters raises four critical points concerning our understanding of international cooperation. First, he states that international cooperation against tax evasion and avoidance should rather be understood as a ‘neutralization of disenabling factors’ than the creation of enabling international institutions, as we put it in our article. This point is well taken. Indeed, one of us has written extensively on the international regime of double tax avoidance (DTA) as the institutional foundation of tax competition. Historically, the specific institutional design of the DTA regime endogenously created the problems of international tax evasion and avoidance and ultimately structures how tax competition among countries works. We chose to shortcut the genesis and historical trajectory of these new institutions in our contribution. But in terms of their effects, ‘neutralizing disenabling factors’ and creating enabling institutions is logically equivalent in our view.

Second and similar to Avi-Yonah, Peters argues that we paint too bleak a picture of the BEPS project. He points out that Country-by-Country Reporting (CbCR, action 13) and new minimum standards for the prevention of tax treaty abuse (action 6) have brought real progress in the fight against tax avoidance. Owing to space constraints,
our treatment gives short shrift to the details of the BEPS agreement. In the longer original article, we discuss these provisions, especially CbCR, as relevant progress. Nevertheless, we maintain that these achievements fall short of the paradigmatic change that AEoI represents in the fight against tax evasion.

Third, Peters rightly characterizes our vision of international cooperation as being compatible with the rational-functionalist theory of international relations. International institutions and cooperation are chosen by states over conflict only if they provide participating states with benefits. Peters argues that a corollary of this view is a one-sided focus on output legitimacy, or the effectiveness of cooperation. Input legitimacy – whether international agreement came about under transparent, inclusive and democratic conditions – does not matter. We disagree with Peters’ view of rationalist-functionalist cooperation theory in this regard. Rather, rationalist cooperation theory argues that to reach output legitimacy, input legitimacy will have to be reckoned with. The two are complements and substitutes at the same time. They are complements because an agreement that came about in an illegitimate procedure is likely to be undermined by less than full compliance from affected parties that were not involved in its elaboration. They are substitutes because bringing all affected actors to the negotiating table creates excessive transaction costs. As interest heterogeneity increases, the depth of the agreement is likely to decrease, leading to cooperation that is ineffective and thus lacks output legitimacy. A rational institutional designer would therefore aim to strike an ‘optimal’ balance between these considerations. As one of us has argued elsewhere, this would call for a more inclusive and more robust international organization than the OECD currently is. But the ‘optimal’ institutional design is also likely to have lower input legitimacy than the ‘cosmopolitan pluralist’ model that Cees Peters favours.

Fourth, Peters points out that the problem of international tax evasion can be solved in a way that leaves national tax sovereignty and democracy largely unconstrained. It thus fits Dani Rodrik’s vision of ‘sensible globalization’ extremely well. In contrast, other problems resulting from ‘neoliberal globalization’, including tax avoidance by corporations, may not be amenable to such a solution. We agree with this observation. As one of us has discussed elsewhere, we distinguish between legislative sovereignty, i.e., states’ ability to design their tax laws, and administrative sovereignty, i.e., their autonomy to administer their tax systems. One can easily see that a remedy to tax evasion only requires states to share their administrative sovereignty, e.g., by automatically exchanging taxpayer information to ensure compliance with national tax laws. In contrast, effectively curbing tax avoidance by multinationals, which is legal by definition (if often illegitimate), requires sharing legislative sovereignty because some degree of national tax law harmonization is required. This distinction is important because sharing administrative sovereignty does not compromise democracy at the national level: national political bodies are still able to design their tax systems as they wish. Sharing legislative sovereignty, however, compromises this democratic right. Citizens are no longer unconstrained in their choice of national tax policy because some degree of coordination among governments, and thus regard for the preferences of other nations, is required to arrive at (partially) harmonized tax systems. It is thus true that a satisfactory solution to the problem of tax avoidance will not perfectly fit Rodrik’s vision. Nevertheless, we maintain that unitary taxation and formula apportionment (UT + FA) would strike a sensible balance between international harmonization and national democracy. While nations would be constrained in the design of tax bases, they could set tax rates as they wish – ideally above some agreed upon minimum tax rate. In this sense, UT + FA would still respect the trade-offs in Rodrik’s framework as much as possible.

In sum, the comments from Reuven Avi-Yonah, Steven Dean and Cees Peters gave us a welcome opportunity to question our own work and clarify many of its underlying assumptions. We are certain that they could offer additional comments on our response that would be just as challenging. But we hope that many of the pressing questions that we could not settle within the scope of this debate section will inspire future research. We thus look forward to continuing the conversation as new legislation is passed and new empirical data becomes available.
Footnotes

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8 S. Dean, *FATCA, the US Congressional Black Caucus, And the OECD Blacklist*, Tax Notes Int'l (6 July 2020).


10 Hakelberg, *supra* n. 2.

11 Compare Dean, *supra* n. 8.

12 Hakelberg, *supra* n. 3, at 89–91.


14 Hakelberg, *supra* n. 2.


18 Caymanians, for instance, are apparently shut out of the upper echelons of their home country’s financial sector, which mainly employs expatriates from the Global North. See V. Amit, *A Clash of Vulnerabilities: Citizenship, Labor, and Expatriacy in the Cayman Islands*, 28(3) Am. Ethnologist 574 (2001); M. Hen, *Sub-elites as fiduciary gatekeepers of global elites* (Routledge 2018).


28 Or, at least, the costs of coercing them into compliance will be too high if they were merely rule-takers of decisions of others.

29 We would argue that the development of global tax governance does indeed reflect these trade-offs and tensions. For example, the OECD’s Harmful Tax Competition initiative in the 1990s led to strong resistance by ‘tax haven’ countries and a discreditation of the initiative as illegitimate (see Sharman, *supra* n. 17). The OECD responded by inviting these countries to the Global Forum. The outcomes of the Global Forum process were initially seen as lacking effectiveness, and only gathered new momentum, when the USA unilaterally introduced FATCA (*see supra*). Similar dynamics and tensions can be observed in the current negotiation processes on business taxation (see Hearson & Rixen, *supra* n. 1).

30 Rixen, *supra* n. 25.


It is very likely that this difference in the way effective solutions constrain national tax sovereignty and democracy are an important reason for the lack of success in curbing tax avoidance in contrast to the successful cooperation against evasion. See P. Genschel & T. Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, in *Transnational Legal Orders* 154 (T. Halliday & G. Shaffer eds, Cambridge University Press 2015); see also Rixen, *supra* n. 24.