International Tax Relations: Theory and Implications

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International Tax Relations: Theory and Implications

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1. Introduction

Governments rely heavily on taxes to fund their operations. If the business transactions subject to tax are entirely domestic, a country wields considerable power to implement a tax system and collect the designated taxes. But if the transactions cross national borders, who taxes them? Whose rules apply? And, perhaps most important, what happens when countries disagree? Who “prevails” and why? These are serious, critical, and relevant questions for which there are few answers. The dominant focus of international tax literature has been an analysis of substantive tax law and its implications. Receiving much less attention is how countries have come to agree on particular tax rules and practices—the international relations of international tax.

The vast majority of tax rules are “domestic” in that they are enacted and enforced by a single state. That characterization, however, belies the inherently international nature of the subject. Many income tax rules directly affect large numbers of nonresident taxpayers engaged in cross border transactions and indirectly affect other nations. As early as the 1920’s, countries began negotiating over the content and contours of income tax rules.1 The outcome of such negotiations determines each country’s prospects for tax revenues and for investment. Countries, though, are not the only participants in international tax debates.2 Tax professionals and taxpayers, especially multinational corporations, actively seek to understand, influence, and shape

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1 See note 14 and Subsection II.B.2.

2 “International tax” has no formal or specific definition. It generally refers to the subset of income tax rules of a country that govern (1) the taxation of residents of the country earning income outside of the country, and (2) the taxation of nonresidents earning income inside that country. In addition, income tax treaties, which are bilateral agreements negotiated between countries, are included under the umbrella of international tax.
international tax law and policy. The current landscape reveals an enormous array of mechanisms by which the international tax system is influenced and these mechanisms vary tremendously in size, formality, membership, participation, subject matter, and output. Relatively little attention has been devoted to understanding how these forces shape international tax policy—the focus on the "tax" piece of international tax has been at the expense of the "international" aspect, the unique and complex dynamics of multijurisdictional relations. Countries not only must construct domestic tax policies and rules; they also must navigate the intersections with other countries' systems.

The time has come to shift, or perhaps expand, the scope of tax analysis to include examination of the dynamics of multijurisdictional relations. This claim prompts two questions: "Why now?" and "Isn't this addressed elsewhere?" As to the first, the multilateral nature of international tax has long been understood. Two important features of the tax world have changed, however: (1) the volume of cross border business and (2) the structure and form of that business. While both elements are widely discussed, their importance in affecting the dynamics and interactions that generate, develop, and change the international tax regime has not been explored. The increasing volume of activity and of participants intensifies the need for good cross border tax policy, and good policy requires more than good rules. It

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3 Unless otherwise specified, the use of the term "regime" or "system" connotes the generic and broad usage of these terms in the international tax literature, and not the more specific (though often contradictory) uses of the terms in international relations theory, which are examined more specifically in Part II.C.

4 See, e.g., Foundations of International Income Taxation 1 fig.1.1 (Michael Graetz ed., 2003) (showing increase in U.S.-owned assets abroad from roughly $3 billion in 1990 to over $8 billion in 2001, and increase in foreign-owned assets in the United States from over $2 billion in 1990 to over $6 billion in 2001).


6 Although existing rules may have identifiable and known weaknesses, the limited volume of transactions or higher transactions costs of the past have operated as a friction on potential abuse of the rules. As the volume increases and the frictions decrease, the backstop for abuse is weakened and the underlying rules must be confronted directly.
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demands an ability to get them implemented in a multijurisdictional tax world.\(^7\)

The failure to anticipate other countries' views or the interactions of their rules with your own can have potentially dramatic effects, including loss of revenue (to other countries or to double nontaxation),\(^8\) increased antipathy to international investment,\(^9\) fairness concerns,\(^10\) increased administrative costs (as countries try to pursue regimes that are increasingly unworkable),\(^11\) and misallocation of investment and commercial activity.\(^12\) To avoid these counterproductive clashes, countries must be able to reach agreement on tax issues that require coordination for successful implementation. This need for agreement is not new, but the escalating number of important intersections between countries' rules increases the pressure to secure agreement.

This conclusion leads to the second question, "Isn't the subject of how countries reach agreement addressed elsewhere?" The answer is yes, and no. The study of the interactions among multiple participants in a global setting is the subject of an independent field of inquiry, international relations. Unfortunately, the literature and analysis in the international relations area rarely use taxation as a case study for the theories of international relations.\(^13\) Thus, a nuanced understanding of the application of international relations theory in the international tax realm is missing. This Article begins to fill this gap by exploring how international relations analysis of the international tax system could improve decisionmaking in the international tax arena.

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\(^7\) A country's success in implementing its tax rules can depend in part on the impact those rules have on other countries and the responses that those rules generate.


\(^11\) See, e.g., Roin, note 9, at 570-76.

\(^12\) See, e.g., Avi-Yonah, note 9, at 1604-16.

\(^13\) Game theory analysis, a prominent part of some international relations analysis, appears in several notable works on international taxation. See, e.g., Avi-Yonah, note 9, at 1583; Tsilly Dagan, The Tax Treaties Myth, 32 N.Y.U. J. Int'l L. & Pol. 939, 948-77 (2000); Robert A. Green, Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes, 23 Yale J. Int'l L. 79, 104-10 (1998); Mitchell A. Kane, Strategy and Cooperation in National Responses to International Tax Arbitrage, 53 Emory L.J. 89, 122-28 (2004); Roin, note 9, at 550-54. None of these works focused on the general question of how to examine comprehensively the interaction of states in the sphere of international taxation and the development of agreement on a range of topics.
The theoretical and practical aspects of negotiating with many sovereigns in an interactive political and economic environment require specific attention.\textsuperscript{14} This Article starts bridging international relations theory and international tax law with the ultimate aim of determining how countries reach agreement over international tax and how that knowledge can improve tax policy and tax negotiations. To test the proposition that the study of international relations will enhance international tax analysis, this Article identifies the most promising analytical direction in international relations theory and applies that theory to the most widely known example of international tax negotiations among countries: the development of a system to relieve double taxation. Using this classic case study, the Article argues that the additional perspective and insight of international relations theory can enhance our understanding of an established tax story. Ideally, such knowledge allows us to predict and, more importantly, modify the contours of international tax relations. The Article also outlines an agenda for further research on these issues with the expectation that extensive case study projects are the foundation of predictive guidance on international tax relations.

Part II begins by establishing the normative goals of the tax system and then evaluating international relations theory for use in tax debates. Part III examines the application of international relations theory to the double taxation case study to cast this well-known example in a new light. The Article evaluates which models of international relations theory seem most pertinent to the structure, issues, and dynamics of international tax. Building on these conclusions, Part III proposes an international relations-international tax research agenda that would develop the international relations analytical approach and extend the inquiry into many important substantive and procedural issues in the international tax system. The task of exposing the link with international relations theory and exploring it in detail brings some common intuitions, past experience, and perhaps misconceptions to the fore. The Conclusion considers further interaction between the tax and international relations fields, as well as limits on the ability of international relations to improve tax policy. Not only is the

\textsuperscript{14} The claim here is not that strategic issues of international tax have been ignored (for example, consider the initial efforts to compose international committees for drafting treaties in the 1920's). Rather, the rich and extensive work in international relations theory that has been pursued over the past decades has not been integrated into international tax analysis. See text accompanying notes 30-34; Michael J. Graetz & Michael M. O'Hear, The "Original Intent" of U.S. International Taxation, 46 Duke L.J. 1021, 1043-56, 1066-76 (1997) (describing development of the foreign tax credit in the United States and of the International Chamber of Commerce's Double Taxation Committee's approach to the problem of double taxation).
tax world called upon to integrate important areas of nontax research into its universe, but scholars and researchers in the area of international relations theory are exhorted to take seriously the international experiences of the tax system, especially as nonmilitaristic aspects of international relations form an increasingly central part of international relations theory. A marriage of international relations theory and international tax—in research, analysis, and application—should advance both fields.

II. DEVELOPING AN INTERNATIONAL RELATIONS THEORY FRAMEWORK FOR INTERNATIONAL TAX

A. Introduction

The ultimate quest of this project, as well as much of international tax literature, is to improve tax policy. This goal requires a vision of what constitutes “good” tax policy—and how that will be measured. It also requires flexibility in exploring avenues outside of traditional tax analyses that may clarify important operational aspects of the international tax system. This Part outlines these two fundamental components of successful tax policy (a desired tax rule and a model of tax relations). First, and more briefly, given its relative ubiquity in the literature, the goals of the tax system are defined and probed to identify their essential parts and their ambiguous or contradictory elements. Second, international relations theory is examined to identify the research and theoretical models most likely to inform analysis of the international tax system.

B. Normative Goals of the International Tax System

The basic goals other than revenue of the international tax system are the same ones generally espoused for domestic tax policy: efficiency, equity, and administrability. The list is simple; the contextual application is quite difficult. In the domestic setting these criteria are challenging to implement. Indeed, the components can even be difficult to measure because of informational limits (for example, in efficiency-oriented analyses) or uncertainty in the normative dimension of the standard itself (what constitutes equitable tax treatment). Although in theory one can analyze the efficiency and equity effects of a single provision, the picture is incomplete without consideration of other tax provisions. Even when tentative conclusions can be reached regarding the efficiency, equity or administrative effects of a given tax treatment, there remains the question of how to balance the three criteria in judging the desirability of a specific provision.
In the international context, additional questions arise due to multiple sovereign taxing authorities, many of which are interested in the same taxable transactions. What do efficiency and equity mean in the global context? How do they impact the likelihood of reaching agreement on international tax matters? Starting with efficiency, should the goal of international tax be worldwide efficiency (either capital export\textsuperscript{15} or capital import neutrality\textsuperscript{16})? What if that clashes with national efficiency?\textsuperscript{17} The dominant approach in economics literature has been to evaluate international tax rules and policy in terms of worldwide efficiency.\textsuperscript{18} This theoretical starting point seems quite distant from the real world behavior of nations, given the potential for conflict between worldwide efficiency and national interests. If the goal is to understand and predict how nations reach agreement, then a willingness to examine a “national” perspective on negotiations is necessary.\textsuperscript{19}

With respect to equity, what should be made of “inter-nation” equity—a factor not present in the purely domestic analysis?\textsuperscript{20} What kinds of claims can nations make upon one another regarding the im-

\textsuperscript{15} A particular tax rule is deemed capital export neutral (CEN) if a taxpayer is neutral, that is, indifferent, as between a domestic and a foreign investment with the same pretax rate of return. De facto, the taxpayer must be facing the same marginal tax rate for either investment. See, e.g., Office of Tax Pol’y, Treasury Dep’t, The Deferral of Income Earned Through U.S. Controlled Foreign Corporations: A Policy Study 23, 26-27, 36-37 (Dec. 2000), reprinted in 2001 Daily Tax Rep. (BNA), Jan. 3, 2001, at S-3, S-13-S-14.

\textsuperscript{16} If a rule favors certain investors among the universe of those who might import capital into a single market, then the rule violates capital import neutrality (CIN)—and thus distorts savings incentives, and may impact the competitiveness of business. For CIN to exist, all investments made in a particular country should be taxed at the same effective tax rate, regardless of the identity of the taxpayer. Essentially, the total tax burden borne by all taxpayers investing in the country should be the same, even though the taxpayers may be based in a wide range of countries. See Michael J. Graetz, The David R. Tillinghast Lecture, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies, 54 Tax L. Rev. 261, 272 (2001).

\textsuperscript{17} See, e.g., id. at 270, 277-82.

\textsuperscript{18} See, e.g., id. at 276.

\textsuperscript{19} Even with that premise, however, there remains the task of measuring efficiency, in particular the choice between CEN and CIN, although some analysts reject both CEN and CIN as potentially too narrow, and instead encourage a broader vision of economic neutrality. See, e.g., Daniel J. Frisch, The Economics of International Tax Policy: Some Old and New Approaches, 47 Tax Notes 581, 586-87 (Apr. 30, 1990). Unless the tax bases and the tax rates across countries are the same, it is not possible for a rule to satisfy both CEN and CIN. See note 16 and Graetz, note 16, at 272. Moreover, despite the dominance of the worldwide approach to measuring efficiency (through the use of either CEN or CIN), some have advocated a rethinking of the importance of national efficiency and whether it has a valid place in the efficiency analysis. After all, tax is somewhat unusual in that it typically assumes little weight for national efficiency. In many nontax contexts we expect that nations, including the United States, will measure options from their own point of view and pursue what they understand to be their interests. See Graetz, note 16, at 276-82.

\textsuperscript{20} See, e.g., Avi-Yonah, note 9, at 1616, 1631-51.
pact of tax rules on different nations? The question of inter-nation equity incorporates both political and moral judgment. Although domestic equity analysis does not encounter this question, the domestic literature on equity may be valuable for its exploration of what constitutes the source and nature of commitments to equity. To the extent it proceeds from explicit participation and membership in a common political venture (a single state), the conclusions may differ in an international context. In any event, each taxing authority's view of equity (just like each authority's view of efficiency) may differ starkly if the authority is considering the welfare of its own state rather than adopting a broader global view.

Efficiency and equity questions also affect the third prong of tax policy—administrability and implementation. It is insufficient to simply determine the desired tax rules or regime for a given international tax problem. Unless actually implemented, the rules are useless. Administrability is critical and tenuous in international tax where execution of tax policy frequently requires agreement among states on the issue. Enactment of domestic legislation is often inadequate to achieve the intended tax policy. The tax rules and decisions of other jurisdictions are crucial to the bottom line for taxpayers with cross border income and for countries seeking to tax them. Thus, to effectively implement a desired tax policy it may be necessary to persuade other countries to participate in a shared vision, at least to some degree. Under what conditions are countries likely to agree? In answering this question, the Article turns to international relations theory and analysis.

Certainly, all three basic goals of any tax system demand recognition of extra-national concerns. Even if a nation takes a parochial view of equity or efficiency, administrability will require international policy coordination (and this in turn may require a readjustment of

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21 In this context it is important to distinguish between “equity-like” arguments that really are efficiency claims in disguise—for example, an argument that a given tax rule benefits Country A at the expense of Country B and thus is undesirable on equity grounds, may be bolstered by observations that if the tax rule is implemented, the likely repercussions (including avoidance behavior and fall-out from declining economic conditions) will negatively impact Country A. This latter argument is less about equity and more about providing a complete assessment of the benefits and costs of the proposed policy—an efficiency argument.

22 Except to the extent that one seeks to recast even these questions as part of an efficiency framework, which mutes their independent analytical and explanatory value.

23 This complexity in the equity calculation helps explain the findings discussed later in the Article regarding states’ interest in relative gains from an international arrangement. Specifically, in assessing options, states may care whether “everyone gains” or whether “they gain more than everyone else.” See text accompanying notes 30-34.

24 Agreement can take place on a variety of levels, such as bilateral treaties or model agreements.
acceptable equity or efficiency results). This need to coordinate provides a powerful impetus to develop a viable application of international relations to tax. The need is even greater than may first appear. Tax policy is not made in an international vacuum. Other aspects of international relations may impede or facilitate discussions of the taxing authorities.\textsuperscript{25} International disputes in unrelated arenas may prevent negotiations or the consummation of agreements.\textsuperscript{26} Moreover, because tax ties directly into the economic engine that is central to international power and prestige, it may be challenging to obtain agreement.\textsuperscript{27}

The following section identifies the domains of international relations theory that are valuable in assessing agreement in the international tax setting. It is important to reiterate that expansion of tax analysis to include applications of international relations theory will not miraculously eliminate the challenges of international tax. Many of the core and persistent problems of international tax derive from the sometimes intractable dilemmas of efficiency, equity, administrability, and the competition for tax revenue. Nevertheless, any information that improves our ability to forecast and pursue agreements is important.

\textbf{C. Mining International Relations Theory to Improve International Tax Policy}

\textbf{1. General Landscape of International Relations Theory}

The international relations literature is rich and complex, addressing a wide range of important questions about the conduct of international relations, including the ways in which agreement is reached (or

\textsuperscript{25} See, e.g., IRC § 901(j) (denying credit for foreign taxes paid to a country if: (1) the United States does not recognize the government, (2) the United States has “severed diplomatic relations” with the country (or simply does not conduct relations with the country); or (3) the country is designated by the Secretary of State as one “which repeatedly provides support for acts of international terrorism”). Countries currently identified by the Service as falling under § 901(j) include Cuba, Iran, North Korea, Sudan, and Syria. Rev. Rul. 2005-3, 2005-1 C.B. 334.

\textsuperscript{26} For example, consider the absence of treaties with countries such as those identified in note 25.

\textsuperscript{27} In some situations, nontax issues will be integrated into tax analysis at an early stage either as a factor in efficiency or equity, or through additional policy arguments raised in the midst of the tax debate itself. For example, states (and taxpayers) often argue that their sovereignty is being undermined. Although sovereignty typically is not defined, the term tends to invoke an image of harm to the ability of the nation to speak for itself and to make decisions that further its national interests in the global sphere. The role and meaning of sovereignty has been extensively considered in international relations theory, and an illumination of that concept should better inform consideration of such claims with regard to tax policy.
not) at the international level. The task is to locate the international relations literature that asks how and under what circumstances agreement can be reached internationally. The field of international relations research directed at this question, "international regime theory," is a sensible starting point. The next Subsection outlines in some detail the contours of international regime theory in an effort to draw from that literature a model for analyzing the international tax system. This Subsection briefly reviews the foundations of international relations theory to provide context for the discussion of regime theory to follow.

At a broad theoretical level, two important traditions, neorealism and neoliberalism, drive international relations analysis. Neorealism emphasizes: (1) the state as the central (and rational) actor in the international arena; (2) the state’s desire to achieve relative gains over other states (thus the attention to the balance of power); (3) the importance of survival of the state in what is an anarchical international society; and (4) the importance of structure in terms of the relationship among units of the international system (that is, the power dynamics). This thinking is perhaps most closely identified with the work of Kenneth Waltz. Neoliberalism (sometimes referred to as neoliberal institutionalism identified with Robert Keohane), also takes the state as a primary actor. It views a state’s pursuit of national self-interest in a market-oriented model as a dominant factor in shaping international relations and in determining how successful international institutions can be in directing and modifying international behaviors. In this framework, the pursuit of absolute gains (that is, both states are better off) is more important, and the pursuit of relative gains (measured in comparison to other states’ success) is less so.

In the latter part of the 20th century a pluralist approach to international relations theory emerged, encouraging examination of the role of individuals, bureaucracies, and nongovernmental organizations in...
decisionmaking at the international level.\textsuperscript{35} Although the literature frequently characterized neorealism and neoliberalism as in direct opposition to each other, the work of the pluralists played a somewhat different role. Rather than seek to completely supplant either of the two main traditions, the pluralist approach contended that both neorealism and neoliberalism failed to account for a major force in the international relations dynamic when they ignored the role of non-state actors.\textsuperscript{36} The pluralists' work emphasized actors, relationships, and other influential factors.\textsuperscript{37} Examples include research on cooperation and integration in the European Union\textsuperscript{38} and on geographic environment.\textsuperscript{39}

A final, significant international relations strand, cognitivism, arises from the postmodern international relations literature.\textsuperscript{40} The focus of the cognitivist theories is less on developing paradigms for analysis and more on critiquing the dominant models for the failure of international relations to question the basis for knowledge. In particular, cognitivists argue that states create their identities and determine their interests based on beliefs held by state actors.\textsuperscript{41} Changes in knowledge and belief systems can “trigger changes in policy,” thus attention

\begin{itemize}
  \item \textsuperscript{35} See Dougherty & Pfaltzgraff, note 28, at 28-34.
  \item \textsuperscript{36} Nonstate actors include nonprofit organizations, experts, multinational corporations, and trade organizations. See, e.g., id. at 28-29; Peter Willetts, Transnational Actors and International Organizations in Global Politics, in The Globalization of World Politics: An Introduction to International Relations 356, 362-66, 369-81 (John Baylis & Steve Smith eds., 2d ed. 2001) [hereinafter Globalization of World Politics]. For example, in the field of environmental regulation, nonstate actors can include scientists and scientific organizations, and local and international nonprofit organizations such as the World Wildlife Federation.
  \item \textsuperscript{37} Although the description of the relationships between and among neorealism, liberalism, and pluralism draws on widely shared positions, any effort to group international relations theories according to the international relations meta vs. medium range scope remains open to debate and is not universally agreed on. See, e.g., Dougherty & Pfaltzgraff, note 28, at 17-18.
  \item \textsuperscript{38} Id. at 519. This work is referred to as neo-functionalism and is associated with Ernst Hass, Robert Keohane, Joseph Nye, Philippe Schmitter, and Leon Lindberg.
  \item \textsuperscript{39} See, e.g., Harold Sprout & Margaret Sprout, Geography and International Politics in an Era of Revolutionary Change, 14 J. Conflict Resolution 145 (1960) (discussing the relationship between geography and international relations).
  \item \textsuperscript{40} Postmodern is an umbrella term covering diverse theories such as critical theory, feminism, constructivism, and post-structuralism. See Dougherty & Pfaltzgraff, note 28, at 38-40. Constructivism, itself a broad category intersecting with a variety of theories, assumes “that our understanding of the world, and the intellectual tools used for viewing that world, are not objectively derived but instead are the result of socially constructed concepts.” Id. at 166. Part of the process is “cognitive evolution” which explores how new ideas become accepted—including the role of the epistemic community. Thus, the cognitivist strand focuses on information, ideas, and knowledge. Id. at 168.
  \item \textsuperscript{41} Andreas Hasenclever, Peter Mayer & Volker Rittberger, Theories of International Regimes 136 (1997).
\end{itemize}
should be focused on how knowledge is distributed and how it shapes the views of decisionmakers.42

Neorealism, neoliberalism, pluralism, and cognitivism are the major threads of the international relations landscape against which regime theory developed. Each relies on a primary explanatory variable for behavior and outcomes in the international context. The neorealists contend that power (possessing, maintaining, or lacking) is the driving force behind the decisions, behavior, and interactions seen on the global stage. The neoliberal view (though not ignorant of power) places much greater emphasis on the state’s pursuit of its self-interest in a world where information and monitoring costs often prevent states from pursuing mutually desirable goals—“market failure” requiring “intervention.” The cognitivists treat knowledge and information as critical to the shaping of international dynamics. Whoever has information, knowledge, and ideas, and whoever determines what we value and think, de facto determines much of the outcome. In fact, pluralism is implicitly woven into some of the cognitivists’ inquiries. Certainly the reality of how international relations theory has emerged over the decades is less neat, structured, and easily contained than the above outline suggests. Comprehensive historical overviews of international relations theory and its development struggle to present a coherent yet accurate picture. That said, there are in fact two important and clearly dominant traditions, and there have been two valuable additions to the thinking of those traditions—one more of a potential complement (pluralism) and the other a check and critique (cognitivism). The value and importance of the ideas imbedded in all of these international relations threads surface in regime theory. Much work in regime theory synthesizes the neorealist and neoliberal traditions, drawing upon their common features and shared assumptions (such as focus on states as central, rational actors and the reliance on a rationalist mode of explanation that emphasizes material factors, causal connections, and scientific inquiry).43

2. International Regime Theory

International regime theory (“regime theory”) is that part of the international relations literature that seeks to answer the question of

42 Id.

43 For example, the works of Barry Buzan, Charles Jones, and Richard Little contribute to this effort. See Barry Buzan, Charles Jones & Richard Little, The Logic of Anarchy: Neorealism to Structural Realism 36-38, 52, 82 (1993). A synthesis is plausible given the common “core assumptions” shared by realism and liberalism. Stein, note 30, at 8; see text accompanying notes 28-34.
how and when countries reach agreement or how they cooperate. "Regime theory [seeks] to explain the possibility, conditions, and consequences of international governance beyond anarchy and short of supranational government in a given issue area." Although some basic version of these questions always has been of interest to students of political and international relations, attention to the idea of regimes developed in the 1970's. Several background factors prompted this interest, including a recognition among U.S. scholars that the uniquely powerful post World War II status of the United States had enabled it to help create international regimes, and yet that power (at least in economic terms) was diminishing. This apparent change in dominant status generated questions about the prospects for future international agreements and regimes. What began as a research agenda among U.S. scholars transformed into a long-lived and more encompassing inquiry joined by an increasingly diverse group of researchers.

Regime theory is not a single theory in the sense of a single explanatory variable for the formation (or the content or effects) of regimes. In fact, part of its appeal is its reliance on the major meta-theories (neorealism and neoliberalism) in a way that intuitively seems plausible and enhances regime theory. Most scholars reject a single variable approach to regimes. Instead, they urge the development of a cohesive multivariate theory, with an expectation that the specific application of regime theory and the reliability of certain predictive factors will depend on the subject matter.

a. Definition of Regime

What is a regime, or more precisely, an international regime? A "consensus definition," drawn from the work of Stephen Krasner,

44 Although most of the literature has a statist orientation, there is also emerging consideration of international regimes among nonstate players (for example, members of an industry). See, e.g., Virginia Haufler, Crossing the Boundary Between Public and Private: International Regimes and Non-State Actors, in Regime Theory and International Relations 95, 95, 101-09 (Volker Rittberger ed., 1993) [hereinafter Regime Theory].


47 Richard Little, International Regimes, in Globalization of World Politics, note 36, at 299, 300-02.

48 Volker Rittberger, Research on International Regimes in Germany: The Adaptive Internationalization of an American Social Science Concept, in Regime Theory, note 44, at 3, 3-6.

49 See generally Mayer et al., note 45, at 413.

50 Id.

51 See Hasenclever et al., note 41, at 8-9.
has formed the basis of much work in regime theory and served as a central thread.\textsuperscript{52} Krasner defines regimes as

\begin{quote}
[\text{I}mplicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.\textsuperscript{53}]
\end{quote}

A modification of the Krasner definition, which has gained wide support (and in fact could be viewed as a clarification of an implicit assumption) is the emphasis on effectiveness.\textsuperscript{54} Thus, for example, a regime would not exist where certain rules have been nominally adopted by countries, but in practice are generally disregarded. Even if true effectiveness is not required, it is anticipated that the rules of the regime be “referred to in an affirmative manner by governments.”\textsuperscript{55}

A further interpretation of the “regime” definition contends that “[o]nly where compliance is inconvenient—that is, where regime rules conflict with governments’ perceptions of what their self-interests would be if there were no such institutions—is the impact of the regime tested.”\textsuperscript{56} The strength of the inconvenience required should not be overstated. For example, aviation standards requiring a common air traffic controller language (adopted to facilitate international travel and safety) result in many countries requiring airline/air traffic

\textsuperscript{52} Id. at 8; Kenneth Abbott, Modern International Relations Theory: A Prospectus of International Lawyers, 14 Yale J. Int'l L. 335, 338 (1989); Hafler, note 44, at 96-97 (quoting and working with the Krasner definition); Robert O. Keohane, The Analysis of International Regimes, in Regime Theory, note 44, at 23, 26-27 (quoting the Krasner definition); Little, note 47, at 303; Volker Rittberger, Editor's Introduction, in Regime Theory, note 44, at xii.

\textsuperscript{53} Stephen Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, in International Regimes 2 (S. Krasner ed., 1983). Krasner's definition has been valued in part because its complexity encourages greater specificity in analysis of regimes. See, e.g., Hasenclever et al., note 41, at 12-13. Another more simplified definition (which for these purposes is not in opposition to the Krasner definition) comes from Robert Keohane: “Regimes are institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.” Robert O. Keohane, Neoliberal Institutionalism: A Perspective on World Politics, in International Institutions and State Power: Essays in International Relations Theory 1, 4 (Robert O. Keohane ed., 1989).

\textsuperscript{54} See, e.g., Keohane, note 52, at 27-28; Rittberger, note 48, at 9.

\textsuperscript{55} Keohane, note 52, at 28.

\textsuperscript{56} Id. at 33.
controller personnel to speak a language other than the native language of that state.\textsuperscript{57} Such a commitment may be inconvenient for the participating country and thus conform to the regime concept, although the inconvenience hardly rises to the level of, for example, an interest in pursuing certain polluting or military activities. An important element of the regime concept that emerges more explicitly from Keohane’s definition is that it pertains not to an entire field (for example, defense or the environment) but to a narrower problem or question on which some level of agreement has been reached. Agreement may be achieved on certain aspects of a field but not others.

It may be useful at this stage to differentiate international regimes from international institutions and international organizations. The terms in some contexts can be used loosely and overlap; there are, however, important distinctions. “International institutions,” the broadest category, are defined as “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, . . . shape expectations . . . [and] include formal intergovernmental or transnational organizations, international regimes, and conventions.”\textsuperscript{58} International regimes, as defined above, are a subset of international institutions, as are international organizations.\textsuperscript{59} The latter term refers to formal bodies such as the OECD or the World Health Organization that can serve as an information builder, or can do much more in the regime process.

\textbf{b. Outline of Regime Theory}

The focus of regime theory is to explore and better understand the interactions captured under the concept of an “international regime.” The inquiry is divided into three basic questions: [1] “explaining the formation, persistence, and demise of international regimes. . . ; [2] accounting for regime properties and their change. . .; and [3] determining regime consequences (or effects) and explaining their variation. . .”\textsuperscript{60} To date, the bulk of international relations research


\textsuperscript{58} Keohane, note 52, at 28.

\textsuperscript{59} Id. at 28-29 ("[I]nternational organizations are purposive entities, with bureaucratic structures and leadership, permitting them to respond to events. International regimes are institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.").

\textsuperscript{60} Mayer et al., note 45, at 406; see also Keohane, note 52, at 29, 31-33; Oran R. Young & Gail Osherenko, Testing Theories of Regime Formation: Findings from a Large Collaborative Research Project, in Regime Theory, note 44, at 224-25.
has tackled the first question; although the other two are exceedingly important and likely to be interconnected (for example, different types of regimes may generate different effects).

This Article utilizes the work of international relations theory on regime formation—examining why cooperation is achieved on some matters and not others. The current regime theory literature can be grouped into the following rough categories: (1) neorealist-based regime theories, (2) neoliberalist-based regime theories, (3) cognitivist-based regimes theories, and (4) a synthesis approach to regime theory (which includes attention to nonstate actors as suggested by pluralist theories in international relations). These next Subsections briefly review the four perspectives on regime theory and then consider how they might be adapted for international tax.

i. Neorealist-Based Regime Theory

Theories of regime formation initially developed under the rubric of “hegemonic stability theory.” The core elements of this theory contend that: (1) states create regimes where their common interests include public goods because in such cases the states need cooperation to further their interests; and (2) only the presence of an economic and political power with the capacity and willingness to lead can make the states who participate in the world economy a “privileged group.”

61 See, e.g., Little, note 47, at 306-13; Thomas J. Biersteker, Constructing Historical Counterfactuals to Assess the Consequences of International Regimes, in Regime Theory, note 44, at 315-16 (noting that little scholarly attention has been directed to the effects of regimes).

62 See Helmut Breitmeier & Klaus Dieter Wolf, Analyzing Regime Consequences, in Regime Theory, note 44, at 345-47.

63 A regime must first be formed before it can be studied for its particular operation and its effects. Given the dearth of international relations literature on international taxation, formation seems a sensible starting point for examining the international tax system. It is anticipated that future projects will consider the second and third questions of operation and effects.

64 See, e.g., Hasenclever et al., note 41, at 1-6; Young & Osherenko, note 60, at 225, 248-51.

65 Hauffer, note 44, at 95. Hegemonic stability theory developed originally to explain economic stability. Hasenclever et al., note 41, at 87-90; see Charles P. Kindleberger, Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides, 25 Int'l Stud. Q. 242, 247 (1981) (explaining that the stability of the world economy depends on some country acting as a stabilizer through world leadership) [hereinafter Dominance]; Charles P. Kindleberger, The World in Depression 1929-1939, at 303-04 (Univ. of Cal. Press 1986) (1973) (“[f]or the world economy to be stabilized, there has to be a stabilizer—one stabilizer.”); see also Duncan Snidal, The Limits of Hegemonic Stability Theory, 39 Int'l Org. 579, 579 (1985) (hegemonic stability theory “claims that the presence of a single, strongly dominant actor in international politics leads to collectively desirable outcomes for all states in the international system” (emphasis in original)). But see Hasenclever et al., note 41, at 90 (noting that Kindleberger might not support the broader extension of his hegemonic work to regimes).
by supplying and supporting rulemaking and rule enforcement that facilitates mutually beneficial exchanges.\textsuperscript{66} As directed at regimes specifically, hegemonic stability theory (HST) adopts the view that (1) regimes are created and sustained by powerful actors (power determined in relation to the issue area at stake), and (2) that regimes should “decline” when the founding hegemon declines and/or power shifts.\textsuperscript{67} The type of the “hegemon” in HST may vary—from a “benevolent”\textsuperscript{68} hegemon, which effectively bears all of the burdens sustaining the regime, to a forceful one, which uses its power to “coerce” other states to contribute to sustaining the regime and “de facto ‘tax[es]’ them for the collective good provided under [the hegemon’s] leadership.”\textsuperscript{69}

Central to the HST explanation is the assumption that regimes are “public goods.”\textsuperscript{70} To the extent that regimes do not really constitute public goods, the HST would be challenged.\textsuperscript{71} What makes a regime a public good? The question turns on whether a regime possesses “excludability”—if it does, the regime is not a public good.\textsuperscript{72} As to whether in practice regimes possess “excludability,” the answers are expected to vary, although some key international areas (such as trade) seem susceptible to excludability.\textsuperscript{73} For example, if a state fails to implement free trade policies as agreed, goods from that state could face trade barriers abroad, even though other states’ goods would still enjoy the free trade regime.\textsuperscript{74} Such a trade regime could be said to have the quality of excludability. Even a regime possessing excludability, however, can constitute a public good. If it is costly to impose sanctions in the regime and the “benefits” of sanctioning rogue actors are enjoyed by those not sharing in the cost of implementing sanc-

\textsuperscript{66} Hasenclever et al., note 41, at 89 (summarizing Kindleberger on hegemonic stability theory); see generally Kindleberger, Dominance, note 65, at 247-54.

\textsuperscript{67} See, e.g., Peter M. Haas, Epistemic Communities and the Dynamics of International Environmental Co-Operation, in Regime Theory, note 44, at 168, 181; Haufler, note 44, at 95. But see Snidal, note 65, at 612 (concluding that “there is no reason to expect that a decline in hegemonic power will lead to the collapse of economic order”).

\textsuperscript{68} See Snidal, note 65, at 585-90 (characterizing benevolent and coercive hegemons); see also Hasenclever et al., note 41, at 90-91 (describing two variants in the theory of hegemonic stability: the benevolent leadership model and the coercive leadership model).

\textsuperscript{69} Hasenclever et al., note 41, at 91.

\textsuperscript{70} See, e.g., Snidal, note 65, at 580.

\textsuperscript{71} See, e.g., id. at 595 (“Insofar as collective action is likely, the theory of hegemonic stability will be incorrect.”).

\textsuperscript{72} See, e.g., id. at 592, 595-97 (exploring the concept of excludability in regimes).

\textsuperscript{73} See, e.g., id. at 596-97.

tions, then collective action/public goods problems exist. In contrast, where a regime experiences no free-riding problems because the regime benefit is not a public good, then a hegemon is not needed for regime formation. Thus, the empirical question of whether regimes exhibit excludability would be crucial to evaluating HST. If, as the neoliberalists would argue, not all regimes involve public goods, then the role for HST in evaluating regime formation may be limited. Moreover, even assuming that some regimes involve public goods, it is possible under certain circumstances that a small subset of states can exhibit the collective action necessary to form the regime that provides broader public goods. That is, even with "public goods" regimes, a hegemon is not always an essential component.

Therefore, a strong version of HST for regime creation and maintenance is not theoretically mandated and seemingly contradicts some empirical evidence. Observations about the importance and significance of a hegemon remain useful, however, in some cases. Furthermore, the declining impact of HST in regime analysis has not eliminated power-based (neo-realist) examination of regimes. Power-based theorists have identified other ways in which state power critically shapes regimes.

The primary role of power in the HST view of regime formation derives from the expectation that regimes require a "powerful" and attentive player. Another power-based, neorealist picture of regimes espoused by Krasner and others has emerged in response to

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76 See Hasenclever et al., note 41, at 99 (noting neoliberal challenges to the public goods claim).

77 See, e.g., id.

78 See, e.g., Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 50 (1968); Russell Hardin, Collective Action 40-41 (1982) (analyzing the potential for small sub-groups to provide a public good). Collective action by the subgroup is more likely where a very small number of actors benefit from the mutual cooperation (regardless of the overall size of the group that may benefit from the collective good). See, e.g., Hasenclever et al., note 41, at 101; see also Snidal, note 65, at 598-612 (questioning hegemonic stability theory because of the potential for a sub-group to do the hegemon's job).

79 See Young & Osherenko, note 60, at 229 (rejecting pure hegemonic stability theory for five case studies, but finding various power dynamics at work).

80 See Andrew Hurrell, International Society and the Study of Regimes, in Regime Theory, note 44, at 49, 55 (noting the decline of hegemonic stability theory but the continuing influence of power in the analysis).

81 Power is measured by reference to the issue area at stake.

82 I refer to Krasner because of his prominence in articulating this position, but others have developed this line of thinking. See generally Stephen D. Krasner, Global Communications and National Power: Life on the Pareto Frontier, 43 World Pol. 336 (1991) [hereinafter Global Communications]; Stephen D. Krasner, Sovereignty, Regimes, and Human
the neoliberal work on regimes that followed the decline of HST.\textsuperscript{83} The neoliberal story\textsuperscript{84} centers on market failure and argues that regimes form because there is a market failure that prevents states from reaching a Pareto-optimal outcome—and that the regime steps in to reduce various transaction costs and to facilitate a Pareto optimal result.

Krasner and other neorealists recognize that regimes can and will be formed in the absence of a hegemon but contend that power remains at the core of why a particular regime result is reached.\textsuperscript{85} Advocates of this power-based position also agree that the international cooperation witnessed in regime formation often can be characterized as a response to market failure.\textsuperscript{86} Where then do these neorealists part company with the “market failure” neoliberals? An important area of dispute involves the type of game theory models used to represent the states’ interactions. Krasner argues that the neoliberals’ market failure account typically uses a prisoner’s dilemma game theory model, which he claims generates misleading conclusions.\textsuperscript{87} In a prisoner’s dilemma game,\textsuperscript{88} there is a single Pareto optimal outcome that can be achieved (with cooperation provided through the regime mechanism). Little role for “power” differentials seems available in this game. Krasner, though, disputes the prominence of the prisoner’s dilemma game, contending it is not the most plausible model for these interactions among the states.\textsuperscript{89} Rather, he believes that other game

\textsuperscript{83} See Mayer et al., note 45, at 406-07 (the “puzzle” created by the HST of regimes prompted the neoliberalist work in the field).

\textsuperscript{84} See Subsection II.C.2.b.ii for a fuller discussion of neoliberal regime theory.

\textsuperscript{85} See, e.g., Krasner, Sovereignty, note 82, at 140 (“Regime creation and maintenance are a function of the distribution of power and interests among states.”).

\textsuperscript{86} See, e.g., Krasner, Global Communications, note 82, at 337 (where the distribution of power is more or less symmetrical, regimes have been established to combat coordination problems); Krasner, Sovereignty, note 82, at 140 (noting that “[s]ome prominent issues [relating to regimes] can clearly be characterized as market failure problems. . . . ”).

\textsuperscript{87} Krasner, Global Communications, note 82, at 336 (“Regime analyses based on market failure inevitably obscure issues of power because, given a Pareto suboptimal situation and a concern with absolute not just relative gains, it is possible to make at least one actor better off without making others worse off—an outcome that can be resolved [without] resort to power. . . . ”). In many cases, however, there may be “many points along the Pareto frontier: the nature of institutional arrangements is better explained by the distribution of national power capabilities than by efforts to solve problems of market failure.” Id. at 337.

\textsuperscript{88} See text accompanying notes 125-27.

\textsuperscript{89} Krasner, Global Communications, note 82, at 342.
models\(^{90}\) (particularly “battle of the sexes”/coordination games) are prevalent, and in these games there is more than one Pareto-optimal outcome and the truly critical question is why one outcome prevails over the other.\(^{91}\) This is a question of power—a conflict over which of two (or more) Pareto-optimal results will be selected.\(^{92}\) Krasner does not claim that the neoliberals are oblivious to the power (and distributional) dimensions of their market failure theory, but rather that they give them inadequate attention.\(^{93}\) In fact, Krasner identifies three ways in which power is used to shape and influence “the games” the neoliberals describe:  

1. States use power to decide who can join the game (less powerful players face exclusion or the threat of exclusion);  
2. States use power to set the rules of the game, such as which player can “move” first;  
3. States use power to change the “payoff matrix” (that is, to change the other state’s order of preference for outcomes)—a powerful state may link different issues (military, economic, and others) such that only a single resulting “outcome package” is Pareto efficient, and it is an outcome desired by the powerful state. More generally, powerful states may have less vested in a particular game—and can more credibly argue that they will walk away, thereby forcing the other party to choose the outcome favored by the powerful state (that is, among Pareto outcomes, the one more favorable to the powerful state).\(^{95}\) For example, in free trade discussions, larger states typically have more power than smaller ones because they have less invested in that particular outcome—thus the larger states can threaten to change the game or not play, in order to achieve particular goals (economic or noneconomic).\(^{96}\)

In addition to disputing the neoliberal depiction of which games are being played by states and how they are played, neorealism maintains that its view of anarchy is more complex and impacts regime forma-
tion. Under the neorealist view, the anarchic world in which all states exist is not defined merely by the absence of a single enforcer (as, for example, might be provided in a federal system). It also is defined by the fact that states must continually fight for their survival. Equipped with a survival mentality, a state might reject a regime that coordinates action and generates gains for all players if that regime allows another state to achieve relative gains. In this view, the Pareto efficiency story is incomplete in capturing the goals and options facing states. Although states are utility maximizers in both the neorealist and the neoliberal view, the neorealists view a state’s utility as impacted by how other states are faring. The significance of this factor in assessing the likely success of a regime turns on how much weight states place on relative gains in practice. The answer may vary depending on the number of parties and the balance between relative and absolute gains.

In this power-based story, what is the role for the regime? Neorealists typically view regimes as playing a less significant role in explaining and shaping cooperative outcomes compared to the vision held by neoliberals. Regimes do serve to coordinate action and “establish stability,” and, in addition, even these power-based theories hold

98 See, e.g., Joseph M. Grieco, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 Int’l Org. 485, 497-98 (1988). Grieco chooses not to distinguish between realism and neorealism “because on crucial issues—the meaning of international anarchy, its effects on the states, and the problem of cooperation—modern realists . . . are very much in accord with classical realists . . . .” Id. at 485 n.1.
99 See Waltz, note 31, at 102; see also Duncan Snidal, International Cooperation Among Relative Gains Maximizers, 35 Int’l Stud. Q. 387, 389 (1991) (“[States] must attend to their security . . . in order to be around in the longer term.”).
100 See Snidal, note 99, at 387-89.
101 Joseph M. Grieco, Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner’s Dilemma Model, 50 J. Pol. 600, 608-13 (1988) (modeling a state’s utility as a function of the relative payoffs to the state and its partners, and describing six factors that influence a state’s sensitivity to these relative payoffs) [hereinafter Realist Theory]; See also Joseph M. Grieco, Cooperation Among Nations: Europe, America, and Non-Tariff Barriers to Trade 44-46 (1990) [hereinafter Cooperation]; Hasenclever et al., note 41, at 119; Hurrell, note 80, at 58.
102 See, e.g., Grieco, Cooperation, note 101, at 45-46 (discussing a range of factors including the state’s long-term relations with the other state (ally or not), the degree of the existing power imbalance between the states, and the specific topic area in which the regime operates (that is, economic well-being or security)); Duncan Snidal, Relative Gains and the Pattern of International Cooperation, 85 Am. Pol. Sci. Rev. 701, 706, 708-13 (1991).
103 See, e.g., Grieco, note 98, at 485.
that regimes can generate their own power. Krasner offers the example of the telecommunications regime that allocates the electromagnetic spectrum as a case of weak states using the structure of membership and voting in the relevant organization (the International Telecommunications Union), combined with their technical ability to disrupt powerful states' broadcasts, to obtain a better outcome than their power outside of the regime would have permitted.\footnote{Krasner, Global Communications, note 82, at 351-53; see also R. Bender, Launching and Operating Satellites: Legal Issues 42-56 (1998) (reviewing the history, process, and tensions among states in the allocation of the electromagnetic spectrum and the operation of the International Telecommunications Union).} The issue of allocation of the electromagnetic spectrum, is considered a “classic coordination problem” because unless states agree on use of the spectrum, multiple broadcasts will interfere with each other.\footnote{Krasner, Global Communications, note 82, at 351.} For example, particularly desirable slots (the geosynchronous ones) located above equatorial states were highly contested, with some less powerful equatorial states arguing for control of the slots above their space.\footnote{Id.} These allocation issues ultimately were addressed through the conferences organized by the International Telecommunication Union in which states are central actors because they are the key parties to enforcing agreements on broadcasting activities within their borders.\footnote{Id.} Less powerful states could press their position to some degree given the one state, one vote structure. Although the outcome still favors more industrialized (powerful) countries because most frequencies are allocated on a first-come, first-serve basis, the preferences of less powerful states were not completely ignored given their voting role (and the possibility that they could interfere with other states' broadcasts).\footnote{Id. at 352-53. The less industrialized countries argued that first-come, first served allocation (that is, allocation based on present need) favored the more industrialized countries who could demonstrate use of the spectrum now. Thus, the less industrialized countries sought to reserve at least a portion of the spectrum for future need. Id.}

Moreover, although neorealists consider regimes less effective\footnote{Effectiveness is measured as the degree to which the regime achieves its intended purposes. Andreas Hasenclever, Peter Mayer & Volker Rittberger, Interests, Power, Knowledge: The Study of International Regimes, 40 Mershon Int'l Stud. Rev. 177, 178, 217 (1996).} and less robust\footnote{Robustness captures the likelihood of the regime surviving the decline of the power players or changes in external conditions. Id.} than do neoliberal\footnote{Id.}
ways in which the neorealist vision of regimes is broader than that of the neoliberals. It is generally agreed that regimes can remedy certain problems plaguing cooperation (for example, compliance and cheating related issues), but the neorealists see other barriers to cooperation that regimes can resolve. For example, an international regime might include provisions that reduce the size of the gap in benefits accruing to different participants (that is, minimize the relative gain problem). These provisions can take the form of special rules that apply to the weaker states that otherwise would benefit less from the regime. Similarly, regimes can enable the provision of side payments to enhance the position of states dissatisfied with their relative situation. Neorealists also have argued that states may join a regime with a more powerful state because the regime structure may provide the weaker states a better platform for challenging (or at least voicing their concerns and views) about the power state in the relevant issues area.

Whether the neorealist story is a better reflection of some or most regimes turns in part of what types of games are regularly “played” by cooperating states, and how much importance states place on relative gains. Continued empirical research and case studies may illuminate these questions. It is perhaps most plausible that different types of games and thus different types of regimes exist, granting neither vision an exclusive theoretical claim.

ii. Neoliberalist-Based Regimes Theories

The majority of regime theory analyses have developed under the umbrella of neoliberalism. A driving theme of the neoliberal tradition maintains that states are “instrumentally rational actors” pursuing

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112 See Hasenclever et al., note 41, at 122-23; Grieco, Cooperation, note 101, at 233-34.
113 A strong statement of this position would be that because the neoliberals do not see all of the barriers to cooperation, they do not see all of the functions that regimes can and do perform to enable cooperation.
114 Grieco, Realist Theory, note 101, at 614-20; Hasenclever et al., note 41, at 123.
115 Grieco, Realist Theory, note 101, at 619-20; Grieco, Cooperation, note 101, at 234; Hasenclever et al., note 41, at 123.
116 Grieco, Realist Theory, note 101, at 620 (citing Hirschman, note 95). Grieco has characterized France and Italy’s decision to join with the fiscally powerful Germany in moving towards a European monetary union as an effort on the part of France and Italy to use the new institution (that is, the European Currency Bank) to secure a forum and opportunity to raise their concerns and views about EU monetary policy against the more dominant Germany. See Joseph M. Grieco, The Maastricht Treaty, Economic and Monetary Union and the Neo-Realist Research Programme, 21 Rev. Int’l Stud. 21, 34-39 (1995); see also Hasenclever et al., note 41, at 123-24.
117 Hasenclever et al., note 110, at 217-21 (considering possible interactions between realism and neoliberalism); see text accompanying notes 167-73.
118 Hurrell, note 80, at 55-56.
self interest and reciprocal benefits. Essentially, “the basic challenge for states is to overcome market failure... [and] international regimes... are a device for overcoming market failure.” Market failure here describes a situation in which states may not reach their optimal outcome, an agreement, because of problems in the market structure (for example, information or monitoring). If the states can act cooperatively, they may achieve outcomes superior to the suboptimal outcomes of their individual uncoordinated behavior. This cooperation can be obtained through the formation of a regime that offers a number of solutions to the market failure, including overcoming the assurance problem, reducing transactions costs, and facilitating information exchange.

Within this neoliberalist framework, regime research has pursued three major lines of inquiry, each targeting different factors in a regime formation:

1. The bargaining game involved,
2. The issue at stake,
3. The background system.

**Bargaining Games** The interactions among countries (and other actors) in the international arena can be viewed through the lens of game theory. For example, the prisoner's dilemma scenario illustrates the role of regimes in solving a “market failure” by providing a “collaborative outcome.” In a prisoner’s dilemma case, the parties will “defect,” even though that result is inefficient, because that outcome is the only equilibrium in the absence of “collaboration.”

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119 Id. This liberal strand often has been labeled “neoliberal institutionalism.” In this Article, the neoliberal position generally is identified by that term, although occasionally reference to particular authors draws upon the functionalism or institutionalism language).
120 Krasner, Sovereignty, note 82, at 139.
121 See, e.g., Keohane, note 52, at 35; Hurrell, note 80, at 57; Friedrich Kratochwil, Contract and Regimes, in Regime Theory, note 44, at 73, 80.
122 See text accompanying notes 125-33; Stein, note 30, at 27-38 (describing coordination games, dilemma games, and games of common aversion and the likelihood of success in each).
123 See notes 134-45.
124 The background system refers to both the impact of secondary variables (such as frequency of interaction among the parties) and the institutional bargaining involved. See text accompanying notes 146-51; see also Dougherty & Pfaltzgraff, note 28, at 106-08, 111; Manfred Efinger, Peter Mayer & Gudrun Schwarzer, Integrating and Contextualizing Hypotheses, in Regime Theory, note 44, at 252, 260-66; Keohane, note 52, at 35. The existence of institutional structures and agreement in the general policy area may facilitate agreement on a new issue to the extent that the current structures rely on relevant and widely shared norms and can ease communication and reduce costs. See, e.g., Efinger et al., supra, at 260-66; Keohane, note 52, at 35. In addition, the presence of a strong leader can be critical to regime formation. See Young & Osherenko, note 60, at 230 (noting the studies’ indication of the consistent importance of the role of individual leaders).
125 See, e.g., Hasenclever et al., note 41, at 30-31 & n.7 (describing classic prisoner's dilemma).
126 “Collaboration” and “coordination” are both distinct forms of cooperation—that is, acting “together in order to achieve a mutually acceptable outcome.” Little, note 47, at
Stated in the language of the prisoner model, it makes sense to confess if you fear the other prisoner also will confess and implicate you. The creation of a regime facilitates the collaboration and information sharing necessary to overcome the parties' fear of being cheated. Extinguishing the fear of being cheated may be achieved through: (1) a monitoring function, (2) the implications of an iterative game, (3) the risk of tit-for-tat behavior, and (4) reputational concerns.127

Of course there are an array of other strategic games (coordination,128 suasion,129 assurance130) with different properties, such as more than one Pareto efficient equilibrium (for example, coordination games such as air traffic controller language), or alternatively, a single equilibrium where only one party is happy but the loser is still better off because defection is worse (suasion game). Depending on the type of strategic game characterizing the issue area, regime formation may be more or less likely. A hierarchy of probability for regime formation among strategic games has been articulated with suasion games

314. Coordination, as seen in the air traffic controller example above, describes cooperation “to pursue a common strategy in order to avoid the mutually undesirable outcome arising from the pursuit of divergent strategies.” Id. Collaboration describes the cooperation in resolving a scenario such as a prisoner’s dilemma, where the goal is to prevent defection “from a mutually desirable strategy [to] an individually preferable strategy.” Id. 127 Hasenclever et al., note 41, at 34-35.

128 A coordination game differs from the prisoner’s dilemma collaboration version in that there is no risk of defection once some agreement has been reached. Close monitoring to ensure compliance is not necessary as it may be in prisoner’s dilemma case (where a lone defector receives zero prison time instead of a light sentence). For example, recall the air traffic controller situation. A single language for air traffic communication is necessary, and selection of a single language is the best outcome for all parties. Once that language is selected, no one has an incentive to defect, nor does one really fear defection on the other side (in contrast to the prisoner’s dilemma that required monitoring or enforcement of the agreement). In a coordination context, the agreement is “self-enforcing.” Id. at 48.

129 The central idea in a suasion game is that one of the two parties has a primary strategy to cooperate (the “cooperation version”) or alternatively to defect (the “defection” version). In the cooperation version of the suasion game, the dominant strategy for party A is to cooperate. Thus regardless of whether party B decides to cooperate or defect, A will cooperate. As a result, B has to be persuaded to cooperate because for B the best outcome is A cooperates and B defects, and this can be achieved automatically because A’s dominant strategy is to cooperate. Essentially, A has two choices: (1) threaten to act irrationally (that is, threaten to defect even though that is against A’s best interest), or (2) offer something extra to B if B cooperates on this matter. It can be difficult, though not impossible, for A to persuade B that it will act against its own interests. However, it is possible to offer B something else for cooperation. Thus, we might expect to see a suasion game on one issue linked with another suasion game between the parties. Id. at 51-52.

130 The classic example of an assurance game is the stag hunt in which two hunters plan to go hunting for a stag. In order to hunt the stag they must work together; if either hunter wanders off to catch a rabbit, that hunter will gain a rabbit, but no stag will be caught. Thus, both hunters prefer to cooperate and hunt the stag. Mutual defection is also an equilibrium, however, because if one hunter defects, then the other should as well (both obtain rabbits). The worst outcome is if one hunter defects and the other hunter continues hunting for the stag alone. Id. at 49-50.
being the most difficult in which to form a regime because the regime must not only address monitoring and sanctioning, but also distribution of goods (because the parties do not share the same dominant strategy). Prisoner’s dilemma scenarios may be more capable of generating cooperation because distribution is not a major issue (the prisoners’ Pareto optimal outcome of mutual silence imposes the same burdens on both parties) although monitoring and sanctioning needs are still present (recall that each prisoner needs to be certain that the other prisoner is not confessing). Coordination games are arguably easier still because only distribution must be addressed by the regime (for example, picking the “winning” air traffic controller language). Once the selection (for example, of a language) is made, no country has an incentive to defect from that choice. Finally, assurance games are the most likely to experience success because the required coordination poses none (or very little) of the three problems identified above (monitoring, sanctioning, and distribution). In the assurance game, both parties share the same preference (joint cooperation), so a regime is needed only to assure each other that they have rationally reviewed the situation and recognize their mutually preferred outcome.

Issues The issue area itself also constitutes an important explanatory factor for regime creation. Three major policy domains dominate international life: security, system of rule, and economic well-being. Security issues, quite obviously, concern physical protection

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131 Other examples of coordination include “standardization of measurement systems, standardization of equipment within NATO, or recent European attempts to adopt common standards in telecommunications equipment . . . .” Snidal, note 104, at 932.

132 Hasenclever et al., note 41, at 54. In contrast, in the prisoner dilemma scenario, each prisoner would prefer the outcome in which he defected (confessed) and the co-conspirator cooperated (remained silent) because the defector would be freed while the cooperator served a heavy sentence.

133 See Lisa L. Martin, Interests, Power, and Multilateralism, 46 Int’l Org. 765, 769 (1992) (“In ‘assurance games,’ institutions [such as regimes] have little to contribute to cooperation under conditions of complete information. However, given the structural uncertainty of international relations, states may find some . . . institutionalization . . . conducive to . . . achiev[ing] mutual gains.”); see generally Robert Jervis, Cooperation Under the Security Dilemma, 30 World Pol. 167 (1978) (considering historical security situations from the perspective of an assurance game in which both parties prefer a particular outcome but for various reasons of uncertainty may be worried that the other state will not act consistent with their mutually desired goal).

134 “Issue areas” have been defined as “one or more, in the perception of the actors inseparably connected objects of contention and of the behaviour directed to them.” Manfred Efinger & Michael Zürn, Explaining Conflict Management in East-West Relations: A Quantitative Test of Problem-Structural Typologies, in International Regimes in East-West Politics 64, 68 (Volker Rittberger ed., 1990).

135 Hasenclever et al., note 41, at 62 (quoting and translating Ernst-Otto Czempiel, International Politik: Ein Konfliktmodell 198 (1981)).
from internal and external threats. System of rule issues are those regarding how states allocate "opportunities for exercising freedom and for political participation . . . among individuals." And finally, issues of economic well-being address how economic gains are shared and how the "opportunities for achieving such gains" are allocated. The predictive conclusion is that if an issue belongs to the economic category, where there is "divisible 'gain' rather than indivisible 'power' . . . at stake," then regime formation is more likely than for security or system of rule issues. As between security and rule issues, security is considered more conducive to regime formation.

In addition to this basic categorization of issues by subject area, conflicts (or issues) can be grouped based on the nature of the conflict itself. Conflicts break down into four categories: (1) "conflicts about means"—states share the same goal but disagree on how best to achieve it; (2) "conflicts about values"—states "hold incompatible principled beliefs regarding the legitimacy of a given action or practice;" (3) conflicts of interest over relatively assessed goods—states value the same scarce resource, in this case goods whose value to the state depends on how much of the good the state has relative to other states (for example, weapons); and (4) conflicts of interest over absolutely assessed goods—states value the same scarce resource, in this case goods whose value to the state is independent of the amount of the good possessed by other states (for example, food items).

The first two classes of conflicts are "dissensual" (that is, the states disagree about what is "desirable"). The second two classes are consensual: There is agreement as to what is desirable and that agreement generates the conflict because the good is subject to competition (weapons or food, in the above examples). Regime theory work contends that conflicts over absolutely assessed goods (for example, food) are most conducive to regime formation, followed by conflicts over means, then conflicts over relatively assessed goods, and finally conflicts over values (for example, human rights). This ordering by

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136 Id.
137 Id.
138 Id.
139 Id. at 62-63 (citing Czempiel, note 135). Note that a classic example of a "rule" issue is human rights. See, e.g., Hasenclever et al., note 41, at 63.
140 Id. at 63.
141 Id.
142 Id. at 63-64.
143 Id. at 63; see also Beth A. Simmons & Lisa L. Martin, International Organizations and Institutions, in Handbook of International Relations 192, 196 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002).
144 Simmons & Martin, note 143, at 196; Hasenclever et al., note 41, at 63-64.
145 Hasenclever et al., note 41, at 64 fig.6.
conflict type from most conducive to least conducive (absolutely assessed goods, means, relatively assessed goods, values), corresponds to the ordering identified above by issue type (economic, security, rules). Why is this the case? Economic conflicts are likely to be conflicts over absolutely assessed goods; security conflicts are likely to be conflicts over relatively assessed goods; and rule conflicts are likely to be conflicts over values. The remaining conflict type, "conflict over means," is the second most likely to produce agreement. Because a conflict over means reflects disagreement about form, not substance, one would expect to see such conflicts arise in all three issue types.

**Background System** Features of the background system against which the specific international conflict occurs impact the likelihood of agreement and regime formation. Two primary background features are: (1) the set of "secondary variables" that characterize the parties and the situation; and (2) institutional elements that frame the mindset of a negotiating country. The secondary variables can be readily enumerated and the potential influence on interaction between and among states is obvious, even if the specific outcome is not. These variables include: (1) "frequency of interaction," (2) type of foreign policy practiced by the states, (3) "the distribution of issue-specific resources,... (4) the presence or absence of salient solutions,... (5) the number of actors in the issue-area,"146 and (6) strong individual leadership (relying on "negotiation skill and ingenuity (rather than power)").147 The effect of each factor may vary depending on the strategic game under consideration.148 For example, distribution of the relevant resources among states "makes a difference for coordination, collaboration and suasion situations, but hardly so for assurance situations."149

The "institutional bargaining" factors are elements inclined to affect the state's general perspective on the agreement process. Two key elements are likely to promote bargaining: (1) uncertainty—states' uncertainty about possible strategies and outcomes and about how those outcomes relate to the states' "core" interests leads states to "engage in integrative (rather than distributive) bargaining;"150 and (2) exogenous shocks—the existence of an exogenous shock (for example, dis-

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146 Id. at 54-55; see also Young & Osherenko, note 60, at 231.
147 Hasenclever et al., note 41, at 76 (analyzing Oran Young's model of leadership).
148 Id. at 55.
149 Id. Recall that in an assurance game, both parties prefer "mutual cooperation" as their first choice and defection as a second choice (with no advantage to a state that defects while the other cooperates). In such games, the distribution of resources is not important. If both states have "full" information, they will cooperate.
150 Id. at 72; see also Young & Osherenko, note 60, at 231.
covery of the ozone hole over the Antarctic) is expected to increase states' efforts to create a regime.151

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In sum, neoliberal regime theories view regimes as forming in response to market failures in the interactions among states. Market failure itself though is insufficient to ensure the creation of a regime. Three core factors influence whether a regime will in fact emerge: (1) the bargaining game involved, (2) the issue itself, and, (3) the background system. Evaluating the bargaining game, issue, and background system of a particular international conflict may indicate the likelihood of regime formation and may reveal the greatest hurdles.

Despite the distinctions between neorealist and neoliberal theories reviewed here, the two are strongly connected as rationalist theories152 and in fact are potentially quite complementary in their views of regimes.153 Both share a number of common assumptions, including: (1) states function against a backdrop that is anarchical; (2) states are rational (and, at least to some degree, unitary actors); (3) cooperation in the international environment is the source of regimes; and (4) regimes “promote international order.”154 These common features are the subject of critiques from the major remaining strand of international relations theory on the study of regimes, cognitivism.

iii. Cognitivist-Based Regime Theories

Cognitive theory stands separate from the first two strands of regime theory. Cognitive scholars as a group have provided the primary challenge to the rationalist theories, “criticiz[ing] realists and utilitarians [i.e. neoliberals] for not taking into account the pervasive ambiguity of reality and consequently emphasiz[ing] factors such as perception, knowledge, and ideology.”155 In fact, the theory is predominantly a critical one, not directed at establishing an affirmative vision of regime formation. Cognitivist theory in the regime area has divided into two strands, a “weak” version and a “strong” ver-

151 Young & Osherenko, note 60, at 234-35; Hasenclever et al., note 41, at 75; see generally Oran R. Young, Creating Regimes: Arctic Accords and International Governance 6 (1998) (describing the role of new ozone information in redefining the problem under negotiation).

152 Mayer et al., note 45, at 409; Hurrell, note 80, at 56.


154 Little, note 47, at 301.

155 Mayer et al., note 45, at 409.
sion,” although only the former contributes to regime theory.\footnote{Hasenclever et al., note 41, at 137. Note that the terminology of “weak” and “strong” refers to the strictness and exclusiveness of the theory’s focus on knowledge, not to the quality of the arguments.}

Under the weak version, “the demand for regimes in international relations depends on actors’ perception of international problems, which is, in part, produced by their causal and normative beliefs.”\footnote{Id.} Thus, the weak version draws attention to the question “what are the ‘origins and dynamics of rational actors’ understanding of the world?’”\footnote{The cognitivists’ focus on this last point does not make it exclusively their domain. Presumably neorealists and neoliberalists anticipate that countries must have some measure of agreement on what the issue is in order to work through a resolution. The distinction is that the cognitivists are particularly focused on why we know what we know. If information shapes states’ goals and conduct, what is the origin of the information? What kind of power and influence accords to those who possess, frame, and disseminate information?}

The analysis of regimes from the weak cognitivist viewpoint starts with three assumptions: (1) states’ interests are contingent on their understanding of the world because these interests are not a given; (2) due to the technical nature of many international issues and the uncertainty that states experience in trying to assess what options best achieve their interests, states are increasingly relying on experts and scientists to provide information and advice (and such reliance affords the experts an opportunity to influence state action); and (3) some degree of intersubjectively shared meaning about the subject at issue is required before regime formation is possible; that is, the states must have some shared vision of the problem and its context in order to achieve some level of cooperation.\footnote{Id.}

One particularly interesting development from the work is attention to the role of learning and “epistemic communities.” Because of the weak cognitivists’ first assumption (a state’s interests are not a given), policymakers turn to experts as described in the second assumption, to help them formulate the state’s interests. In some cases, these experts as a group may be able to shape the direction of policy and, through widespread dissemination of particular knowledge, facilitate broad...
agreement and ultimately regime formation. Such a group of experts is defined as an “epistemic community” (“network[s] of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”).

Epistemic communities facilitate regime formation by first developing some consensus among themselves on an issue (for example, ozone). Second, the epistemic community, which exists across the relevant states, exerts influence to shape, direct, and change state views on the issue. This new knowledge and learning can cause the states to redefine their conception of their national interest. To the extent the epistemic community has been successful disseminating its information and causing decisionmakers to adopt its views, the “widely shared ideas may facilitate cooperation in the absence of a unique equilibrium, [and serve] as focal points which help define acceptable solutions to collective action problems.” Thus, weak cognitivism proposes a model of how states may come to adopt new positions and how purveyors of knowledge can under certain circumstances shape the direction of new policy. Despite the major role of cognitivists as skeptics and critics, cognitive theories frequently are understood (even by advocates) as being “complementary” to realism and neoliberalism.

iv. Synthesizing the Regime Theory Literature

In order to use international relations theory as a tool to understand and ultimately improve international taxation, the first step is to determine how to envision the relationship of the various international relations theories. Are they purely competitive models requiring the user to test and select the most appropriate one? Are they compatible and capable of integration into a larger theoretical approach? Although much of the international relations regime theory work has been strongly competitive, with scholars pursuing their own individual directions, there have been efforts to synthesize the international relations literature. With respect to coordination of neorealism and neoliberalism one could ask “whether market failure or distributional issues best describe the range of issues involving international polit-

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161 See generally Haas, note 67, at 168-201.
162 Hasenclever et al., note 41, at 144.
163 See, e.g., Christer Jönsson, Cognitive Factors in Explaining Regime Dynamics, in Regime Theory, note 44, at 203. This move has been interpreted as not just a vote for complementarity, but a recognition of the “priority ([but] not the superiority) of rationalistic approaches...” Mayer et al., note 45, at 410 (assessing Jönsson’s position on the place of cognitive theory in the regime agenda).
As an example, Krasner argues that "human rights regimes... do not address political market failure problems and therefore cannot be adequately understood from the perspective of liberal co-operation theory... [that is, neoliberal regime theory]." He applies his position to four case studies of human rights and concludes that "success and failure were not a function of the regime's ability to reduce uncertainty and to supply information for its members but rather of the willingness of the most powerful states to enforce its principles and norms (which these states themselves had promoted) [that is, neorealistic regime theory]." Whether one views international tax conflicts as the result of market failure (for example, uncertainty, information needs, and transaction costs) or not, may have direct bearing on the applicability of neorealist vs. neoliberal regime theories. It is certainly plausible, however, that different international tax issues could be classified in different ways. Even if market failure plays no role in any human rights regimes, such uniformity may not be evident in all other subject matter areas.

If regimes develop for different reasons, then the different theories may each be valid and informative for some subset of cases. Haas enumerates four basic regime patterns:

1. Neorealist "follow-the-leader" pattern: "The regime is created by the strongest party and other countries are compelled by the dominant country to join and comply" (although the regime itself may be weak or strong depending on the underlying goals of the powerful state).

2. Institutionalism (neoliberalism) and bargaining: Regimes are created through bargaining structures reflecting each state's individual cost-benefit analysis and drawing upon game theory propositions (the more participants, the more difficult to reach agreement; moreover, the rule or position adopted by the regime often represents the lowest common denominator of the participants (although not always)).

3. Epistemic communities and follow-the-leader: Regime creation reflects the cognitivists claim about uncertainty in the international tax system—if states' interests are unclear and epistemic communities

164 Krasner, Sovereignty, note 82, at 140.
165 Mayer et al., note 45, at 408.
166 Id.
167 Observe the influence of pluralism ideas in the synthesis described in the text. Not only does a more sophisticated neoliberalism recognize the role of "secondary" variables (including leadership), the weak cognitivists' attention to epistemic communities provides another way to understand the impact of certain professional groups and international organizations with an expertise.
168 Haas, note 67, at 180-90.
169 Id. at 181.
170 Id. at 183.
have "consolidated influence in the dominant state, then [the] follow-the-leader [model] may be modified" to acknowledge the epistemic consensus and role in the hegemon.\textsuperscript{171}

(4) Epistemically informed bargaining: A regime can be created with the assistance of a widespread epistemic community, even in the absence of a strong state; for example, "[e]nvironmental regimes in this instance emerge through institutional bargaining, as described by institutionalists."\textsuperscript{172}

These four patterns represent a power-based model (realism), an interest-based model (liberalism), a modified power-based model where information or knowledge (cognitivist thread) impacts the exertion of power, and a modified interest-based model where the institutional bargaining pursued by the states is significantly impacted by information or knowledge transmitted by epistemic communities.\textsuperscript{173}

III. INTERNATIONAL TAX CASE STUDY IN REGIME THEORY

A. Some Initial Issues

This Part undertakes the evaluation of the international tax case study using international regime theory. The purpose is to assess regime theory as an explanatory model.

Before undertaking this task, it is valuable to confront an obvious reality of this project. Any effort to import international relations learning into international tax requires a certain measure of effort on the part of the tax analyst. The international relations structure, terminology, perspective, and tools must be absorbed and understood before they can be applied to tax. Can we be sure that this investment is worth the effort? Several factors strongly argue yes. First, in environmental law, the application of regime theory analysis to a series of case studies has generated interesting preliminary analysis about elements that are regularly present in cases of successful regime forma-

\textsuperscript{171} Id. at 187. Essentially, the epistemic community in the hegemonic state is helping that state to formulate and identify its interests, which as "hegemon" it will then pursue.

\textsuperscript{172} Id. at 188. In this pattern, there are no relevant "hegemons," and the states do not have a clear sense of their interests. If an epistemic community spreads across the states and reaches a degree of consensus on some issue, such as the pollution problem in a certain region, then the epistemic community may be able to mobilize in each of the affected states to inform decisionmakers (and the public) and galvanize their action.

\textsuperscript{173} Although many of the case studies completed by international relations theorists to date tend to favor interest-based theories as explaining regime formation, there remain gaps in that theory, notably in its failure to account fully for struggles marked by power and distributive concerns. See, e.g., Young & Osherenko, note 60, at 230-31; Hasenclever et al., note 41, at 4, 7.
tion and those that are absent. Second, the effort to carefully parse the factors influencing international relations should lead us to evaluate them more precisely in the international tax context, even in the absence of a full scale international relations regime theory analysis. Without question, improving our understanding of how we do and do not reach agreement on international tax does matter. Third, use of an independent field of study to enhance tax policy and practice is not new. Over the past several decades, in both domestic and international tax, economic analysis and economic models have been central in shaping discussion, targeting concerns, and framing possible options. These efforts to use economics are not costless—tax scholars must devote substantial resources to absorbing the literature. Even though the resulting tax conclusions typically rely on stylized models and highly simplified assumptions, there seems to be a consensus that the effort to integrate economic analysis into the development of tax law and policy has been, on balance, fruitful.

Clarification of tax terminology is also crucial to the case study. Frequently tax practitioners, scholars, and government officials speak of the “international tax system” or “international tax regime,” by which they have in mind a wide assortment of common rules and problems, as well as interactions among nations. For purposes of exploring the ability to reach agreement on particular rules in the international tax arena, however, such a broad use of the term “regime” is not effective. Some features of the system constitute a regime but others do not. Describing the entire effort as a “regime” would be

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174 For more than 15 years, environmental researchers and scholars have been studying regime formation and regime effectiveness. See, e.g., The Effectiveness of International Regimes: Casual Connections and Behavioral Mechanisms 1-2 (Oran Young ed., 1999). One large multinational collaborative project conducted five in-depth case studies in environmental regime formation. The project involved fourteen researchers from four countries. See generally Young & Osherenko, note 60, at 224. The project sought to ascertain the determinant factors in success (or failure) or regime formation. The five case studies were tested for the persuasiveness of four basic explanatory hypotheses (power-based, interest-based, knowledge-based, and contextual analysis), both broadly and in more detail. Interesting and potentially valuable observations emerged from this serious study. For example, the study suggested that knowledge-based factors can play a role in early regime formation but are less significant as the terms of the regime are more concretely negotiated. Id. at 236. “Leadership” of individuals (in particular, structural, entrepreneurial, and intellectual leadership) played a notable role in all of the environmental case studies and was thought to be a “necessary condition” for the regime formation. This environmental research identifies a plausible role for such research to play in the development and growth of the substantive subject area. For additional analysis of environmental regime formation, see Young, note 151. Other research projects, including those examining why regimes vary in effectiveness, also demonstrate possible roles for regime study. See, e.g., id.

175 For example, in the debates surrounding domestic tax arbitrage, economic analysis has been used to flesh out the impact of potential tax rules under different scenarios. See Ring, note 8, at 106-09 (describing the difference between “normal” and “pure” arbitrage).
both inaccurate and would miss much of the detailed operations in the international tax world. Just as in the environmental area one would not speak (in international relations terms) of a single regime, but rather of regimes on different initiatives (for example, the Mediterranean Action Plan—targeting the poor water quality of the Mediterranean),176 so too in the tax context it is necessary to focus more clearly on particular problems or initiatives.

B. Application of International Relations Theory to the Avoidance of Double Taxation Regime

1. The Regime

The selected case study targets what is often characterized as the heart of the international tax system—agreements to relieve double taxation (that is, income tax treaties). Although these agreements might be tempting primary candidates for regime designation and analysis, it is valuable to look behind the specific bilateral treaties to the network of bilateral treaties, model treaties, and domestic law, all of which reflect a shared understanding of double taxation and its relief.177 Arguably a regime exists at this level, at least as measured by the consensus definition of regime: "the principles, norms, rules, and decision making procedures" that prescribe state behavior in an issue-area.178 Thus, in this case, the principle is that international double income taxation is harmful and should be avoided. The norm is that residence countries should yield primary tax jurisdiction to source, at least with respect to certain types of income. The rules include the details of the particular mechanisms by which the residence jurisdic-

176 Haas, note 67, at 191-93.
177 The problem of double taxation refers to the possibility that two different states might tax the same income of a given taxpayer. For example, if a U.S. corporation earns money providing services in France, both countries could plausibly seek to tax that income. Such an outcome generally has been perceived as undesirable because, particularly at higher tax rates, such an uncoordinated tax burden could eliminate all profit from the transactions. Relief from double taxation does not require agreement (bilateral or multilateral). A country can unilaterally provide this relief by offering a credit for foreign taxes paid (or alternatively by excluding income earned in another country from taxation). In fact, shortly after the U.S. income tax was enacted in 1913, the United States adopted a foreign tax credit (FTC), allowing U.S. taxpayers a credit against their U.S. income taxes for foreign taxes paid on foreign income. Revenue Act of 1918, ch. 18, §§ 222(a)(1), 238(a), 240(c), 40 Stat. 1057, 1073, 1080-82 (1919). Given this unilateral relief opportunity, actually utilized by a major economic player, what more was needed? Why was a regime needed? As noted, certain issues required for the proper functioning of FTC depended on the cooperation of (and adoption of appropriate rules by) the corresponding source sovereign. Thus, unilateral action sought bilateral long-term support. See text accompanying notes 191-193, 258-59.
tion yields to the source jurisdiction (either through granting an FTC for the income taxed by the other country, or through the exemption of foreign source income). The procedures include the process of bilateral specification through a negotiated treaty with reciprocal rights and obligations and the opportunity for review through the competent authority mechanism. Although the details of many individual treaties vary, their content is remarkably constant, down to the order and numbering of the actual articles. This uniformity holds not only for the major model treaties (OECD, U.N., and U.S.), but also for the network of bilateral treaties. How did this regime emerge? What were its origins? These questions must be answered before examining the double taxation issue through the regime theory lens.

2. The History of the Double Taxation Regime

The current avoidance of double taxation regime has its origins in the 1928 League of Nations draft model bilateral income tax treaty and the documents preceding it (including the work of the International Chamber of Commerce ("ICC")). The central challenge, as clearly understood by the participants, was how to resolve the competing claims of the source and residence jurisdictions to tax the income from cross border transactions. On a theoretical level, two competing tax norms existed, supporting the two sets of claims. Residence jurisdiction could be preferred on the grounds that: (1) It best reflects ability to pay (because the taxing state can "readily" base its taxation on the entirety of the taxpayer's income and thus have an accurate sense of the taxpayer's fiscal picture). (2) Income "belongs" to people (residence), not places (source). (3) People are less mobile than activities. (4) The source approach would put tremendous pressure on the definition of source. Alternatively, source jurisdiction could be preferred: (1) The source country provides the infrastructure permitting the creation of the income (the benefits principle). (2) The source country may be aware of the income's existence and hence better able to capture the tax. (3) The source country can tax it.

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179 The treaty provisions specify how states, through designated representatives, will evaluate and review problems under the treaty.
180 See notes 214, 219, and 227.
181 See generally Graetz & O'Hear, note 14.
182 See id.
183 See, e.g., id. at 1034. In fact, in addition to resolving the source/residence conflict in taxation, treaties serve a crucial function in resolving source/source disputes. The "source" of income is not always obvious; thus any system that relies heavily on source designations places great pressure on the source rules.
184 See, e.g., id. at 1037-38 (Thomas S. Adams, a major U.S. tax advisor at the time of the framing of the international agreement on double taxation, expressed the view that source-
Since, any state concerned that its residents might face double taxation could either implement an FTC or exempt foreign source income from residence country taxation. Why would a country take this move unilaterally, which, for example, effectively allocates the first right to tax the foreign income of U.S. taxpayers to the source country? Three important reasons supported the decision: (1) It encouraged foreign investment (that is, U.S. investment into Europe), which was desirable post-World War I when U.S. private investment was viewed as essential to the rebuilding of Europe and thus to Europe’s ability to pay its war debts. (2) It encouraged U.S. exports by increasing European access to dollars. (3) Tax rates during and just after World War I were high enough to turn double taxation from a nuisance into a serious issue.

After the U.S. implementation of an FTC several other countries followed although not on the same scale (nor through the same mechanism), including Great Britain, Belgium, Italy and France—all by based taxation was inevitable because the revenue was “there” and it was unlikely that source countries could be convinced otherwise). This view has been repeated frequently. See, e.g., Stephen E. Shay, J. Clifton Fleming Jr. & Robert J. Peroni, “What's Source Got to Do With it?” Source Rules and U.S. International Taxation, 56 Tax L. Rev. 81, 89 (2002) (noting claims that “force majeure” has driven source taxation as much as any moral argument).

Edward Seligman, the influential U.S. economist who oversaw the League of Nations' 1924 report on international taxation, viewed enactment of the FTC as “the United States . . . making a present of the revenue to other countries.” Edwin R.A. Seligman, Double Taxation and International Fiscal Cooperation 133-34 n.10 (1928), quoted in Graetz & O'Hear, note 14, at 1046. The decision to provide relief from double taxation through the FTC rather than an exemption, seems to have been driven in part by the views of Adams, the proponent of the U.S. FTC in 1918. Adams saw residence countries as a valuable backstop in the taxation of income. If income escaped taxation in the source jurisdiction, it could still be taxed in the residence country under a credit approach. Graetz & O'Hear, note 14, at 1038-39; see note 185.

Adams expressed the view to the League of Nations during the inter-nation treaty process that “[e]ach State should be eager, for selfish and economic reasons, to relieve its own nationals and residents from that measure of double taxation which is due to its own legislation.” Graetz & O'Hear, note 14, at 1051 (quoting T.S. Adams).

See id. at 1049, 1052-53.

See id. at 1050 (quoting Mitchell Carroll in 1927: “The American [foreign tax] credit system is ideal for a wealthy nation that desires to encourage the expansion of its foreign trade, and is willing to afford relief from double taxation to its own citizens or residents . . . . The United States says, in effect, to its citizens—go abroad and trade . . . and I will give you relief.”). In addition, where the FTC facilitated cross-border investment, it encouraged economies of scale of production, which would mean more efficient production for the home market. Id. at 1051.
Despite states’ ability to provide unilateral relief through a credit (or an exemption), there was significant and widespread interest in developing a treaty approach for resolving many of the issues not so readily subsumed under the FTC. Important questions included: (1) how to determine the source of particular income; (2) how to balance the concerns and desires of creditor and debtor nations, especially with respect to rules governing interest and dividend taxation (After World War I the United States and the United Kingdom were major creditor nations and the continental European countries were debtor nations.); (3) what should be the limits on a state’s ability to tax the business enterprise of another state (the permanent establishment question); and (4) how to mesh the details and mechanics of two states’ domestic systems that begin with different tax bases and different levies.

The ICC, which was formed in 1920, directed early attention to double taxation. In 1920, the ICC adopted a resolution seeking “prompt agreement between the Governments of the Allied countries in order to prevent individuals or companies from being compelled to pay a tax on the same income in more than one country.” The ICC presented resolutions (not in treaty form) regarding double taxation at its 1923 Rome Conference. The resolutions included features that remain today (classification of income by category for taxation and allocation of business income among the source nations to which it corresponds). Ultimately, the resolutions were not adopted, largely due to British opposition derived from a strong preference for residence-based taxation and their view that the resolutions granted too much taxation to the source countries.

For a capital exporter, the British position is not surprising. Perhaps what is more interesting is that the United States, also a capital exporter in 1923, generally supported the substance of these resolutions. The U.S. position seems explained in part by: the views of Adams, the major (and influential) U.S. representative to the ICC, who

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190 See Mitchell B. Carroll, Double Taxation Relief, Discussion of Conventions Drafted at the International Conference of Experts, 1927 and Other Measures 2 (Dep’t of Commerce Trade Information Bull. No. 523, 1928).
191 See generally Graetz & O’Hear, note 14, at 1082-85; cf. note 215.
192 See, e.g., Graetz & O’Hear, note 14, at 1087.
193 Several famous early treaties preceded the Models including the 1922 Treaty of Rome (ratified by Austria and Italy) and the 1926 U.K.-Irish Free State Treaty. See Carroll, note 190, at 5.
194 Seligman, note 186, at 114.
195 Graetz & O’Hear, note 14, at 1066 (quoting the ICC); see also Seligman, note 186, at 114.
196 Graetz & O’Hear, note 14, at 1069.
197 Id. at 1069-70.
198 Id. at 1071-72.
historically had advocated for source-based taxation.\textsuperscript{199} Adams was interested in reaching international agreement on the details of double taxation, which required the support of debtor states.\textsuperscript{200} Another factor was “the international balance of payments, which was overwhelmingly in the United States’ favor and which permitted (perhaps even, in the interests of providing dollars for the purchase of U.S. exports and for the payment of U.S.-held debt, required) generosity in source rules to capital importers.”\textsuperscript{201}

As the ICC undertook its work in the early 1920’s, the League of Nations issued its famous 1923 Report on Double Taxation by the “four economists” representing the United States, the United Kingdom, Italy, and the Netherlands.\textsuperscript{202} The Report adopted a decidedly more pro-residence approach than the ICC by allocating interest and dividends to the residence (that is, lender) country, and by failing to call for residence countries to provide an FTC.\textsuperscript{203} In fact, the structure of their recommended scheme mirrored their view that the double taxation question was not one of sharing and allocating taxing rights between residence and source countries. Rather, they understand the question as an exclusive choice—either residence or source jurisdiction for income. The 1923 Report divided taxes into those on global income (taxed only at residence) and all other taxes (taxed at residence or source depending on an “economic allegiance” principle that in practice favored residence).\textsuperscript{204}

As its 1923 Report was being drafted, the League of Nations separately appointed a Committee of Technical Experts to translate the concerns over double taxation into more precise, practical and concrete suggestions.\textsuperscript{205} The Technical Experts issued their preliminary

\textsuperscript{199} Id. at 1072.

\textsuperscript{200} Id.

\textsuperscript{201} Id.


\textsuperscript{203} Graetz & O’Hear, note 14, at 1077-78. The work of the “four economists” was substantially led by Seligman, a U.S. tax scholar of significant influence in the United States, but with a decidedly pro-residence stance, in contrast to Adams. See, e.g., W.H. Coates, League of Nations Report on Double Taxation Submitted to the Financial Committee By Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp, 87 J. Royal Stat. Soc. 99, 102 (1924) (citing the four economists’ long-term hope that countries will come to the option of allocating the whole tax to residence (with an exemption system) as the most desirable resolution of the double taxation issue).

\textsuperscript{204} Graetz & O’Hear, note 14, at 1077; see Carroll, note 190, at 5-6.

\textsuperscript{205} Graetz & O’Hear, note 14, at 1080.
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Report in 1925. In contrast to the 1923 League Report by the four economists, this 1925 Report reflected a stronger pro-source stance ("a majority of the drafters of the 1925 Report came from debtor nations") and was endorsed by the ICC. The next step for the League was to draft an actual model bilateral treaty. In preparation for this assignment, the Technical Experts committee sought to broaden its drafting body. The United States came on board as one of the few creditor nations, motivated in part to protect its interests as such, to ensure a model that would integrate well with the U.S. system (which did not use the more schedular approach of many European countries), to encourage global uniform rules (to facilitate U.S. investment and trade), and to promote a multilateral treaty. The Technical Experts worked for several years, eventually producing the model treaty (actually three models reflecting different combinations of states with either unitary or mixed tax systems) in 1928. The resulting allocation of income was described as one in which "neither the country of origin nor the country of residence makes a complete sacrifice in favor of the other."

The next major contribution to the double taxation project came from the Organisation for European Economic Cooperation ("OEEC"), established in 1948 (predecessor to the OECD) as part of the U.S./Canadian aid distribution under the Marshall plan. From 1958-61 the OEEC Fiscal Committee undertook the task of developing a model treaty because of the "increasing importance of [the uncertainty in existing treaties as an] impediment to international..."
commercial transactions.\textsuperscript{215} The OEEC released four reports between 1958-1961, including draft treaty provisions and commentary.\textsuperscript{216} In 1961, the OECD superseded the OEEC and took over its Fiscal Committee and the treaty project.\textsuperscript{217} In 1963, the OECD issued its model tax convention and commentary, which limited the source country’s ability to collect tax on investment income.\textsuperscript{218} Subsequently revised Model Treaties were released in 1977 and 2000 (with updates in the interim and thereafter).\textsuperscript{219}

Developing countries\textsuperscript{220} dissatisfied with the pro-residence orientation of the OECD Model Treaty prompted the United Nations (which had replaced the League of Nations in 1945)\textsuperscript{221} to enter the realm of model tax treaty drafting. The U.N.’s Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries tackled the problem of drafting a model treaty to promote investment into the developing country and protect tax revenue.\textsuperscript{222} The Ad Hoc Group produced its first report in 1969, which reflected the OECD Model Treaty as its starting point. In 1980, the first model treaty was released.\textsuperscript{223} Although it favored source jurisdiction more than the OECD Model Treaty, it still reflected a compromise in that it granted neither source nor residence countries exclusive jurisdiction to tax.\textsuperscript{224} A more recent draft model treaty was released in 2001.\textsuperscript{225}

The last major player to enter the drafting universe (although it produced a draft before the United Nations) was the United States—with its 1976 Model Treaty.\textsuperscript{226} (Subsequent models appeared in 1977, 1981, 1996, and 2006.)\textsuperscript{227} Differences exist between the U.S. and

\begin{itemize}
\item \textsuperscript{217} OECD History, note 213.
\item \textsuperscript{218} OECD, Draft Double Taxation Convention on Income and Capital (1963).
\item \textsuperscript{219} OECD, Model Double Taxation Convention on Income and on Capital (1977); OECD, Model Tax Convention on Income and on Capital, Apr. 29, 2000; OECD Model Tax Convention on Income and on Capital, July 15, 2005 [hereinafter OECD Model Treaty].
\item \textsuperscript{220} Generally developing countries are capital importers, and thus are more frequently the source country in a transaction than the residence country.
\item \textsuperscript{222} See, e.g., U.N. Model Treaty, note 214, at viii.
\item \textsuperscript{223} Id. at x-xi.
\item \textsuperscript{224} Id. at xiii-xiv.
\item \textsuperscript{225} See U.N. Model Treaty, note 214.
\item \textsuperscript{227} Treasury Dep’t Model Income Tax Treaty of May 17, 1977, reprinted in 1 Tax Treaties (CCH) ¶ 212; Treasury Dep’t, Model Income Tax Treaty of June 16, 1981, reprinted in 1 Tax Treaties (CCH) ¶ 211; United States Model Income Tax Convention of Sept. 20, 1996,
\end{itemize}
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OECD Model Treaties, reflecting special concerns of the United States, such as the treatment of citizens and the prevention of treaty shopping. Yet once again the similarity between treaty models is dramatic, revealing shared views on the nature of the problem, the structure of its solution, and much of the content of the solution.

3. **Regime Theory Application**

Accepting the assertion at the beginning of Part III that there is indeed a regime governing the issue of double taxation, and that the regime comprises the above-described activities, agreements, and documents, is it possible to understand how it formed and to contemplate when regimes will be successful in the international tax environment? To the extent that regime theory accurately describes this case study, it begins to define the contours of regimes in international tax. Of course additional steps (outlined in Part IV) will be needed to develop confidence in the regime view of international tax.\(^\text{228}\)

The first step is to discern whether the double tax regime seems driven by power (neorealist tradition) or whether it seems to represent a case of market failure (neoliberal tradition)—that is, whether the resulting regime is a product of the exercise of power by one state, or a product of several states overcoming informational barriers to reach mutually desirable outcomes. Then, one must analyze the case within the framework of either the neorealist or neoliberalist theory with attention to the knowledge-based questions generated by the weak cognitivists, where applicable.

**a. Neorealist Regime Theory—Power and Distribution**

An initial reaction may be that any problem involving tax is inherently distributional\(^\text{229}\) because the rules are de facto allocating the rights to tax revenue to one country over another. If countries have approximately equal investment flows, however, then tax rules that are uniform (that is, reciprocal) ultimately should provide the same net amount of tax revenue to each country. At the very time that the

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\(^{228}\) For example, one would need to review a wide array of cases, including those in which regimes failed to be established. Also, one would need to apply the regime theory model to cases currently in progress and attempt to predict the likely course of events. But this process begins here with the first case study.

\(^{229}\) It is important to note that in this context the term "distributional" has no equity or fairness connotation. Instead it captures the distribution of "power" with respect to a particular topic. Thus, the distribution of relevant resources matters to the extent it impacts a state's power.
first model treaties were being drafted, the collected nations were in fact not equals but rather represented a set of creditor and a set of debtor nations. In such cases, the anticipated alignment of interests would be that debtor nations (capital importers) would prefer a source-based rule structure and creditor nations (capital exporters) would prefer a residence-based one. This dynamic was mirrored in the clash between the United Kingdom (which favored a residence rule) and the drafters of the 1923 ICC Report (which "favored" source-based taxation). To the extent the double taxation/source issue is perceived as a distributional one, one might anticipate that the more powerful countries would prevail—by pushing for rules that favor their type of country (capital importer or capital exporter). Given that creditor nations (capital exporters) typically would be cast as the more "powerful" set of nations, one would expect the double taxation rules to favor residence jurisdictions. In contrast, the actual outcome, as explored below, suggests a degree of complexity not fully accounted for by a model based on power—both because of the detailed source/residence allocation rules produced and because the two major powers and capital exporters, the United States and the United Kingdom, did not take the same expected position (favoring residence).

Recall that the United States and several other countries implemented a unilateral FTC (in whole or in part), which favored the source jurisdiction, whereas the views espoused in the 1920's by the United Kingdom supported taxing most cross-border income at residence.\footnote{See, e.g., Graetz & O'Hear, note 14, at 1072-73.} Presumably the original U.S. unilateral FTC provisions were enacted based on the assessment (voiced by T.S. Adams\footnote{See note 186.}) that a country benefited more by facilitating its own residents' cross-border business activity, than by collecting the taxes. Why? The answer reflects the temporal and economic dimensions of tax rules. On the temporal side, if no FTC is available this year, the residence country can obtain extra tax revenue, but in the future cross-border activity will be discouraged with negative consequences for the revenue base and the economy of the residence country. A country must measure its success by more than its current tax revenue;\footnote{Or certainly more than its immediate revenue. If the residence country's multinationals do business overseas, and the residence country allows an FTC, it still may get some tax revenue this year from those transactions, and it will continue (at least in theory) to see that flow. Also, the residence country will benefit from its industrial economy of scale (better goods at home too), and likely capture wages from producing companies' employees based in the residence country.} economic growth is also valued. If tax rules discourage taxpayers from engaging in otherwise desirable cross-border transactions, there may be a significant...
drag on the residence economy and revenue. Thus, the divide between debtor and creditor nations in terms of their preferred tax rules was not as great as might have been anticipated. Although continental Europe was in debt, it had leverage (as explained by Adams) against creditor nations such as the United States because: (1) the United States wanted repayment (as opposed to offering debt forgiveness); (2) Europe was a viable and needed market for U.S. exports; (3) agreement on the details of double taxation presumably would facilitate cross-border trade; and (4) the debtor nations were well represented in the ICC and their support was needed for agreement upon any model treaty. The United States may have been powerful in economic terms, but with respect to double taxation, European partners (and their role in a continuing and growing U.S. economy) were important actors as well.

Why did the United Kingdom not share the U.S. perspective on the source/residence debate? Certainly the U.K.’s position was consistent with the initial expectations for a capital exporting nation—but what about the additional factors bearing on the U.S. thinking? The precise foundation for U.K. advocacy of residence taxation (beyond the basic observation that it tends to favor capital importers) is not clear, but two possibilities emerge. First, the residence position was the existing Commonwealth approach and the United Kingdom may have resisted any deviation. Second, the United Kingdom, while a creditor nation, may not have been as strongly involved as the United States in the commercial side of rebuilding Europe after World War I.

Thus, although there is a distributional aspect to the resolution of double taxation, particularly in the case of countries with unequal investment flows, it is not entirely clear that the distributional issues are as significant as the potential market failure problem described in the next Subsection. That is, power does not seem to fully account for how the ultimate agreement was reached and how the regime on double taxation was formed. Why is power not enough? Note that some countries (more powerful) took the unilateral step of enacting an FTC (which limited their revenue) before negotiating the remainder of the double taxation details with other states. This decision

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233 Such as the provision of uniform source or allocation rules.

234 The double taxation issue can be envisioned as an effort to make the revenue pie bigger for countries by encouraging cross-border transactions (and perhaps discouraging evasion of especially burdensome taxes).

235 One could argue, however, that unilateral adoption of the FTC is evidence neither of power nor of market failure as the root of the double taxation agreement. If a certain practice is beneficial enough that it should be implemented, even if only unilaterally, then the fact that the regime was developed in two stages does not eliminate the power explanation. In this case though, the credit approach adopted unilaterally and promoted globally.
was interesting because it both went counter to presumptions about the general interests of capital exporting states, and because it indicated that some dimensions of the double taxation problem could be resolved without agreement or a regime. But in the end even these states sought multilateral agreement on double taxation because, in part, of the potential harm from clashes between states taking different positions on the residence/source country debate and from differences in source rules.236 In fact, given that the United States and much of post-war Europe favored the claim of the source countries, one might question the need for a regime. But the additional implementation details mattered as well as the general ideas—and a closer look at those details demonstrates that they were resolved to ensure neither the source nor residence country yielded all and that certain tradeoffs made by a state would be guaranteed.237 Thus, although the model treaties offered by the United Nations, the OEEC, and the OECD tended to favor the residence country in its various source and allocation rules,238 the baseline idea of eliminating double taxation through an FTC (or exemption) favored the source jurisdiction.

Over time, other countries have entered the dialogue concerning the allocation of taxing rights between residence and source. Many of them are non-European countries that are in a distinctly different medium- to long-term economic posture vis a vis traditional capital exporters such as the United States, or even vis a vis the capital importers of the 1920’s, many of which were countries recovering from World War I.239 Some of these new entrants to the debate balked at the OECD’s pro-residence formulation of its model

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236 If country A claims residence taxation prevails and country B claims source taxation prevails, and both agree the income was earned in country B, then double taxation is possible. Also, even if country A and country B agree that source taxation has priority, double taxation is possible if the two countries disagree as to where the income is "sourced."

237 See Carroll, note 190, at 17.

238 For example, treaties source particular classes of income based on the residence of the taxpayer. See, e.g., OECD Model Treaty, note 219, art. 11 (interest income sourced to the residence country, which is permitted to tax it; the source country may also tax the income, but at a capped withholding rate). Also, a source country (country B) is permitted to tax the activities of a residence country (country A) taxpayer taking place in country B, only if the activities rise to a certain threshold—that is, constitute a “permanent establishment.” See, e.g., id., art. 5 (permanent establishment defined), art. 7 (taxation of the permanent establishment’s business profits).

239 See, e.g., U.N. Model Treaty, note 214, at viii (listing countries involved in the U.N.’s treaty drafting process, including Argentina, Brazil, Ghana, Pakistan, Sri Lanka, Republic of Korea, Mexico, Nigeria, and Venezuela).

240 At first it may seem contradictory to suggest that the behavior of the United States, or other countries that enacted an FTC, was “favorable” to source jurisdictions, while also noting that source/capital importing countries were displeased with the OECD Model
treaty provisions, a characterization that even the OECD accepted. As the countries had no direct mechanism for influencing the OECD's model treaty because of the "limited" nature of the OECD membership, they ultimately worked through the UN to produce a draft more sensitive to the position of developing, that is, source, countries. This historical development leads to two observations regarding the neorealist understanding of regime formation. First, consistent with the neorealist view of what functions a regime can perform, the double taxation regime and its reliance on model treaties drafted by

241 The traditional tax conventions have not commended themselves to developing countries, because the essential fact remains that tax conventions which capital-exporting countries have found to be of value to improve trade and investment among themselves and which might contribute in like ways to closer economic relations between developing and capital-exporting countries are not making sufficient contributions to that end... Existing treaties between industrialized countries sometimes require the country of residence to give up revenue. More often, however, it is the country of source which gives up revenue. Such a pattern may not be equally appropriate in treaties between developing and industrialized countries because the income flows are largely from developing to industrialized countries and the revenue sacrifice would be one sided. U.N. Model Treaty, note 214, at vii (quoting the OECD).

242 Developing countries, in theory, could have started afresh on the issue of double taxation, rather than rely on the existing double taxation treaty framework. Such an approach would have entailed a number of costs, including developing the alternative structure, and the loss of familiarity, certainty, and predictability of the longstanding framework. Tax treaties appeal to developing countries for a number of reasons, chief among them the comfort that they provide to the new investor. Treaties facilitate the intersection of two countries' tax system and provide a framework for resolving conflict. Treaties also can signal to investors that a country is part of the "international" system and one can be comfortable pursuing business and investments there. Many emerging market countries believe that a treaty is an important indicator to potential investors about the status and reliability of the nation—that is, a country needs to have a treaty to be perceived as a plausible and viable investment destination. See, e.g., Lee Sheppard & Juliann Avakian Martin, Part II: Departing U.S. Treasury Staffer Discusses Treaties, 15 Tax Notes Int'l 949, 950 (Sept. 22, 1997) (quoting Deputy Intl. Tax Counsel Daniel Berman).

243 Recall, neorealists view power as the dominant explanatory factor for the existence of regimes, and more specifically, for the form the regimes take. Neorealists expect states to be concerned about their relative gains--thus a mutually "beneficial" regime could be rejected by a state because it accorded another state relative gains. Additionally, neorealists generally view regimes as weaker than neoliberals do, although they see some functions for regimes in coordinating action (for example, the powerful state may use the regime to more smoothly produce its desired outcome). Neorealists even acknowledge that regimes can provide power to the weaker players.

244 But this is also not inconsistent with the neoliberalist perspective considered in the next Subsection.
different international bodies, allowed the weaker states (for example, post-World War II developing countries) to voice their views on treaty structure.\textsuperscript{245} The implication is that participation inside the regime with the potential for some influence is preferential to sitting outside the regime entirely. Along these lines, it is interesting to note that the UN used the OECD Model Treaty as its starting point. Not only were these developing countries working within the double taxation regime, they were really working "inside" by accepting the pre-existing structure for resolving the issues.\textsuperscript{246}

Second, contrary to the neorealist view that regimes reflect and further the powerful state's goals, the double taxation regime exists separate from and independent of the continued participation of many developing and emerging market countries—many "comparably" positioned states seek agreement with each other on the matters of double taxation. In that sense, the regime at its core is not about a major power struggle in resolving double taxation. Developed countries with relatively comparable flows seek agreement because it enables coordination on details that otherwise could impede the smooth operation of unilateral efforts to prevent double taxation (for example, through credit or exemption). That said, to the extent the basic model treaty favors residence countries it does disadvantage developing countries by layering the tax treatment (which might be net neutral for two countries in comparable economic positions) on top of the pre-existing economic and investment imbalances between the two countries. Why do the developing countries continue, for the most part, to participate in (and in fact often clamor for) bilateral treaties even on these general terms? As described below, the treaties provide benefits that the market has failed to provide—coordination of the tax rules between nations. Thus, without rejecting the existence of

\textsuperscript{245} See, e.g., Krasner, Global Communications, note 82, at 351-53 (describing an example of weaker states using a regime to achieve a result slightly more favorable than their initial power position would have secured).

\textsuperscript{246} The UN Ad Hoc Group of Experts decided to use the OECD Model Convention as its main reference text in order to take advantage of the accumulated technical expertise embodied in that Convention and the Commentary thereon, and also for reasons of practical convenience stemming from the fact that the Convention was being used by OECD member countries in the negotiation of tax treaties not only with each other but also with developing countries. See UN Model Treaty, note 214, at x. The OECD and the U.N. Model Treaties also overlapped in personnel as well. Stanley Surrey, U.S. Assistant Secretary for Tax Policy (1961-69), and one of the "dominant players" in the 1960's in tax policy, "was also a major player in international organizations like the OECD (which issued its model tax treaty in 1963, ... heavily influenced by Surrey) and the UN (Surrey was the major force behind the UN 1980 model tax treaty)." Reuven Avi-Yonah, All of a Piece Throughout: The Four Ages of U.S. International Taxation, 25 Va. Tax Rev. 313, 327 (2005).
some power and distributional elements on the formation of the double taxation regime, the double tax regime does not seem adequately explained by reference to these factors. The next Subsection considers how a neoliberal view of regime formation illuminates the activities described above.

b. Neoliberalist Regime Theory—Market Failure Explanations

i. Bargaining Game Model

In order to assess the applicability of the neoliberal model, this Subsection begins by trying to identify the type of bargaining game involved. Recall the idea is that without the regime, the states are not engaged in "optimal" (that is, efficient) behavior. There are Pareto efficient outcomes the states could seek that would make at least one state better off without making the other worse off. Without cooperation, however, that Pareto efficient outcome will not be achieved. The expectation is that in some cases formation of a regime can provide the needed cooperation. The type of "game" being played impacts that likelihood that regime formation will be possible. Four basic types of games (suspension, prisoner's dilemma/collaboration, coordination, and assurance) were outlined in Part II.

As an initial matter, if cooperation means that a country unilaterally provides an FTC or exemption of foreign source income,247 and defection means that a country refuses such a credit or exemption, then the parties arguably prefer joint cooperation.248 In the absence of any coordinated strategy, how would country A and country B each respond to the existence of double taxation? Assuming A and B view double taxation as undesirable (because each wants its residents to engage in cross-border business to stimulate its economy and enhance the economic well-being of the country and its residents), they would relieve double taxation for their residents regardless of the other country's decision. Thus, even if B does not relieve the double taxation of its residents, A would provide the credit/exemption for its own residents

247 As discussed earlier, both the FTC and the exemption method alleviate double taxation by advantaging source-based taxation. It is also possible to reduce double taxation by granting more taxing rights to the residence country over source. However, given that a primary motivation behind the double taxation movement in the 1920's was a concern that one's own residents be able to pursue cross-border business activities without undue (or perhaps crippling) tax burdens, countries willing to try to resolve the double taxation problem unilaterally could do so by only relinquishing their own rights to tax—granting the FTC or providing an exemption. Thus, the "cooperative" strategy at this stage implies granting an FTC or exemption, which also relinquishes residence country taxation in favor of the source country.

248 Joint cooperation (both countries granting an FTC) would significantly reduce double taxation.
because A’s loss of tax revenue is offset by the economic benefits of having A’s own residents pursue cross-border business opportunities. While B, at least in the short run, may have extra tax revenue, B’s residents will likely reduce their cross-border activities, which negatively impacts B’s tax revenues and B’s broader economic picture.\textsuperscript{249}

Thus, cooperation, even in the face of defection, is the preferred strategy for A and B.\textsuperscript{250}

Moreover, cooperation (that is, the use of a credit or exemption) by both A and B is probably their preferred outcome out of the four possible results (both A and B cooperate, both A and B defect, A cooperates and B defects, A defects and B cooperates). Taxpayers in A, under some circumstances, may be treated as residents of B (if, for example, the country A taxpayer had a subsidiary in B). In such cases, A would prefer that B relieve double taxation for its residents because A’s grant of an FTC or exemption would not help the subsidiary in B earning income in country C. Furthermore, mirroring assumptions from the trade arena, A may adopt the view that it benefits when the global economy is more open and investments and activities can freely move around the world. If B does not relieve its residents’ double taxation, that may hinder this economic mobility, and decrease investment in A by B residents.\textsuperscript{251}

In terms of possible outcomes, joint defection is the worst. If neither A nor B relieve their residents’ double taxation then each country’s own residents will not pursue valued global commercial activities (triggering corresponding national economic and revenue effects), and the global economy overall may suffer. Implicit in the above analysis is the conclusion that an outcome in which one cooperates and the other defects is less desirable, but not as undesirable as mutual defection.

Thus, the four possible outcomes can be ranked in terms of A’s likely preference (best to worst):\textsuperscript{252} (1) joint cooperation, (2) A cooperates and B defects, (3) A defects and B cooperates, and (4) both A and B defect. An important assumption made here, that will be re-

\textsuperscript{249} If B does not implement a credit or exemption, there is an indirect effect on A, as B residents will be discouraged from foreign investment, including investment in A.

\textsuperscript{250} “Preferred strategy” here indicates that it is the action the party would likely choose in the absence of any coordination.

\textsuperscript{251} Of course A could provide some limited relief to the double taxation faced by country B residents in those cases where the B residents are earning income in A by exempting them from source country (that is, country A) tax. This outcome requires A to highly value the global free flow of investments, given that the investors are not their own residents, or to strongly desire the investment into A. Even if A would consider offering this relief, it presumably would prefer that B resolve the double taxation of B’s own residents.

\textsuperscript{252} B’s preferences would be the same, except the labeling of A and B in the listings would be reversed.
laxed later, is that A and B both share the principle that double taxation is harmful and should be avoided. They then adopt the norm that residence countries should yield to source (this adoption may be either a function of unilateral practicality or of their views of legitimate taxing jurisdiction). Finally, the rules they use to implement their norms and principles here (the FTC and exemption system) are sufficiently compatible without further accommodation (but would benefit from additional coordination). The assumption that A and B share a similar vision of the principles, norms, and rules is realistic where both A and B are developed countries. If, however, A is a developed country and B is a developing country, then the assumption must be re-evaluated, which the next Subsection does.

Based on the above analysis and rank ordering of outcomes for A and B (as two developed countries), what type of bargaining game characterizes the double taxation scenario? The suasion game is eliminated because this is not a case where there is a single equilibrium that makes one party happy but not the other. The prisoner’s dilemma also is eliminated because the outcome that results in this double taxation case, without any mutual agreement, is the Pareto optimal outcome. A coordination game fails to describe the double taxation case because, under the core assumptions in the problem, the choice is either to cooperate (institute a unilateral FTC or exemption system) or defect (offer your residents no relief from double taxation). Both A and B can arrive at rules (an implementation) that will work without negotiation between them (they can choose either the FTC or exemption system, and effective cooperation will follow). Finally, an assurance game characterization also fails because in such a game (for example, stag hunt) both parties favor the same outcome (cooperation—getting the stag) but also favor joint defection (getting two rabbits) over a cooperation/defection pattern (getting one rabbit). In contrast, with double taxation, country A (or B) would prefer to “cooperate” even if the other state defects, as evidenced by the unilateral FTC examples.

If it is true that none of the categories applies, and that the double taxation problem is not a “game” in which the parties’ must coordinate their actions to achieve desired outcomes, why have countries

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253 If a country strongly holds the principle that international double taxation of its residents should be avoided, the only unilateral option open is for that country to offer its residents an FTC or exemption.

254 In contrast, the air traffic controllers example revealed widespread agreement on the need for a single language but disagreement over the implementation (selection of a language).

255 One could argue that a fifth choice from the international relations literature applies: a harmony game. In a harmony game, both sides unilaterally prefer, and thus cause, the
pursued an elaborate process of developing and negotiating model and actual income tax treaties to relieve double taxation? It appears that both A and B would unilaterally come to the same conclusion and adopt double taxation relief without reliance on any “regime” to facilitate the process.

The answer is that this view misses a key point: There are in fact two levels of “cooperation.” The first level of cooperation concerns the decision to offer double taxation relief for residents—an outcome that seems to flow from unilateral decisionmaking. The second level of cooperation, however, concerns optimization of the double taxation relief mechanism. Although I previously asserted that no coordination of the rules was required in relieving double taxation, and that A could adopt the credit and B could adopt the exemption method, that is in fact an overstatement. In theory A and B can adopt mechanisms unilaterally that should provide adequate relief from double taxation. In reality, however, the likely intersections of their tax rules (such as tax definitions and source rules) require some coordination to provide maximum relief from double taxation. Where differences exist on these elements, double taxation will persist, even if, for example, both countries grant an FTC. Taking the provision of an FTC/exemption as a baseline, then the game is really about the implementation details and the coordination necessary to ensure full relief. Countries may be very willing to take these details seriously and devote resources to their resolution where the double taxation situations are iterative games as many taxpayers from the two countries keep facing the intersection of the countries’ rules.

Having established that the treaty regime is not about the basic implementation of double taxation relief (that would be achieved unilaterally) but rather about the complicated matter of ensuring complete relief, I now must determine the kind of game that represents the interaction. The best category would appear to be a coordination game (the air traffic controller example). Both A and B would prefer “cooperation,” here understood to be the use of shared definitions and detailed rules (such as source definitions and allocation rights). Some mechanism is necessary to reach agreement on these rules (similar to the selection of the air traffic control language) and once they are

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256 Some of these potential challenges and complications, such as the allocation of income between two countries, are discussed below.

257 Just as having a country's native language selected for the uniform standard can be desirable, so too having tax rules and definitions that resonate more clearly with a coun-
set, the parties do not have a very strong incentive to defect from the definitions.

One notable distinction separates the double taxation case from the classic coordination game of the air traffic controller, although ultimately this distinction should not be enough to render the coordination classification invalid. Unlike the air traffic controller example, it is possible that countries might perceive a defection from certain double tax rules and definitions to be to their advantage if this defection increases their tax base, while the other country continues to follow definitions that limit its taxing power. In truth, such defections are not in the country’s medium- to long-term interests given two connected facts: Double taxation is an iterative game, and defections generally will be transparent. If country A defects (refuses to follow coordinating rules and definitions), this defection will be transparent because it will immediately affect country B residents who will be very unhappy about their tax treatment. They will face unexpected double taxation because, for example, A is taxing an item of income that had been allocated to B under the treaty. Generally, B also would tax that item, as permitted under the treaty (that is, B cooperates). The resulting double taxation will trigger two responses. First, the residents of B will hesitate to invest in A because the existence of the treaty is no protection against double taxation. Second, B may seek to formally end the treaty or may engage in defections similar to A. Either or both of these outcomes is undesirable for A; thus A is unlikely to defect from the agreement.

How difficult will it be to reach this agreement, from which neither A nor B will likely defect? Assuming that both A and B are developed countries with comparable investment flows, then mutual cooperation should achieve improved trade and investment activity. If flows are equal between the states, then regardless of whether the decision is made to favor the source or the residence country in the allocation of taxing rights, the net revenue effect to the states should be try’s domestic tax rules or that seem to grant the country some additional potential revenue can be desirable. Countries will not naturally and unilaterally reach the same conclusions on these issues, and thus the regime is necessary to facilitate an agreement on the details (language or tax rules).

258 A country’s decision to defect from the selection of English as the universal air traffic controller language will likely result in the crash of a domestic plane in another country, or a foreign plane in a defecting country. Neither result is desirable, even in the short run. Hence defection is very unlikely.

259 Although defection is unlikely, that does not mean that countries would not complain or lobby for a change in the rules (that is, the “language” selected in the air traffic controller imagery).
the same. Thus, the distributive effects of the rules would be relatively minor and agreement quite probable.260

Application Involving a Developing Country

How does the analysis change if country A is a developed country and country B is a developing country?261 Returning to the threshold cooperation decision of whether to provide double taxation relief, A’s ranking should remain the same. The dominant force behind A’s desire to relieve double taxation for its residents was the view that such relief improved the economic and revenue picture for A.262 B, however, may have a quite different perspective if it has few residents that are ready and able to pursue cross-border investment opportunities (or even domestic ones), and B greatly desires investment into its country. Under these assumptions, B’s rankings (from best to worst) on the basic cooperation question (relief or no relief) would be: (1) A

260 This is not to suggest that countries of comparable investment flows will have no conflict in negotiating their double taxation treaties. Some conflict is quite likely—both because flows and economic circumstances will never be identical, and because countries may have reasons beyond direct economic impact for preferring some rules over others. That said, the more similar the economic status of the two countries the fewer distributive effects the rules typically will generate.

261 It is also possible that A and B are both developing countries. The text does not elaborate on this scenario because it is less likely to lead to any negotiations over a treaty, and where it does, the structure of the dynamics more closely mirrors that of two developed countries. If both A and B are developing, then they primarily seek investment, which neither of them has to offer. Neither A nor B is eager for its own residents to invest abroad instead of at home, and so at a unilateral level they will be inclined to offer no relief. A and B are not seriously concerned about whether the other offers relief to its own residents because those residents have nothing to invest and so the added drag on investment from double taxation is not significant. At the margin, B might prefer that A offer relief, just in case a resident of A was considering an investment in B. That preference is relatively weak, however, and not likely to prompt B to pursue treaty negotiations. Plus, in negotiation, A would demand that B offer relief as well, which B is not inclined to do, especially where the “upside” of the deal is very little investment from residents of A.

On the unilateral decision of offering relief, both A and B will defect (offer no relief). That is a Pareto efficient outcome because the only change that might make B better off would be if A offered relief, but that would make A worse off (because it is trying to keep investment inside A). See text accompanying notes 262-63 (analysis of a developing country’s perspective on double taxation, investment, and priority setting). The characterization of countries as either developed or developing is clearly a broad brush. The label helps to focus on the countries’ quantity of residents capable of significant foreign investment and on the countries’ need and ability to attract domestic investment. In reality, countries vary on these dimensions, and that variation affects their assessment of the benefits and costs of treaty negotiations. For example, if A and B each have some resident investor base that they are trying to protect from double taxation abroad and that the other is hoping to attract, A and B will negotiate like the pair of developed countries (even though they may be labeled as developing vis a vis a third country). If A and B are both developing countries according to conventional labels, but A has more resident investors, then the analysis would mirror that of a developed/developing country pairing.

262 These expectations seem reflected in the U.S. unilateral decision to implement the FTC in 1918. See notes 186-89.
cooperates and $B$ defects, (2) both $A$ and $B$ cooperate, (3) both $A$ and $B$ defect, and (4) $A$ defects and $B$ cooperates. This ranking reflects $B$’s priority of getting (and keeping) investment in its own country. If $A$ cooperates and $B$ defects, then the residents of $A$ can invest in $B$ without fear of double taxation ("good" for $B$). At the same time the few residents of $B$ with investment capacity, at least to some degree, will prefer investment in $B$ to avoid the double taxation that will occur with investment outside $B$ ("good" according to $B$’s stated goal of increasing investment in $B$). If both $A$ and $B$ cooperate, then $A$ residents will invest in $B$ ("good" for $B$) but $B$’s few resident investors will invest (to some degree) outside country $B$ ("bad" according to $B$’s identified goals). A still less desirable result follows from joint defection because if $A$ offers no relief from double taxation, then $A$ residents will not invest in $B$ ("very bad" for $B$), although at least $B$’s few resident investors will be inclined to invest in $B$ ("good" for $B$). Least desirable is the outcome in which $A$ defects and thus its residents will not invest in $B$ ("very bad" for $B$), and $B$ cooperates and its residents invest outside $B$ ("bad" for $B$).

Two observations emerge from this effort to identify the preferences where $A$ and $B$ are developed and developing. First, the likely outcome, in the absence of agreement between $A$ and $B$, is $A$ cooperates and $B$ defects. Second, $B$ does not just prefer an outcome in which $A$ cooperates and $B$ defects. It actually matters to $B$ how $A$ achieves relief of double taxation. If $A$ selects the exemption method, $B$ has an opportunity, should it choose, to levy little or no source country tax in order to encourage residents of $A$ to invest in $B$. Conversely, if $A$ selects the FTC (at least in the absence of tax sparing), $B$ can benefit from implementing a zero or low-tax rate in two ways. First, if residents of $A$ invest in $B$ through a country $B$ subsidiary, then country $A$ tax may be deferred until the subsidiary pays a dividend (assuming no anti-deferral rules apply). Second, $A$ must be aware of the income earned in $B$ in order to effectively tax it. That is, if residents of $A$ are willing to evade tax otherwise due to $A$ on their foreign source income, then a zero-tax source country would be appealing.

263 The FTC provides a benefit to the residence country taxpayer only when the source jurisdiction actually levies an income tax. If the source jurisdiction imposes little or no tax (to attract investment), the residence country taxpayers would still face residence country taxation on the foreign source income (either currently, if operating in branch form, or later, if operating in the source country through a subsidiary). Thus, the source jurisdiction is limited in its ability to use a low tax rate to attract investment. To counter this effect, some residence countries have implemented tax sparing provisions to assist source countries that are also developing countries. Under tax sparing, if a resident earns income in the developing source country and that country levies no income tax, the residence country will still provide a credit for a "phantom" tax deemed paid to the source country. See, e.g., Alvin C. Warren Jr., Income Tax Discrimination Against International Commerce, 54 Tax L. Rev. 131, 152 n.98 (2001). Thus, the residence country investor benefits from investing in the no-tax source country, and presumably will be drawn to invest there as a result.

264 $B$ can benefit from implementing a zero or low-tax rate in two ways. First, if residents of $A$ invest in $B$ through a country $B$ subsidiary, then country $A$ tax may be deferred until the subsidiary pays a dividend (assuming no anti-deferral rules apply). Second, $A$ must be aware of the income earned in $B$ in order to effectively tax it. That is, if residents of $A$ are willing to evade tax otherwise due to $A$ on their foreign source income, then a zero-tax source country would be appealing.
because A will first impose its tax on the income of residents of A and then permit a credit for any B taxes.

Arguably the resulting outcome, A cooperates and B does not, is a Pareto optimal result. No one's position can be improved without harming the other: The outcome reflects B's first choice, and to the extent A would prefer that they both cooperate, a move in that direction would make A better off, but would make B worse off. In terms of a "game" type, the developed/developing country pairing looks like a suasion game where one party wants to defect and the other has a dominant strategy to cooperate. Thus, one might anticipate that A would have to entice B into "cooperation."

In truth, however, just as with the developed/developed country pairing, there are two levels of decisionmaking. The preliminary decision concerns whether to offer unilateral relief. On that, the developed/developing country pairing produces a seeming equilibrium of cooperation/defection. In reality, however, both A and B need more than their unilateral action to fully achieve their goals. To ensure that there is no double taxation, A wants to specify with B the details of how country A residents will be taxed on their income and activities in B. This step requires a regime in which they can reach agreement (and produce a treaty). But again this raises the obvious question: Why would B participate? Recall that B's driving motivation was not relief of double taxation, but rather the encouragement of investment into B. A small amount of investment will come from country B residents who feel forced to invest in B because they face double taxation on foreign source income (B offers no credit or exemption). Country A investors, who bring the bulk of investment into B, will not come if they face double taxation or uncertainty.265 Given B's goal to increase investment, B will strive to reduce double taxation and uncertainty.

As to double taxation there are two ways to ensure country A residents will not suffer: negotiate a treaty and iron out the details with country A, or not tax country A residents (that is, impose no source country tax). A treaty would allow B to actually collect some tax without driving country A residents away. Alternatively, a zero tax could serve as strong attraction for investment (at the cost of revenue)—but in many cases it will require that the country A resident

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265 Obviously, investment in B by country A residents is not subject to an on/off switch. Even in the face of uncertainty and/or double taxation, some country A residents may invest in B. What can be said is that uncertainty and double taxation will seriously dampen enthusiasm for investment in B, and may also limit the types of investments that are considered attractive.
invest in $B$ through a country $B$ subsidiary.\textsuperscript{266} This tradeoff suggests that $B$ might not care about pursuing a treaty, at least if it is willing to forgo taxing residents of $A$. If, however, it intends to tax residents of country $A$, or if it wants to address the second problem facing investors from country $A$, uncertainty, then $B$ might seek a treaty. The treaty resolves uncertainty both explicitly and implicitly. Treaties explicitly ameliorate uncertainty by addressing questions of potential ambiguity or rule overlap, and by providing a framework through which to resolve conflict with $B$ using the help of $A$ (the competent authority mechanism). Treaties can also reduce uncertainty implicitly by signaling that $B$, a developing country, is playing according to well-known and established rules (as spelled out in the treaties) and has already been able to negotiate and work with the residence country (as demonstrated by the treaty negotiations), and therefore is an viable investment destination.

Thus, for at least a significant subset of developing countries, their real preference is in fact cooperation (that is, relief of double taxation and full resolution of the details) by both $A$ and $B$. Although their desire for investment initially might lead them to favor an outcome of cooperation by $A$ and defection by $B$, a fuller consideration of their investment goals will lead them to “embrace” the principle of eliminating double taxation. Moreover, they also will share the norm that the residence country should yield to source, as they are generally capital importers and hence their dominant role is as a source country. The details, however, may prove more troublesome, as described below, because many rules will not be a wash where the investments flows between $A$ and $B$ are not equal. These developing countries will be willing to move forward with the negotiation of a treaty—although in that process, their status as developing countries will influence their views on the rules and the ease with which agreement will be reached.

The remaining subset of developing countries, those, for example, that are primarily interested in zero taxation and who believe that they are sufficiently well-known to investors to be attractive jurisdictions, may stop at the first decisionmaking level (unilateral double taxation relief). Country $A$ will provide relief (credit or exemption) and $B$ either will provide no relief, or will provide it but not seek to coordinate with $A$.

Returning to the subset of developing countries that seek to negotiate a treaty, the selection of rules will be difficult. In a treaty context, a given country is both a residence country and a source country. If

\textsuperscript{266} See text accompanying note 264 (explaining the circumstances in which a country $A$ resident can defer $A$ tax on its foreign source income, and thus benefit in the interim from a low or zero tax rate at source).
the flows between the two negotiating countries are equal, then a treaty that favors the residence country or the source country does not in reality favor either of the two countries. If, however, \( A \) is a developed country and \( B \) is a developing country, the choice of rules (the specific method of "cooperation") to accomplish the elimination of double taxation will not be revenue neutral (as compared to a pairing of developed countries). In terms of real investment flows, the developed country will be predominantly the capital exporting country, that is, the residence country, and the developing country will be predominantly the capital importing country, that is, the source country. As an example, recall that in the 1920's, debates over the various formulations of the allocation of taxing rights to source or residence countries were significant where the countries perceived themselves as being creditor or debtor nations. The creditor nations would benefit from "pro"-residence country rules and the debtor nations would benefit from "pro"-source country rules.

Under these circumstances, the coordination game in double taxation has a strong distributional component (in contrast to the coordination game example of air traffic controllers). Although \( B \) has made the decision to provide and coordinate double taxation relief (unlike the other subset of developing countries), it may be hesitant to cooperate in the second level of the game\(^{267}\) if coordination means adjustments that favor developed countries. Country \( B \) would need to determine whether the loss of revenue from acceding to those adjustments would be offset by increases in valued economic investment and activity\(^{268}\). The reaction of many emerging and developing countries to the possibility of a tax treaty with the United States suggests that on balance they view having the treaty as desirable for the reasons identified earlier: (1) The business community is comforted by the existence of a treaty. (2) Treaties signal a country is part of the global economic and business mainstream. (3) Treaties provide a procedural bridge (for example, for dispute resolution). (4) Treaties provide predictability by answering questions on the intersection of the two countries' systems\(^{269}\). Despite their interest in reaching agreement, the developing countries still resisted a rule framework that was not neutral to them. For that reason, the OECD's traditional formulation was less appealing. What developing countries sought was an approach to double taxation that was cognizant of their distinct position. The work of the UN, falling on the heels of the OECD Model Treaty

\(^{267}\) This second level involves coordination of the definitions and adjustments to the allocation of taxing rights between the source and residence countries.

\(^{268}\) This point actually reflects the neorealist idea that regimes could perform certain functions including allowing differential treatment for "weaker" states.

\(^{269}\) See text accompanying notes 266-67.
(which had gained broad acceptance), can be understood as playing this role, to the extent it provided an alternative yet sufficiently familiar structure for coordination involving countries with unequal flows.

Thus, although complex factors dominate the double taxation case, the coordination game seems a relatively strong description of the nature of the interactions. As such, one might expect better success at regime formation than in the case of the suasion games or prisoner dilemma games. Although extensive monitoring may not be necessary, defection cannot be ruled out as readily as in the classic coordination game example of air traffic controller language.

ii. Regime Topic

After determining the nature of the bargaining game involved, the next step (under a neoliberalist approach) is to consider the impact of the topic itself on the likelihood of regime formation. Conflicts are disagreements over either: means, values, relatively assessed goods, or absolutely assessed goods. Depending on the type of conflict, regimes are more or less likely: Conflicts over absolutely assessed goods (for example, food) are most conducive to regimes; conflicts over means (for example, method of reaching an agreed result) are the next most conducive; conflicts over relatively assessed goods (for example, weapons) are less conducive; and conflicts over value (for example, human rights) are the least conducive. As a general matter there seems little disagreement that double taxation is a problem (although the measures taken to eliminate it may indicate differing views on the severity of the problem). This conclusion is reflected in the observations on a developed/developed pairing: Both A and B will unilaterally "cooperate" and provide relief. In a developed/developing pairing, the developing countries that participate are those that have made the determination that overall reduction of double taxation is desirable (even if they are not otherwise inclined to provide relief for

270 The assurance game characterization, which was rejected, would foreshadow easier regime formation. See text accompanying note 132.

271 Certainly examples of defection can be identified, such as U.S. treaty overrides. These defections are highly public and do not raise monitoring issues. In addition, U.S. law seeks to minimize the likelihood of treaty overrides, at least explicit ones. See IRC § 7852; see also S. Rep. No. 100-445, at 321 (1988) ("... neither the treaty nor the [U.S. tax] law shall have preferential status by reason of its being a treaty or a law. ... [t]he committee does not intend this codification to alter the initial presumption of harmony between, for example, earlier treaties and later statutes."). Ultimately, defections of this sort can be viewed as unilateral renegotiations of the rules that will risk triggering retaliation. The decision of the treaty partner on the retaliation question requires an independent analysis of risks and benefits.

272 See text accompanying note 145.
their own residents). Thus, there seems to be no serious debate over values.

Does the double taxation issue involve a conflict over means? Again countries seem to agree that one jurisdiction (residence or source) must surrender taxing rights in some circumstances, and the tensions arise over which jurisdiction that will be and to what extent. That debate is not founded on a disagreement about whether favoring source or favoring residence is actually more effective at achieving the goal of eliminating double taxation (a question of means), but rather on an allocation issue of who may have to bear any burden for achieving this goal. Unless the flows between the countries are equal, favoring source or residence will impose some burden on one of the countries. Thus, the conflict concerns goods, here, the tax revenue.

This leaves the question of whether the conflict is over relatively assessed or absolutely assessed goods. Given that the distinction turns on whether a country’s enjoyment of the goods correlates with how much of the goods the other country has, the application in the double tax context is not completely self-evident. First, tax revenues are money and money of course is power, as well as the ability to buy goods of any type, whether relatively or absolutely assessed. This observation provides little initial guidance as to the classification of the double taxation conflict. Second, where the countries involved have relatively equal investment flows, an agreement of any type should improve those flows for both parties, which is a benefit. Whether the specifics of the agreement favor residence or source should not have a significant distributional effect on the parties. Described in this way the conflict seems less about goods and more about the means (that is, the details as to which choice of rules is more effective), as noted above. In that case, the conflict is of the type second most likely to support regime formation.

To the extent the parties are not equals, for example A is a developed country and B is a developing country, tax dollars are at stake and the money as power characterization applies. Tax revenue is liquid and could readily become any asset the state sought. Thus, the double taxation issue could be viewed as a conflict over relatively assessed goods because countries value revenue in part by reference to how it compares to that of other countries. If this assessment is accurate, then the likelihood of regime formation for a developed and a

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273 Although there was discussion on a more theoretical level about the relative merits of source and residence countries’ claims to tax revenue, the core double taxation debate seems more of an allocation battle between capital importers and capital exporters, and later between developed and developing countries. See text accompanying notes 182-12.

274 See text accompanying notes 259-60.
developing country is less than for two developed countries, where the conflict could be characterized as a conflict over means.

Is it accurate, though, to view a dispute over revenue as a conflict over relatively assessed goods simply because a country could purchase such goods with its tax dollars? Food, which is often considered an absolutely assessed good, in theory (and in reality) could be used to buy guns, which typically are considered a relatively assessed good.\textsuperscript{275} Does this “substitution” argument undermine any distinction between conflicts over relatively and absolutely assessed goods? If countries were actually negotiating over food, should the conflict be characterized as a conflict over relatively assessed goods because food could buy guns? Despite the blurring of the distinction between the two categories of goods due to their exchangeability in the market, the distinction between relatively and absolutely assessed goods may still be a valuable measure of the likelihood of agreement. In the actual negotiation process, the nature of the good literally “on the table” might influence the negotiations (perhaps because of its salience and proximity). Thus, even though food can be used to buy guns, a dispute over food nevertheless may be less sensitive in a concrete negotiation than a dispute over weapons.

Where does this leave the categorization of the double taxation conflict, and how much does it matter? If the double taxation conflict is viewed as conflict over absolutely assessed goods, then the likelihood of reaching agreement is better than if it is viewed as a conflict over relatively assessed goods. If it constitutes a conflict over means, then, agreement should be easier to achieve than with relatively assessed goods, but not as likely as with absolutely assessed goods. Labeling does not make negotiations over revenue easier or harder, but a more accurate understanding of the conflict may improve understanding of the negotiation process. The history of bilateral tax treaties supports the idea that for countries of comparable economic situation (for example, two developed countries) the double taxation issue may most closely resemble a conflict over means, which is the second most readily formed agreement. When the UN and the developing world looked at the then-existing model treaty (from the OECD) in the 1960’s, they concluded that the terms were not easy for a developing country to accept, although they had worked adequately for the developed world.\textsuperscript{276} From the perspective of the developing world this was no “means” dispute; serious tax revenue was at stake.

\textsuperscript{275} Hasenclever et al., note 41, at 64.

\textsuperscript{276} United Nations, Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries 2-3 (1979).
Ultimately several conclusions can be drawn regarding the nature of the regime topic and how conducive it is to regime formation. First, where revenue flows are comparable, the rules allocating taxing rights have minimal distributional effect and are best characterized as a conflict over means. Not surprisingly, such conflicts are, on balance, easier to resolve than conflicts over relatively assessed goods (for example, weapons). Second, where revenue flows are not comparable, actual distributional consequences follow from whether the rules favor the source or residence jurisdiction. One country will obtain more goods (revenue) depending on how the rules are drafted. Third, whether the distributional dispute is a conflict over relatively assessed goods or absolutely assessed goods cannot be definitely answered, but the unique nature of money suggests that it may be somewhere in the middle. Money is not as benign as wheat on the negotiating table, nor is it as contentious as weapons, and certainly it can be converted into either. Finally, although the analysis has depicted a negotiation in which the flows between A and B are either equal or not equal, this picture oversimplifies the negotiation process. It is quite possible that on some issues A and B have comparable flows, but that on others they have different and unequal positions. Thus, within the negotiation over treaty rules there may be some conflicts over means and some conflicts over goods. Depending on the overall balance, likelihood of success may vary.277

iii. Background Factors Influencing Regime Formation

Having determined the game model, and the probable classification of the conflict, the last basic step in the neoliberal approach to regime analysis examines the “background factors”—those that can influence the success or failure of regime formation. Some of the major factors include frequency of interaction, distribution of issue-specific re-

277 As noted earlier, the literature on issue type argues that disputes over absolutely assessed goods are easier to resolve than those without a distributional component (the dispute over means). See text accompanying note 145. Presumably the intuition is that a finite resource will virtually force an agreement between contending parties. The frequent observation in international tax (that parties to an income tax treaty should not be very concerned over the specific formulation of the rules if the parties have comparable investment flows) seems to contradict the rank ordering of conflict types. See ALI, Federal Income Tax Project, International Aspects of U.S. Income Taxation II, Proposals of the American Law Institute on U.S. Income Tax Treaties 220 (1992). Several explanations are possible: (1) The rank ordering is different in tax. (2) The observations from the tax world implicitly assume that distributional conflicts in double taxation are essentially conflicts over relatively assessed goods, which are more difficult to resolve than conflicts over means. (3) The observations from the tax world are simply wrong guesses born of an inattention to a detailed international relations evaluation of double taxation. Further research may illuminate this question.
sources, presence or absence of salient solutions, number of actors in the issue area, and availability of leadership. Not all factors are expected to influence all game structures equally. For double taxation, the frequency of interaction combined with the "semi-exogenous" shock of World War I's high tax rates may have galvanized a measure of interest in resolving double taxation issues. The distribution of issue specific resources, another way of describing whether the two states have comparable investment flows, impacts ease of regime formation (comparable flows are a conflict over means whereas unequal flows are a conflict over goods).

As to solutions, the mechanisms for reducing double taxation (FTC or exemption) were theoretically well established and relatively clear in their application. The challenge arose in agreeing to a given application's distributional effects and coordinating the intersections of the states' distinctive domestic regimes. The difficulty in this area seems borne out by the fact that although the model treaties were the product of a group of nations (ICC, League of Nations, OEEC, OECD, and U.N.) the end products have been bilateral treaties. This held true, despite the fact that many participants along the way advocated for a multilateral treaty. Because of the large number of actors in the issue, any formal, binding multilateral agreement would have been more difficult. Some analysts have argued that the model treaties should be viewed as effectively a multilateral agreement on double taxation with the individually negotiated bilateral treaties serving as the equivalent of national reservations to the basic document. Obviously, this analogy is a stretch but it does capture the sense that there is more multilateral agreement on double taxation than the use of bilateral treaties otherwise might indicate. Moreover, the fact that countries approving the OECD Model Treaty can make their own individual observations and reservations to the model commentary supports the image of multilateral agreement with specified national reservations.

278 See Graetz & O'Hear, note 14, at 1046.
279 The exception is the U.S. Model Treaty, but even this showed the strong influence of the multilateral models that preceded it, and indeed, on which the U.S. Model Treaty is structurally based.
280 See, e.g., U.N. Model Treaty, note 214, at ix (stating that a Group of Eminent Persons appointed by the UN Secretary-General recommended a worldwide multilateral tax agreement).
The final factor, leadership, is both elusive and potentially quite powerful.283 Certainly in the early years of the U.S. income tax, a few key individuals played a pivotal role in the formation of tax policy including T.S. Adams (who pressed for the enactment of the U.S. FTC and urged the importance of source jurisdiction) and Edwin Seligman (who was one of the "four economists").284 The presence of a U.S. leader (Adams) advocating a position on double taxation that "favored" source countries must have diffused some tension between the debtor and creditor nation camps in the 1920's.285 Of course, the fact that Adams had difficulty persuading the United Kingdom shows the limits to leadership power.286 Furthermore, the differing positions of two major U.S. figures in the 1920's, Adams and Seligman, reveal that even a single country may not have a uniform voice, although Adams clearly prevailed both in terms of domestic legislation (the FTC) and international support for source jurisdiction.287 In later years, Stanley Surrey played a dominant role in both the OECD and the U.N., demonstrating the potential for individuals to transcend countries and organizations.288

The secondary factors, while not dispositive in terms of regime formation nonetheless generally resonated with the actual experience in the double taxation area. Once we have amassed a body of research on international tax case studies from an international relations perspective, it will be useful to consider whether particular factors regularly play a larger role in tax regime formation. In other subject areas, such as environmental law, extensive analysis of many case studies has demonstrated the recurrent importance of certain factors in establishing regimes in those fields.

### c. Cognitive Regime Theory

Although cognitivism has not stood alone as an independent theory of regime formation, it has developed (in its "weak" theory version) a complementary role with the neoliberalist and neorealist traditions, through its examination of the impact of epistemic communities and

283 See, e.g., Young & Osherenko, note 60, at 246-47.
284 See Graetz & O’Hear, note 14, at 1027; see also Seligman, note 186, at 114-65.
285 Graetz & O’Hear, note 14, at 1038-41.
286 Id.
287 Id. at 1043-54, 1072.
288 Avi-Yonah, note 246, at 327.
288 See, e.g., Young & Osherenko, note 60, at 223 (reviewing the findings of a large multi-sample research project in environmental law); see generally Oran R. Young, The Effectiveness of International Environmental Regimes, in The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms (Oran R. Young ed., 1999); Young, note 151.
the use of knowledge. Even in the absence of a dominant state, regimes can be created when a community of experts active across multiple states develops a vision, raises public awareness, and lobbies the government. Once a determination has been made that a particular regime is best characterized as either neorealist or neoliberalist, the regime then is examined to consider whether epistemic communities significantly impacted regime formation.

In this double taxation case study, several international organizations (League of Nations, OEEC, OECD, and U.N.) played a central role in gathering and organizing expertise, and using it to foster regimes (the treaty models). In fact, the League of Nations labeled the body it assembled to draft a model treaty as the “Committee of Technical Experts.” The organizations and their “experts” provided a setting in which many of the detailed issues of international taxation could be explored and elaborated by and among those with extensive knowledge. In addition, the momentum within these organizations to identify, enumerate, and solve the problems of double taxation propelled countries toward model treaties. The resulting model treaties themselves had an independent life of their own, exemplified by the U.N.’s decision to closely follow the OECD Model Treaty and depart only where truly necessary to achieve the specific goals of the U.N. The OECD Model Treaty had become such an established benchmark that unnecessary departures from its structure and content would have made the U.N. Model Treaty less attractive and less susceptible to adoption.

These international organizations have been vital to treaty development. But do they constitute epistemic communities? Typically these organizations comprise official representatives from the individual member countries. Differences in opinion can and do exist between the representatives that the states send to an organization and the states themselves. Nonetheless, these state-based international bodies do not represent the most classic version of an “epistemic com-

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289 See text accompanying notes 168-72, identifying four basic regime patterns, neorealist, neoliberalist, epistemic communities, and epistemically informed bargaining. Epistemic communities are groups of experts in a given field that can shape policy, disseminate information and facilitate agreement. See text accompanying notes 160-62.

290 Seligman, note 186, at 143-65.

291 See note 242 and text accompanying note 246.

292 This point actually raises a complicated question about who speaks for the “state” and whether it makes sense to describe the state as having a single view. In the most simplistic usage, where the state’s view refers to the bottom line position on an issue, there still can be a gap between that position and the views of the individual representatives to the organization. This may be especially likely if the individual has represented the state in the organization for a number of years as domestic political power changes.
munity" as understood by neoliberal theory. This tension between the organizations as independent forces of experts and as reflections of state interest can be seen in the observations Seligman made regarding the League of Nations Committee of Technical Experts:

[T]he report of the economic experts [the four economists] was . . . submitted for consideration to the official government representatives, who became known under the name of technical experts. . . . When the economic experts first met, there was from the outset nothing but cordial cooperation, as is entirely natural in the case of those who pursue the career of science and who are interested only in the attainment of truth. When, however, the technical experts came together, their concern was primarily to enter into some arrangement which would be politically agreeable to their respective countries. Everyone accordingly brought with him, together with a desire to arrive at a final arrangement, a feeling we shall not say of hostility or even of suspicion, but at all events of doubt . . . . [W]hen they learned to know each other more intimately; and especially in proportion as they were subjected to the indefinable but friendly atmosphere of the League of Nations, their whole attitude changed. Suspicion was converted into confidence; doubt was resolved by the feeling of certainty of accomplishment; and aloofness gave way to warm personal friendship which contributed materially to the smoothing out of difficulties

The picture conveyed by this quote suggests a complicated dynamic within the League of Nations that is not adequately captured by labeling the organization as a collection of countries. Moreover, these organizations have an independent internal leadership structure beyond the basic membership of representative countries. For example, the OECD is led by the Secretariat General, whose leadership is crucial to the organization and must derive from a sense that he or she is not "merely" the advocate for particular country. Even if these organizations are not the prototypical epistemic communities, they play a sufficiently similar role to require comparable attention.

293 A more classic example would be a group of scientists concerned about a developing environmental hazard on which countries are not currently focused. If the scientists are able to identify and understand the underlying environmental issue and reach a basic consensus on how it should be handled, their views could both force countries to take the issue seriously and shape the direction of the policy they develop.

294 Seligman, note 186, at 143-44.

4. Conclusions from the Double Taxation Case Study

The application of regime theory analysis to the double taxation case study generates the following specific conclusions (more general observations are discussed in Part IV). First, analysis supports the description of the double taxation relief system as a regime, with the critical components of *principle* (double taxation is harmful), *norm* (residence should yield to source), and *rules* (details coordinating the intersection of two countries' tax laws).

Second, of the two dominant models of regime formation, the neoliberalist more accurately reflects the experience of the double taxation regime. Although the neorealist focus on power (including economic power) may be useful in explaining why one distributive rule prevails over another in some treaty negotiations, the neoliberalist model (which looks beyond power to the impact of game theory, issue type, and background factors) offers a more comprehensive understanding of the regime formation process here. For example, it helps explain why countries negotiate these treaties despite the availability of a unilateral solution to double taxation, and why some countries pursue treaties and others do not.

Third, within the neoliberal model, the double taxation regime process most closely mirrors a coordination game. As such, one would expect that agreement would be relatively easier to achieve because there is no monitoring problem (that is, no need to prevent defection). The primary challenge in a coordination game is the need to reach a decision that may have some distributive effects. The greater the distributitional component of the coordination game, the more difficult it is to reach a consensus. Thus, where negotiating countries A and B are both developed countries with similar investment flows, fewer distributional issues should arise. If A is a developed country and B a developing country, the selection of regime rules will carry distributional consequences that will impede agreement.

Fourth, the nature of the conflict in the double taxation regime impacts regime formation. Following the observations articulated above for the game theory aspect of the analysis, where A and B are similarly situated, the conflict can be characterized as one over the "means" of implementing double taxation relief. Regardless of whether the selected rules favor residence or source, A and B will not experience any serious distributional impact. If, however, A is a developed country and B a developing country, then rules that favor the residence country will typically favor A—adding a distributional dimension to the conflict. Depending on how the distributional di-

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296 See Subsection II.B.3.b.
mension is viewed (conflict over absolutely or relatively assessed goods, or somewhere in between), this factor increases the tension and difficulty in reaching agreement on the rules.

Fifth, the background elements (including frequency of interaction, availability of salient solutions, impact of exogenous shocks, and presence of strong individual leadership) enhance the explanatory success of the other factors. For example, influential and credible individual leaders (Adams, Seligman, and Surrey) appear prominently in the double taxation story. Is this characteristic of regime formation in the tax area? If it is, or if it is important in a subset of cases, how might that realization impact regime strategies?

Finally, neoliberalist regime theory alone can not adequately account for the double taxation regime. The “epistemically informed bargaining” model more fully captures the factors crucial to regime formation because it incorporates these expert communities into the neoliberalist model. The epistemic community (as described by cognitivist theory) served as a driving force in the double taxation problem, both in terms of providing a forum for discussion and providing a base of expertise to structure the debate. Although the precise contours of this epistemic community and its role merit further attention, its sustained importance in the process is powerfully demonstrated over the decades.

IV. DEVELOPING THE INTERNATIONAL RELATIONS-INTERNATIONAL TAX RESEARCH AGENDA

A. Introduction

The double taxation case study demonstrates how international relations theory and methodology can contribute to our understanding of even the most familiar of international tax stories. A recurrent question in international tax is how and whether countries can reach agreement on some problem or set of issues. Whether the topic is transfer pricing, documentation standards, withholding, or arbitrage—the real question has been whether a meaningful regime can be formed. The international relations regime theory literature is devoted to understanding and answering that question. Based on the initial application of regime theory to the double taxation case study, two questions emerge: (1) What broader observations can one make? (2) How should we design a research agenda to further the development of international relations regime theory in international tax?

297 See Subsection III.B.3.c and text accompanying note 172.
B. General Observations

1. Unique Role of Taxation

The first observation derives from the fact that regime theory has been applied to many fields other than tax (for example, environment, security). How is international tax different from these areas and why might that matter to regime theory? In many other fields such as environmental or communication law, the government intervenes (that is, regulates) because the market does not function adequately on its own. For example, environmental regulations often address externalities that are beyond the scope of the market to address and require government intervention. In contrast, governments issue tax regulations for revenue and wealth redistribution reasons, rather than to remedy market failure. In this way, states have a direct and unique interest in their role as tax regulators.

In the international sphere, the government’s role in providing tax rules for cross-border transactions is no different. The state, as part of its “domestic” revenue collection function, must define what is income and who must pay taxes. Traditionally, states have taxed foreign source income earned by their residents as well as income earned in the state by nonresidents. Many countries are engaged in this taxing function simultaneously and, not surprisingly, clashes occur and cooperation is required to resolve the conflict—they need a regime. As countries form a regime, such as the double taxation regime, they must integrate their multiple roles. The states can be seen as actors pursuing an activity (taxation) and the international regime (in place of a supranational government) regulates the activity so that it can take place more efficiently (for example, reduced administrative burdens on parties, information sharing, or increased efficiency of cross-border investment). This characterization of regimes in international tax supports the view that neoliberal regime theory better describes regime formation in tax: Certainly that is the case for double taxation; further research will establish whether the majority of tax regimes share that quality.

In addition to improving taxing efficiency, the rules in a tax regime can and do allocate revenue among the competing states. Several of the double taxation regime scenarios (for example, where A was a developed country and B was a developing country) included some

298 Tax, as a subject, is a complete construct of the government. Tax issues would not exist in the absence of government tax regulation (although distributional needs would). The type of tax regulation is not necessarily related to the particular distributive/revenue goal being met. Although the primary force behind tax law is the need to collect revenue, governments do use the tax system for secondary purposes as well, including the promotion of social, political or economic goals.
allocation of tax revenue that had distributional effects (effectively favoring A or B). Governments are real stakeholders as to this revenue and have expressed a strong sensitivity to incursions against their "sovereignty" in the tax field. Whether this sovereignty claim can be justified may relate to the state's somewhat special role as a different kind of stakeholder in tax matters.

2. Importance of the Identity of Regime Participants

Of course countries are not equal in terms of their power or their resources relevant to the regime area. In the double tax regime this point emerged through the recognition that some double tax rules would have distributional effects where the flows between countries were not equal (as with a developed/developing country pair). However, even all developing (or all developed) countries are not equal. The game theory analysis demonstrated that a developed country pair could have distributional concerns in negotiating the double taxation rules. Treaty negotiation between two countries can include some rules with no distributional effects, and other rules with a small or large distributional effect. Some developing countries will pursue a double taxation regime while others will not, depending in part on the type, nature, and quantity of foreign investment into the developing country and the strength of the developing country's reputation as an investment destination.

3. Details Matter

A productive and accurate use of the game theory models requires a detailed knowledge of the substantive area being evaluated. In the scenario with a developed/developing country pair, what initially looked like a suasion game (in which A, the developed country must "pay" B to participate), looked on further reflection like a coordination game because both A and B wanted to reach agreement on double taxation to facilitate investment and neither benefited from defection.

4. Benefits of Game Theory Analysis

Evaluating regime formation from a game theory perspective offers two benefits. Using game theory requires the careful examination of parties, goals, facts, constraints, and structure in a precise way that disciplines one's analysis of the case study. A negotiator or other participant in an international regime that undertook a game theory analysis would emerge a much better informed player in the process. To
the extent that evidence suggests certain game types are more suscep-
tible to agreement or regime formation, this knowledge may offer
some predictive guidance on forward looking inquiries.

5. **Regime Formation and Path Dependence**

When states gather to evaluate a problem and seek to establish a
regime, they are likely to approach the problem from their own per-
spective. As a result, participation in the initial formation of the re-
gime can be critical to shaping the debate and its lasting
consequences. The “staying power” of regimes, exacerbates this “first
mover” problem.\(^{299}\) If an organization (or set of states) makes the
first move at resolving an issue (even if that agreement fails to reflect
the interests of all possible participants), then the regime, once estab-
ished, may have a life of its own that effectively constrains the ability
of a second generation agreement from gaining the same degree of
prominence.\(^{300}\)

6. **Overview Observations**

At the end of the day, the value of international relations regime
theory to international tax resides not in a precise predictive power,
but rather in creating a framework that shapes thinking about interna-
tional tax questions. This framework forces one to examine various
templates or lenses to see how each one illuminates the particular inter-
national tax problem. Despite the somewhat complicated and un-
resolved nature of regime theory, the coherence and organization it
brings to international tax will discipline our investigations into inter-
national agreements and will encourage tax scholars to appreciate in-
ternational tax relations as part of a broader system of international
relations.

**C. Research Agenda**

How should we design a research agenda to build upon the applica-
tion of international relations theory to international tax? What ques-
tions are especially pressing? Going forward several avenues of
inquiry are particularly important. First, as has been done in other
substantive fields, it will be valuable to develop a stable of case studies

\(^{299}\) See, e.g., Hasenclever et al., note 41, at 38 (discussing regime persistence).

\(^{300}\) Note for example the use of the same treaty structure and framework by the various
double taxation model treaties. This was true even for the U.N. despite its goal to counter
the OECD model treaty's focus on the needs of developed countries. ALI, note 277, at
220.
to help identify common issues, patterns, and problems, and to serve as a database for testing various aspects of regime theory. It may be possible to discern particular factors central to regime formation in the tax area, mirroring comprehensive efforts in the application of regime theory to environmental law. Included in the group of new case studies should be an example of "complete" failure to form a regime, as well as examples in which the states were partially successful in establishing a regime (perhaps by changing or limiting the parameters of their negotiations). Candidates for study include the agreement of the Pacific Association of Tax Administrators on documentation for transfer pricing, advance pricing agreement programs, the European Union savings directive, and efforts to limit "harmful" tax competition.

Second, the role of epistemic communities in taxation requires careful examination. Rather than approach this question solely through the case studies suggested above, it would be useful to directly study the major groups involved in international tax policy, including the League of Nations, the OEEC, the OECD, the U.N., and the International Fiscal Association. How have they identified and clarified issues, directed discussion, and shaped conclusions? In looking for their influence, we should go beyond their direct roles in producing agreements to consider more subtle contributions. For example, long before an agreement is on the table, do these epistemic communities raise the profile of issues by generating discussion and study? Do they increase the general comfort level on various rules and outcomes by presenting and reviewing them repeatedly and extensively? Based on the double taxation case study, organizations that are part of the epistemic community are worth our attention, are worth joining, and are

301 Young & Osherenko, note 60, at 223-61.
305 Beginning with the issuance of its 1998 Report on Harmful Tax Competition, the OECD has sought to mobilize support for constraints on certain types of tax competition. OECD, Harmful Tax Competition: An Emerging Global Issue (1998).
a good vehicle for advancing issues and ideas about which one has strong views.

On a related point, the impact of individuals on regime formation in taxation must be delineated. Influential individuals may be acting inside and or outside of an epistemic community or organization. This issue can be approached in two directions, through direct study of critical figures in international tax (that is, mini-biographies), and through an awareness of any individual actors in the case studies undertaken (for example, tax competition).

Finally, two connected issues that only have been hinted at so far deserve analysis—the impact of the domestic tax and political environment on formation of regimes, and the role of sovereignty in regime formation and regime failure. Asking about the domestic environment acknowledges that states are not monoliths and may not speak with a single voice or follow a single vision. (In a limited way this occurred in the tension between the views espoused by Adams and by Seligman on double taxation).306 States are not merely actors on the international stage; they are entities responsive to and in many cases shaped by their domestic sphere. One of the many threads in domestic political rhetoric on international tax is the question of sovereignty: Whether a regime would or could impinge on the nation’s sovereignty in tax matters? The power of these fears to direct international tax policy may depend on the constellation of domestic political forces and the particular international tax regime at issue.

V. Conclusion

As nations devote more attention to the coordination of their international tax activities, our understanding of how these efforts are structured, shaped, and influenced becomes critical. Regime theory from the international relations literature offers an important framework for examining the agreement process between and among nations. Through analysis of international tax case studies, we can identify common themes in the regime experience in international tax that may be generalized and may enable us to predict where and when regime formation efforts are likely to be successful and how that success can be fostered. This work is not only the domain of tax scholars. Just as researchers in international relations have developed extensive case studies in other substantive fields, they should now turn to taxation. This expansion not only offers a new realm in which to test and apply their theories, it also offers an opportunity to examine regime formation in a context in which the states have a special role (revenue

306 Graetz & O’Hear, note 14, at 1037.
collector). Ultimately, work from researchers in both taxation and international relations theory should together guide states in their efforts to design and implement international tax policies.