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# Taxation as a Global Socio-Legal Phenomenon

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## **Taxation as a Global Socio-Legal Phenomenon**

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This essay makes a proposal that may not be controversial among those with a particular interest in international law, but may be less accepted among those primarily interested in tax law: that international social and institutional structures shape, and are shaped by, historical and contemporary domestic policy decisions. As a result, to incorporate these lessons, tax scholarship should turn to fields such as international relations, organizational theory, and political philosophy to provide a broader framework for understanding the rapid changes that are taking place in tax policy and politics in the United States and around the world.

What is clear to those interested in tax law is that our field presents an increasingly technocratic thicket of special rules, principles, and standards intended to accomplish goals of varying comprehensibility and coherence. Many—perhaps most—who study tax law concern themselves with the policy goals and outcomes of a given system as described and implemented through these rules, standards, and principles, including legislative, judicial, and administrative efforts. Some scholars are explicit about their focus on a particular bounded society; others may be less explicit, but rely equally on the idea that tax law and tax policy are by their nature products and functions of people gathered within, and defined by, sovereign states.

Yet it is equally clear that the subjects of taxation—both people and activities, to different degrees—are increasingly free in their movement across physical boundaries. The four authors presenting this essay count themselves among a growing number of tax scholars who are becoming increasingly convinced that the international flow of capital, goods, and, to a lesser extent, people, presents us with a fundamentally and significantly

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changing role for legal systems and institutions that tax scholarship has not confronted as fully as other fields.<sup>1</sup>

Our aim in this essay, and in collaborating over our working papers at venues such as the 2007 ILA annual conference in New York, is to further the emergent dialogue between tax law scholars and international law scholars about how law and institutions evolve in our globalized world. Tax scholarship could benefit from the expertise of those who have focused in more depth on how international organizations, transnational networks, and non-state institutions and actors shape business and investment activities and their regulation in a world of increasingly diffuse interests and resources. In turn, uncovering the particular ways in which international tax systems, institutions and organizations develop uniquely and independently from those in related fields, such as environmental regulation and international trade, can contribute to the broader understanding of such organizations and institutions and how they impact the development of the rule of law in global society.

To that end, each of us presents below a brief introduction to a line of inquiry that we suggest could add to the story of how tax law is evolving in the United States and globally. The common thread of these inquiries is that each focuses on understanding the structure of what has been described as a “flawed miracle:” the modern international tax regime.<sup>2</sup> The existence of such a regime, assuming it is properly so designated, is a miracle in the sense that, despite the lack of any explicit multilateral agreement, there appears to be consensus on at least some fundamental issues of taxation among a fairly large, and perhaps growing, number of countries.<sup>3</sup>

But the miracle is flawed because of the failure of states to agree sufficiently on an increasingly lengthy list of key areas, which has had far-reaching and unanticipated

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<sup>1</sup> Some examples include Arthur J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 Yale J. L. & Tech. 136 (2006); Julie Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 Va. L. Rev. 1753 (1995); Reuven S. Avi-Yonah, *International Tax as International Law*, 57 Tax L. Rev. 483 (2004); Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 Law & Pol'y Int'l Bus. 145 (1998); Peggy B. Musgrave, *Sovereignty, Entitlement, and Cooperation in International Taxation*, 26 Brook. J. Int'l L. 1335 (2001); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. Rev. 443 (2007); and Tsilly Dagan, *National Interests in the International Tax Game*, 18 VA. TAX REV. 363, (1998). This is, of course, not an exhaustive list.

<sup>2</sup> Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 Tex. L. Rev. 1301 (1996).

<sup>3</sup> Reuven Avi-Yonah is the principal proponent of the theory that there is an international tax regime. See Avi-Yonah, *The Structure of International Taxation*, supra note 2. Others, such as David Rosenbloom, are skeptical that the collection of international agreements and commonality of particular rules, principles, or standards, can truly be considered a regime at all. See, e.g., H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 Tax L. Rev. 137 (2000).

effects. In effect, the flaw of the modern miracle is a series of unrelieved collective action problems among states, each multiplying the harm of the other, resulting in policies across borders that distort behavior and decision-making of individuals. Among such problems identified in the international tax law literature are international tax arbitrage and the increasingly complex matter of tax competition. The cumulative impact of this growing web of collective action problems is the potential demise of the ability of any one country, regardless of size, to effectively collect sufficient revenue to support its public needs, at the very time a growing inequality of the distribution of social burdens and benefits is being perceived worldwide.<sup>4</sup>

The need for revenue to address this global public goods concern,<sup>5</sup> and the increasing unease about the distributional effects of regulation in an economically integrated world, require that this web of collective action problems be addressed and, if possible, overcome. Correspondingly, the conception of the modern state itself has increasingly become co-extensive with the construct of citizenship, incorporating ideas about political, social, and economic rights and obligations to connect peoples with particular governments and the world. Certainly no single state can exist as a going concern without raising revenues, and just as certainly it cannot raise revenues without some plausible connection to persons and property as revenue sources. Further, states cannot raise revenue effectively or fairly in the modern international economic regime without interacting with other states, and their citizens, as people, goods, services and capital increasingly cross global borders. International tax law thus inexorably intertwines with the broader sovereign authority of the state itself, including its connections with, and to, its citizenry and the other nations of the world.

Traditional approaches to international tax scholarship have generally analyzed the law in terms of pursuing the dual policies of worldwide economic efficiency and the equitable distribution of the international tax burden. One striking feature of this traditional approach is that it is both unilateral and Ameri-centric. To the extent other countries are involved, their taxes are often considered only as a cost to be taken into account in applying the above policies.

Approaching international taxation as an inherently *global* socio-legal phenomenon would require a departure from this approach, one in which the international tax regime is analyzed as the interaction of people, capital, business, other institutions, and states, rather than purely as a cost of global capital investment. Such an approach would require both a broadening of the scope of the literature incorporated in the tax law

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<sup>4</sup> For example, as measured by an increasing gini co-efficient in an increasing number of countries. See, e.g., United Nations World Income Inequality Database, available at [http://www.wider.unu.edu/research/Database/en\\_GB/database/](http://www.wider.unu.edu/research/Database/en_GB/database/).

<sup>5</sup> See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1575 (2000)

scholarship and a departure from the traditional baselines for analysis. For example, the literature could begin to incorporate the lessons from multiple areas of scholarship, including international relations theory, sovereignty theory, political philosophy, political economy, and behavioral game theory, so as to begin to understand the changing pressures on taxation that are emerging as a result of the increasingly complex relationship between states, markets, and people in the globalized world.

Each of us has begun to consider the broad outlines of these inquiries, and presents a particular focus below.<sup>6</sup>

### **I. International Relations Theory and International Tax<sup>7</sup>**

Given the critical role of taxation and revenue for national governments, combined with the high (and continually growing) volume<sup>8</sup> of cross border business, disagreement is inevitable over whose tax rules should apply, what those rules should be and what role each country should play. How are these international tax disputes resolved? When and under what circumstances are countries able to reach agreement on these tax-based conflicts? The international tax literature has devoted tremendous resources to considering substantive issues in international taxation. Little attention, however, has been directed to how conflict is handled—essentially the “relations” aspect of international tax. Where can we look for a deeper understanding of these fundamental concerns?

Cross-border conflict is not confined to the field of taxation; virtually all social and commercial behavior can generate international disagreement. The international relations literature is devoted to examining questions of relationships, roles, conflicts and solutions on an international scale and across a wide range of substantive topics.<sup>9</sup> As

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<sup>6</sup> Each of the four co-authors served as a main contributor of one of the four Sections of this Essay, with helpful comments and suggestions from the others. Professor Ring is the principal author of the Section titled International Relations Theory and International Tax; Professor Christians is the principal author of the Section titled The Role of Sovereignty in the Development of Tax Law; Professor Dean is the principal author of the Section titled Political Economy and International Tax; and Professor Rosenzweig is the principal author of the Section titled Group Dynamics, Game Theory and International Tax.

<sup>7</sup> Professor Ring has discussed these issues in greater depth in prior articles. *See, e.g.*, Diane M. Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83 (2007); Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79 (2002).

<sup>8</sup> The U.S. Treasury Department recently observed that “[t]he United States is increasingly linked to the world economy through trade and investment. Capital now flows more freely across the globe. Businesses start up and operate more freely across borders, and business location and investment decisions are more sensitive to tax and regulatory structures than in the past.” Treasury Department, Conference on Business Taxation and Global Competitiveness Background Paper (July 23, 2007).

<sup>9</sup> *See, e.g.*, James E. Dougherty & Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations* 28-34 (5<sup>th</sup> Ed. 2001); Arthur Stein, *WHY NATIONS COOPERATE* (1990); Barry Buzan, Charles Jones & Richard Little, *THE LOGIC OF ANARCHY: NEOREALISM TO STRUCTURAL REALISM* (1993);

international tax increasingly turns its attention to the impact of state-to-state dynamics, multiple players,<sup>10</sup> and intersecting issues, the analyses and insights from international relations research will move to the fore. Although it can be daunting to begin the process of synthesizing such an expansive field of literature as international relations for the purpose of integrating it into international tax theory and policy, the effort is invaluable and ultimately essential.<sup>11</sup>

For example, by drawing upon the work in “regime theory”<sup>12</sup> from the international relations field, we can develop models for evaluating when countries are likely to reach a resolution on a significant issue of tax law or procedure (i.e. create a “regime”). Even the narrow dimension of the international relations theory literature subsumed under the heading of regime theory is not monolithic but rather incorporates several different strands and models, each of which is best understood as applicable to different circumstances (depending on whether power *or* other factors such as game theory, type of issue, and related background features are more salient) and *not* competing for complete analytic superiority. Thus, regime theory analysis provides a new lens through which to understand one of the central features of the international tax system --the regime for avoidance of double taxation which is significantly implemented through income tax treaties.

The effort to interpret the past 90 years of double taxation policy and practice through the framework of regime theory encourages us to: (1) understand that double taxation policy includes *principles* (e.g., double taxation is harmful), *norms* (e.g., residence should yield to source) and *rules* (e.g., details for coordinating the countries’ tax laws) – each of which plays a different role in the nature and degree of conflict and agreement among states;<sup>13</sup> (2) consider the impact of “power” as compared to game theory, type of issue, and pairing of states in understanding regime formation; (3) examine the relationship between a game theory description of the regime process and the types of states involved;<sup>14</sup> (4) contemplate the role played by nonstate actors in the regime process.<sup>15</sup>

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<sup>10</sup> For a consideration of nonstate actors on the global stage, see, e.g., Dougherty & Pfaltzgraff, Jr., *supra* note 8 at 28-34 (5<sup>th</sup> Ed. 2001); 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 3d. 2001).

<sup>11</sup> See, generally, Diane Ring, *International Tax Relations: Theory and Implications*, *supra* note 6.

<sup>12</sup> See, e.g., Andreas Hasenclever, Peter Mayer & Volker Rittberger, *THEORIES OF INTERNATIONAL REGIMES* (1997); *REGIME THEORY AND INTERNATIONAL RELATIONS* (Volker Rittberger ed., 1993). This use of the term “regime” from international relations theory is narrower and more precise than the general usage seen, for example, in characterizing the international tax system as an “international tax regime.” See *supra* text accompanying notes 1 and 2.

<sup>13</sup> Ring, *supra* note 6 at 147.

<sup>14</sup> The implications of game theory in international tax are considered below in Part IV by Adam Rosenzweig.

<sup>15</sup> Ring, *supra* note 6 at 147-48.

The application of regime theory to the double taxation case study serves as a window onto the possible relationship between international tax and international relations theory. First, a regime theory approach can be used to illuminate other issues currently under debate in the international tax arena, including tax competition, transfer pricing, and arbitrage. Second, with increased experience we may develop a better sense of what factors are likely to contribute to regime formation in international tax, and what factors are mostly likely to be problematic. Third, regime theory directs our attention to the powerful impact of nonstate actors including international organizations and multinational corporations on the development of international tax policy and practice.

Each of the above points emerging from regime theory work will benefit from continued research and analysis within international tax. However, regime theory is not international relations theory's only potential contribution to international tax. Two other particularly important strands from international relations theory include: (1) the role of sovereignty in regime formation and failure, and (2) the impact of a state's domestic tax and political situation on its international tax policy. Two of us (Diane Ring and Allison Christians)<sup>16</sup> are currently examining taxation and sovereignty, and two of us (Steven Dean and Adam Rosenzweig) are pursuing the impact of domestic politics and group dynamics on international taxation<sup>17</sup> -- all with the expectation that international tax will be enriched through this expanded scope of inquiry which recognizes the powerful link between international tax and international relations.

## II. The Role of Sovereignty in the Development of Tax Law<sup>18</sup>

Professor Ring's work on regime theory in international taxation highlights how important core international law concepts can be for understanding how tax law is evolving in the United States and elsewhere. When ideas change about the meaning and significance of concepts such as sovereignty—what it is, and what it implies for those who make, implement, and try to abide by what they consider to be law—the implications can be significant even if it is not clear why or how the conceptions have changed and are changing. Admittedly, a simple inquiry into the connection between taxation and sovereignty is not particularly novel—a people's right to establish its own tax system, often labeled “tax sovereignty,” as classically described by Schumpeter is a well-accepted construct in tax scholarship.<sup>19</sup> Even so, many of the ideas we tax scholars

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<sup>16</sup> Diane Ring, *Sovereignty in International Tax*, (2008), working paper on file with the authors; Allison Christians, *Sovereignty, Taxation, and Social Compact: The OECD's Search for Global Tax Policy Standards* (2008), working paper on file with the authors.

<sup>17</sup> Steven Dean, *infra* Part III; Adam Rosenzweig, *infra* Part IV.

<sup>18</sup> Professor Christians explores these issues in detail in other work. *See, e.g.*, Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 WIS. INT'L L.J. 3 25 (2007); *Sovereignty, Taxation, and Social Compact*, *supra* note 15.

<sup>19</sup> Joseph A. Schumpeter, *The Crisis of the Tax State* (1918), reprinted in *International Economic Papers* (Peacock, Stolper, Turvey and Henderson, eds., 1954).

seem to hold about sovereignty have been fairly thin, and some of our key assumptions seem to be undergoing major challenges and changes. It seems clear that tax scholars could benefit from studying a more fully developed scholarship on the nature of sovereignty as a constraint on law from a theoretical and philosophical as well as instrumentalist perspective.

As is the case in many other regulatory policy areas, globalization has brought transnational and international issues to the fore in domestic tax policy debates. At issue for those interested in how the benefits and burdens of taxation are shared among the members of societies is what states can or should do to regulate economic activity in an age in which sovereign borders mean little for the flow of economic activity yet potentially constrain the rule of law. To overcome the potential constraints of national borders on the regulation of international activity, domestic policymakers are increasingly using transnational networks, such as the Organization for Economic Cooperation and Development (OECD), as places to coordinate and forge consensus on tax practices and related regulatory issues.<sup>20</sup> In confronting the collective action problems posed by the international tax regime, these policymakers are rethinking what sovereignty does, can, and should mean in a globalized world.

A major example of this rethinking has emerged in the OECD's work on curbing what they describe as harmful tax practices.<sup>21</sup> In the relatively short amount of time since the OECD began this initiative, a significant body of scholarship has emerged to try to understand and explain what exactly the OECD's role is, can, or should be in shaping domestic tax law.<sup>22</sup> Substantively, the OECD's work illustrates the difficulty of overcoming global collective action problems in the absence of a multilateral agreement such as the GATT and a forum for resolving disputes such as the WTO. The OECD's

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<sup>20</sup> The OECD is a thirty-member international organization that includes most of the world's largest economies, including the United States, Japan, Germany, and the United Kingdom, but not including China or India. See OECD, Ratification of the Convention on the OECD and OECD Member Countries, [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html). The OECD develops tax policy guidance that both encapsulates and sets international tax standards in what are usually referred to as "international" issue areas such as transfer pricing in multinational firms and cross-border income tax coordination. It serves as a forum for consensus-building among interested parties rather than a body for creating laws with which its members are expected to comply. As such, it operates more like a transnational network than a supranational organization. See Anne-Marie Slaughter, A NEW WORLD ORDER (2004) at 11-13, 145 (Describing a transnational network as a horizontal network of national officials that builds consensus among the members but may be "decentralized and dispersed, incapable of exercising centralized coercive authority," and a supranational organization as a vertical network used by "states to delegate their sovereignty to an institution above them with real [coercive] power.") *Id.* at 13. Nevertheless, many of the OECD's declarations in tax matters may be accepted by some as largely equivalent to binding law. See, e.g., Allison Christians, *Hard Law, Soft Law, and International Taxation*, *supra* note 18.

<sup>21</sup> See [http://www.oecd.org/department/0,3355,en\\_2649\\_33745\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_33745_1_1_1_1,00.html).

<sup>22</sup> See discussion in Christians, *Hard Law, Soft Law, and International Taxation*, *supra* note 18.



work has demonstrated that striving for coherency within any one tax system is becoming an increasingly futile effort without achieving virtually global adherence to some fundamental, globally agreed-upon tax policy principles. But this recognition uncovers major challenges for national policymakers, who must determine both what justifies any given choice of principles and on what basis one sovereign state can compel any other to adhere to any given choices.

Some kind of framework is needed to debate the principles themselves as well as the theoretical justification for their implementation. One such framework that seems worth exploring is found primarily in political philosophy and international relations literature: that of defining and understanding the role of a social contract in constraining the behavior of individual societies for the benefit of the community of societies as a whole. Through its initiative, the OECD is implicitly advancing the existence of a global social compact that constrains states to regulate in a way that prioritizes community-wide fairness in tax policy over competition among states.<sup>23</sup> This work suggests that interpreting the OECD's work on harmful tax competition as a forging, or defining, of a social contract is one way to frame the issues for debate on both the substantive merits (which rules, standards and principles are being chosen) and instrumental ones (how the goals are being developed, implemented, and monitored).

This work argues that key players in the OECD are implicitly advancing a theory that sovereign states, by virtue of their membership in international society, are obligated to design their tax systems according to a set of fundamental principles agreed upon by the OECD. These policymakers are working together to create consensus positions and disseminating these positions with justificatory rhetoric regarding whether and how countries must cooperate in tax policy formulation. Their main principle seems to be that nation states have, as a function of their membership as respected sovereign entities in international society, a duty to design their tax systems in ways that are responsive to global community goals, even when these conflict with domestic goals.

This principle, and an evolving theory about sovereignty and a social compact, emerges from the language developed by international experts and officials over time to defend tax sovereignty while simultaneously advancing universality in several key areas of tax policy. The rhetoric of those who shape international tax policy gives us clues about what the rule makers, and those who reflect on the rules, think is important and appropriate, as well as what they think is unimportant or inappropriate, at any given time. Using a social contract approach is one way to explore emerging ideas and perceptions about what states owe each other, and to recognize that these ideas and perceptions are constantly evolving. Searching for changes in thinking about what tax sovereignty means within the language currently used by international experts and policymakers is a starting

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<sup>23</sup> See Christians, *Sovereignty, Taxation, and Social Compact: The OECD's Search for Global Tax Policy Standards* (2008), *supra* note 16.

point for addressing the larger question of what sovereignty does or should entail for taxation in a globalized world.

### III. Political Economy and International Taxation<sup>24</sup>

Making sense of the relationships that form the international tax regime represents an enormous, perhaps insurmountable,<sup>25</sup> challenge. As discussed above, one way to conceptualize those relationships is to picture states as citizens of a global community committed to observing norms of behavior that advance the collective interests of that community. The concept of state as citizen invites a number of compelling questions. One is whether states are “members of a close-knit group” of the type that can sustain the informal norms that can create “Order without Law”<sup>26</sup> so that the community’s interests are served despite the absence of a formal supra-national governance structure.<sup>27</sup> A second is a question that international tax scholars have only begun to confront.<sup>28</sup> The notion that individuals often act irrationally and counter to their own best interests is well entrenched among legal scholars. The question international tax scholars must grapple with is whether there is any reason to expect better of our metaphorical citizen-states. Assuming that it is possible for large groups of individuals to agree on the nature of their collective best interests,<sup>29</sup> how likely are national governments to translate their rational desires into coherent laws, treaties and policies? There are good reasons to doubt the results that even well-intentioned legislators produce.<sup>30</sup> The link between a nation’s collective well-being and the actions of its government is likely to be even more

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<sup>24</sup> Professor Dean has explored related themes in two prior articles. See Steven Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. (forthcoming, 2008); Steven Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911 (2007).

<sup>25</sup> It may even be worth asking whether any such system exists. See Rosenbloom, *International Tax Arbitrage and the “International Tax System”*, *supra* note 3 (“What, exactly, is this ‘international tax system’ that the Committee invoked? Is it real? Currently functioning?”). Professor Ring’s work, for example, demonstrates that we cannot hope to find answers unless we go beyond the traditional approach to tax scholarship into literatures that expressly try to resolve such questions.

<sup>26</sup> Ellickson, Robert C., *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES*, 167 (1991).

<sup>27</sup> Such as that presented by the WTO.

<sup>28</sup> See, e.g., Daniel Shavero, *Why Worldwide Welfare as a Normative Standard in U.S. Tax Policy?* 60 TAX L. REV. 155 (2007) (considering why it might be rational for nations to pursue policies that advance worldwide welfare).

<sup>29</sup> Are we strict utilitarians attempting to achieve the highest possible GDP? Rawlsians intent on achieving a fair distribution of well-being? Radical environmentalists?

<sup>30</sup> “Arrow’s Impossibility Theorem” does not offer much reason for optimism on this front. “In 1972, Kenneth Arrow won the Nobel Prize in large part for proving mathematically that no legislative process can simultaneously satisfy... five assumptions on legislative fairness... and remain rational, where rationality is defined as the capability of aggregating individual preferences into transitive group orderings.” Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1224 (1994).

attenuated when the role of special interests and the other foibles of the domestic political process are taken into account.

Still, accepting that domestic politics and the inherent limitations of government play a significant role in determining the shape of the international tax regime is not tantamount to rejecting the possibility that international tax scholars can understand and even help to improve that regime. In fact, just the opposite may be true. With the right tools, including the theoretical insights offered by international law scholars,<sup>31</sup> students of the international tax regime may be in a position to answer questions that would otherwise defy rational explanation. For example, domestic political considerations might explain why existing bilateral tax treaties do a good job of ensuring that taxpayers are not subject to duplicative taxes but do little to help extend the administrative reach of national tax authorities beyond national boundaries (even if both would increase the treaty partners' economic welfare).<sup>32</sup> Expanding the focus of international tax scholarship to consider these themes, along with the others described in this Essay, would help to provide policymakers with both a more accurate snapshot of the international tax regime and a greater capacity to shape its development.

#### **IV. Group Dynamics, Game Theory and International Tax<sup>33</sup>**

As with those issues discussed above, applying game theory to the international relations of states generally, and to the tax relations of states specifically, is not new.<sup>34</sup> Further, the recognition in the realm of international relations and international law that states rarely fit the traditional unitary actor model is not novel either, with public choice theory among others providing alternative, and at times persuasive, arguments to explain the rise of particular state policies.<sup>35</sup> As the unitary actor model of the state becomes increasingly challenged outside of international tax scholarship,<sup>36</sup> the assumption of the state as a unitary actor in game theoretical approaches to international tax grows decreasingly persuasive. Correspondingly, the predictions to be made from a particular model using the state as a unitary actor may not necessarily conform to reality, even if the game has persuasive explanatory effect.

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<sup>31</sup> Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 514-19 (2005) (creating a comprehensive framework for predicting the likelihood that nations will commit to and comply with international regimes).

<sup>32</sup> See Dean, *The Incomplete Global Market for Tax Information*, *supra* note 23 (discussing the differing fortunes of the early League of Nations anti-double tax and administrative assistance treaties).

<sup>33</sup> Professor Rosenzweig has focused on these issues in previous work. See Adam Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555 (2007).

<sup>34</sup> For an overview, see Ring, *International Tax Relations: Theory and Implications*, *supra* note 6.

<sup>35</sup> See, e.g., Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003).

<sup>36</sup> See, e.g., Enrico Colombatto & Jonathan R. Macey, *The Decline of the Nation State and its Effects on Constitutional and International Economic Law: A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925 (1996).

Introducing group dynamics into game theory, or incorporating groups and sub-group dynamics into the models, may provide an avenue with which to understand this disconnection.<sup>37</sup> International law and international relations theorists have begun to incorporate these multi-layered group dynamics into their models of how societies, through groups, governments or otherwise, and states interact with each other.<sup>38</sup> What is emerging from this work is that private actors interacting with each other across borders can impact not only how any one state interacts with other states, but also how such private actors interact with each other within their own borders.<sup>39</sup> As groups of private actors internalize norms through such interactions across borders, their influence on the policies of their particular state may change as well. In other words, it is the increasing globalization of people, goods and capital itself which may be changing the terms of the game, by transforming both the internal and external incentives of countries and their citizens.

This is a potentially powerful conclusion for the field of international tax law. As people, goods and capital increasingly cross state borders, and as more states are brought into the international tax discussion, it may be necessary to more directly confront the possibility that group dynamics are changing the way to conceptualize a game theoretical model of international tax. Doing so would not only provide further support to the existing explanatory game theory models of international tax, but could also significantly increase their predictive power as well. Taken to its logical, but not necessarily inevitable, conclusion, focusing the international tax laws on these group dynamics could itself change the group dynamics, potentially leading to a more optimal worldwide tax system.<sup>40</sup>

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<sup>37</sup> See Paul G. Mahoney and Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 CAL. L. REV. 1281 (2003).

<sup>38</sup> See, e.g., Alex Geisinger and Michael Ashley Stein, *A Theory of Expressive International Law*, 60 Vand. L. Rev. 77 (2007); Charles K. Whitehead, *What's Your Sign? – International Norms, Signals, and Compliance*, 27 Mich. J. Int'l L. 695 (2006); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and the Law*, 102 Mich. L. Rev. 71 (2003); see also Brent Simpson, *Social Values, Subjective Transformations, and Cooperation in Social Dilemmas*, 67 Soc. Psych. Q. 385 (2004); Peter Kollock, *Social Dilemmas: The Anatomy of Cooperation*, 24 Ann. Rev. Soc. 183 (1998).

<sup>39</sup> See, e.g., Kahan *supra* note 38 at 71 (“This set of dynamics--which I propose to refer to as the “logic of reciprocity”--suggests not only an alternative account of when collective-action problems will arise, but also an alternative program for solving (or simply avoiding) them through law.”); Whitehead *supra* note 38 at 696 (“The unitary model, consequently, understates the impact on compliance of informal pressures at the small group and individual levels, and of potentially competing interests between domestic and international state representatives.”); Simpson *supra* note 38 at 386 (“it follows that a tendency for actors to transform [Prisoners Dilemma] into [an Assurance Game] would have important implications for how groups solve social dilemmas”).

<sup>40</sup> See, e.g., Geisinger and Stein *supra* note 38 at 112 (“When norms are uncertain, the process of international law making can serve to construct normative beliefs.”)

This is not to say that game theory is a panacea for international tax cooperation. The literature is littered with the remains of theories claiming such authority in the past. It may, however, have more relevance than perhaps some would attribute, even given its limitations, if broader global socio-legal interactions are incorporated into the models so as to more closely tailor their explanatory power with the reality seen in the modern world.

## **V. Conclusion**

Contemporary tax scholars face a daunting task in redefining the contours of a rich body of literature, created by generations of professors, practitioners and policymakers, to reflect a swiftly evolving international environment. Fortunately, the work of international law scholars, among others, offers insights that make that task much more manageable. The four lines of inquiry we have outlined here represent just a few ways to approach the complex web of interrelated issues that make up the global social, economic, and legal landscape of which taxation plays a part. Each is part of a search for more comprehensive analytical tools to assess tax policy decisions that are being made by national, subnational, and transnational bodies. As the line between national and international blurs in taxation as it has in other regulatory fields, tax scholarship can benefit from the analytical work being done by others who have grappled with the role and reach of international actors, institutions, organizations, and frameworks. We hope that this essay furthers this kind of study.