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## Case Study Research and International Tax Theory

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**CASE STUDY RESEARCH AND INTERNATIONAL TAX THEORY**

ALLISON CHRISTIANS\*

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## INTRODUCTION

International income tax law, just like domestic tax law and law in general, evolves through political, economic, and social contexts that are complex, multifaceted, dynamic, and difficult to study systematically. Perhaps as a result, the underlying theories of international income taxation have been static—and unsatisfactory—since they first emerged in the early twentieth century.<sup>1</sup> Over the last ten years, legal scholars have begun to use what they describe as “case studies” in an effort to develop better theories about how governments can or should impose taxation on international activities.<sup>2</sup> The attributes and functions of case studies, while well-studied and documented in other disciplines, have not been explored in tax law scholarship.

This article explores case study research in international tax law scholarship and argues that legal scholars could significantly advance international tax theory by approaching their case studies more explicitly and more methodically. It advocates especially for an heuristic approach to case study research, that is, one that employs qualitative social science research methods with the primary goal of identifying new data and developing new theoretical approaches for the study of international tax law. A more methodical, qualitative approach to case studies would help legal scholars more effectively test established international tax theories and assumptions, reveal information that will help new theories and assumptions emerge, and create new spaces for policy development in international tax law.

This article is thus a study of case studies. The goal is to investigate both how and why legal scholars use case studies for developing theory in international tax law, and to consider how qualitative case study research principles and practices from other disciplines might inform the work undertaken by legal scholars.<sup>3</sup> As a result, much of this work describes the

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1. See, e.g., Michael J. Graetz, *The David R. Tillinghast Lecture, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261 (2001) (discussing the development of current international tax policy and suggesting how it should be reexamined for the twenty-first century).

2. The use of the term “legal scholars” is intentionally limiting: this article focuses on the use of case studies by academic writers whose principal or only training is in the study of law. As a result, it omits many case studies on topics of international tax law undertaken by economists and social scientists. See WORLD TAX REFORM: CASE STUDIES OF DEVELOPED AND DEVELOPING COUNTRIES (Michael J. Boskin & Charles E. McLure, Jr. eds., 1990) [hereinafter WORLD TAX REFORM] for a sampling of international tax law studies by economists and social scientists. The authors of the case studies discussed in this article are full-time legal professors, with three exceptions: Scott Budnick and Ben Seessel, now practicing attorneys, were law students when they wrote their case studies, and Andrew Morriss has a joint appointment in the law and business schools at his institution.

3. This article thus responds directly to earlier calls for legal scholars to engage in a more multidisciplinary approach to the study of international tax law. See, e.g., Allison Christians et al., *Taxation as a Global Socio-Legal Phenomenon*, 14 ILSA J. INT’L & COMP. L. 303, 303

case studies themselves, including a survey of the scholars' stated assumptions about the purpose and goals for engaging in the case studies, their approaches to or methods of building the cases, and their statements about the applicability or explanatory value of their case studies. These descriptions are contextualized by social science discourse on the use of case studies for theory development.

Part I begins the inquiry with the criteria I used for choosing the scholarship for this study and explores what is meant by the term "case study." Part II explores why legal scholars choose to study cases in their international tax scholarship. Part III examines how these scholars decide what cases to study. Part IV explores the approaches legal scholars have taken to present their case studies in international tax law. Part V examines how international tax law scholars assess the applicability or explanatory value of their case studies and suggests that while the growing contribution of case studies to international tax theory is exciting, legal scholars could engage in case studies more productively by consulting the method-related considerations which inform social science research.

#### I. WHAT ARE "CASE STUDIES"?

Beginning an inquiry into the use of case studies in international tax law scholarship requires some explanation of what is meant by the term "case study." The term has not been explicitly defined by international tax law scholars. In the language of social science, a case study is described as "not a methodological choice but a choice of what is to be studied."<sup>4</sup> In this view, one must first determine what constitutes a "case" in order to decide whether a case is being studied.<sup>5</sup>

Social science discourse includes rigorous debate about what might constitute a case, with descriptions ranging from very broad to very specific

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(2008) ("[T]ax 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."); Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 368 (1998) (encouraging tax scholars to expand beyond normativity to embrace empirical studies and narrative projects, using social sciences to aid their research); Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 86–87 (2007) [hereinafter Ring, *International Tax Relations*] (calling for integration of "important areas of nontax research into [the] universe" of international tax scholarship).

4. Robert E. Stake, *Qualitative Case Studies*, in THE SAGE HANDBOOK OF QUALITATIVE RESEARCH 443, 443 (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2005) [hereinafter THE SAGE HANDBOOK].

5. *See id.* at 444.

criteria.<sup>6</sup> In one view, a case is described in terms of its subject matter: What counts as a case is a “phenomenon for which we report and interpret only a single measure on any pertinent variable.”<sup>7</sup> This subject-oriented description permits a very broad view of cases, in which any study of a particular event or phenomenon constitutes a case study.<sup>8</sup> But most analyses of cases also require a purposive element: A case is not defined simply by reference to a subject but necessarily implies a purpose for undertaking the study.<sup>9</sup> From this perspective, a case may be described as “an instance of a class of events . . . [which is] a phenomenon of scientific interest . . . that the investigator chooses to study with the aim of developing theory (or ‘generic knowledge’) regarding the causes of similarities or differences among instances (cases) of that class of events.”<sup>10</sup> The underlying premise is that the audience expects social science research to demonstrate or explain a social phenomenon through the rigorous and systematic study of cases.<sup>11</sup>

For purposes of analyzing the use of case studies in international tax law scholarship, I began by identifying articles on the subject of international taxation in which the authors explicitly referred to their content as a “case study” (one of which is my own work).<sup>12</sup> Not all of the authors of these

6. See generally Charles C. Ragin, *Cases of “What is a Case?”*, Introduction to WHAT IS A CASE?: EXPLORING THE FOUNDATIONS OF SOCIAL INQUIRY 1, 2 (Charles C. Ragin & Howard S. Becker eds., 1992) [hereinafter WHAT IS A CASE?] (discussing the wide-ranging application of the term “case” to both qualitative and quantitative research conducted in the social sciences).

7. ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 17 (2005) (describing this view as “[o]ne early definition, still widely used” but increasingly rejected by political scientists); see also Harry Eckstein, *Case Study and Theory in Political Science*, in 7 HANDBOOK OF POLITICAL SCIENCE, STRATEGIES OF INQUIRY 79, 85 (Fred I. Grenstein & Nelson W. Polsby eds., 1975).

8. See John S. Odell, *Case Study Methods in International Political Economy*, 2 INT’L STUD. PERSP. 161, 162 (2001) (“What counts as a case can be as flexible as the researcher’s definition of the subject. By a *case* I mean a single instance of an event or phenomenon, such as a decision to devalue a currency, a trade negotiation, or an application of economic sanctions.”); Ragin, *supra* note 6, at 2 (“At a minimum, every study is a case study because it is an analysis of social phenomena specific to time and place.”).

9. See, e.g., GEORGE & BENNETT, *supra* note 7, at 18 (“A case study is thus a well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historical event itself.”).

10. *Id.* at 17–18.

11. Ragin, *supra* note 6, at 2.

12. Ilan Benshalom, *The Quest to Tax Interest Income in a Global Economy: Stages in the Development of International Income Taxation*, 27 VA. TAX REV. 631, 636 (2008); Scott Budnick, *Internet Taxation & Burkina Faso: A Case Study*, 10 ILSA J. INT’L & COMP. L. 549, 549 (2004); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639, 639 (2005); Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333, 336 (2002) [hereinafter “Cockfield,” *Digital Biosphere*]; Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171,

articles discuss the criteria by which they describe their work as a case study—indeed, very few of them do. It may be debatable whether the research would be considered to constitute case studies by scholars in other disciplines. Yet for purposes of discovering why scholars might be using case studies in international tax law scholarship, the fact that these scholars use the term “case study” to describe what they are doing seems relevant.

This is not to say that the handful of articles discussed herein are the only articles in which legal scholars use the term “case study” to describe their work on the subject of international tax. First, my source of articles is generally limited to legal scholars who publish in law reviews and journals that are available in the databases maintained by LexisNexis and Westlaw.<sup>13</sup> Any article, book, monograph, or other material that is not published in a law review or journal included in these databases, not cited by any of the authors of the searched publications or not explicitly identified as a case study, is therefore excluded.<sup>14</sup> Second, because this article focuses on the use of case studies for the purpose of developing theory in international tax law scholarship, I omitted articles that use case studies solely for purposes of description.<sup>15</sup>

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1175 (2001) [hereinafter “Cockfield,” *Transforming the Internet*]; Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 411 (2005); Ring, *International Tax Relations*, *supra* note 3, at 86; Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79, 85 (2002) [hereinafter “Ring” *One Nation*]; Diane M. Ring, *What’s at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT’L L. 155, 159 (2008) [hereinafter *Sovereignty Debate*]; Adam H. Rosenzweig, *Harnessing the Costs of International Tax Arbitrage*, 26 VA. TAX REV. 555, 559 (2007); Ben Seessel, Comment, *The Bermuda Reinsurance ‘Loophole’: A Case Study of Tax Shelters and Tax Havens in the Globalizing Economy*, 32 U. MIAMI INTER-AM. L. REV. 541, 543 (2001).

13. To identify case studies in international tax scholarship, I searched the legal scholarship databases in LexisNexis and Westlaw for articles that included both the terms “international tax” and “case study” (including variations). Of course, I also Googled “international tax case study,” which yielded over ten million hits. A review of the first 1,000 hits (an admittedly arbitrary sample) revealed most of the articles I had otherwise identified for this study, but no additional articles meeting my selection criteria.

14. Because of these limitations, there are probably theory-developing international tax case studies written by legal scholars, especially those outside of the United States and Canada, that I have missed. I hope that as I continue this research, and discuss it with others, any such studies will come to light.

15. For example, I excluded an article in which the author used what he identified as a case study to investigate how profits from international Internet software sales would be taxed by the United States in alternate scenarios involving the physical location of the server. See J. Clifton Fleming Jr., *US Income Taxation of Profits from Software Sales by Australian Vendors into the US via the Internet*, 4 INT’L TRADE & BUS. L. ANN. 97, 97 (1999), reprinted in 19 TAX NOTES INT’L 675 (1999) (providing a thorough description useful for subsequent studies, but not itself purporting to develop theory).

In addition to the self-identified international tax case studies, I identified an additional article, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles* (“*The Saga of the Netherlands Antilles*”), as an international tax case study.<sup>16</sup> This article differs from the others in that it does not explicitly use the term “case study” to describe its approach. Even so, I included it in my study, first, because it embodies the case study concept in general, in some ways more so than the self-identified case studies, and second, because it is the sole example of a primarily heuristic approach—the authors undertook the case study for the purpose of developing new information from which to draw and to test new theoretical approaches to existing questions of international tax law.<sup>17</sup> Perhaps many additional international tax law articles could be described as case studies to varying degrees. However, I chose each of the case studies discussed herein for its unique approach to the studied topic, as discussed below.

In the self-identifying case study articles chosen for this study, the authors identified tax avoidance practices;<sup>18</sup> a proposed set of legal rules;<sup>19</sup> an existing set of legal rules;<sup>20</sup> the formation of a set of legal rules;<sup>21</sup> a set of international tax agreements;<sup>22</sup> a proposed set of international standards;<sup>23</sup> a country’s

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16. Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT’L L.J. 377 (2009).

17. *Id.* at 383 (using the experience of the Netherlands Antilles “as a lens through which to examine” how “onshore” legal systems and “the international regulatory climate may affect other international financial centers, both onshore and offshore”).

18. Benshalom, *supra* note 12, at 674 (using the issue of thin-capitalization or earnings-stripping, a means of tax avoidance employed by multinational companies, as a case); Cockfield, *Digital Biosphere*, *supra* note 12, at 367 (using the tax planning efforts of Wal-Mart Stores, Inc. to reduce sales tax burdens on Walmart.com as a case); Ring, *One Nation*, *supra* note 12, at 90 (using four methods of international tax avoidance as cases); Seessel, *supra* note 12, at 543 (using tax avoidance through reinsurance mechanisms as a case).

19. Cockfield, *Transforming the Internet*, *supra* note 12, at 1188 (using a draft proposal on e-commerce taxation by an OECD working party as a case); Ring, *Sovereignty Debate*, *supra* note 12, at 206 (using European Union efforts to harmonize the corporate tax base as a case).

20. Ring, *Sovereignty Debate*, *supra* note 12, at 216 (using a WTO ruling against U.S. export tax incentive rules as a case); Rosenzweig, *supra* note 12, at 617 (using a set of legal rules—the entity classification election regime—as a case).

21. Dean, *supra* note 12, at 411 (using “the creation of the 1996 check-the-box entity classification regulations” as a case).

22. Ring, *International Tax Relations*, *supra* note 3, at 86 (using “the development of a system to relieve double taxation” tax treaties as a case).

23. *Id.* at 122–23 (using United States participation in an OECD-led campaign to curb harmful tax competition as a case).

experience with a specific set of legal rules;<sup>24</sup> and a hypothetical international agreement<sup>25</sup> as their “cases.” None of these articles defined the studied phenomena or events as cases by reference to identifying criteria such as those described above from the social science literature (i.e., chosen to serve a specific scientific or intellectual purpose). In each case, the articles simply identify the event or phenomenon as a “case” without further discussion. In *The Saga of the Netherlands Antilles*, the article that does not self-identify as a case study, the case in question is the history that led the Netherlands Antilles to become a notoriously famous tax haven.<sup>26</sup>

Are these cases? Does it matter whether they are or not? It might, if defining the case as such helps scholars explain the goals and expectations behind the decision to focus on a particular event or phenomenon.<sup>27</sup> In the social science literature, the debate over what constitutes a case takes place in part because there is some concern about the purpose of undertaking the study, as well as the reliability of the conclusions to be drawn from the study.<sup>28</sup> These concerns ought to inform legal scholarship as well.

Social scientists suggest that one of the most problematic aspects of using case study methods in scientific inquiry is the possibility that researchers may choose unrepresentative or otherwise inappropriate cases to “prove” a specific point.<sup>29</sup> In statistical (quantitative) research, the problem with this tendency, called “selection bias,” is that the researcher may choose subjects for study that are not sufficiently random, causing doubt about the study’s conclusions. The selection bias problem is what leads scientific researchers to caution one another not to “select cases on the dependent variable”—that is, not to choose only those cases that demonstrate the outcome sought for the research.<sup>30</sup>

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24. Budnick, *supra* note 12, at 556 (using Burkina Faso’s experience with e-commerce tax and tariff rules established by developed countries in the context of the WTO as a case).

25. Christians, *supra* note 12, at 666 (identifying a hypothesized tax treaty between the United States and Ghana, based on other U.S. tax treaties with developing countries, as a case).

26. Boise & Morriss, *supra* note 16, at 414–19.

27. Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1189 (2006) (“We must have some theories, or at least organizing assumptions, that guide us in what we look for and ask.”).

28. See, e.g., Ragin, *supra* note 6, at 3–4.

29. GEORGE & BENNETT, *supra* note 7, at 22 (stating that case studies “are particularly prone to versions of ‘selection bias’ that concern statistical researchers”); Christopher H. Achen & Duncan Snidal, *Rational Deterrence Theory and Comparative Case Studies*, 41 WORLD POL. 143, 160 (1989); David Collier & James Mahoney, *Insights and Pitfalls: Selection Bias in Qualitative Work*, 49 WORLD POL. 56, 59 (1996) (“Selection bias is commonly understood as occurring when some form of selection process in either the design of the study or the real-world phenomena under investigation results in inferences that suffer from systematic error.”); Barbara Geddes, *How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics*, 2 POL. ANALYSIS 131, 131 (1990).

30. See, e.g., Collier & Mahoney, *supra* note 29, at 60.



Selection bias is identified as a problem to the extent that the goal is to show that one factor (variable) caused or is predicted to cause another.<sup>31</sup> The concern is that in choosing cases that exhibit selected features or outcomes, the researcher might ignore contradictory cases or over-generalize from the selected cases to wider populations.<sup>32</sup> In other words, the particular case being studied, which may or may not be representative, might cause us to either overstate or understate the relationship between different aspects of the objects of our study.<sup>33</sup> This problem might be especially acute in tax scholarship, since this scholarship (like much legal scholarship) is typically normative rather than scientifically inquisitive in nature.<sup>34</sup>

The question this raises for international tax law scholars using case studies (as for any researcher) is, thus, what can be learned both *about* and *from* the event or phenomenon identified as the case.<sup>35</sup> Selection bias may not necessarily constitute a problem for case study research in international tax law scholarship, but awareness of the possibility of bias might help tax law scholars build their cases more explicitly and more persuasively. For instance, a scholar might intentionally choose a case that exhibits particular features or a particular outcome in order to make a point about those features or that outcome.<sup>36</sup> Legal scholars might take this approach because they wish to identify variables that might lead to a selected outcome, or those that “are not necessary or sufficient conditions for the selected outcome.”<sup>37</sup> In this deductive structure of inquiry, the research starts with a broad theory or question and searches for a case that demonstrates or explains.<sup>38</sup>

This perspective on choosing cases, while potentially quite useful, does not describe how many legal scholars frame their research. Instead, it is typically through the intense study of a specific legal rule or phenomenon that legal scholars come to view the studied rule or phenomenon as a “case” that

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31. In such a project, the social scientist seeks to show that “whatever variation is being exploited for the purpose of investigating causal relationships is the product of the causal factor of interest . . . and not of other confounding factors.” JOHN GERRING, *CASE STUDY RESEARCH: PRINCIPLES AND PRACTICES* 212 (2007). The principle is termed “*ceteris paribus*,” or “all other things being equal.” *Id.*

32. *See, e.g.*, Macaulay, *supra* note 27, at 1186.

33. *See, e.g.*, Collier & Mahoney, *supra* note 29, at 71–72.

34. *See, e.g.*, GEORGE & BENNETT, *supra* note 7, at 25 (“This form of selection bias is far more common in political argumentation than in social science case studies.”).

35. Stake, *supra* note 4, at 443.

36. GEORGE & BENNETT, *supra* note 7, at 23 (observing that qualitative researchers might intentionally “choose cases that share a particular outcome”); Ragin, *supra* note 6, at 5 (noting that researchers normally define a problem broadly, identify relevant variables, and then collect information on each variable).

37. GEORGE & BENNETT, *supra* note 7, at 23.

38. *See* Ragin, *supra* note 6, at 5.

demonstrates or explains a theory or question.<sup>39</sup> In this inductive structure of inquiry, the theory or question emerges from the study of the case.<sup>40</sup> This approach forces the researcher to continually ask, “[w]hat is this a case of?”<sup>41</sup> For some social scientists, this approach may be perceived to undertake case selection in the abstract, a potentially problematic method of research design.<sup>42</sup> For others, inductive empirical work is valuable because it leads to theoretical discovery.<sup>43</sup> The premise is that theoretical understanding emerges when data is gathered gradually through successive rounds of inquiry on a specific subject.<sup>44</sup> This acceptance of inductive learning from case study is encouraging for legal scholars, who learn from studying cases as an epistemological matter.<sup>45</sup> We are trained to gain knowledge by reading, analyzing, and categorizing individual cases—albeit typically packaged in the form of judicial opinions.<sup>46</sup> Social science research can help us conceptualize cases more broadly and understand them as reflecting social phenomena.<sup>47</sup>

Thinking in these terms about what defines a case might help international tax law scholars more explicitly articulate our purposes in undertaking case studies and, therefore, guide the reader, both in understanding the parameters of the research and in judging the value of the case within these stated

39. Interview with Steven A. Dean, Professor of Law, Brooklyn Law Sch., in Portland, Or. (Mar. 31, 2010) (on file with author).

40. Ragin, *supra* note 6, at 6.

Strong preconceptions are likely to hamper conceptual development. Researchers probably will not know what their cases are until the research . . . is virtually completed. What *it* is a *case of* will coalesce gradually, sometimes catalytically, and the final realization of the case’s nature may be the most important part of the interaction between ideas and evidence.

*Id.*

41. *Id.* (emphasis added).

42. GERRING, *supra* note 31, at 71. From this perspective, since the purpose of all social science research is to demonstrate or prove an inference, “[i]t is impossible to pose questions of research design until one has at least a general idea of what one’s research question is.” *Id.*

43. See Douglas Harper, *Small N’s and Community Case Studies*, in WHAT IS A CASE?, *supra* note 6, at 139, 139 (“[T]he deductive, natural science model, with specific hypothesis testing and statistical analysis, may not allow us to see the most sociologically meaningful boundaries of cases or the complexities of their social processes.”); Charles C. Ragin, “*Casing*” and the *Process of Social Inquiry*, in WHAT IS A CASE?, *supra* note 6, at 217, 220 (“Empirical research often proceeds without clear guidance from theory. . . . [C]ases often must be delimited or found in the course of research. . . . Cases often must be found because they cannot be specified beforehand.”).

44. Harper, *supra* note 43, at 141.

45. Reza Banakar & Max Travers, *Law, Sociology and Method*, in THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 1, 12 (Reza Banakar & Max Travers eds., 2005).

46. Edmund M. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 381 (1952) (quoting Keener, *The Inductive Method in Legal Education*, 17 A.B.A. REP. 473, 489 (1894)).

47. See Banakar & Travers, *supra* note 45, at 12–13.

parameters. Whether choosing a case to study or deciding that a specific rule or phenomenon is, in fact, a case *of* something, legal scholars inevitably—if not explicitly—decide whether their case may or should be viewed as applicable to other cases, and whether the case may be used to test an existing theory or a new theory.<sup>48</sup> The next sections examine these issues in more detail, exploring how international tax scholars choose their cases, how they approach their research, and what conclusions they draw from their research.

## II. CHOOSING TO STUDY A CASE: GOALS AND PURPOSES

Why do scholars engage in case studies? From the perspective of social science, a case study may be undertaken to describe or illustrate an event or phenomenon that is intrinsically interesting,<sup>49</sup> because the case is instrumental in providing insight or drawing (or re-drawing) a generalization,<sup>50</sup> or because the case is one of many that may be compared for the purpose of investigating “a phenomenon, population, or general condition.”<sup>51</sup> One typology suggests that case studies are undertaken “for identity, for explanation, or for control.”<sup>52</sup> Perhaps most closely aligned with the study of law, case studies may be used “to illustrate a point, a condition, or a category—something important for instruction.”<sup>53</sup> As these typologies suggest, not all case studies are undertaken to develop theory. The international tax case studies discussed herein thus represent a subset of a larger universe of case studies. This subset is the subject of its own typology in the social science literature, which may be

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48. See, e.g., GEORGE & BENNETT, *supra* note 7, at 75 (describing these issues in the design of case study research).

49. Odell, *supra* note 8, at 163 (“Many cases are selected for investigation because they are recent or seem intrinsically important. . . . Understanding crucial break points is as important as testing any hypothesis that might be valid between them.”); Stake, *supra* note 4, at 445.

50. GEORGE & BENNETT *supra* note 7, at 5 (describing a case study as “the detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events”); Odell, *supra* note 8, at 163 (“The disciplined interpretive case study interprets or explains an event by applying a known theory to the new terrain.”); Stake, *supra* note 4, at 445.

51. Stake, *supra* note 4, at 445. Stake defines the third approach above as a multiple or collective case study and describes it as an “instrumental study extended to several cases,” in which the cases are chosen “because it is believed that understanding them will lead to better understanding, and perhaps better theorizing, about a still larger collection of cases.” *Id.* at 446. See also Ring, *One Nation*, *supra* note 12, at 85 (exemplifying a multiple or collective case study).

52. Harrison C. White, *Cases are for Identity, for Explanation, or for Control, in WHAT IS A CASE?*, *supra* note 6, at 83, 83. Of course, these are not exclusive: “Reports and authors often do not fit neatly into the three categories.” Stake, *supra* note 4, at 447.

53. Stake, *supra* note 4, at 447 (citation omitted). “For decades, professors in law schools and business schools have paraded cases in this manner.” *Id.*

useful in considering the reasons why international tax law scholars might be turning to case studies in developing their scholarship.<sup>54</sup>

The typology of theory-building studies includes four types of cases that seem to typify the purposes for which the international tax case studies were undertaken: “disciplined configurative,” “theory testing,” “plausibility probes,” and “heuristic.”<sup>55</sup> Each of these types of cases is described below in the context of the international tax case studies that seem to reflect these profiles.<sup>56</sup> Many of the studies can be described by more than one of these four types, even though some scientists might argue that, in social science terms, some or all of these projects fail to qualify as case studies at all. Legal analysis is not social science research, and it is not suggested here that these international tax case studies meet the rigorous standards of social science research methods or methodologies. Instead, the purpose of this characterizing exercise is both to explore the reasons legal scholars might engage in case studies to develop international tax theory and to suggest that legal scholars could do a better job of clearly identifying their purposes in undertaking a given study, giving readers—including other researchers and policymakers—a better understanding of the value of this type of research.

A. *Disciplined Configurative Cases: Exemplifying an Established Theory*

In keeping with the theme that in the legal context, case studies are often used to illustrate a point, six of the international tax case studies appear to fit the description of “disciplined configurative cases.” These are studies undertaken for the purpose of using established international tax theories in order to explain the existence or evolution of legal rules and practices. The six articles that seem to fit this profile are *The Quest to Tax Interest Income: Stages in the Development of International Taxation* (“*Stages of International Taxation*”);<sup>57</sup> *Transforming the Internet into a Taxable Forum: a Case Study in*

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54. See generally GEORGE & BENNETT, *supra* note 7, at 75 (outlining what qualifies as a “disciplined configurative” case study); Eckstein, *supra* note 7 (discussing case study method in political science); Arend Lijphart, *Comparative Politics and the Comparative Method*, 65 AM. POL. SCI. REV. 682 (1971) (discussing comparative politics methodology vis-à-vis traditional political science methodology).

55. See GEORGE & BENNETT, *supra* note 7, at 75. George and Bennett include two additional types of cases in their typology, namely “[a]theoretical/configurative idiographic case studies,” which are described as “good descriptions” that “do not cumulate or contribute directly to theory,” and “[b]uilding block” studies that “identify common patterns or serve a particular kind of heuristic purpose.” *Id.* at 75–76. Other researchers have used different variations of these terms. Because they do not directly affect or develop theory, I have omitted atheoretical case studies from my analysis; I have also omitted the building block category because I have not identified any case studies that seem to fit this particular type.

56. Of course, most of the case studies fit in more than one category to relative degrees.

57. See Benshalom, *supra* note 12.

*E-commerce Taxation* (“*Transforming the Internet*”);<sup>58</sup> *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws* (“*Digital Biosphere*”);<sup>59</sup> *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage* (“*One Nation*”);<sup>60</sup> *What’s at Stake in the Sovereignty Debate?: International Tax and the Nation-State* (“*The Sovereignty Debate*”);<sup>61</sup> and *The Bermuda Reinsurance ‘Loophole’: A Case Study of Tax Shelter and Tax Havens in the Globalizing Economy* (“*The Bermuda Loophole*”).<sup>62</sup> Most of these case studies are principally descriptive or illustrative in nature, and most appear to undertake the description because the case is viewed as a historically important event or phenomenon.

Thus, *Stages of International Taxation* by Professor Ilan Benshalom seems to fit the profile of a disciplined configurative case study because its goal is to explain a set of rules—known as thin capitalization or earnings-stripping—as a historically important sequence of stages in international tax policy.<sup>63</sup> The author uses the case to “demonstrate[] the problems” of the anti-avoidance paradigm.<sup>64</sup> The article also uses the case to exemplify the author’s new paradigmatic stage theory for understanding the international tax regime.<sup>65</sup> The case of thin capitalization rules thus also may be used as a preliminary study to test a new theory, described below as a plausibility probe.<sup>66</sup>

Similarly, *Transforming the Internet* and *Digital Biosphere*, both by Professor Arthur Cockfield, undertake case studies to use established international tax theory to explain the complications created by e-commerce.<sup>67</sup> The cases are different in kind: in *Transforming the Internet*, the case is a draft proposal on e-commerce taxation by an OECD working party,<sup>68</sup> while in *Digital Biosphere*, the case involves tax planning efforts by Wal-Mart Stores, Inc. to reduce sales tax burdens on its online business.<sup>69</sup> However, both case studies share the goal of explaining how established international tax theory

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58. See Cockfield, *Transforming the Internet*, *supra* note 12.

59. See Cockfield, *Digital Biosphere*, *supra* note 12.

60. See Ring, *One Nation*, *supra* note 12.

61. See Ring, *Sovereignty Debate*, *supra* note 12.

62. See Seessel, *supra* note 12.

63. Benshalom, *supra* note 12, at 636 (“Part VI uses the [earnings-stripping rules] as a case-study to assess critically whether the anti-avoidance paradigm met any of its feasible objectives.”).

64. *Id.* at 676.

65. *Id.* at 636 (arguing that the failure of the earnings-stripping rules “is directly derived from the tottery foundations of the Anti-Avoidance Phase and, as such, is reflective of a more profound systemic failure in the [international income tax regime]”).

66. See *infra* notes 103–17 and accompanying text.

67. Cockfield, *Digital Biosphere*, *supra* note 12, at 333; Cockfield, *Transforming the Internet*, *supra* note 12, at 1174–75.

68. Cockfield, *Transforming the Internet*, *supra* note 12, at 1187–92.

69. Cockfield, *Digital Biosphere*, *supra* note 12, at 336.

fails in the context of e-commerce because the established theory involves assumptions about the nature of goods that are fundamentally incompatible with the nature of modern commercial practices.<sup>70</sup>

*One Nation* and *The Sovereignty Debate*, both by Diane Ring, are also disciplined configurative case studies.<sup>71</sup> In *One Nation*, Ring uses established international tax theories to explain the existence of four case studies of various tax arbitrage techniques.<sup>72</sup> The article explains that these four cases may not necessarily be intrinsically important, but that they exemplify the character of international tax phenomena.<sup>73</sup> Ring then analyzes the four cases from the perspective of conventional international tax policy theory, on the basis of efficiency, equity, and revenue impact.<sup>74</sup>

Finally, *The Bermuda Loophole* also seems to fit the profile of a disciplined configurative case study.<sup>75</sup> This article seeks to show how established international tax theory about what constitutes economic substance in tax transactions caused the United States legislature to adopt a set of legal rules specific to insurance companies, thereby allowing the proliferation of a certain type of tax shelter.<sup>76</sup> The article does not address explicitly the question of whether the case in question—“the process whereby Bermuda property and casualty insurance companies avoid U.S. taxation”<sup>77</sup>—is considered a historically important or an exemplary case.

The common theme of these six articles is that their use of case studies might be characterized as an extension of, or a variation on, what we might consider a standard approach to tax law scholarship—namely, the use of specific examples to demonstrate or prove a point. The examples are drawn from the statutes, regulations, treaties, court cases, and other materials that

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70. Cockfield, *Digital Biosphere*, *supra* note 12, at 385 (concluding that the case study shows “how traditional tax laws that emphasize control over geographic space fail to achieve the appropriate balance within the digital biosphere”); Cockfield, *Transforming the Internet*, *supra* note 12, at 1175–76 (“The purpose of the case study is to demonstrate how the virtual world can subvert legal rules that rely on traditional tax principles that govern physical space.”).

71. See Ring, *One Nation*, *supra* note 12, at 90; Ring, *Sovereignty Debate*, *supra* note 12, at 159.

72. Ring, *One Nation*, *supra* note 12, at 90.

73. *Id.*

74. *Id.* at 90, 101. The article also explores the impact of these arbitrage techniques on a less conventional theory of political accountability, but acknowledges this analysis may be part of the traditional efficiency/equity analysis. *Id.* at 101.

75. See generally Seessel, *supra* note 12 (discussing the Bermuda loophole, its cause, and potential solutions). This article does not explicitly discuss its goals in undertaking the case study, nor does it assess whether the studied case provides insights or draws conclusions.

76. *Id.*

77. *Id.* at 543.

constitute the primary sources in tax law scholarship.<sup>78</sup> The use of the term “case study” might be merely a signal that the author intends to make a more convincing case than that which may be achieved with a simple recitation of examples.<sup>79</sup> However, the reason to use a case study appears to be more than simply fleshing out an example more concretely.<sup>80</sup> As one author explained, “I would say that people use the term ‘case study’ deliberately, as opposed to ‘example.’ I think it means something different than ‘example,’ and we know it means something different than ‘example.’ . . . It is not merely descriptive. It cannot stand alone.”<sup>81</sup>

Disciplined configurative cases may be most prevalent in international tax law scholarship, because a primary goal of this kind of case study is to explain why an event occurred or a phenomenon exists.<sup>82</sup> Explaining phenomena—especially in relation to how international tax law actually works—is something international tax scholars spend a lot of time working on.<sup>83</sup> This is probably because the system of international tax law is widely viewed as enormously complex, multifaceted, and even incoherent.<sup>84</sup> In-depth study of specific events or phenomena may be the best means of translating the abstract construction of international tax theory into a coherent discussion. Documenting what actually happens as a result of international tax rules may be an effective way to lend credibility to a policy argument advanced in the context of such complexity, or to highlight areas needing theory development.<sup>85</sup>

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78. See, e.g., Christians, *supra* note 12 (examining treaties); Cockfield, *Digital Biosphere*, *supra* note 12, at 334 (examining a statute); Dean, *supra* note 12 (evaluating regulations); Seessel, *supra* note 12, at 548 (examining a court case).

79. One author suggests that the term signals intellectual credentials that may or may not be justified from the methodological approach. Interview with Steven A. Dean, *supra* note 39 (“I think the real reason to use ‘case study’ is it sounds fancier than ‘example.’ It lends academic credence, and it’s pretentious.”).

80. In the words of one author, a case study is “the opposite of traditional doctrinal research, which is to say let’s look at a bunch of cases, find the common theme, and explain why that has become the law.” Interview with Adam H. Rosenzweig, Assoc. Professor of Law, Wash. Univ. Sch. of Law, in Portland, Or. (Mar. 31, 2010) (on file with author).

81. Telephone Interview with Diane M. Ring, Professor of Law, Bos. Coll. Law Sch. (Feb. 23, 2010) (on file with author).

82. GEORGE & BENNETT, *supra* note 7, at 75.

83. See, e.g., Christians, *supra* note 12, at 643; Cockfield, *Digital Biosphere*, *supra* note 12, at 333–34.

84. See, e.g., Graetz, *supra* note 1, at 264; see generally Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151 (1981) (discussing the history and development of the current international taxation system).

85. Eckstein, *supra* note 7, at 99. In this way, disciplined configurative cases may serve heuristic purposes as well. See *infra* notes 118–29 and accompanying text.

*B. Theory-Testing Cases: Assessing the Validity of Existing Theories*

After the disciplined configurative case studies, the second most common type of case study observed in the international tax law scholarship fits the profile of “theory-testing case studies.” In the social science literature, theory-testing case studies are typically described as deductive: The study begins with an established theory and tries to assess its validity by presenting test cases.<sup>86</sup> The test cases may be chosen because they seem likely to prove the theory but fail to do so, or because they seem likely to disprove the theory but do not do so.<sup>87</sup> Inductive theory-testing is also possible: study of a case may reveal information that allows a theory to emerge. Three of the international tax law case studies appear to employ a theory-testing approach: *Internet Taxation & Burkina Faso: A Case Study (“Internet Taxation”)*,<sup>88</sup> *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study (“Tax Treaties for Investment and Aid”)*,<sup>89</sup> and *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification (“Attractive Complexity”)*.<sup>90</sup>

Each article is primarily deductive in nature, using cases to explore the validity of an existing theory. However, the articles include some inductive approaches. *Internet Taxation* addresses the theory that a World Trade Organization (WTO) ban on e-commerce taxation will hurt developing countries by examining the impact of the WTO ban on one developing country, Burkina Faso.<sup>91</sup> *Tax Treaties for Investment and Aid* addresses the theory that tax treaties will improve investment flows between developed and developing countries by examining the likely impact of a tax treaty if concluded between the United States and one developing country, Ghana.<sup>92</sup> *Attractive Complexity* addresses the theory that taxpayers abhor complexity in the tax code by examining the development of rules for classifying entities according to type for tax purposes.<sup>93</sup>

Each of these case studies suggests that the established theory does not hold when applied to the given case. In each article, the case is a vehicle both for demonstrating that the given theory is insupportable in the context of given facts and for advancing an alternative theory. Thus, in *Internet Taxation*, the

86. See GEORGE & BENNETT, *supra* note 7, at 75.

87. That is, they are “crucial cases.” See, *infra* text accompanying notes 153–63, for a discussion of these terms in connection with the reasons for choosing a specific case for study.

88. Budnick, *supra* note 12.

89. Christians, *supra* note 12.

90. Dean, *supra* note 12. This article also appears to exemplify two other types of case studies, namely, plausibility probes and heuristic cases. See *infra* notes 103–29 and accompanying text.

91. Budnick, *supra* note 12, at 553–54.

92. Christians, *supra* note 12, at 643.

93. Dean, *supra* note 12, at 466–67.



case is offered both to show that developing countries will not necessarily be adversely affected by the WTO ban on internet taxation and to suggest the validity of an alternative theory, namely that the WTO ban is generally neutral with respect to its effect on the tax revenues of developing countries.<sup>94</sup> Similarly, in *Tax Treaties for Investment and Aid*, the case is offered both to show that developing countries will not necessarily be aided by the existence of tax treaties with developed countries and to suggest the validity of the alternative theory, that tax treaties between developing and developed countries are largely symbolic.<sup>95</sup> Finally, in *Attractive Complexity*, the case is offered both to show that taxpayers do not consistently abhor complexity and to suggest the validity of the alternative theory, that taxpayers express an abhorrence of complexity when they wish to convey an abhorrence of regulation.<sup>96</sup>

Positing the failure of one theory and suggesting the validity of another is not the only function of these theory-testing international tax law case studies, however. Each of these three case studies also suggests that recognizing that the established theory has failed can or should impact policy-making going forward.<sup>97</sup> Thus, the purpose for testing the theory is not limited to disproving one theory or advancing another, but also quite explicitly to suggest that the knowledge of the failure of the theory should prompt responsive reaction from tax lawmakers. *Internet Taxation* argues that since the case study suggests the WTO ban should be seen as neutral with respect to Burkina Faso, the ban should “remain in place as presently formulated,” opposing proposals to lift it.<sup>98</sup> Similarly, *Tax Treaties for Investment and Aid* suggests that based on the strength of the case study involving Ghana, policymakers should approach tax treaties between developing and developed countries with a high degree of skepticism, despite the overwhelming support for such treaties.<sup>99</sup> Finally, *Attractive Complexity* states that based on the strength of the story of how entity classification rules developed, policymakers should be critical of taxpayer calls for simplicity in international tax law, contradicting the accepted wisdom that simplicity is a normatively valid tax policy goal.<sup>100</sup>

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94. Budnick, *supra* note 12, at 569.

95. Christians, *supra* note 12, at 644.

96. Dean, *supra* note 12, at 466–67.

97. Budnick, *supra* note 12, at 569; Christians, *supra* note 12, at 712–13; Dean, *supra* note 12, at 467.

98. Budnick, *supra* note 12, at 569.

99. Christians, *supra* note 12, at 712–13 (“[E]very potential tax treaty relationship with [Less Developed Countries] should be approached critically. . . . [I]t should not be pursued . . . in a myopic adherence to traditional notions . . .”).

100. Dean, *supra* note 12, at 467 (“Recognizing that rational taxpayers will sometimes prefer complexity over simplicity will help prevent attractive complexity from undermining the success of efforts to simplify the tax law.”).

In this way, the theory-testing international tax case studies are similar to their disciplined configurative counterparts: In both types of case studies, legal scholars tend to use the case study to advance a policy position. This should not be surprising given the general advocacy nature of legal scholarship.<sup>101</sup> As such, thinking about these case studies from the perspective of scientific approaches to building knowledge may help legal scholars to be more explicit about what they are trying to accomplish. None of the three case studies here identified as theory-testing describes itself as such, and thus, none explicitly addresses the question of whether and why the chosen case is suitable for disproving the posited theory, or how much confidence the reader can have in the policy prescription. International tax scholarship, and in turn international tax policy discourse, could be served by answering this question more systematically.<sup>102</sup>

### C. *Plausibility Probes: Testing a New Theory*

Like theory-testing case studies, plausibility probes set out to test a theory. However, in the case of plausibility probes, the selected theory is new or relatively untested rather than established.<sup>103</sup> In the social science context, the case is used to demonstrate that the new or untested theory deserves additional testing.<sup>104</sup> Translated to international tax law scholarship, where “testing” is a fairly unfamiliar endeavor, a plausibility probing case study might be designed to show that the new or untested theory should be applied to other contexts to determine if it seems accurate or holds true across cases.<sup>105</sup> In the international tax case study literature, two articles seem primarily designed as plausibility probes: *International Tax Relations: Theory and Implications* (“*International Tax Relations*”)<sup>106</sup> and *Harnessing the Costs of International Tax Arbitrage* (“*Harnessing Tax Arbitrage*”).<sup>107</sup>

*International Tax Relations* begins with the conventional view that the international tax regime is incoherent and argues that regime theory from the discipline of international relations should be applied to bring “coherence and organization” to the field.<sup>108</sup> The article suggests that international tax scholars have a difficult time conceptualizing and theorizing international tax because

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101. See, e.g., Livingston, *supra* note 3, at 399.

102. Perhaps the most interesting and significant aspect of these cases, however, is that while their theory testing appears from its final presentation in written form to have been conducted deductively, the authors developed their theories through empirical study of the cases. See discussion *infra*, Part III.

103. GEORGE & BENNETT, *supra* note 7, at 75.

104. *Id.*

105. See, e.g., Ring, *International Tax Relations*, *supra* note 3, at 152–53.

106. Ring, *International Tax Relations*, *supra* note 3.

107. Rosenzweig, *supra* note 12.

108. Ring, *International Tax Relations*, *supra* note 3, at 151.

they are not using relevant tools from the discipline of international relations, where scholars' central questions concern relationships between countries.<sup>109</sup> The article uses the international income tax treaty regime "to assess regime theory as an explanatory model" of the failure of conventional international tax theory to answer some fundamental questions about the structure and implications of existing international tax rules.<sup>110</sup> The purpose of the case study is to test whether regime theory provides explanations that are different from those obtainable through conventional theoretical approaches.

A similar yet distinct purpose and approach is evident in *Harnessing Tax Arbitrage*.<sup>111</sup> This article begins with the conventional theory that current international tax rules are incapable of preventing international tax arbitrage.<sup>112</sup> The case, the same entity classification rules that formed the case study in *Attractive Complexity* discussed above, is provided in this article to demonstrate the inadequacy of the approach to arbitrage under existing international tax theory.<sup>113</sup> Unlike *International Tax Relations*, which suggests that existing international tax theory fails to understand the nature and character of its own regime,<sup>114</sup> *Harnessing Tax Arbitrage* does not argue that the existing theory is faulty in its understanding of the issue of arbitrage. Rather, *Harnessing Tax Arbitrage* argues that conventional international tax theory is capable of identifying, but simply fails to address, the given problem.<sup>115</sup> The purpose of using the case is both to demonstrate that the existing international tax rules will not curb the identified problem, and to propose an alternative substantive solution. The case study thus does not challenge existing international tax theory as such, but tests the author's suggested new approach to solving the identified problem.

In this way, *Harnessing Tax Arbitrage* is similar to much tax law scholarship and much legal scholarship in general. Its purpose is to serve as a testing ground for a proposed substantive law change, much like a set of facts (real or hypothetical) might be used to test the validity of a proposed statutory revision or a proposed judicial balancing test. Yet, as in the case of the disciplined configurative cases discussed above, the use of the case study appears distinctive from the conventional approach to international tax legal

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109. *Id.* at 84–85; Interview with Diane M. Ring, *supra* note 81 ("I did believe that IR theory is relevant, the idea of trying to understand how governments and other forces at the international level interact with each other, and including a subset of actions that might result in regimes, has to be relevant [to the study of the international tax regime] because this is the body of literature that asks questions about those relationships.").

110. Ring, *International Tax Relations*, *supra* note 3, at 114.

111. Rosenzweig, *supra* note 12, at 558.

112. *Id.* at 557.

113. *Id.* at 620.

114. Ring, *International Tax Relations*, *supra* note 3, at 84–85.

115. Rosenzweig, *supra* note 12, at 558.

scholarship. The author has reasons for closely studying a particular set of rules, rather than a hypothetical fact pattern or a mere “example,” to test a proposed substantive doctrinal approach. Explicitly addressing these reasons in the scholarship may help the reader assess the value of the proposed approach. Thus, with respect to *International Tax Relations*, Professor Ring suggests that her decision to use case studies to explore the validity of a regime theory approach to international taxation was motivated by the desire to contextualize the abstraction of a new idea—international relations theory—to a known audience, i.e., international tax scholars.<sup>116</sup> The case studies provided a way to use known and important issues to show scholars in the field that the new theoretical approach was relevant, meaningful, and one the readers could readily absorb.<sup>117</sup>

*D. Heuristic Cases: Identifying New Variables or Theories*

The final category of theory-developing case studies in international tax law scholarship is that of heuristic case studies. Heuristic case studies are described as those that “inductively identify new variables, hypotheses, causal mechanisms, and causal paths.”<sup>118</sup> As discussed above in the context of disciplined configurative case studies, heuristic case studies may be undertaken for the purpose of showing that existing theories inadequately explain observed phenomena.<sup>119</sup> *The Saga of the Netherlands Antilles* appears to be the sole international tax law case study to exemplify the heuristic approach to case studies.<sup>120</sup> The primary contribution of this article is to introduce new variables by producing a narrative that includes several historical events and contextual phenomena that have not been described or illustrated elsewhere in the tax literature. The authors then use these events and phenomena to introduce new theories to the tax literature regarding the historical role tax havens played as financial markets became increasingly globalized, especially during World War II.<sup>121</sup>

It seems clear that the goal of *The Saga of the Netherlands Antilles* is to make an in-depth, historically-grounded exploration of one country’s experiences in order to show that existing theories about tax havens are inadequately conceptualized and contextualized and, therefore, inadequately

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116. Interview with Diane M. Ring, *supra* note 81.

117. *Id.*

118. GEORGE & BENNETT, *supra* note 7, at 75.

119. *Id.*

120. See Boise & Morriss, *supra* note 16, at 441–47. *Attractive Complexity*, discussed above in Part II.B, also serves heuristic purposes by impugning an established theory about the desirability of simplification, thereby highlighting the need for a new theory. Dean, *supra* note 12, at 467. However, as discussed above, the principal goal of that case study appears to be theory-testing in nature. See *supra* notes 90–102.

121. Boise & Morriss, *supra* note 16, at 391–96.

theorized.<sup>122</sup> In much of the literature about tax havens, scholars conventionally suggest that countries deliberately employ certain tax law and related regulatory strategies for the sole purpose of gaming the international tax system for financial advantage at the expense of rich, capital-exporting countries like the United States.<sup>123</sup> In contrast, *The Saga of the Netherlands Antilles* states that its goal is to use the experience of the Netherlands Antilles “as a lens through which to examine [how] onshore [legal systems] and the international regulatory climate may affect international financial centers, both onshore and offshore.”<sup>124</sup> The goal of exploring the Netherlands Antilles is to show that there is a heretofore unknown or unacknowledged context that explains the legal systems in this country, and that the knowledge of this context illuminates deep flaws in the conventional theories surrounding tax havens.<sup>125</sup>

*The Saga of the Netherlands Antilles* thus demonstrates a heuristic purpose for undertaking a case study: The goal is to introduce a host of new factors to the tax literature that must inform any future attempt to consider the role of, and international response to, tax havens.<sup>126</sup> Tax havens have been an enormously popular subject of research in international tax law scholarship, but the theorizing has mainly occurred in the absence of the kind of detailed context explored in *The Saga of the Netherlands Antilles*.<sup>127</sup> As a heuristic case, the history of the Netherlands Antilles as an offshore financial center provides both a rich source of context and a reason to pursue alternative theories about managing the goals of taxation in a world of financially integrated markets.

As the foregoing typology of case study research design suggests, case studies may be used for several different purposes, and the reader may be served by knowing the goals of the research. Unfortunately, it is not always clear which purpose the author is pursuing in the studies discussed above. One way in which the social science literature might prove helpful to legal scholars

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122. *See id.* at 451.

123. *See generally* Adam Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. (forthcoming Dec. 2010) (reviewing the literature on tax havens) (on file with author).

124. Boise & Morriss, *supra* note 16, at 383.

125. *Id.* at 426–27.

126. *Id.*

127. Some examples of international tax articles on international tax include: Hugh J. Ault, *The Importance of International Cooperation in Forging Tax Policy*, 26 BROOK. J. INT’L L. 1693 (2001); Allison Christians, *Sovereignty, Taxation and Social Contract*, 81 MINN. J. INT’L L. 99 (2009); Steven A. Dean, *Philosopher Kings and International Tax: A New Approach to Tax Havens, Tax Flight, and International Tax Cooperation*, 58 HASTINGS L.J. 911 (2007); Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime?*, 27 LAW & POL’Y 100 (2005); Papali’i T. Scanlan, *Globalisation and Tax-related Issues: What are the Concerns?*, in INTERNATIONAL TAX COMPETITION: GLOBALISATION AND FISCAL SOVEREIGNTY 43 (Rajiv Biswas ed., 2002).

is simply to impose some discipline with respect to the description of research goals.<sup>128</sup> These disciplines developed typologies of research purposes in order to be systemic about gathering and assessing data such that scholars and their readers could be more confident about the claims made with respect to the outcomes of the research.<sup>129</sup>

The typologies serve as a guide—not necessarily binding, but useful as a starting point—for being more explicit about the goals sought to be accomplished by using case studies instead of or in addition to the standard approaches to legal scholarship.<sup>130</sup> Using the social science literature might help legal scholars explain their scholarly goals more explicitly and give the reader a better sense of the reasons the author chose a case study over other means of making a scholarly point. Once readers understand why the author has chosen a case study in the first place, they may better critique the fit between the case and the stated objective.

### III. CHOOSING THE CASE: WHY THIS CASE?

Once the author has determined to study a case in order to develop international tax law theory, the author must choose “the” case to be studied. Again, with reference to the social science literature, specific cases may be studied because they serve specific research purposes. Four general categories of cases described in the social science literature seem most suited to describing the international tax case studies: 1) representative cases—a typical or standard example of a wider category;<sup>131</sup> 2) atypical or “deviant cases”—those that deviate from the expected;<sup>132</sup> 3) crucial cases—either those considered most likely to demonstrate a given theory that do not, or those considered least likely to support a theory that do, in fact, support the theory;<sup>133</sup> and 4) archetypal cases—defining cases, in the sense that the case studied became a model that influenced subsequent cases of the same type.<sup>134</sup> Each of these types of cases is described in the context of the international tax case studies below.

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128. Livingston, *supra* note 3, at 415.

129. *Id.* at 368.

130. Eckstein, *supra* note 7, at 103 (“Aiming at the disciplined application of theories to cases forces one to state theories more rigorously than might otherwise be done.”).

131. Isidora Djurić et al., Letter to Editor, *The Role of Case Study Method in Management Research*, 5 SERBIAN J. MGMT. 175, 177 (2010).

132. See, e.g., Ali Kazancigil, *The Deviant Case in Comparative Analysis: High Stateness in a Muslim Society: The Case of Turkey*, in *COMPARING NATIONS: CONCEPTS, STRATEGIES, SUBSTANCE* 213–14 (Mattei Dogan & Ali Kazancigil eds., 1994).

133. Eckstein, *supra* note 7, at 118.

134. Djurić et al., *supra* note 131, at 178.

### A. Representative Cases

Most of the international tax law case studies may be viewed as representative in nature, although only *Stages of International Taxation* states explicitly that the case was chosen because it represents events or phenomena of the general kind being studied.<sup>135</sup> The author states that he chose to study the use by multinational corporations of thin-capitalization/earnings-stripping techniques because these techniques are “the best representative example” of the problems of attempts by governments to separate abusive tax-motivated transactions from ordinary business transactions.<sup>136</sup> In making the case that the international tax regime created an unworkable anti-avoidance paradigm, *Stages of International Taxation* uses the case of the earnings-stripping rules as a typical strategy employed by governments to prevent taxpayers from engaging in excessive tax avoidance.<sup>137</sup>

None of the other case studies examined explicitly characterizes the nature of the case studied, but six, in addition to *Stages of International Taxation*, appear to be representative. These are *Internet Taxation*,<sup>138</sup> *Digital Biosphere*,<sup>139</sup> *One Nation*,<sup>140</sup> *International Tax Relations*,<sup>141</sup> *The Sovereignty Debate*,<sup>142</sup> and *The Bermuda Loophole*.<sup>143</sup> Each of these articles implies that the studied subject is one of a class of like subjects, often (but not always) by referring to or directly providing some empirically observable evidence of likeness. For example, in *Internet Taxation*, the author suggests that Burkina Faso is representative of other developing countries because its “economy and policies mirror that of similarly situated countries.”<sup>144</sup> In *Digital Biosphere*, the author implies that the subject of its case study, Wal-Mart, might be representative of a class by stating that “there are many more click-and-mortars that are attempting to use similar entity isolation strategies.”<sup>145</sup> In *The Bermuda Loophole*, the author suggests that Bermuda is one of a class of “tax-efficient jurisdictions” by suggesting that if rules were changed with respect to

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135. Benshalom, *supra* note 12, at 676.

136. *Id.*

137. *Id.* at 674.

138. Budnick, *supra* note 12.

139. Cockfield, *Digital Biosphere*, *supra* note 12.

140. Ring, *One Nation*, *supra* note 12.

141. Ring, *International Tax Relations*, *supra* note 3.

142. Ring, *Sovereignty Debate*, *supra* note 12.

143. Seessel, *supra* note 12.

144. Budnick, *supra* note 12, at 556. I make the same suggestion in *Taxation for Investment and Aid*, but, for the reasons discussed below, I characterize Ghana as a “crucial case.” Christians, *supra* note 12, at 712; see *infra* notes 153–63 and accompanying text.

145. Cockfield, *Digital Biosphere*, *supra* note 12, at 373.

Bermuda, taxpayers would simply move their money to an alternate jurisdiction in the class.<sup>146</sup>

Each of these statements suggest that—for the purpose of developing this kind of case study—the fact that empirical evidence could presumably be marshaled to demonstrate the purported like class is sufficient to support the proposition that the case studied is worthy of study because it represents a larger body of like cases. The authors assume that the case is relevant for studying the asserted phenomenon based on a claim that there are other cases like this one out there—which we presumably do not need to study since we are studying this one. The prospect of selection bias discussed above<sup>147</sup> appears to be most problematic in this context, since we do not have studies of the other cases of which the instant case is representative. Describing qualitatively whether and why we think our cases are representative might help us assess the credibility of the claims and proposals we make. In other words, the qualitative approach that forces us to confront the assumptions underlying our articulation of cases in international tax scholarship might also help us to contextualize our specific case more effectively.

#### B. *Atypical or Deviant Cases*

In contrast to representative cases, a scholar pursues atypical or deviant cases to illuminate the exceptional.<sup>148</sup> Atypical cases ask why something that was expected to happen did not happen.<sup>149</sup> Just one of the international tax case studies appears to typify a deviant case study, namely *Attractive Complexity*. The article is not explicit in this characterization, but describes a situation involving international tax rule formation in which if a stated theory were true, a certain result should have occurred, but did not.<sup>150</sup> Finding that the expected result did not occur, the author states that an alternative theory must be developed to explain the events that occurred in contravention of the

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146. Seessel, *supra* note 12, at 568 (“[E]ven if the Treasury or Congress closes the loophole with respect to Bermuda, the reinsurance business would shift to other tax efficient jurisdictions . . .”).

147. See *supra* notes 29–34 and accompanying text.

148. GEORGE & BENNETT, *supra* note 7, at 75.

149. Odell, *supra* note 8, at 166 (“When a body of theory is fairly well developed and substantial evidence has confirmed it, a detailed study of a deviant case can be illuminating. . . . An anomaly sometimes can suggest new hypotheses that also account for cases previously thought accounted for.”).

150. Dean, *supra* note 12, at 407 (“If it were true that the tax law’s ever-increasing complexity was merely a product of political failure, the check-the-box election, by all accounts a political success story, should have unambiguously diverted public and private resources away from the tax law.”).



prevailing theory.<sup>151</sup> Consistent with atypical cases in general, *Attractive Complexity* uses the atypical case of the formation of the entity classification rules to “tidy up our understanding of exceptions and anomalies” or “to identify underlying causes.”<sup>152</sup>

### C. *Crucial Cases*

The crucial case study is premised on the idea of showing that a theory works even in the least likely conditions or, conversely, does not work even in the most likely conditions.<sup>153</sup> If a scholar can show a theory works in conditions where it should not, it is likely to be valid in all other circumstances as well; conversely, a theory that “fails to work even in the most favorable conditions can quickly be dismissed.”<sup>154</sup> As one example of a “least likely” case from the social science literature, a researcher tested his thesis that all organizations become dominated by a ruling elite by examining the ruling structure of socialist parties.<sup>155</sup> His theory was that since socialist parties are organizations committed to the norm of internal democracy, it would be very unlikely that such an organization would be dominated by a ruling elite.<sup>156</sup> If oligarchy existed in this “least likely” case (as it did), it would also likely apply to other organizations that lacked a democratic culture.<sup>157</sup>

On the other hand, the social science literature suggests that “[a] single crucial case may certainly score a clean knockout over a theory.”<sup>158</sup> I did not identify any “least likely” cases in the international tax law literature.

151. *Id.* (“Concluding that the check-the-box election failed to produce a clear improvement in simplicity and that the tax law’s complexity has not been significantly affected by the public’s growing interest in simplification would suggest an alternative explanation of complexity’s relentless advance.”).

152. Djurić et al., *supra* note 131, at 178; Kazancigil, *supra* note 132, at 214.

153. Djurić et al., *supra* note 131, at 177–78.

154. *Id.* at 178; *see also* Odell, *supra* note 8, at 165–67.

155. *See generally* ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (Eden & Cedar Paul trans., 1915) (analyzing the characteristics of political parties during the rise of the nation-state to learn about the characteristics individuals seek in political leaders).

156. *Id.*

157. *Id.*

158. Eckstein, *supra* note 7, at 127;

Probably the closest a single case study can come to approximating a neutral test would be when the researcher selects an extreme case that is highly unlikely to confirm, and finds that even this case does so. Such a least-likely case study would provide strong, though not unqualified, support for the inference that the theory is even more likely to be valid in most other cases, where contrary winds do not blow as strongly.

Odell, *supra* note 8, at 165. Others suggest that this conclusion places too much weight on one case, and assumes a narrow theory-testing role for case studies that may not be appropriate. *See, e.g.,* GERRING, *supra* note 31, at 118 (“[N]o single-case test can offer strong confirmation of the theory.”).

However, one article, *Tax Treaties for Investment and Aid*,<sup>159</sup> may typify its corollary, the “most likely” case. In that article, I state that the case study involves a country, Ghana, that is a likely candidate for a treaty, and that if a treaty between the United States and Ghana would not provide the benefits commonly attributed to tax treaties, then the theory that tax treaties provide such benefits must not hold.<sup>160</sup> The aim of the case study is to question the validity of the theory that tax treaties can have a positive impact on trade and investment.<sup>161</sup> Yet, as the social science literature demonstrates, caution should be used in determining that the case is, in fact, “most likely” and in determining what conclusions can be drawn from the evidence provided by the single case.<sup>162</sup> The social science literature might suggest that additional cases should be identified and studied to increase the certainty that the initial conclusion remains plausible.<sup>163</sup>

#### D. Archetypal Cases

Archetypal cases constitute a defining case—that is, something that the author argues sets the stage for everything that follows.<sup>164</sup> Within the international tax literature studied, only *The Saga of the Netherlands Antilles* is an archetypal case. In that article, the authors suggest that the Netherlands Antilles set the stage for “offshore finance.”<sup>165</sup> It may be that the Netherlands Antilles is now a representative case (i.e., it is one of a certain class of countries), such that studying the Netherlands Antilles may give us insight into how these other countries operate. We might want to suggest, for example, that the Netherlands Antilles is like other “tax havens” or other “offshore finance centers.” As discussed above, such a claim would be more credible to the extent we could offer more empirical description of the relevant characteristics. Indeed, as various efforts to curb international tax evasion have illustrated, defining the term “tax haven” has required extensive attention

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159. Christians, *supra* note 12.

160. *Id.* at 644.

161. *Id.*

This case study demonstrates that in today’s global tax climate, a typical tax treaty would not provide significant tax benefits to current or potential investors. . . . [and that] much of the conventional wisdom about the impact of tax treaties on the global flow of investment does not apply in the context of many of the LDCs most in need of realizing the benefits attributed to these agreements.

*Id.* at 644, 712.

162. See, e.g., Odell, *supra* note 8, at 172 (pointing out the potential short-comings of the single-case approach).

163. See *id.* (implying that additional cases will strengthen a conclusion).

164. Djurić et al., *supra* note 131, at 178; see also WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 109 (2003).

165. Boise & Morriss, *supra* note 16, at 383.

to (and suffered from the lack of) qualitative empirical evidence.<sup>166</sup> But *The Saga of the Netherlands Antilles* does not necessarily direct us to examine this problem. Rather, the point of this archetypal case seems to be that, but for the specific historical developments in the Netherlands Antilles, the phenomenon we now identify as “offshore finance” would not exist in its current form.<sup>167</sup> As a result, the history of this particular country is presented as intrinsically interesting, as well as significantly impacting succeeding events.

Categorizing cases into social science types is informative as well as cautionary. The fact that most of the cases fit into a few categories might reveal some key assumptions legal scholars make about the nature of knowledge and what is needed to convince an audience that a claim or proposition ought to be viewed as worthy of attention—if not deference—in future decision-making. We may view our generally light documentation of the ways in which the chosen case is like or unlike other cases, compared to our relatively more thorough documentation of the substance of the cases themselves, as illustrative of what legal scholars perceive as important to the function of legal scholarship.

The caution is that failing to think about our cases in terms of what they are a case *of* may lead us—both authors and readers of international tax scholarship—to make assumptions and draw conclusions that will not withstand, and may even be contradicted by, the cold light of implementation in the understudied context. If we are more reflective about the universe of possible cases and contexts, we may be more deliberate in our approach to the case and in our assessment of what we find. Categorizing our case studies within a social science framework provides a means of thinking about why we are undertaking cases in the first place. But it also forces us to consider more carefully how we ought to make the case.

#### IV. BUILDING THE CASE: METHODS AND SOURCES

How do international tax law scholars approach their cases? None of the international tax case studies includes a description of the author’s reasoning regarding how the case is or should be constructed. Instead, the case studies evidence an approach that is common to tax law scholarship: Narratives are built by gathering and analyzing relevant facts and authoritative legal doctrines.<sup>168</sup> Much of the narrative is drawn from what might be described as standard sources of tax-related legal research and the standard approaches to legal argumentation—“standard” because they are the prevailing sources and

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166. See Christians, *supra* note 127, at 122–24.

167. Boise & Morriss, *supra* note 16, at 383 (stating that this case is “an important contribution given the historic role played by the island’s financial sector in the overall development of offshore finance”).

168. See Livingston, *supra* note 3, at 374–75.

approaches used in tax law scholarship.<sup>169</sup> In the context of the international tax case studies, both the litany of sources and the approach to analysis reflect decisions that the authors made regarding what they believed was needed to “make the case.”<sup>170</sup>

Accordingly, international tax case study authors use all of the primary source materials that are familiar to tax law scholars in general, including tax and other statutes,<sup>171</sup> tax treaties,<sup>172</sup> and court cases,<sup>173</sup> as well as Treasury and agency guidance,<sup>174</sup> legislative history,<sup>175</sup> and other congressional and executive materials.<sup>176</sup> They also use the standard secondary sources commonly employed in constructing tax law scholarship, such as other law review and journal articles,<sup>177</sup> tax trade publication articles,<sup>178</sup> scholarly and popular books,<sup>179</sup> newspaper and other media accounts,<sup>180</sup> and other guidance

169. *Id.* at 376–78.

170. *See, e.g.*, Interview with Diane M. Ring, *supra* note 81. The approach to case study research is “almost self-evident,” and implied by the kind of case the author wishes to make: “I wanted to do something that’s not vague or insufficiently concrete to persuade, something that the reader could envision.” *Id.*

171. *See, e.g.*, Benshalom, *supra* note 12, at 639 n.12, 640 n.16 (citing Internal Revenue Code provisions and other United States statutes); Cockfield, *Transforming the Internet*, *supra* note 12, at 1176 n.15, 1178 n.16 (citing Internal Revenue Code provisions and other United States statutes).

172. *See, e.g.*, Christians, *supra* note 12, at 640–41 n.4 (citing United States tax treaties with Barbados, China, Cyprus, Egypt, Indonesia, Jamaica, Korea, Morocco, Pakistan, Philippines, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia, and Venezuela); Cockfield, *Transforming the Internet*, *supra* note 12, at 1187 n.50 (citing a U.S.-India tax treaty).

173. *See, e.g.*, Cockfield, *Transforming the Internet*, *supra* note 12, at 1201 n.104 (citing a United States Supreme Court case).

174. *See, e.g.*, Benshalom, *supra* note 12, at 682 n.165 (citing the United States Treasury 1996 Model Income Tax Convention); Christians, *supra* note 12, at 647 n.22 (citing a Treasury press release); Cockfield, *Transforming the Internet*, *supra* note 12, at 1178 n.17 (citing the United States Treasury 1996 Model Income Tax Convention).

175. *See, e.g.*, Cockfield, *Transforming the Internet*, *supra* note 12, at 1201 n.106 (citing a Congressional bill).

176. *See, e.g.*, Benshalom, *supra* note 12, at 693 n.211 (citing Joint Committee on Taxation publications); Budnick, *supra* note 12, at 556 n.52 (citing U.S. CIA World Factbook); Christians, *supra* note 12, at 639 n.1 (citing U.S. CIA World Factbook); Cockfield, *Transforming the Internet*, *supra* note 12, at 1174–75 n.12 (citing the Advisory Commission Report to Congress and GAO Report on e-commerce).

177. *See, e.g.*, Benshalom, *supra* note 12, at 633–36 nn.1–7; Budnick, *supra* note 12, at 552 n.19; Christians, *supra* note 12, at 640 n.2; Cockfield, *Transforming the Internet*, *supra* note 12, at 1173 n.7.

178. *See, e.g.*, Benshalom, *supra* note 12, at 671 n.137 (citing an article in *Tax Notes International*); Cockfield, *Transforming the Internet*, *supra* note 12, at 1176 n.15 (citing an article in *Tax Notes*).

179. *See, e.g.*, Benshalom, *supra* note 12, at 643 n.23, 645 n.30; Cockfield, *Transforming the Internet*, *supra* note 12, at 1173 nn.7 & 9.

and commentary from institutional sources like the American Law Institute,<sup>181</sup> the United Nations,<sup>182</sup> and the Organisation for Economic Co-operation and Development.<sup>183</sup>

International tax case study authors also employ the kinds of approaches that are common in the tax law literature—namely, persuasion via thorough, extensive documentation. Thus, much of the international tax case study scholarship, like much other tax law scholarship, is designed to illustrate, demonstrate, or prove the accuracy of the author's perspective on how tax rules, regimes, or practices operate or should operate.<sup>184</sup> Similarly, much of the international tax case study scholarship, like much other tax law scholarship, makes the case for a proposed change of rules<sup>185</sup> or for adopting the author's view of an event or phenomenon.<sup>186</sup> Scholars accomplish these objectives by producing relevant facts and doctrines, explaining why these facts and doctrines are relevant and important and how they fit together, and making persuasive statements about why their narrative compels the reader to draw certain conclusions.

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180. See, e.g., Budnick, *supra* note 12, at 549 n.2, 550 n.3 (citing an Internet news story and an African news media account); Cockfield, *Transforming the Internet*, *supra* note 12, at 1172 nn.1, 2 & 5, 1186 n.47 (citing *Time* magazine, an Internet news story, an Associated Press story, and *The Economist*).

181. See, e.g., Benshalom, *supra* note 12, at 659 n.85 (citing an ALI Tax Advisory Group draft proposal).

182. See, e.g., Budnick, *supra* note 12, at 550 n.9 (citing an UNCTAD report); Cockfield, *Transforming the Internet*, *supra* note 12, at 1186 n.49 (citing the U.N. Model Tax Treaty).

183. See, e.g., Benshalom, *supra* note 12, at 664 n.103, 674–75 n.147; Budnick, *supra* note 12, at 557 n.57; Christians, *supra* note 12, at 647 n.21; Cockfield, *Transforming the Internet*, *supra* note 12, at 1174 n.10, 1175 n.13.

184. Benshalom, *supra* note 12, at 686–87 (demonstrating the inadequacies of the anti-avoidance paradigm); Boise & Morriss, *supra* note 16, at 383 (showing how the “onshore” legal systems and “the international regulatory climate may affect other international financial centers, both onshore and offshore”); Budnick, *supra* note 12, at 579–80 (showing how e-commerce tax rules impact developing countries); Christians, *supra* note 12, at 712 (discussing why there are few tax treaties between the United States and developing countries); Cockfield, *Digital Biosphere*, *supra* note 12, at 403 (showing how traditional tax laws are ill-equipped to deal with e-commerce practices); Cockfield, *Transforming the Internet*, *supra* note 12, at 1175 (showing how regulators developed e-commerce tax rules “while striving to preserve existing international tax principles”); Ring, *One Nation*, *supra* note 12, at 79 (showing how tax arbitrage works); Ring, *Sovereignty Debate*, *supra* note 12, at 159 (showing how individuals use the concept of sovereignty to advance different policy positions in tax); Seessel, *supra* note 12, at 542–43 (illustrating how income is tax sheltered through tax havens).

185. Rosenzweig, *supra* note 12, at 629–30 (arguing adoption of his proposed treatment for arbitrage).

186. Benshalom, *supra* note 12, at 634 (arguing for his view of stages of development of international tax theory); Dean, *supra* note 12, at 467 (arguing for his view of taxpayer attitudes about simplicity); Ring, *International Tax Relations*, *supra* note 3, at 153–54 (arguing for her view of the coherence of the international tax system as a regime).

However, many of the international tax case studies also employed approaches and used sources that differ from these traditional standards, reflecting a more qualitative research instinct. These approaches include both gathering non-standard source material and analyzing standard source materials in non-standard ways. For example, three of the case studies are expressly constructed using information gathered through personal interviews with individual legal practitioners, judges, government officials, and other relevant parties.<sup>187</sup> It is not uncommon for tax scholars to cite a single interview or an e-mail correspondence for a particular proposition, but extensive qualitative interviewing is a rarity in international tax law scholarship.<sup>188</sup>

Other scholars similarly engaged in some form of qualitative interviewing, but did not document this data when constructing their cases. That is, at least some of the authors spoke to one or more individuals with personal experience and knowledge on the subject of the study, and whom the authors perceived to be credible sources of information.<sup>189</sup> These authors—perhaps like many legal scholars—used their discussions with these individuals to better understand the studied subject or to construct theories about the studied subject, but they did not cite to the primary source of data—namely, notes from interviews or e-mail correspondence.

In addition to qualitative interviewing, many of the case studies used social science approaches to examine standard source material in ways that may be considered unconventional in international tax law scholarship. One study used recorded statements of key government officials and commentators, a common source of citation in international tax law scholarship, but used the comments in a non-standard way—namely, by engaging in rhetorical analysis of these sources.<sup>190</sup> Another study used information found in company filings as a primary source material, a relatively less common source of citation in tax law scholarship.<sup>191</sup>

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187. See, e.g., Boise & Morris, *supra* note 16 (using data from thirteen referenced interviews); Christians, *supra* note 12 (using data from seven referenced interviews); Cockfield, *Transforming the Internet*, *supra* note 12 (using data from one referenced interview).

188. *The Saga of the Netherlands Antilles* and *Tax Treaties for Investment and Aid* are the sole instances of international tax law scholarship constructed through qualitative interviewing of which I am aware.

189. Interview with Steven A. Dean, *supra* note 39 (stating he consulted with law firm partner knowledgeable on the check-the-box regime); Telephone Interview with Ben Seessel (Mar. 19, 2010) (on file with author) (stating he spoke to former law firm partner with knowledge on the general area of law).

190. See, e.g., Ring, *Sovereignty Debate*, *supra* note 12, at 187–89.

191. See Cockfield, *Transforming the Internet*, *supra* note 12, at 1181 n.29 (citing interview with company vice president of legal affairs), 1180 nn.26–27 (referring to a company's annual SEC reports).

Although none of these articles articulated why additional or different sources or approaches might be necessary or useful in the research, it seems clear that some kind of empirical study allowed the authors to understand context and build theory. Thus, in *The Saga of the Netherlands Antilles*, the authors construct a history of the Netherlands Antilles as an offshore financial center through the use of some standard legal source material: legislative records, scholarly articles, information available on institutional websites, industry and interest group reports, media accounts of events, and statements by policy commentators at conferences.<sup>192</sup> Similarly, in *Tax Treaties for Investment and Aid*, I constructed economic, social, and political attributes of a particular country, Ghana, through standard legal source material.<sup>193</sup> But in each case study, the authors also conducted interviews which they used to help construct their narrative.

The authors employed these interviews for a range of pedagogic purposes. First, interview data was used to make assertions about facts, including facts that are or could be reinforced with other documented sources.<sup>194</sup> The data was also used to explain why an event happened historically, often in ways that seem to create links that the outsider might not otherwise find significant.<sup>195</sup> In a few instances, interview data was used to explain what a legal doctrine required or prohibited.<sup>196</sup> Interview data was also used to describe (positively or negatively) political or social contexts of events or states,<sup>197</sup> to characterize people, places, or events, especially in a narrative or informal format using metaphor or analogy,<sup>198</sup> and to infer or estimate facts not otherwise available.<sup>199</sup>

What may not be as clear from the set of the interview data in these case studies is the extent to which the interviewing was instrumental in more fundamental ways, beyond its usefulness in providing citations to specific points. For example, although it is not obvious from the manner in which the

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192. Boise & Morriss, *supra* note 16, at 379 n.4.

193. Christians, *supra* note 12, at 640 n.2.

194. Boise & Morriss, *supra* note 16, at 394 nn.102–04, 404 n.75; Christians, *supra* note 12, at 684–85 n.189, 689 n.211, 702 n.270.

195. Boise & Morriss, *supra* note 16, at 394 n.100, 395 n.104, 411 n.226, 416 n.255, 421 n.286, 424 n.301, 432 nn.340–41, 434 n.348, 437 n.361.

196. *Id.* at 404 nn.176–77, 422–23 n.296.

197. Christians, *supra* note 12, at 701 n.269.

198. Boise & Morriss, *supra* note 16, at 394 n.101, 405 (likening a group's expertise to "three donkeys and six dinosaurs"), 406 (describing an event as "like finding gold"), 419 (describing an event as "then disaster struck" and a change of circumstances as "a 'new wind' was blowing"), 421 ("[T]he United States is a lot better off without [the Antilles tax treaty]."), 422–23 n.292, 426 (describing the impact of a legal-doctrine change on a population as "'slaughtered' and 'absolutely run over'"), 433–34 (describing the relationship between two countries as "[i]f you stand in the ring with Mike Tyson").

199. *Id.* at 432 n.340.

interview data was used in *Tax Treaties for Investment and Aid*,<sup>200</sup> as the author of that study, I am aware that I conducted many of my interviews primarily to learn about and understand the complicated social and political contexts of my subject matter because I believed that my understanding would be incomplete if obtained solely through the standard sources of legal research.<sup>201</sup> My goal was to test what is written about tax issues by learning how people who were living and working within the specific context perceived these issues from their different perspectives.<sup>202</sup>

The common theme of the uses of interview data in these two case studies is that the data was evidently instrumental in presenting a narrative about a sequence of events, contextualizing known facts, and linking facts for the reader.<sup>203</sup> What is missing from the literature and what might make the data even more compelling, is a discussion about the authors' objectives, processes, and reasoning for collecting and using the data—especially in the case of qualitative interviewing.<sup>204</sup> In other words, as in the context of determining what defines a case and what constitutes a case study, the international tax law scholarship might better achieve its objectives by consulting literature on epistemology, especially in the social sciences where researchers have methodically studied how knowledge may be reliably generated through qualitative means such as interviewing.<sup>205</sup>

For example, international tax case study scholarship might benefit from applying some of the methods social scientists use to test their data to ensure the credibility of their assertions. Perhaps the most useful tool in this area would be the concept of triangulation, which in simple terms means scientists

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200. Christians, *supra* note 12.

201. See Stake, *supra* note 4, at 453 (“What details of life the researchers are unable to see for themselves is [*sic*] obtained by interviewing people who did see them or by finding documents recording them.”).

202. See Joel Slemrod, *Tax Principles in an International Economy*, in WORLD TAX REFORM, *supra* note 2, at 11, 13 (“A discussion of tax principles in an international economy must come to terms with the real world, where the implementation of certain tax systems, which may be desirable in theory, is extremely difficult.”).

203. See Norman K. Denzin & Yvonna S. Lincoln, *Introduction: The Discipline and Practice of Qualitative Research*, in THE SAGE HANDBOOK, *supra* note 4, at 1, 19 (“In writing, the field-worker makes a claim to moral and scientific authority.”).

204. See *id.* at 5 (“Qualitative research is inherently multi-method in focus, . . . a strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry.”).

205. See Stake, *supra* note 4, at 455 (cautioning that “[case researchers] will, like others, pass along to readers some of their personal meanings of events and relationships—and fail to pass along others.”); see also *id.* at 456 (“[T]he [case] researcher decides what the case’s ‘own story’ is, or at least what will be included in the report. More will be pursued than was volunteered, and less will be reported than was learned.”). Because it consists in making representations, qualitative research cannot overcome the fact that “[o]bjective reality can never be captured.” Denzin & Lincoln, *supra* note 203, at 5.



often test the outcomes they derive from one method of research by obtaining the same results from another method of research.<sup>206</sup> The use of qualitatively-gathered data by international tax scholars suggests that one of our main ways of using this data is to confirm or bolster factual statements which are, or could be, available from different sources. This suggests that international tax scholars are already engaging in some effort to triangulate, even if this effort is not explicitly stated.<sup>207</sup> Being more explicit about that process could improve our confidence (and the confidence of our readers) in the conclusions we draw from our research. This is not to say that tax law case studies must look like or try to emulate social science case studies in terms of methodology.<sup>208</sup> But I do suggest that social science discourse on the promises and perils of case studies ought to inform the way tax scholars view and present the usefulness of case studies in international tax law scholarship.

Perhaps the most significant observation of this work is how useful a qualitative social science approach can be for developing theory. In most, and perhaps all, of the articles studied here, the authors were able to articulate theories about international taxation only after gathering some amount of empirical data—whether through interviewing or studying texts—and writing about the specific case. For example, Professor Dean had an intrinsic interest in the check-the-box regulations which, upon close study of the regulatory history underlying the change to the rules, revealed to him the inconsistency of articulation regarding simplicity as a valid policy goal for international tax law.<sup>209</sup> Studying the case provided a rich context for thinking about simplification as a rhetorical substitute for very different political goals.

Similarly, in my own work, I wanted to understand why the United States has so few tax treaties with Sub-Saharan African countries despite many other trade and aid relationships with these countries. Only after studying the economic and social relationships between the United States and one Sub-Saharan African country was I emboldened to develop a theory about the purely symbolic nature of tax treaties between developed and developing countries. Professors Boise and Morriss clearly developed a theory about the

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206. Laurel Richardson & Elizabeth Adams St. Pierre, *Writing: A Method of Inquiry*, in THE SAGE HANDBOOK, *supra* note 4, at 959, 963; Stake, *supra* note 4, at 453–54 (“To reduce the likelihood of misinterpretation, various procedures are employed, two of the most common being redundancy of data gathering and procedural challenges to explanations.”).

207. One reason for failing to articulate a scholar’s research method is that legal audiences are uninterested in these issues. *See, e.g.*, Edward J. McCaffery, *Tax’s Empire*, 85 GEO. L.J. 71, 75 (1996) (“I sense that contemporary audiences are easily bored with discussions of pure methodology.”).

208. *See* Macaulay, *supra* note 27, at 1177–82 (discussing ways in which legal scholars can use some of the tools of social science without necessarily forcing us to “master social science method, enlist good partners, or both”).

209. Interview with Steven A. Dean, *supra* note 39.

nature of tax haven evolution by learning from the contemporary and historical context.<sup>210</sup> Theory develops as knowledge emerges through empirical study of social, economic, and political contexts. We could do a better job of studying and understanding these contexts by consulting literature that directly addresses the question of how to learn from observation.

## V. ASSESSING THE CASE

The final aspect of analyzing the international tax case studies involves the assessment of the applicability or explanatory value of the case(s) studied: “[I]t is one thing to marshal the facts, and another to know what to make of the facts.”<sup>211</sup> As in other aspects of the international tax case studies, authors are not typically explicit about the criteria they use to assess the pedagogic value of their cases.<sup>212</sup> Most, however, do draw some substantive conclusions specifically from the cases studied.<sup>213</sup> Perhaps most problematic from the perspective of social science work on the validity of conclusions drawn from research, most international tax case studies draw fairly broad conclusions without discussing the criteria used to determine whether, and to what extent, the observations drawn from the case ought to be viewed as generalizable to other cases or to international tax theory in general.<sup>214</sup>

An examination of the conclusions international tax scholars draw from their case studies suggests that most believe their conclusions are generalizable in some way. Several propose that the case study is generalizable in terms of explaining an event or phenomenon. For example, *Stages of International Taxation* advocates that the conclusions drawn from studying the case of the earnings-stripping rules are generalizable to explain failure in the international tax law system.<sup>215</sup> *The Saga of the Netherlands Antilles* indicates that the case explains both a general phenomenon (offshore finance) and predicts future phenomena (the prospects for offshore finance going forward).<sup>216</sup>

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210. See Boise & Morriss, *supra* note 16, at 383.

211. Dennis Patterson, Response, *The Limits of Empiricism: What Facts Tell Us: Comments on Daniel Keating's "Exploring the Battle of the Forms in Action,"* 98 MICH. L. REV. 2738, 2738 (2000).

212. Diane Ring is the most explicit. See *infra* note 217 and accompanying text.

213. Not all authors do so, however. Ring, *One Nation*, *supra* note 12 (explicitly refusing to draw conclusions from the cases she studied).

214. This point relates back to the prior discussion on selection bias, *supra* Part II.

215. Benshalom, *supra* note 12, at 636, 686 (stating that the case “is reflective of a more profound systemic failure in the [international income tax regime]” and that the case “is a reflection of the anti-avoidance paradigm as a whole”).

216. See Boise & Morriss, *supra* note 16, at 426–27.

[F]rom the experience of the Antilles one can discern the contours of a theory that explains the relatively brief arc of that jurisdiction's success as an offshore financial intermediary and offers insight into the future prospects of both the Antilles and other

*International Tax Relations* suggests the cases studied demonstrate that regime theory can help explain the international tax regime.<sup>217</sup>

Two of the case studies imply that their cases are generalizable to populations other than those studied. Both *Internet Taxation* and *Tax Treaties for Investment and Aid* suggest that conclusions drawn from the case studies involving one country—Burkina Faso and Ghana, respectively—are generalizable to other developing countries.<sup>218</sup> Both articles make some references to explain why the cases involving these countries ought to be viewed as applicable to other, similarly situated countries.<sup>219</sup> In *Internet Taxation*, the author suggests that Burkina Faso’s “economy and policies mirror that of similarly situated countries.”<sup>220</sup> In *Tax Treaties for Investment*

offshore financial centers in the twenty-first century. . . . The rise and fall of the Antilles suggests four critical propositions for the offshore financial sector at large.

*Id.* at 426–27.

217. Ring, *International Tax Relations*, *supra* note 3, at 148, 151 (discussing how regime theory is an explanatory model for the double tax treaty regime and can bring “coherence and organization” to the study of international tax. “[T]he 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.”). Ring is most explicit about the value of cases. *Id.* at 151–52 (“[I]t will be valuable to develop a stable of case studies to help identify common issues, patterns, and problems, and to serve as a database for testing various aspects of regime theory.”). More case studies and institutional analysis could help test this theory. Ring is also explicit about the nature of generalizing. *Id.* at 153 (“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.”).

218. Budnick, *supra* note 12, at 568 (“[Burkina Faso’s] numbers suggest that developing countries will not necessarily be harmed in the future by current international [tax] policy.”). Further, Burkina Faso’s loss of tax revenue seems to be based more on its internal choices than as a result of the WTO ban on e-commerce taxation. *Id.* at 569 (“[T]he present WTO ban should remain in place as presently formulated. Although the ban does result in disproportionate losses in percentage terms for developing countries, when placed within the context of a single country, these losses appear minimal.”). “This data [showing minimal losses to Burkina Faso] would indicate that not in all situations are developing nations unfairly prejudiced [by the WTO ban, but would be] adversely affected by the imposition of residence-based taxation.” *Id.* at 579. *See also* Christians, *supra* note 12, at 712 (suggesting that the case of Ghana shows tax treaties are not generally beneficial for developing countries and that the failure of tax treaties to provide benefits explains why few tax treaties between the United States and developing countries exist).

219. Here, the question of whether the case is generalizable relates back to the discussion of whether the case is representative, discussed in Part III, *supra*. Both of these articles claimed that their cases were representative, so it seems straightforward to claim the conclusions drawn are generalizable to other similar cases.

220. Budnick, *supra* note 12, at 556. The reasoning seems a bit circular: the case studied claimed to be like other cases that are like it. In terms attributed to Abraham Lincoln, “People who like this sort of thing will find this the sort of thing they like.” GEORGE W.E. RUSSELL, *COLLECTIONS AND RECOLLECTIONS* 309–10 (1898).

*and Aid*, I suggest that the failure of the theory of the beneficial nature of tax treaties when applied to Ghana (a “most likely case”) makes it unlikely that tax treaties will prove beneficial in cases involving other countries as well.<sup>221</sup> The social science literature suggests a more careful approach should be taken in extrapolating across populations and that international tax law scholarship might benefit from this caution.

Finally, three of the case studies suggest that the case demonstrates that a specific tax policy ought to be adopted or continued. This claim is most strongly made in *Transforming the Internet*,<sup>222</sup> *Digital Biosphere*,<sup>223</sup> and *Harnessing Tax Arbitrage*.<sup>224</sup> As discussed above in the context of choosing a case, the potential issue in drawing policy prescriptions from one or even several cases is that there may be means of determining whether and in what ways the case might deviate or produce atypical results that might help bolster policy claims.<sup>225</sup> That is, to the extent that international tax scholars wish to use case studies to advance a position on a specific tax policy direction, the argument could be stronger if the reader had more confidence in the case used to draw the conclusion.<sup>226</sup> As in the other areas, international tax scholars

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221. Christians, *supra* note 12, at 712.

222. Cockfield, *Transforming the Internet*, *supra* note 12.

The case study suggests that proposals to tax profits emanating from computer servers will not be an effective solution. . . . [The] analysis suggests that a more effective regulatory framework is required to govern the taxation of international e-commerce transactions. . . . [and] show[s] how the virtual world can subvert regulatory attempts that try to replicate real world rules and principles.

*Id.* at 1175–76, 1200, 1265.

223. Cockfield, *Digital Biosphere*, *supra* note 12, at 373, 385–86 (suggesting that Wal-Mart’s strategy will spread and have a negative effect on state and local government revenues; proposing a change in tax policy to avoid this result; and stating that the case study shows “how traditional tax laws that emphasize control over geographic space fail to achieve the appropriate balance within the digital biosphere” and that the traditional rules “will lead to revenue losses and a distortion in the marketplace as companies seek to develop tax-free online affiliates”).

224. Rosenzweig, *supra* note 12, at 629–30. The case study demonstrates “the distributional and cooperative benefits of the approach proposed by this article.” *Id.* at 559. The case study also evidences that existing approaches to international tax arbitration cannot work. *Id.* at 558.

225. In this aspect, the international tax law scholarship may suffer from some of the same problems faced in international legal scholarship more generally. See Joel P. Trachtman, *International Economic Law Research: A Taxonomy*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 43, 45 (Colin B. Picker et al. eds., 2008) (“[T]here is no agreement on the theory and methodology of international law. This lack of consensus challenges the very legitimacy of international law as an academic field.”).

226. Susan D. Franck, Essay, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT’L L. 767, 770–73 (2008) (asserting that international legal scholars’ work could benefit by using empirical methods more often, as other legal scholars and international scholars have done).

could benefit from the work done by social scientists in examining the promises and perils of drawing conclusions from our research.<sup>227</sup>

#### CONCLUSION

International tax law case studies demonstrate the range of political, economic, and social contexts that inform theory about how best to approach the taxation of international income.<sup>228</sup> Three integrated characteristics appear to describe case study research in the context of international tax legal scholarship. First, international tax case studies are characterized by their subject, i.e., the case. The case may be an event or a phenomenon that involves, implicates, or explains aspects of the taxation of international activities. Second, case studies are characterized by what may be defined as an approach—namely, the author’s attempt to engage in a detailed exploration of the case, mainly using sources and approaches familiar to legal scholarship, but increasingly integrating sources and approaches common in other disciplines. Third, international tax case studies are characterized in terms of their purpose. International tax law scholars engage in case studies for a wide range of purposes, from illustrative (the majority of the cases), to demonstrative (a few cases), to proof-providing (even fewer cases).

We could do more, and better. Legal scholars’ use of case studies to develop theory in international tax law is mostly implicit, and this article has attempted to draw conclusions about the authors’ goals and purposes by inference, as well as through the qualitative approach of interviewing the authors themselves. But the primary purpose of this undertaking is more than

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227. See, e.g., Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 979–80 (2005) (discussing the growth of empiricism in international law recommending the use of modern case studies); Kelley L. Mayer, *Reform of United States Tax Rules Governing Electronic Commerce Transfer Pricing*, 21 T. JEFFERSON L. REV. 283, 302 (1999) (“[C]ase studies should be conducted to determine the ramifications of applying different treaty provisions to various countries in differing circumstances.”); Kunio Mikuriya, Summary Remarks at the Second Joint WCO/OECD Conference on Transfer Pricing and Customs Valuation (May 23, 2007), available at <http://www.wcoomd.org/speeches/?v=1&lid=1&cid=7&id=51> (“At the global level the WCO and the OECD should continue their existing cooperation relating to the sharing of knowledge, the development of training material, and the e-learning module initiative. This cooperation could be further enhanced by the suggestion to create a small focus group of customs and tax experts to dialogue on and study issues involving the WTO and the business community initially targeting practical and concrete case studies based on commercial realities.”). For an argument that socio-legal perspectives on international law provide valuable information, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1266 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

228. Stake, *supra* note 4, at 460 (“Case studies are of value in refining theory, suggesting complexities for further investigation as well as helping to establish the limits of generalizability.”).

that of documenting the contours of what I perceive as a valuable approach to international tax law scholarship. It is, rather, to suggest that the growing use of case studies to develop international tax theory could be expanded and enriched by consulting the methodology considerations which inform social science research. Audiences for social science research expect rigorous analysis of empirical evidence in order to show us something about how the world works. Audiences for international tax law, like audiences for legal scholarship in general, have been content with the traditional, typically non-empirical, approach to case review. In a world of complex economic, financial, and social relationships, using qualitative socio-legal methods to study our cases represents our best hope of developing new knowledge and, with it, new and better theory for international taxation.

