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Redefining the Great Powers:
The Revisionist Model and the Emergence of a Global Regulatory Regime for Cross-border Tax Intermediation

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Abstract

The international tax system has been the locus of both international scandals and sweeping regulatory change since the Global Financial Crisis of 2008 (GFC). Starting with two highly publicised international tax scandals involving Switzerland’s UBS and Liechtenstein’s LGT banks, the past decade witnessed a string of further scandals including some of the largest-ever data leaks such as the Panama Papers and Luxembourg Leaks. Simultaneous to the first scandals breaking, governments were responding to the fallout of the GFC, bailing out too-big-to-fail banks with taxpayer money. The confluence of these events resulted in an “evolutionary moment” (Grinberg, 2012) in international tax regulation, where a new regulatory regime, originating in the US Foreign Account Tax Compliance Act (FATCA), forced nearly every non-US financial institution on earth to act as tax reporting intermediaries for the US. Despite early attempts to repeal FATCA, it quickly became the international standard for the cross-border automatic exchange of information for tax purposes.

This dissertation asks why the FATCA regime succeeded in becoming a global regime where previous international initiatives failed. Drawing from the international political economy literature, the dissertation seeks to answer this question by comprehensively testing Drezner’s Revisionist Model as an explanatory framework for the emergence of the new regime. The aims of the dissertation are to understand the power dynamics between the ‘great power’ states in implementing the regime, and how the application of the Revisionist Model’s analytic framework can help foster a more nuanced empirical understanding of the architecture of the global financial system and its role in regulatory governance. As such, the dissertation speaks to several related literatures: international regulatory governance and global financial regulation (e.g. Drezner, 2008; Kahler and Lake, 2003; Keohane and Nye, 2012; Quaglia, 2014; Simmons, 2001), international tax coordination literature (e.g. Christians, 2014; Grinberg, 2012; Palan, Murphy, Chavagneux, 2010; Sharman, 2006; Zucman, 2015), as well as contributions to regulatory theory development (e.g. Drezner, 2008; Farrell, Newman, 2021; Mattli and Büthe, 2011; Mattli and Woods, 2009; Quaglia, 2014; Slaughter, 2004).
After examining recent theoretical developments, the dissertation provides a detailed explication of the Revisionist Model before comprehensively testing the model through the FATCA regime case study. The analysis finds the Revisionist Model does not fully explain the regime’s emergence due to several falsified elements, including limitations in defining ‘great powers’ as the explanatory variable. The model also correspondingly struggled to predict the standards that describe real-world events. A significant finding here that is contrary to the model’s core hypotheses, is that small states—as compared to the US and EU as ‘great powers’—such as the UK and Switzerland, as well as coalitions of small states, were critical to the overall success of the regime development. Consequently, the dissertation argues that while the theoretical frame of the Revisionist Model is a powerful heuristic, different issue areas will likely require independent variables more closely related to their respective issue areas when defining the relevant great powers. The research also details methodological learnings derived from the model as an analytical tool, presenting several areas of further research in theory development.

The Revisionist Model as analytical frameworks is nonetheless a formidable tool for understanding and analysing the case study of the FATCA regime, offering four substantive findings relating to the research question. First, the US was able to translate its market size into a credible coercive mechanism and globally operationalise the threat. Second, to break through the international impasse on FATCA’s implementation, the US formed a bargaining core the EU’s five largest economies, tacitly acknowledging that despite its enormous power asymmetry, it could not solve the problem of global tax evasion, even for itself, on its own. Third, the overwhelming structural commonalities between the US and EU financial regulatory architecture, made implementation less expensive and enabled the US to leverage existing financial crime regulation to build on. Last, the political salience of the offshore tax evasion problem, as a function of major tax scandals and a post-GFC international appetite for regulatory coordination, created unique circumstances for regime development that the US and EU actors were able to leverage, leading to a global regime with both bilateral and multilateral outcomes.

The dissertation’s main theoretical contribution is the application of a novel case in global tax regulation to test a major theory of regulatory governance in IPE. The dissertation also contributes to state power modelling and the definition of ‘great powers’, and power
dynamics in global financial regulation. Last, the dissertation contributes to the growing IPE issue area of international tax regulation.
Lay Summary

The Global Financial Crisis of 2008 resulted in governments around the world bailing out banks they deemed ‘too big to fail’ using taxpayer money. At the same time, two major international tax scandals involving Switzerland’s UBS and Liechtenstein’s LGT banks, demonstrated how these, and other banks, were enabling offshore tax evasion by wealthy individuals and corporations. These circumstances forced governments to act, with the US government passing a law in 2010, the Foreign Account Tax Compliance Act (FATCA), that forced nearly every financial institution on earth to send information about US persons who were their account holders, directly and on an automatic basis, to the US government. If financial institutions did not send the information to the US, the law required the imposition of a 30% punitive withholding tax on that financial institution’s US-sourced income. For most non-US financial institutions, however, sending this information to the US would break the data and privacy laws in the countries where they operate. After two years of lobbying the US Congress to repeal FATCA, it became clear that the law was not going to change. This led to the US and the five largest EU Member States brokering an agreement to implement FATCA based on bilateral agreements between the US and other states. These agreements would ultimately become the basis for an emerging, global and multilateral framework for automatically exchanging tax information between governments and financial institutions.

This dissertation asks the question of why the FATCA regime was successful when for the thirty years prior, other initiatives failed. To answer this, the dissertation uses a theory called the Revisionist Model developed by Daniel Drezner, a scholar in the field of International Political Economy. The dissertation uses the FATCA regime as a case study to both analyse the regime, and to test the theory’s predictions about what how the regime would emerge and why. In the research, the primary objectives are to understand the power dynamics at play between the key, decision-taking states. The model calls these states ‘great powers.’ Their power is based largely on measures of economic strength, such as their market size and GDP. The model predicts that the two great powers, the US and the EU, are the primary rule makers in the global financial system. If they agree to coordinate on the development of any regulatory regime, this would set the international standard.
The research in the dissertation found that these predictions were not entirely accurate and that small states like the UK and Switzerland played an outsized role in shaping the regime and guiding its standards according to their preferences. Regardless of these limitations, the research found that the model is a powerful tool for analysing global financial and tax regulation. The research also details learnings on the model’s methods derived from the analysis and suggests several areas of further research with the intention of improving the model.

In terms of the research question, the analysis in this dissertation makes four primary findings. First, FATCA succeeded because the US was able to use its market size into a create a coercive mechanism (the punitive withholding tax), forcing almost literally every financial institution on earth, as well as most states to respond. Second, to break through the international impasse on how states should implementation the regulation, the US agreed to negotiate with the EU’s five largest economies. This was also a subtle acknowledgement of the part of the US that despite its enormous power compared to other states, it could not solve the problem of global tax evasion on its own. Indeed, all states require the help and coordination of every other state to create a truly effective regime. Third, the similarities between US and EU regulatory systems were significant. The US and the EU states used this to their mutual advantage in the negotiations, making implementation less expensive, and use of some existing tools, like customer due diligence, made it easier for financial institutions to comply. Last, the political focus on offshore tax evasion, because of the tax scandals and global financial crisis, meant governments around the world, not just the US, were eager to work together on regulation to address the problem. These unique circumstances for regulatory development led to a global regime for the sharing of tax information between financial institutions and governments. In turn, this will make tax evasion, like the examples in the Panama Papers and Luxembourg Leaks, far more difficult going forward.
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Introduction: The emergence of a global regulatory regime for tax

“[T]here is no effective global regulation or governance in the area of tax.” - Duncan Wigan1

For more than thirty years prior to the Global Financial Crisis (GFC), progress in international tax regulation aimed at curbing offshore abuses was slow, and largely ineffectual. The EU, US, and OECD half-heartedly made efforts to address the problem of offshore tax evasion, harmful tax competition (HTC) and the use of tax havens. There were several reasons for this. States, especially states with the largest economies, had divergent preferences in how and whether to address the issue. While the EU made minimal efforts to push for tax information exchange within the EU, the US made virtually no efforts at all. Of course, the domestic preferences of all states are to be able to tax effectively, and as such, tax evasion is generally a domestic crime; the problem is what to do about it. During the 1990s, a more serious push was made by the EU and especially the OECD to address tax evasion directly, but as Sharman describes, these efforts were fought off by a coalition of three dozen tax havens, effectively demonstrating the impotence of the international community to address the issue.2

Then in 2003, the EU passed its Savings Directive (EUSD), but even this regulation was reduced substantially from its original proposal due to pressure from the EU’s own bank secrecy jurisdictions—Austria, Luxembourg, the Netherlands, and the UK. Part of the argument from these states was that constraining activities aimed at tax evasion and avoidance within the EU would see massive outflows to non-EU European states who were direct competitors for these flows—namely, Switzerland, Andorra, Liechtenstein, Monaco, San Marino, and so on. Since EU rulemaking in all matters concerning tax requires unanimity, EU secrecy states were able to keep the constraints at bay. In the US, the Qualified Intermediary programme brought some constraints to US persons investing offshore, but the loopholes were obvious and numerous, and the programme, while innovative in its underlying reporting mechanisms, was generally ineffective.

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Then, the GFC arrived, alongside two major international tax scandals involving Switzerland’s UBS and Liechtenstein’s LGT banks. The former cracked open the case revealing degree and extent of US tax evasion, the latter, the flows from Germany into non-EU tax haven states. These scandals would ultimately result in governments and the financial services industry alike claiming that the era of banking secrecy “is over.” The idea that states were bailing out ‘too big to fail’ financial institutions with taxpayer money at the same time those, and other global banks, were helping the world’s wealthiest individuals and corporations evade tax, created a perfect storm demanding government action. However, the question was what kind of action, since, as the quote from Wigan at the beginning of this section notes, there was “no effective global regulation in the area of tax”. Furthermore, generic approaches were also unlikely to render results, since, as Quaglia observes, “the crisis underscored the need for ‘fit-for-purpose’ financial regulation and supervision.”

Acting unilaterally, the US enacted the Foreign Account Tax Compliance Act (FATCA), which required virtually every financial institution on earth to start reporting account information or US accountholders directly, and automatically, to the US government. Failure to comply would see the financial institution hit with a 30% punitive withholding tax on all its US-sourced income, effectively pricing it out of US markets. After two years of relentless efforts by states, industry bodies, financial institutions, and even celebrities to get the US to repeal the law, the world relented to the reality that FATCA was here to stay. As a result, and to address the multiple issues including primarily the conflict-of-law problems FATCA presented, the US and five EU Member States (the UK, Germany, France, Italy, and Spain) led by the UK, negotiated an approach involving bilateral intergovernmental agreements (IGAs) with the US to solve these issues and enable implementation. The IGA bargaining process also saw the US make major concessions to these smaller EU states including foregoing the coercive mechanisms and agree to EU-style routing. In other words, the IGA

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process saw the US, as well as the EU subtly admit that they needed to, as Morse puts it, “ask for help.”

A great deal has been written about FATCA and its subsequent regulatory ‘offspring’, as will be explored in the literature review. Yet, most of this work has focused on either the technical features of the law or represents quantitative analyses of its efficacy; very little is known about the state power dynamics at play in the development of the FATCA regime. Neither is there much understanding of the power dynamics relating to how the IGA approach worked and its subsequent impact on the development of intra-EU legislation (the Directives on Administrative Coordination or DACs), and international regulatory standards (the OECD’s multilateral framework known as the Common Reporting Standard, or CRS) that emerged as a function of the regime.

At the same time, global regulatory governance as an issue area in political economy also underwent something of a renaissance. New work on the development of regulatory theories from the early 2000s to the present, and especially in response to the GFC, have created new opportunities for theory testing from many diverse approaches. To help frame the understanding of great power in regulatory governance, Simmons envisions a hegemonic regulator at a regulatory centre that ‘diffuses’ its surrounding by small states with divergent preferences. Building on institutionalist approaches Büthe and Mattli posit that states have delegated regulatory authority to private non-state private actors who increasingly leverage technical expertise to “write the rules” of the international system. Kahler and Lake argue for hierarchies of states, and networks of non-state actors to explain the lack of supranationalism. Additionally, the literature developed new approaches to the EU, treating the EU as a single actor with robust regulatory capabilities: Quaglia employs the concepts of regulatory uploading, downloading, and cross-loading to argue for the variation in the EU’s ability to influence global financial regulation; Damro argues for a

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9 Quaglia, *The European Union and Global Financial Regulation*. 
Market Power Europe, adding to market-size-based approaches to regulatory power the concepts of ‘interest contestation’ and the institutional features of the EU as a regulator; and Posner argues that centralisation, the ability to draw regulatory authority from EU Member States, is a key feature of the EU’s regulatory power.

Finally, in 2008, Drezner published his ‘unified theory’ of international regulatory regimes: the Revisionist Model. The model seeks to contain in a single model all the theoretical features required to analyse any international regulatory issue. In the realist tradition, the model is state-centric, employing a market-size-based taxonomy to identify the ‘great powers’. These great powers, he argues, are the US and EU in a bipolar power arrangement whereby a concert between the two is both necessary and sufficient to deliver regulatory coordination over any transnational issue. Methodologically, the model sets out a stepwise approach to regulatory analysis offering a robust an analytical framework designed to be used in single case studies. Theoretically, it contains a set of central hypotheses and falsifiable postulates leading to a typology of outcomes, in the form of standards. The Revisionist Model is widely referred to in the literature, and it is an ideal theoretical framework for analysing new regimes, like FATCA.

The emergence of the FATCA regime in the context of the GFC offers a complex case study for analysis. Uniquely, as a recent, high-profile case, FATCA’s trajectory was highly visible from the events that led to the enactment of the law, to the wide recognition that it was directly responsible for the creation of a new global regulatory regime. Enacted in 2010 in the form of a US law, within a period of four years, an intergovernmental approach to its implementation emerged, as did intra-EU legislation codifying the IGA approach, and finally the foundation of a global, multilateral framework governed by the OECD. This depth and complexity mean that it is also an ideal case for study under the Revisionist Model’s analytical framework.

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The rest of this chapter will discuss the research questions and aims for this dissertation, the structure of the dissertation and its arguments, and finally, it will present an explication of the emergence of FATCA as critical background to the reading of the rest of the dissertation.

Research questions and aims

The principal research question this dissertation aims to answer is: *Why did FATCA succeed as a global regulatory regime when previous, and repeated, international attempts failed?* In addition to the political context in which FATCA emerged, the question seeks to understand the ongoing and underlying state power mechanisms at play in evolution of FATCA from a US law to a global regime. The question also seeks to understand the mechanisms behind the failure of previous attempts and whether these influenced the construct of the initial law, subsequent regulations, and the content and structure of the IGAs. Further, the question is attentive to the influences, preferences, and motivations of other actors—both state and non-state, as the emergence of the global multilateral CRS regime was due almost entirely to non-US actors. To answer the primary question and its attending considerations, the method of analysis will be through an application of the FATCA case to the Revisionist Model.

The Revisionist Model is a compelling theoretical and analytical framework providing a testable, stepwise process for case study analysis. Importantly, its core set of hypotheses and postulates are testable in a manner that allows for both consistent reproducibility and falsifiability. Further, Drezner argues that the model can apply to any international regulatory issue. The taxonomy for the identification of great powers presented by the model necessarily entails coordination between the US and EU to employ the fullness of the model. Thus, on all the principal requirements for case selection under the model, FATCA meets the criteria. In addition to seeking answers to the principal research question through its analysis in the model’s framework, this dissertation also seeks to understand the strength of the model, to test its core hypotheses and postulates, to enable reproducibility, and to test whether these methodological and theoretical structures are falsified by the case study. If there are instances of falsification, the research will offer detailed analyses of the falsified elements and consequently, articulate resulting areas for future research. Taken together, the testing of the model and the overall analysis of its performance, coupled with
analysis of falsified elements comprise one of this dissertation’s contributions to theory development.

Through the analysis of FATCA, the dissertation will also aim to address a second set of questions relating to the principal research question. First, the analysis will seek to understand, which states have the power to originate and successfully implement global regulatory regimes like FATCA, and why. This question speaks to state-centric models of regulatory power and seeks to understand the role, especially of smaller states. Next, the analysis will seek to understand whether the Revisionist Model fully explains the emergence of FATCA. This question speaks to both the methodological robustness of the model, as well as the complexity of the regime. The research also seeks to answer, what, if anything, can the findings from this case study tell us that we do not already know about global regulatory regimes? This question is directed at both the Revisionist Model and the case itself. If the hypotheses and postulates in the model perfectly predict the trajectory of the case, what can be derived from this? If not, does this raise questions about the model, case selection, or both? Last, and related to the previous question, the research will ask whether any of its findings are generalisable.

Structure and arguments
The thesis contains 8 chapters. The structure of the overall dissertation follows the structure of the Revisionist Model as explicated in Chapter 3. This enables a consistent analysis of the model and an easier structure for understanding the stepwise process the model requires. Chapters four through seven comprise the testing of the model and analysis of the case. Chapter eight comprises the final analysis and conclusions. Below is a brief outline of the content of each chapter alongside their most salient arguments.

Chapter 2 covers the literature, research design, and methods for the dissertation. Having pointed already to some of the principal literature the dissertation speaks to, this chapter will discuss the literature that is relevant to the study as well as some of its outcomes. It will also discuss the additional literatures relevant to the dissertation’s analysis, including the regulatory and legal literature; and the literature covering tax havens, tax evasion, and HTC.
As already alluded to, the research design and methods detail the use of the Revisionist Model, case selection, and sources and data.

Chapter 3 offers a contextual background to, and full explication of, the Revisionist Model. While this explication draws directly from Drezner, he does not explicitly structure the model into four distinct steps as this research does. The chapter argues the rationale for this structure is ease of understanding, clarity, and reproducibility. It outlines each of these steps, as well as associated language, concepts, and typologies. It concludes with initial observations of the model and suggests possible limitations.

Chapter 4 tests the first step in the model: the identification of the great powers. Here the dissertation updates Drezner’s measures of economic power using 2014 data. It argues for some modifications to the original measures to provide additional clarity, basing these changes on recent enhancements to data availability since the original version was produced. Other modifications comprise the inclusion of additional states relevant to the data and following Drezner’s approach. Last, the chapter outlines the rationale for the data timeframe. The analysis of the chapter finds that while the identification yields the US and EU as great powers, there are some possible interpretive limitations to the model’s explanatory power stemming from its market size-based dependent variable construct. It argues that the bipolar matrix the model demands may present empirical difficulties in later steps since negotiations over the IGA approach were led by a group of EU states rather than the Commission. Specifically, it argues the model may lack the explanatory power for predicting FATCA outcomes since it neither predicts nor allows the coalition of states central to the creation of the FATCA regime (in Drezner’s terminology, the ‘great power concert’)\textsuperscript{12}. Still, it argues, in addition to a ‘purist’ reading of the model the group of EU states can act as a ‘proxy’ for the EU—the analysis will keep open the possibility of multiple interpretations which will also help test the limits of the model.

Chapter 5 examines the initial preferences of the great powers. This chapter is broken into two parts: the first addresses US preferences, the second those of the EU. The chapter observes that, methodologically, the Revisionist Model offers little in the way of guiding the

\textsuperscript{12} Ibid.
discovery or analysis of initial preferences. Following from the model’s definition of its dependent variable—international regulatory coordination—that the requirement for ‘codified adjustment’ as a measure offers a starting point to the analysis. The argument is that existing codified rules (legislation) can be understood as the best indication of status quo preferences within a state. Part 1, the US, begins with the legal and legislative context of the US, and the specific background context relating to the FATCA law which clearly defines the US’ preferences for offshore tax abuse. It identifies three principle legal avenues that comprise the US’ initial regulatory environment in which FATCA emerged. Specifically, it argues that FATCA emerges at the confluence of the US tax treaty framework, its financial crime (especially AML/CFT) regulatory landscape, and its Qualified Intermediary (QI) programme. The chapter concludes that FATCA builds on either the legal logic and precedent or regulatory architecture—or both—of these three groups of rules.

Part 2 of Chapter 5 defines the EU’s initial preferences relative to FATCA. As with the US, the chapter begins with the legislative environment in the EU and the advantages, and constraints, of law making at the supranational/EU level. The chapter then identifies the most salient existing rules to identify the status quo preferences for the EU. Again, as with the US, this first identifies the EU’s money-laundering directives (MLDs) arguing the underlying regulatory architecture of the MLDs is relevant to considerations under FATCA as they share similar provisions (e.g. due diligence and beneficial ownership). Then it identifies two initiatives relevant to the exchange of information for tax purposes between governments: the EU Savings Directive (EUSD) and the Directives on Administrative Cooperation (DACs). The section argues that while the legal logic of these directives strongly mirrors the logic in FATCA, the approach in the EU to implementation and relationship to wider EU law is categorically different to the US, which would indicate strong oppositional preferences compared to the US.

Chapter 6 takes the initial preferences identified in Chapter 5 to first create a cost-benefit analysis, testing the model’s game-theoretic-derived hypothesis that when the cost of regulatory adjustment outweighs the benefits, coordination will not occur. The definition of costs and benefits are construed along two lines: political and financial/economic costs and benefits. Taking these in turn, the analysis argues that the EU faced significant political costs in failing to address the principal conflicts-of-law and implementation costs FATCA
presented to the EU. On the other hand, it argues that there were also significant benefits both domestically (intra-EU level) and internationally (as a regulatory great power in international fora). Financially and economically, the costs of adjusting to FATCA were very high and on a net basis would not confer benefits. Last, testing the Revisionist Model’s second central hypothesis, the variable of coercion is introduced to the coordination analysis. Contrary to the model, the chapter argues that FATCA demonstrates that great powers can successfully use coercion against each other as an effective element in cost-benefit calculus, and following from recent research on FATCA’s efficacy, that coercion may even be a necessary bargaining component in bringing about some international regulatory regimes. Finally, the chapter analyses the bargaining core leading to the IGA framework. Here it argues that, as predicted, the model was unable to offer a complete empirical understanding for the emergence of the bargaining core. This leads to two competing interpretations: the model is validated when the group of 5 EU states is treated as a proxy single actor for the EU; however, the model is falsified when the states are treated as an independent coalition.

Chapter 7 discusses the outcomes of the FATCA IGA process and the regulation’s evolution into an international regime, leading to global standards. The chapter begins by explicating the events between 2012-2014 which cover the period of the bargaining core, and which led to the adoption of the DAC2 in the EU and OECD’s creation of the Common Reporting Standard (CRS) and the basis for a global multilateral standard. After this, the chapter analyses which standards in the model’s typology most accurately define the outcome. The chapter then argues that there are competing standards depending on the actors’ perspectives: for the US, the result of FATCA implementation is global harmonisation; from the perspective of the EU, the outcome is club standards; and from an international perspective, there are two regulatory paradigms—the bilateral US model, and the multilateral OECD model (which excludes the US)—resulting in rival standards.

Methodologically and theoretically, the chapter argues that the model’s standards typology is incomplete, lacking the ability to explain both temporal elements of standards creation and constraining interpretation to categories that are too narrow.

Chapter 8 summarises the dissertation’s central findings explicating them in a similar stepwise fashion that mirrors both the model and structure of the dissertation. It then
presents the overall conclusions to the dissertation including discussion of the primary research question, contributions, and areas of further research. As relates to the case of FATCA, the conclusions offer four elements that explain why FATCA was a successful global regulatory regime where previous initiatives failed. Theoretically and methodologically, the chapter analyses the falsified elements of the model, and concludes that the model is presents a strong analytical framework that offers ample opportunity for further research and theory building in addressing its limitations.

Macrolevel context and explication of FATCA
The purpose of this section is to offer an explication of the background to FATCA’s emergence, its legal underpinnings, its high-level technical mechanisms, and development into an international regime. This background is an essential first introduction to what FATCA is before continuing with its analysis under the Revisionist Model: the objective is not to comprehensively explicate FATCA, rather, to lay the critical foundations of FATCA to enable seamless understanding in the analytical chapters.

Introducing the problem of offshore tax evasion
As the adage goes, “in this world nothing can be said to be certain, except death and taxes.” But the current era of high-profile, international tax scandals would suggest that, for a significant number of high-net-worth individuals and multinational corporations, taxes are anything but certain. Starting in 2008, these scandals have given rise to more than a decade of leaks and revelations about tax havens that would fundamentally change the world of offshore finance: the Luxembourg Leaks (2014), Swiss Leaks (2015), the Panama Papers and Bahamas Papers (2016), Paradise Papers (2017), Mauritius Leaks (2019), and Pandora Papers (2021). The scale of the leaks is difficult to overstate. To put them in perspective, the Panama Papers leak alone contained about 1500 times more data than the 2010 WikiLeaks dump. But it was two individual cases from 2008 at the international banks UBS of Switzerland, and LGT of Liechtenstein, that put the issues of tax havens and international tax competition front and centre on the global stage. The cases uncovered

practices previously shrouded by bank secrecy laws and shined a bright light on governments’ seeming failure to do anything substantive about the issue. While some countries had pre-existing bilateral tax treaties and/or information sharing protocols designed to prevent ‘harmful tax competition’, these proved to be ineffective mechanisms to combat the complex, multilateral nature of international tax competition and offered little understanding of the scope and scale of the global problem. Further, because many tax avoidance and evasion schemes involve more than two countries or jurisdictions, information about the size of pass-thru financial flows evading tax and methods by which this is accomplished were virtually non-existent. There was so little reliable information about the size, scale, and amount of lost offshore tax revenue, that the size of offshore tax evasion has been described by many researchers as “unknowable”.16

The timing of the UBS and LGT cases also coincided with the Global Financial Crisis of 2008. Governments were in the process of bailing-out banks considered “too big to fail” with taxpayer money, while at the same time tax scandals in the press were describing how some of these same multinational banks were the conduits for tax avoidance and evasion activity, causing governments to scramble to define credible responses. The UBS case in particular caused tensions to rise between governments of Switzerland and the United States. The case unveiled how the bank relied heavily on Swiss bank secrecy law to target, and enable, US persons to evade their tax liabilities to the US through schemes that read more like the plot of a movie than a financial accounting manual, and prompting the US government to formally question whether the Swiss government gave approval to these practices. Consequently, alongside growing protests of the bailouts, and the “righteous indignation”17 of taxpayers forced to bear the costs of bailouts while “global elites”18 evaded taxation, US

lawmakers focused their attention on the issue of tax evasion and avoidance practices and the role of both financial institutions and foreign states’ involvement.

Politically, early fallout from the scandals argued for a global approach noting that, similar to the approach taken in response to 9/11 with the enactment of the US PATRIOT Act’s provisions aimed at AML and terrorist financing, tax evasion was a global issue requiring a robust US response. Where the financial regulatory elements of the PATRIOT Act enhanced AML and CFT, effectively merging the two\(^\text{19}\), offshore tax evasion was being cast as a similar harm indicating the US’ likely legislative approach would be to treat tax evasion as a global finance crime. The fallout of the scandals would also see the US and Swiss governments in a confrontation that would ultimately force the Swiss government to choose between saving UBS a second time (the Swiss had bailed out UBS five months prior due to GFC exposures) and protecting its hallowed domestic bank secrecy laws. With the Swiss choosing the former, the US government and media proudly claimed “the era of banking secrecy is over.”\(^\text{20}\) The US Senate investigations of 2008 into these practises would lead, in just two years, to the enactment of the Foreign Account Tax Compliance Act (2010) aimed at curbing the effects of global tax evasion on the US. Demonstrating the political commitment to the issue, the law contained a coercive mechanism one scholar called “a ‘nuclear bomb’ on the institutional architecture of cross-border tax evasion”\(^\text{21}\). The law would eventually become the basis for a new international regulatory regime characterized as ‘an evolutionary moment’\(^\text{22}\) for the global financial system.

The UBS and LGT tax scandals: ‘As sexy as tax gets’

The cases of UBS of Switzerland, and LGT of Liechtenstein, were unlike previous cases relating to offshore tax evasion: legal proceedings demonstrated that rather than one-off instances involving a few ‘bad apples’ where bankers were helping wealthy clients funnel illicit assets, the banks were engaged in a global, systemic practice of using offshore vehicles to evade tax that implicated tens of thousands of individual clients with assets estimated, at

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\(^\text{20}\) Birkenfeld, “Bradley Birkenfeld: The Whistleblower in His Own Words.”


\(^\text{22}\) Grinberg, “Beyond Fatca: An Evolutionary Moment for the International Tax System.”
the time, at more than $23 billion. As the details of the two cases emerged, governments, tax officials, financial services professionals, and the public and press alike were enthralled: as Itai Grinberg, law professor and former official at the US Treasury’s office of International Tax Counsel, put it, “[…] the stories really do read like a thriller – they are as sexy as tax gets: bankers are smuggling diamonds across borders in toothpaste tubes, governments are buying illegally stolen lists of clients that are engaging in tax evasion from disgruntled bankers and giving [the bankers] brand new identities, its great stuff, right – like a novel.”

Indeed, this was how Bradley Birkenfeld, the American citizen working in the private banking arm of UBS in Geneva, described his role and exploits as the central witness in the UBS case to the US government in 2007 when he blew the whistle on the UBS’s tax evasion services, “[revealing] to the outside world the inside secrets behind these illegal practices.” The documentary evidence Birkenfeld handed over to the US Department of Justice (DOJ) included more than 19,000 named individuals with “in the range of $18 billion in undeclared assets,” enabling the DOJ to bring a case against UBS. The scale of UBS offshore practice was, according to Birkenfeld, “unprecedented.”

Despite blowing the whistle on UBS’ illegal offshore tax practices and detailing the processes he himself engaged in, the US government found Birkenfeld to be withholding of a full and complete accounting of his involvement. Specifically, Birkenfeld omitted the fact that while he was working as a private banker for UBS, one of his clients was California billionaire and US citizen, Igor Olenicoff, who held roughly $200 million in assets with the bank offshore. Thus, in 2008, the US brought the charge of “Conspiracy to defraud the United States”

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23 While the LGT case was similarly dramatic and influential in bringing illicit offshoring to light and framing future regulatory responses in multiple countries, this dissertation will focus on the Birkenfeld case, both for relevance and influence on subsequent political and legislative action.

24 During the time the United States government’s response and subsequent legislative efforts were being developed, there were very few reliable sources on the formation of the legislative agenda relating to FATCA. Grinberg was a consistent academic, legal, and governmental voice on how these regulations came to be. He worked in the US Treasury Department during this period, and he subsequently wrote on these subjects as a law professor at Georgetown University. As such, this section will cite from his work heavily.


26 Birkenfeld, “Bradley Birkenfeld: The Whistleblower in His Own Words.”


28 Birkenfeld, “Bradley Birkenfeld: The Whistleblower in His Own Words.”
against Birkenfeld, to which he pled guilty. The lawsuit, and a subsequent report on tax haven banks by the US Senate’s Permanent Subcommittee in Investigations, revealed the remarkable detail to the public of how UBS acted on behalf of their clients to knowingly evade US tax obligations. The lawsuit’s statement of facts, written by the US Government and signed by Birkenfeld, showed that UBS was not only aware of these practices, but even produced training manuals for staff on how to engage with US authorities. As recounted in excerpts from UBS training documents included in the Senate Subcommittee report:

An undated UBS training document entitled, “Case Studies Cross-Border Workshop NAM” provides a series of scenarios designed to train its personnel. An excerpt from one of the scenarios is as follows: “After passing immigration desk during your trip to USA/Canada, you are intercepted by the authorities. By checking your Palm, they find all your client meetings. Fortunately [sic] you stored only very short remarks of the different meetings and no names.

The Senate report goes on to list off the extraordinary measures the bankers would employ to avoid detection by the US authorities including, the use of unmarked, multicurrency Swiss credit cards, nameless international wire transfers to and from Switzerland, destruction of all banking documents located in the US, and the instruction of clients in the US to show withdrawals of their own funds in the US as “loans from the Swiss bank”. Further methods included thwarting US anti-money laundering and terrorist financing laws: as a function of the US PATRIOT Act of 2001, enhanced measures on US-originating wire transfers over $10,000 require additional scrutiny. To avoid this, Birkenfeld and an accomplice would carry “bundled checks” to Switzerland to have the payments deposited directly through the foreign bank. The US PATRIOT Act also required the declaration of cash or monetary

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30 As per the Senate Subcommittee report’s footnotes, “‘NAM’ refers to the North American division at UBS Switzerland”.
32 Ibid., 100.
instruments physically passing into or out of the US\textsuperscript{34}; so, in perhaps the ‘sexiest’ example of evading this kind of detection,

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\text{[...]} \text{on one occasion, “at the request of a U.S. client, defendant Birkenfeld purchased diamonds using that U.S. client’s Swiss bank account funds and smuggled the diamonds into the United States in a toothpaste tube,” presumably so that the U.S. client could obtain possession of his Swiss assets without alerting U.S. authorities.}\textsuperscript{35}
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In addition to the case against Birkenfeld as an individual, the United States Department of Justice (DOJ) Tax Division was also undertaking a criminal investigation of tax fraud in UBS. A Reuters Special Report detailed the conflict between the US and Swiss governments over UBS, which at the time was Switzerland’s largest bank and “three times bigger than Lehman in terms of assets”.\textsuperscript{36} In response to the investigation on tax fraud, UBS was prepared to admit guilt with the intention of settling the case with the DOJ. However, the DOJ was determined that any settlement with UBS included the disclosure of names of US clients as a “condition of settlement”, something inconsistent with Swiss banking secrecy law. As UBS was ‘teetering’ as a consequence of the GFC, and having just been bailed-out by the Swiss government, it sought to work with the DOJ on a settlement, in order to “avoid the potentially catastrophic consequences” indictment would entail. While the private banking business at UBS was “tiny” (circa 1% of its total UBS assets under administration), the ramifications of a criminal indictment were thought to have been grave enough to push the bank into collapse.\textsuperscript{37} Given the size of UBS, the US Federal Reserve Bank, although not involved in the case, raised warnings about what the collapse of UBS would mean to global financial markets, and the implications of collapse were so grave that Hillary Clinton, then Secretary of State, was directly involved in the case “at several points”. These conditions set up the central conflict between the US and Swiss governments: the Swiss government was

\[\text{\textsuperscript{\text{34} Ibid., CRS-14.}\text{\textsuperscript{35} United States, "Tax Haven Banks and U.S. Tax Compliance," 100.}\text{\textsuperscript{36} Lisa Jucca, "Special Report: How the U.S. Cracked Open Secret Vaults at Ubs," Reuters, 9 April 2010.}\text{\textsuperscript{37} One of the possible consequences of an indictment for a financial services institution is that many states as well as corporations have strict rules against doing business with companies that have been criminally indicted.}}\]
determined to retain its domestic banking secrecy laws, and the US was determined to stop
Swiss banking practises that cost it “hundreds of millions of dollars” in lost tax revenue. 38
The involvement of the Swiss government in these negotiations was reflective of the impact
the financial crisis had on UBS with the institution described as, “Europe’s biggest casualty
of the sub-prime crisis.” 39 The Swiss authorities had bailed-out UBS almost exactly four
months earlier in a deal that included both a liquidity injection, and the removal of billions
in toxic illiquid assets from UBS’ books: “In a deal coordinated by ministers, the Swiss
National Bank and federal banking commission, the government effectively pumped $60bn
into UBS, taking virtually the last $50bn of its toxic assets into a special purpose vehicle off
its books and owned by the SNB.” 40 The deal also gave the Swiss government nearly 10%
stake in the bank. As such, ensuring that UBS was not criminally indicted was not only in the
interest of the Swiss government insofar as this would protect the Swiss financial services
sector, but also in its own financial interest to protect its largest financial institution from
this new risk of collapse. The US government, blamed in part for the crisis through lax
regulatory oversight, was now leveraging the fallout of the crisis vis-a-vis UBS to pressure
the Swiss government to make a choice between protecting its hundred-year-old tradition
of banking secrecy, and risking the collapse of its largest financial institution in which it had
a major financial interest. In the wake of the US allowing the collapse of Lehman Brothers
just 5 months earlier, it was unclear to the Swiss whether the US would risk the collapse of
another of the world’s largest financial institutions (again, UBS was three-times the size of
Lehman), “but the Swiss decided not to take the risk.” 42

Thus, on February 19, 2009, “UBS and the US government […] agreed an out-of-court
settlement to end one of the most bitter assaults on Switzerland’s hallowed bank secrecy,”
including more than $780 million in fines for UBS, and supplying the names of “at least 5000
US offshore clients” to the US government – in addition to those already named in the
Birkenfeld lawsuit. 43 The settlement was ultimately authorised “with the blessing of Swiss

40 Swiss National Bank
41 Gow, “Switzerland Unveils Bank Bail-out Plan.”
regulators, who had to draft an emergency regulation to bypass the court system to save UBS from the risk of failure.” The US Internal Revenue Services (IRS) commissioner framed the result as a US victory over the Swiss government, saying, “We are pleased to have initialised an agreement with the Swiss government which protects the US government’s interests.” The Swiss justice minister, on the other hand, characterised the result as a compromise protecting Swiss sovereignty: “I am pleased to say that it has been possible to resolve the matter in the form of a compromise between two sovereign states – that is in the interests of both states.”

Whatever relief the Swiss government or UBS felt because of the settlement of the criminal tax fraud investigation was extremely short-lived. The day after settlement, the US shocked the Swiss in its continued “civil action by the IRS to discover the names of the 52,000 US clients with offshore UBS accounts in Switzerland”. The civil action raised by the Americans renewed the domestic law confrontation. In the criminal case against UBS, “[...] it had been possible to stretch Swiss law to settle charges of tax fraud,” however, in this related but new civil action demanding some 52,000 names, “the summons breached new ground by targeting tax evasion, an area in which the Swiss do not offer international cooperation.” The confrontation was hotly contested for several months ultimately leading to a compromise position by the Swiss, who agreed to allow UBS to furnish the US government with the additional names. As with the criminal suit, it was senior representatives of the Swiss and US governments, namely the Swiss foreign minister Micheline Calmy Rey, and again US Secretary of State Hillary Clinton, who facilitated a mutually diplomatic outcome rather than UBS itself: “Insiders say that by early March, it was clear that without Swiss government intervention, UBS would face another damaging legal clash that threatened Switzerland’s relationship with the United States.”

45 Simonian, “Ubs and Us Strike Tax Evasion Deal.”
46 Ibid.
48 Here, the term ‘insider’ refers to people working in the bank who are barred from sharing any information about the bank externally. Being an ‘insider’ simply means the individual is bound by non-compete and other regulatory obligations.
Birkenfeld, meanwhile, was sentenced to 40 months in prison and received a $30,000 fine.\textsuperscript{50} And while others were tried and fined by the US government (including Igor Olenicoff, the California billionaire and Birkenfeld’s client, who paid $52 million in fines\textsuperscript{51}), Birkenfeld was the only person to go to prison over the revelations, which he claimed would discourage future whistleblowers: “The fact that I am the only person behind bars as a result of the international banking scandal sends a chilling message to future financial whistleblowers: if you come forward to expose illegal banking practices, you could go to jail.” He also warned that failure to protect whistleblowers would exacerbate these types of practices in future, saying, “[whistleblowers] deserve to be praised and protected, not prosecuted.”\textsuperscript{52}

However, in 2014, in a Hollywood-style twist, Birkenfeld was notified that he qualified, under the IRS whistleblower programme, to receive a percentage of the roughly $5 billion that had been collected in tax revenue up to that point, as a function of his whistleblowing revelations. In September of the same year, the IRS paid Birkenfeld $104 million, the largest pay-out ever under the programme, for “revealing the secrets of the Swiss banking system”, which amounted to, “more than $4600 for every hour he spent in prison.”\textsuperscript{53}

Toward a systemic response: America’s new international regime

While the revelations that emerged from the Swiss settlements addressed the immediate issue of the UBS case, and while these names and additional information from the Department of Justice investigations gave the US unprecedented new information about the mechanics of bank-facilitated offshore tax evasion, the settlements and new information did not address systemic tax evasion issues in the broader global financial system. The Swiss settlements addressed specific financial institutions regarding a specific case; they did not give the US insight into every Swiss financial institution as a matter of legal precedent or treaty, nor did they give insight to any other financial institution in any other jurisdiction. Consequently, while the settlements were undeniable wins for the US, the question the US, and other governments, faced was what to do about the systemic, global issue.

\textsuperscript{50} \textit{United States V. Birkenfeld}, Document No. 81, Judgment, 21 August 2009.
\textsuperscript{52} Birkenfeld, “Bradley Birkenfeld: The Whistleblower in His Own Words.”
In July 2008, just before the height of the crisis and in the middle of the Birkenfeld/UBS saga, the United States Senate’s Permanent Subcommittee on Investigations launched an investigation into “Tax haven banks and U.S. tax compliance” with the initial aims of understanding the size and scope of offshore financial assets, “the extent to which financial institutions in tax havens may be facilitating international tax evasion.” The investigation focused on the two tax scandals that emerged earlier that year, and made a number of recommendations for enhancing and strengthening existing regulatory frameworks relating to tax enforcement. The report also made recommendations relating to legislation: specifically, the recommendation to enact the Stop Tax Haven Abuse Act. The act, as its name would suggest, focused almost entirely on tax haven jurisdictions. However, this approach was problematic in two regards. First, the recommendations in the act relied heavily on OECD assessments and ‘black lists’; and second, the approach had no clear international enforcement or coordination mechanism. These were problematic because the focus on tax haven states and jurisdictions through rich-state clubs such as the G7 and OECD had only recently resulted in humiliating defeat for those clubs. In his comprehensive treatment of this issue from the early 1990s to the early 2000s, Sharman writes that, “the OECD sought to pressure tax havens to adopt a standard package of tax, financial, and banking regulations [...]. By 2002 the small state tax havens had prevailed, and the campaign to regulate international tax competition had failed.”

The US was not alone in being pressured to act. Politicians and ministers around the world, and notably both the United Kingdom and Germany, were dealing with similar issues as tax evasion had suddenly taken center stage in the press. As the Senate investigation noted, “nearly a dozen countries have announced plans to investigate taxpayers [...] demonstrating not only the worldwide scope of the tax scandal, but also a newfound international determination to contest tax evasion.” Despite its conclusion that tax scandals are international in nature, conspicuously absent from the Senate’s analysis and

55 UBS and LGT.
56 Sharman, Havens in a Storm: The Struggle for Global Tax Regulation.
recommendations was the need for international coordination to effectively ‘contest tax evasion’.

This may have been because recent history would suggest that international coordination on tax matters had been fraught. Sharman explains that “[…] securing a common position on tax regulation that the United States, France, Germany, Britain, Japan, Switzerland, and the other twenty-two members could agree on looked much harder than convincing tiny island states to sign on.”58 While states have control over their own domestic law and policy, any form of global tax regulation would require international coordination and a credible international enforcement mechanism. In the case of international tax regulation, coordination is often incoherent because tax competition is a zero-sum game amongst states and jurisdictions, hinging on differing, and often opposing, concepts of sovereignty. This dynamic creates two principal perspectives on tax competition.59 First, high-tax states observing capital and asset flows to low-tax jurisdictions where the capital and assets evade, or aggressively avoid, taxes owed to the high-tax state, is seen by high-tax states as ‘harmful tax competition’. Second, and opposing, low-tax states using their sovereignty to create low-tax environments to attract global capital and thereby grow their own economic prosperity is seen as a manifestation of global capitalist ideals.60

Against this backdrop, with unrelenting political pressure to take meaningful action, and under the direction of the new democratic presidential administration, in February 2010 the US Congress passed the Hiring Incentives to Restore Employment, or HIRE Act, which President Obama signed into law a month later. Contained within the act in Chapter 4 was the Foreign Account Tax Compliance Act. FATCA was sweeping legislation requiring all non-

59 In some sense these approaches respectively mirror Keynesian and more laissez-faire economic approaches to fiscal policy; however, these interpretations are not the subject of this dissertation.
U.S. financial institutions, as well as some non-US non-financial institutions, to report directly and automatically, information about US persons and some companies who are account holders, including a broad range of detailed information about their accounts, to the US' Internal Revenue Service (IRS). As an enforcement mechanism, financial institutions failing to comply would incur a 30% punitive withholding tax on all US-sourced income. As law professor and former International Tax Counsel for the US Treasury, Itai Grinberg put it, foreign financial institutions were required to comply, “or else - with the ‘or else’ being punitive withholding taxes that, as a practical matter, would mean loss of access to US financial markets for any non-complying institution.”

Importantly, and different to previous attempts at regulatory intervention, this new legal framework applied not only to so-called ‘tax haven’ states, but to all states. This presented a sudden and immediate challenge for every financial institution located outside the US who required access to US markets: conflict with their respective domestic laws, where this type of account reporting ran counter to domestic data protection, and in several critical instances, bank secrecy laws in non-US jurisdictions. Speaking in 2013, Grinberg continues,

The thing is, these reporting requirements apply regardless of restrictions placed on a financial institution under their domestic law in the country where they actually operate. And under most countries' domestic law [...] revealing bank information of a client to a foreign sovereign, a foreign sovereign, without the client’s permission, is flat out illegal.

So, FATCA really put non-U.S. financial institutions between a rock and a hard place. It said, “do something that is illegal for you to do, or else Uncle Sam whacks you.” That is U.S. law, and it comes into force next year.

In the press, FATCA was “billed as the first time a country will impose an overtly extraterritorial tax regime”, and that, “[o]ne of the most important and draconian pieces of tax legislation to come out of the US in generations continues to cause anxiety and uncertainty among the world’s biggest financial services groups.”

61 Grinberg, "Academic and Journalistic Perspectives on Illicit Financial Flows."
62 Ibid. Emphasis in original.
banks, banking associations, and foreign government officials launched concerted lobbying efforts for the United States Congress and the Obama administration to modify or repeal the law, including meetings between “senior bank executives” with the then Treasury Secretary, and former New York Federal Reserve Bank President, Timothy Geithner. There was also a formal letter from European Union officials to the US Treasury Secretary on the matter, warning of extraterritorial overreach and unintended consequences. As the Financial Times reported, “[b]anks and foreign governments [were] mounting an increasingly desperate push against a sweeping US tax law”, which they saw, in the words of the then Head of the Canadian Bankers Association, Terry Campbell, as “conscripting financial institutions around the world to be arms of U.S. tax authorities.”

Simultaneous with lobbying efforts, financial institutions threatening to exit US clients from service, and institutions threatening to exit US markets, several high-profile US expats, including pop star Tina Turner and Facebook cofounder Eduardo Savarin, relinquished their US citizenship citing FATCA and tax matters. The culminating effect was for lobbying efforts to become highly visible in the international financial press with headlines ranging from direct attacks of the act, to personal crises of nationality: “Dropping the bomb: America’s fierce campaign against tax cheats is doing more harm than good”; “Out of control’ rules inhibit Ucits”; “Banks Battle over US Tax Law”; “US legislation: Industry concerned at extraterritorial tax clampdown plan”; “FATCA’s Flaws: America’s new law on tax compliance is heavy-handed, inequitable and hypocritical”; “Taxation: US offshore crackdown brings planning worries”; “Tax compliance bill drives expat to despair of US - ‘I have lost interest in being an American’”.

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64 Financial institutions engaged in public lobbying campaigns included, among others, Black Rock, Citadel, DWPBank, RBS, Credit Suisse, Barclays, and TD Bank of Canada. Other lobbying efforts included the European Banking Federation, the British Bankers Association, and the Canadian Bankers Association, as well as representatives of foreign governments, including EU officials and the European tax commissioner.


66 Nikki Tait and Vanessa Houlder, "Transatlantic Tussle over Us Tax Mounts," ibid.

67 Braithwaite et al., "Banks Battle over Us Tax Law."


Nonetheless, the combined efforts of foreign governments, foreign banks and financial institutions, banking associations, US banking groups, US citizens abroad, and domestic US citizen groups ultimately failed. When it became clear to foreign financial institutions that FATCA would not be repealed, they were forced to change their strategy from lobbying against FATCA to lobbying their respective domestic governments to solve the conflict of law problem that FATCA presented. Again, as Grinberg describes the issue,

Counterintuitively, as a result of that lobbying enacted [sic] in 2010, foreign financial institutions were forced into being the United States Government’s best lobbyists for FATCA. On the one hand, they ran around the United States and lobbied for FATCA repeal, but it became pretty clear that wasn’t going to happen, OK? It’s hard to argue against the law about addressing offshore tax evasion. So, what do they do? They lobbied foreign sovereigns even harder to come up with a solution to this problem to solve the conflict of law problem.70

In in a 2015 interview for this dissertation, the interviewees had a similar perspective. The interviewees, a senior partner at a ‘Big 4’ multinational consultancy firm and their colleague who was a US lawyer and former international tax counsel at the US Treasury on the matter, had both worked on the FATCA regulations with financial institutions and governments alike and gave an explanation virtually identical to Grinberg for the change in approach. The lawyer explained,

[h]ere’s the situation: either FATCA is challenged in court, which would take years, rendering the challenge moot as banks would already have had to have implemented it, or, you get a member of congress to propose a bill of repeal. Well, no breathing politician is going to propose a bill to repeal an act aimed at stopping tax evasion. Not after the crisis and not after congress passed HIRE with overwhelming bipartisan support. So, when they realised this, it was the banks that became the biggest lobbyist for FATCA.71

70 Grinberg, "Academic and Journalistic Perspectives on Illicit Financial Flows."
In the UK, for example, both individual financial institutions as well as industry bodies such as the BBA (British Bankers Association) lobbied the UK government to resolve the inherent contradictions between FATCA and their biggest concern at the time: domestic data protection regulations. The US government had also indicated that it was seeking input from both foreign governments and foreign financial institutions on the legislation; however, they were clear that they were not willing to substantively change the law. Doug Shulman, the then IRS Commissioner, indicated there “would be no ‘substitution’ of the law with bilateral agreements”, explaining, “we’re talking with a number of governments to make sure that places where local laws need to be adjusted or reporting regimes need to be put in place to make this doable [sic]”.

At the same time, the EU was attempting to devise their own alternative approach to FATCA through tighter coordination of existing regulations. The EU Tax Commissioner, Algirdas Šemeta, as well as the EU presidency (Hungary in 2011), both indicated they believed there was the possibility of using EU Savings Directive framework as an alternative route for information sharing, and as an alternative to FATCA. As reported in the FT, “In a speech in Brussels last week, Mr Semeta [sic] said: ‘This initiative [FATCA] puts costly obligations on financial institutions. We have engaged in a dialogue with the US Treasury to seek more proportionate conditions for the EU financial industry, building on the synergies between FATCA and the EU savings directive.’”

Ultimately, however, the EU Commission did not receive a negotiating mandate for FATCA, and consequently the US did not engage in direct regulatory coordination with the EU. Rather, late in 2011, the US began discussions with the five largest EU economies to address the conflict of law issue more directly. Led on the EU side by the UK, in February 2012, the US issued a joint statement with the governments of France, Germany, Italy, Spain, and the United Kingdom detailing their “wish to intensify their co-operation in combating international tax evasion”, specifying the awareness that FATCA presents legal issues

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72 Based on interviews for this dissertation with several senior industry stakeholders involved in these efforts.
74 Tait and Houlder, "Transatlantic Tussle over Us Tax Mounts." Brackets in original.
including “that FFIs established in these countries may not be able to comply with the reporting, withholding and account closure requirements because of legal restrictions” and that, “[a]n intergovernmental approach to FATCA implementation would address these legal impediments to compliance”.75 In July of the same year, and in an apparent reversal of the US position on bilateral arrangements, the group issued a joint communique announcing their “intensified cooperation by collaborating with the development of a ‘Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA’”. The communique also included language indicating that this group was specifically operating outside official EU channels, and that the group itself would set the reporting standards for the intergovernmental framework:

This is an important step forward in establishing a common approach to combat tax evasion based on automatic exchange of information. France, Germany, Italy, Spain, the United Kingdom and the United States will, in close cooperation with other partner countries, the OECD and where appropriate the EU, work towards common reporting and due diligence standards to support a move to a more global system to most effectively combat tax evasion while minimising76 compliance burdens.77

With the bilateral, intergovernmental agreement (IGA) framework in place, the UK was first to sign an IGA, on 12 September 2012. Based on the established model agreements, the IGAs were at first slow to gain traction with other states and jurisdictions: indeed, by the end of the first year only nine IGAs were signed. However, despite repeated claims that the delay in collecting IGAs spelled certain doom for FATCA, and the insistence that certain states, like China, would be outside the regime78, by the 2014 implementation date (the formal FATCA go-live date) there were close to 100 agreements signed. At the time of

76 While this was a joint communique, it was first issued by the US government. As such, it is perhaps telling that the word ‘minimising’ uses the British spelling.
77 US Treasury Department, “Joint Communique by France, Germany, Italy, Spain, the United Kingdom and the United States on the Occasion of the Publication of the “Model Intergovernmental Agreement to Improve Tax Compliance and Implement Fatca”,” news release, July 25, 2012. Emphasis added.
78 Wigan, “Offshore Financial Centres.”
writing there are 115 agreements\(^{79}\) including every EU member state, and every OECD member state. Tax havens also aligned to the new framework. The OECD stopped reporting on ‘blacklists’ of uncooperative tax havens in 2009; however, using the last comprehensive OECD list from June 2000, 21 of 35 jurisdictions signed an IGA with the US. Of the remaining 14, four are under the sovereignty of the Netherlands which has an IGA; and one is a US territory. This leaves only 9 of the original 35 tax haven jurisdictions unsigned.

With the completion of nearly 100 IGAs at the time of its formal implementation in 2014, it was clear that FATCA was a new permanent fixture in the international financial regulatory architecture, and that it was considered by governments and financial institutions alike to be an international regulatory ‘regime’. This macro-level overview of the timeline of the ‘birth’ of the FATCA regime outlines key moments in the evolution of international tax regulation; however, additional detail on FATCA will also emerge as a function of the main body of analysis in Chapters 4-7.

Chapter 2: Literature, Research Design and Methods

“There is no shortage of explanations for how the world economy is regulated in an era of globalisation.” Daniel Drezner\(^{80}\)

This chapter reviews the salient literature for this dissertation and outlines the research design and methods for the project. It also covers the case selection and timeframe for the research. As the dissertation undertakes to comprehensively test Drezner’s “theory of coordination processes and outcomes”\(^{81}\), what he calls the Revisionist Model, the chapter also contains a full explication of the model to establish the theoretical framework and approach for theory testing. This explication comprises its own section at the end of the chapter.

Literature

This dissertation relies on three—often overlapping and interrelated—literatures in its investigation of the emergence of the global FATCA regime. The first is the literature on

\(^{79}\) Of these 115 IGAs, 113 are considered to be ‘in force’.

\(^{80}\) Drezner, All Politics Is Global Explaining International Regulatory Regimes, 13.

\(^{81}\) Ibid., 26.
international regulatory governance, which frames both the design and theory for this dissertation. This section focuses on theories of regulatory governance deriving largely from IPE, as well as literature that offers contrasting approaches and addresses gaps the Revisionist Model—whether complementary to its aims, or as a critical contrasting approach. The next literature is the technical legal and regulatory literature. This literature is critical in understanding the mechanisms of both FATCA and related laws and regulations, and how the regulations investigated here were understood by states and other actors. For example, when it was enacted, for tax lawyers and legal academics FATCA represented an “evolutionary moment”\textsuperscript{82} in international tax and a “radical”\textsuperscript{83} change to global tax governance. However, FATCA was also widely misunderstood at the time it was enacted, resulting in misguided notions in various literatures of its impacts on states and financial institutions, as well as claims about its longevity and effectiveness. As such, the technical literature serves to articulate the legal underpinnings and regulatory process researched here, as well as importance of the regulations in case selection for testing. This literature also helps to set the timeframe and scope of the research. Third, there is a growing field of research in global tax governance, harmful tax competition (HTC), and illicit financial flows.

International regulatory governance

One of the primary factors in determining the theoretical approach to this research was the way in which the FATCA regime emerged. After decades of ineffectual and half-hearted attempts to address the global issue of offshore tax evasion, two major tax scandals swiftly followed by the GFC spurred the US into action. While the US is not the only state affected by tax evasion, its approach was unilateral \textit{and} global in nature, requiring nearly every non-US financial institution on earth to respond. This approach was new and radical, defying precedence in global financial regulation. This set of conditions meant that understanding the eventual FATCA regime would require an interpretation of regulatory governance that could address these unique circumstances. Further, the first four years of the regime’s emergence were dominated almost entirely by states. The US engaged with other, mainly EU, states to negotiate the eventual approach and regulatory framework for the

implementation of the law, and standard-setting ultimately devolved to the OECD, however
the initial framing of the regime was entirely state-led.

For these reasons, approaches with robust explanatory mechanisms for both state power
dynamics and the emergence of new regulatory regimes was critical to the analytical
elements of the research. It was also critical to seek a model that contains testable
hypotheses and falsifiable propositions. Given the US-centred unilateral action in FATCA,
realist/hegemonic approaches were a natural starting point, therefore. Simmons for
example, envisions a framework with a “dominant regulatory innovator” against “the rest of
the financial world”, and the options available to the world in response to the regulatory
innovations. She argues that the US is this dominant regulator, or hegemon, with
asymmetric power over actors outside the dominant centre. The responses open to other
states, depend on the positive or negative incentives offered by the US’ regulatory change.
She argues that their responses matter: the US by virtue of size alone cannot guarantee
harmonisation with its preferences. Rather, non-centre jurisdictions can choose “divergent
regulatory trajectories”. When a state takes a divergent approach, the US will use directed
coercive pressure; if the divergence does not have an obvious source, the US will exert
pressure through multilateral organisations. While a compelling model, Simmons’
hegemonic model elides the effects of globalisation, the centrality of other dominant actors,
such as the EU, and includes only the UK as a lesser but comparable financial power. The
reliance on hegemonic power to drive regulatory innovation is compelling in the case of
FATCA but lacks the possibility of regulatory innovation happening outside the dominant
centre. Also problematic for the analysis here is that “Simmons offers a theory not of the
emergence but of the diffusion of a given regulatory model.” For FATCA, especially at its
inception, the domestic forces that explain its emergence are critical to how the regime
evolved. Last, Simmons’ model arguably lacks the complexity required to explain the
intricate negotiations that took place on FATCA implementation.

Purely US-centric and hegemonic approaches also miss the complex power dynamics at play
between, not just states, but other actors in the global system. To this end, Keohane and

84 Simmons, "The International Politics of Harmonization: The Case of Capital Market Regulation."
85 See, “In Whose Benefit? Explaining Regulatory Change In Global Politics” in, Walter Mattli and Ngaire
Nye’s foundational conceptual framework, from the 1970’s, of complex interdependence as a complement to realism warranted consideration in unpacking the emergence of the FATCA regime. Complex interdependence focuses on the interaction of multiple actors and developed analytic componentry for understanding their power balances and asymmetries on issue areas rather than aggregate and absolute terms (as in many realist approaches). In analysing FATCA this degree of detail and ability to account for large numbers of actors and preferences is a better reflection of the modern globalisation at play in the regime than purely state-centric models. The obvious shortcoming of the framework is that is lacks testable propositions. As the authors note in the preface to the 2012 edition, “the difficulties in evaluating the validity of the analysis [...] is that it is highly qualified, hence difficult to falsify.”

Taking these concepts further, another, more recent, body of literature considers the institutional context of global regulation. Mattli and Woods, for example, describe a framework for understanding regulatory change and emergence as a function of regulatory capture through an institutional supply and demand framework. Outside of the state-dominated frameworks, they argue that coalitions of regulatory ‘entrepreneurs’ can and do capture regulation, and increasingly at the international level. Like Simmons, Drezner, and others, they also conceive of their own specific typology of outcomes based on capture, which is a function of institutional supply and demand. Responding to Drezner directly, Mattli and Woods argue that his Revisionist Model fails to consider capture as a mechanism for regulatory change at both the domestic and international levels, and that much of transnational regulation is responsive to uniquely transnational issues. For the purposes of the analysis here, the framework outlined by Mattli and Woods, while compelling, does not accord with the facts of how the FATCA law emerged. In this case, it was as Simmons and Drezner both might predict: a function of domestic issues that are exacerbated by globalisation.

87 Ibid., xxiv.
Still in the institutionalist vein, but with a state-centric approach, Kahler and Lake ask why there is so little supranationalism, offering a model of hierarchies and networks to explain the absence. They observe that while theories of economic integration predict greater supranationalism, this fails to emerge in the global system. This, they claim, is due to two modes of international governance that take the place of supranational institutions: the first is that states transfer their regulatory authority to more dominant states; and second, networks of state and non-state actors “share regulatory authority through coordinated and repeated interaction”. While there is scant evidence in the case of FATCA for these types of networks, the delegated authority to dominant states is a clear explanation for the behaviour of some groups of states with respect to US bargaining over FATCA implementation. As will be evidenced in subsequent chapters, for states with strong banking secrecy and privacy laws, Switzerland is clearly a dominant state: both in the context of intra-EU law and international regulation, states in and out of the EU look to Switzerland to lead on international tax regulation.

Aside from the US in enacting the FATCA legislation, the most important actor in the emergence of the FATCA regime is the EU. There is a robust literature on the EU and regulation, but more specifically, financial regulation in the EU that offers both complementary and contrasting explanations for the emergence of the FATCA regime, compared to the Revisionist Model. Further, this literature generally conceives of a bipolar world where the US and EU are counterpart great powers. This means that, in addition to the content of EU approaches to financial regulation, this literature also fits the bipolar framing of the Revisionist Model and is therefore highly conducive to comparative or complementary analysis.

In this research direction, Quaglia’s model of financial regulation offers a systematic examination across all financial services, and accounts for many of the limitations in, for example, the Revisionist Model. Like Drezner, and others, Qualia’s model EU treats the US and EU as the central actors, with the caveat that there are “perils” to treating the EU “as a

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89 See, Miles Kahler and David Lake. Economic Integration and Global Governance: Why So Little Supranationalism?, in ibid., 242.

fully unitary actor” across all issue areas. Her central argument is that EU influence over global financial regulation is a function of its regulatory capacity (as the explanatory variable) compared to the US, and that its capacity, and subsequent outcomes, has varied over time and issue area. The dependent variable in her model “is international regulatory convergence, both as a ‘process’ and an ‘outcome’”. The values these take are uploading, downloading, or cross-loading regulatory preferences globally. Where both the US and EU have strong capacity, the outcome is mutual cross-loading, mutual partial uploading, or the emergence of rival standards, as adopted from Drezner. Where either the US or EU has the greater capacity the other the other will cross-load, and where neither state has capacity, standards are issued by industry fora or are self-regulated in industry. Across the issue areas in her analysis, she argues that the EU has largely downloaded or passively cross-loaded regulation from the US, albeit there are exceptions. As will be further discussed in the conclusion, but as alluded to in the body of the present research, the framing of her dependent variables as differing values offers a clearer explanation of FATCA’s variable outcomes than Drezner’s typology alone. Further, the framing of the independent variable as regulatory capacity is a clear contrast to Drezner’s market-size-based model and is an alternative approach further explored in the conclusions of this dissertation.

Next, like Drezner, Posner finds the treatment of “the EU as a regulatory great power” to be empirically sound. As such, his research on the EU’s ability to influence international financial regulation, also argues that the EU is rightly considered a rule-maker on the global stage due to the ‘political centralisation’ of EU power. This centralisation is a function of the regulatory power the Union draws from its Member States’ transference of formal decision making to EU institutions. Incomplete though the transfer may be, Posner argues that since the 90s this power has accrued in intra-EU regulatory capability. He further argues that evidence substantiates the cross-border, extraterritorial effects of EU financial regulation. In relation to this dissertation, this effect is certainly seen in the way the EU’s regulatory preferences emerged prior to the enactment of FATCA, but not immediately after; rather,

91 Ibid., 17.
92 Ibid.
whether EU could be credibly treated as a unitary actor in FATCA negotiations with the US is a question addressed in this dissertation. However, after the initial bargaining between the US and the five largest EU economies, the EU once again demonstrated intra-EU regulatory capacity with observable subsequent extraterritorial effects. Posner’s later work helps frame the curious variable behaviour observed in the EU, arguing that the EU’s approach to financial regulation is mainly to enhance market integration rather than drive a distinctive global regulatory agenda.

Related to the issue area of conceptualising the EU as a single actor, Damro’s Market Power Europe (MPE) combines elements of comparative and international political economy to offer an alternative to ‘normative’ power. He argues that, rather, the EU can be conceived of as a market power, drawing on three bases, first of which is its market size. This echoes Drezner and Posner in elaborating market-based explanations of EU regulatory power; however, Damro’s model includes two further critical features that define the concept of MPE. First, the model includes the institutional features of the EU as a regulator, arguing that MPE must account for “policymaking processes and decision-making rules for issuing regulatory measures” which are variable depending on the issue area and Member State preferences. Second, and in reference to the latter point, MPE includes the processes of ‘interest contestation’ as a core feature. Since the EU is an open regulatory institution, interest contestation addresses the variable costs and benefits of regulation to Member States and often asymmetric distributions of costs and benefits to Member States in regulatory outcomes. Interest contestation further includes consideration of non-state actors and influencers of EU regulatory policy and direction-setting. As these three ‘mutually reinforcing’ independent variables grow in strength, the model predicts that EU externalisation as a dependent variable also increases. Last, a core consideration of the MPE model is the means through which power is exercised. Damro’s model frames the debate about the exercise of power through ‘persuasion’ and ‘coercion’ as rather positive and negative conditionality that are tools of externalisation. Damro’s subsequent work further elaborates the dynamic nature of the relationships between the three core characteristics of

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94 Posner and Véron, "The Eu and Financial Regulation: Power without Purpose?"
96 Ibid., 687.
MPE. It includes consideration further externalisation mechanisms beyond regulation, and suggests that MPE as a framework can be applied to other market powers.97 For the research here, while Drezner’s model posits two great powers—the EU and the US—it lacks an operational conceptualisation of the types of powers the states are and their relative differences. In the analysis of FATCA through the Revisionist Model, the role of the EU as an actor is a core problematic. In the conclusions to this research, this dissertation will suggest that Damro’s MPE offers a complementary conceptual framework for understanding the various roles the EU played in the emergence of the FATCA regime, and the externalisation of its preferences.

Another relevant literature in comparative political economy is Hardie’s, alongside Howarth (primarily) and others (e.g. Maxfield, Verdun), market-based banking (MBB) model, which responds to the dichotomous framing of states’ financial systems as coordinated and liberal market economies (CMEs, LMEs) under the varieties of capitalism (VoC) literature. They argue for a focus on banks as principal actors within the financial system and their role in bringing about systemic change.98 As such, a key feature of MBB is its ability to help “depict financial institutions and analyse their evolution because [MBB] describe[s] a way that financial intermediation can occur”.99 In this vein, Hardie and Maxfield examine how MBB operates in the “two archetypal liberal market economies”, the US and UK.100 They demonstrate the clear differences between the two states under MBB with one key element being the role of financial intermediation. This could provide insight into why it was the UK that led the EU’s five largest Member States in negotiating a workable approach to FATCA implementation: FATCA’s ‘nuclear bomb’ of coercion is its 30% withholding tax on US-sourced income; however, its further requirement for financial institutions to withhold on ‘passthru’ payments from non-compliant financial institutions presents a hypothesis that states with highly intermediated financial systems are more susceptible to this coercive

100 Iain Hardie and Sylvie Maxfield, "Market-Based Banking as the Worst of All Worlds: Illustrations from the United States and United Kingdom," ibid.
mechanism. As will be discussed in the conclusion, MBB may therefore offer explanations for the UK’s leading role in framing the regime, as a function of financial system type variation among EU Member States. MBB might also help inform the Revisionist Model’s account of states’ preferences vis-à-vis financial regulation more generally by introducing a focus on banks (and financial institutions) as a locus of regulatory-market pressure.

Regulatory and legal literatures

The second body of literature relevant to the dissertation is the tax and legal literature.\textsuperscript{101} This will help to explain the sources for understanding the regulatory environment, regulatory explication, legal processes, and technical implementation that are critical to the main body of research in testing the case in the Revisionist Model.

The first body of technical literature focuses on FATCA itself. When FATCA was enacted, it was first articulated to the masses in the international press, industry white papers, and legal, tax, and accounting journals. Then in 2012 and 2013, Grinberg published a foundational two-part explication of FATCA, and the emerging global regime that developed subsequently.\textsuperscript{102} Grinberg’s papers were important in their content, of course, but also because they uniquely offered insight into the thinking of the US government on FATCA in an academic format, since he had worked on its implementation. Grinberg joined the faculty of Georgetown University from the “Office of International Tax Counsel at the [US] Department of the Treasury [where] he represented the United States on tax matters in multilateral settings, negotiated tax treaties with foreign sovereigns, had responsibility for a wide-ranging group of cross-border tax regulations, and was involved in international tax legislative developments.”\textsuperscript{103} Thus, the papers\textit{ contemporaneously} shed light on how the US approached the FATCA law, its subsequent regulations, and the IGA approach after negotiations with the EU’s five largest states (led by the UK), and the US role in the likely development of the future global regime. At the time he was writing, there were technical explications, but Grinberg’s papers are considered the landmark works on the subject:

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\textsuperscript{101} This literature is distinct from the primary sources used which will be covered in the subsequent section on research design.


\textsuperscript{103} Georgetown University Faculty of Law, “Profile: Itai Grinberg.”
indeed, virtually everyone writing about FATCA after 2012 will cite him extensively. The papers also introduce his repeated claim that FATCA is a radical departure from previous regulatory attempts to curb offshore tax evasion, and represented “an evolutionary moment”. This moment is characterised by the fact that prior to FATCA, no one thought of financial institutions as cross-border intermediaries for the purposes of administrative cooperation in international taxation; however, after FATCA, states and the financial services were asking “how and for whom” they should act as intermediaries rather than “whether”. As the foundational works in the FATCA literature, this dissertation relies on them heavily throughout the testing of the revisionist model.

Writing only slightly after Grinberg and offering a similarly insightful analysis of FATCA was Morse, who argued that regardless of the power the US wields in the international system, that it could not implement FATCA on its own.104 Christians also wrote consistently about FATCA developments over time, including one of the first dedicated reviews of the IGA framework. She was also the first to make the formal argument that the US’ failure to fully reciprocate under the IGAs was to protect US interests and specifically avoid multilateralism. She argued that such a global multilateral framework as envisioned by the EU and OECD, were against the interest of the US who preferred to isolate itself from multilateralism and build itself into the world’s premier tax haven.105 Kaye developed a similarly detailed and comprehensive review of FATCA, and included a full explication of similar regulatory innovations in the EU including the EU Savings Directive and the Directive on Administrative Coordination (DAC). Her insights on the, then developing, IGA framework were also critical additional contributions.106 Bean and Wright also developed a highly detailed review similar to those of Morse, Grinberg, and Kaye, but argued in scathing terms

104 Morse, "Ask for Help, Uncle Sam: The Future of Global Tax Reporting."
that the US law was the most extreme version of legislative extraterritoriality in US history, implying that FATCA was an example of US legal imperialism.107

Following these works with contemporaneous reviews of the IGA models and their impacts, Somare and Wöhrer 108, alongside DeBlis109, and Tanenbaum110 contributed further explications of the technical detail of the IGAs, comparing their content from both as legal explanations and the impacts they had on the emerging regime. One of the more comprehensive reviews on the IGA framework and its impacts across the EU and non-EU European states came from Parada.111 His review was one of the first detailed European perspectives on the implementation of the new IGA-based regime. Last, Zagaris112 and Harvey113 offered a view of the FATCA regime’s development “from the front lines”. Zagaris was also a critical voice in the development of the anti-money laundering/counter-financing of terrorism (AML/CFT) regime as discussed below.

The other critical contribution of all the contemporaneous writings on FATCA were the perspectives and suggestions on how FATCA might develop. With the benefit of hindsight, these writings offer a view as to the reception and import at the time, for industry, practitioners, tax specialists, and the international legal community.

The second body of literature relates to the other sets of regulation reviewed in the research as a function of the US and EU initial preferences. For the US, these largely refer to US approached to tax treaties, legal extraterritoriality, and the US’ Qualified Intermediary Program (QI). For the EU, this entailed reviewing the literature on its legal frameworks, the EUSD, and the DACs. For both the EU and US, there was considerable overlap in the literature on the US’ AML/CFT regime and the EU’s MLDs. For the EU regulatory initiatives, the dissertation also relied heavily on the EU proposals, directives, statements, and communiques.

Tax havens, evasion, and harmful tax practices (HTC) in the global economy

The third and final body of literature relates to offshore tax evasion, tax havens, and the mechanisms of illicit financial flows. Prior to the emergence of the FATCA regime, there were two primary scholars of the political economy of tax havens and offshore finance.

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Sharman has written extensively on the subject\textsuperscript{120}, and his most relevant work to this research is a detailed constructivist analysis of the OECD’s failings, and the corresponding tax haven successes, in fending off any meaningful international regulatory governance of offshore tax evasion and harmful tax practices generally. This work was critical in the assessment in the present research of the domestic preferences of the US and EU in the thirty-year period prior to the adoption of the EUSD in 2003.\textsuperscript{121} Palan has also written extensively about tax havens, the role of offshore finance in the global economy, shadow banking, and the political economy of harmful tax practices.\textsuperscript{122} Palan’s most influential work is probably still his 2010 book with Murphy and Chavagneux on the role of tax havens in the political economy of globalisation. They argue that tax havens and offshore finance generally are two of the principal instruments of the globalisation of finance.\textsuperscript{123}

The literature on offshore tax evasion in the years 2010-2014 was largely dominated by the literature above and there were few works in the political economy literature referring to the seismic changes FATCA was bringing to the world of international tax. A notable exception to this was Wigan’s chapter on offshore financial centres in Mügge’s 2014 volume on global finance.\textsuperscript{124} Wigan correctly predicted the use of the most favoured nation clause in the first EU DAC to enhance the DAC regime based on the emerging IGA framework. He did not see China signing a FATCA IGA, however, which was indicative of many scholars who were assessing the scale and strength of the new regime’s impact.


\textsuperscript{121} Sharman, \textit{Havens in a Storm: The Struggle for Global Tax Regulation}.


\textsuperscript{124} Wigan, “Offshore Financial Centres.”
In addition to the political economic and legal literature, in 2015 Zucman published his ground-breaking economic study of offshore financial flows. For decades the size of the offshore problem was considered “unknowable” by many scholars, although there were many competing estimates employing unique methodologies. In contrast, Zucman’s central insight was that offshore banks reinvest offshore funds into international financial markets. These investments are quantifiable anomalies in the balance sheets of nations, with more liabilities than assets globally because states do not track their residents’ offshore investments. This methodology is now considered the ‘gold standard’ in estimating the “missing wealth” expected on states’ balance sheets. This methodology has also since been refined and widely employed in studies of offshore finance.

Most recently, a body of literature has begun to emerge on the political economy of the new, global automatic exchange of information regime that originated with FATCA. This literature largely focuses on the period after the 2010-2014 period considered here but is a promising development in establishing a new political economy of global tax governance.

Research Design and Methods
This section discusses the design of the research project, case selection, scope, timeframe, and methods. It also addresses sources other than literature that contributed to this research.

Design
As alluded to in the literature review, this research aims to undertake a comprehensive testing of Drezner’s Revisionist Model using the emergence of the FATCA regulatory regime as a central case. This construct responds to two central themes from the literatures covered above. First, theory testing is an important function in theory building. In his concluding thoughts on the Revisionist Model, Drezner both acknowledges the limitations of

125 See, Barbone et al., "Study to Quantify and Analyse the Vat Gap in the Eu-27 Member States."; Henry, "The Price of Offshore Revisited."
128 For a comprehensive summary of the state of the art (2019, but still representative), see, Christensen and Hearson, “The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis."
the model and the need for additional cases to test the validity of the model’s central postulates: “Four in-depth case studies and a few pages about other issue areas are a small evidentiary base from which to draw conclusive findings.”129 While there is no lack of cases and studies employing the concepts from the Revisionist Model since its initial publication in 2008, one of the contributions from the present research is a critical and comprehensive testing of the model in a stepwise manner. The intention in comprehensively testing the model is to understand the points of the model that are robust, and which can be falsified, and why. In this fashion, the areas of the model that are found lacking open new research pathways for further theory building.

To comprehensively test the grand theory, however, requires a case selection that is robust enough to meet the formal criteria (postulates) of the model. The Revisionist Model as explicated here (see next section) comprises a four-step approach. Its first postulate is that there are two great powers; second, the powers must form their initial preferences on the issue in question; third, the powers bargain and either form a coordinating core, or they do not; and last, whatever the outcome of the bargaining, variations of regulatory standards emerge. The coordination as an outcome of the bargaining core is necessary and sufficient for global governance over any issue; where there is not coordination between the great powers, there can be no international coordination. This framework therefore requires cases that can produce observations along all these dimensions. Without observable data for all dimensions, parts of the theory may gain insight, but no conclusion about the validity of the overall model can be made.

This leads to the second theme in the literature: case selection. The selection of FATCA in addition to its ability to produce multiple observations for each step of the model, also responds to both the IPE literature and the global tax regulatory literature. First, repeating the imperative from the introduction, global tax regulation as a subset of “illicit international financial activity.”130 Second, like so many other IPE issue areas, the dramatic change in global tax regulation emerged as a consequence of the GFC, as well as successive global tax scandals. Understanding the impacts of global tax regulation on globalisation and

129 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 208.
theories of regulation therefore speaks to both literatures, contributing to both in the process.

The design is also qualitative in nature, although the conclusions presented here will argue strongly for quantitative future research to further test and build on the findings presented here.

Methods and Case Selection

Methodologically, the testing follows a ‘purist’ interpretation of the Revisionist Model. That is, the testing aims to adhere to the steps and requirements of the model as strictly as possible, even where it is obvious that this presents methodological issues. For example, the treatment of the EU as a single actor presents conflicting interpretations in the first step of the model—based on observable data from the events leading to the IGA framework. In this example, the analysis acknowledges the anomaly, presenting competing interpretations of the observable data in subsequent steps. In the IGA negotiations, for instance, the analysis offers two interpretations: one where the five EU Member States forming a bargaining core with the US are treated as a ‘proxy EU’; and another, which argues the model does not account for the role of Member States to act in this capacity indicating the potential for falsifiability.

As previously mentioned, the scope of the research is limited to the years from the enactment of FATCA into law in 2010, to its formal global ‘go-live’ implementation date in 2014. The caveat to this, however, is the third step in the model which requires an analysis of the great powers’ initial domestic preferences. This analysis is necessarily historic (in some instances up to thirty years prior); but is tightly limited to the most salient factors affecting preference setting. The research is also limited to the scope of the regulation. This excludes in the majority discussion of the mechanisms of offshore tax evasion, the definition of tax havens, and broader discourse on illicit finance except as it pertains to the emergence of the regime. This may seem counterintuitive since the regulation aims to address global tax evasion; however, the aim of this research is to understand the emergence of the regime, not to undertake a detailed analysis of its subsequent efficacy. Indeed, in the language of the Revisionist Model, the central actors are states, and the model describes the power relations between states in coordinating, or not, international regulatory efforts.
Sources and Data

In addition to the literature discussed, this research relies heavily on primary sources largely from US and EU bodies, although this extends to organisations, for example, the OECD and FATF, as well. These sources include laws, regulations, treaties (especially tax and information exchange), statements, communiques, parliamentary and congressional responses, and so on. Even given the depth of the legal and technical literature as discussed, the preference in the research was for primary sources where possible as the strongest directly observable data. Where these sources were lacking, academic research and elite interviews were the next preference.

In terms of interviews, this research benefits from twenty elite interviews conducted with a range of experts in different fields. First, government officials, including regulators, policy makers, and law enforcement officers in the US, EU, and Australia. Second, senior management and executives in financial services who were directly responsible or involved with regulatory implementation including, especially, of FATCA, CRS, AML, and the DACs. In this area especially, the author’s professional experience working in regulatory implementation in a global bank facilitated both interviews and understanding. Third, interviews were carried out with a range of senior consultants at ‘Big 4’ firms. These interviews especially underscored the degree to which there is a ‘revolving door’ between government, financial services, and professional services firms who service both. Despite the well-known concerns with this reality, these interviews provided insight simply unavailable elsewhere.

As above, whenever using observations gathered from interviews the research sought to verify and validate with primary or secondary sources, favouring the latter sources where available. As such, not all interviews are used here. Several attempts were made to secure interviews on key issues, that did not materialise. For example, apart from one individual, repeated attempts to interview those directly involved in the IGA negotiation process (from all states) were unsuccessful. However, several individuals directly involved in these processes were video recorded at academic conferences, industry colloquia, or public interviews, and these recordings are available on YouTube and the respective sources
websites. Two of these proved especially valuable\textsuperscript{131} and, following the above method of defaulting to primary sources, are cited more heavily than interviews carried out for this research based on verifiability and openness. That is, where an interviewee made the same point as an individual in a public source, the public source was prioritised.

Chapter 3: Explication of the Revisionist Model

Drezner’s Revisionist Model takes as its starting point the notion that “regulatory issues are important in and of themselves.”\textsuperscript{132} The model is therefore built with the explicit intention of theory-building in the domain of international, or transnational, regulation. It aims to consolidate disparate theoretical approaches to into a single, testable model that can be used to explain any transnational regulatory issue, to determine whether coordination on an issue is likely, and if so, to predict the type of coordination as an outcome. The model is therefore a multistep model that employs differing methods at each step. Drezner uses both formal (game theoretic) and “less formal” (expositional argumentation)\textsuperscript{133} as appropriate and to contend with the inherent complexities of a grand theoretical model. This chapter as two aims: to explicate the model and how it functions; and, to test the model using the FATCA regime. The first section will first very briefly discuss how Drezner situates the model in the IR/IPE literature and in terms of theory development, and then explicate the core elements of the model itself. The second section will test the theory focusing on replicability and using the case of the development of the FATCA regime. This analysis results in several areas of potential falsification, which set the basis for theory refinement in the subsequent empirical analysis.

Conceptual background

The Revisionist Model aims to consolidate into a single framework a wide range of theoretical approaches to understanding international regulatory regimes. Drezner situates the model in the literature on international regulatory coordination “along two conceptual

\textsuperscript{131} See both, NYU, “Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part 2” (9 July 2012); Grinberg, "Academic and Journalistic Perspectives on Illicit Financial Flows."

\textsuperscript{132} The explication of the model necessarily draws heavily on Drezner’s own explication. Citations will therefore point to pages with specific quotes, tables, and so on, and where most appropriate to avoid confusion. Drezner, \textit{All Politics Is Global: Explaining International Regulatory Regimes}.

\textsuperscript{133} Drezner’s description, see ibid. at 25.
dimensions”: economic and ideational forces driving regulatory change, and structure-agent-based approaches to understanding actors’ motivations. The result is a 2x2 framework comprising four primary literatures the model speaks to: race-to-the-bottom, global civil society, world polity paradigm, and mainstream IR/IPE approaches (with a strong focus on realism/structural realism, and liberal institutionalism). His central claim is that while each of these approaches has its obvious strengths, their individual shortcomings and the lack of overall explanatory power of any one paradigm leaves the issue area of international regulatory coordination wanting of “more refined theories and better empirical work.” The Revisionist Model therefore aims to situate these disparate theoretical approaches into a single grand theoretical framework. It endeavours to include salient features of competing literatures of globalisation (e.g. global civil society, world polity paradigm, race-to-the-bottom), while prioritising its IR and IPE roots through the development of a state-based model.

In describing the constraints of his approach, Drezner sympathises that globalisation processes make theory development difficult, noting that “[o]ne obvious challenge is the dizzying plethora of actors, factors, and venues that appear to demand explanation.” His method of theory development therefore aims to balance the “computational costs and benefits” of including a wide array of possible variables, by employing both formal models and expositional argumentation to demonstrate his core theoretical propositions. He describes the initial constraints of the model as primarily the “small-n nature of the data” and the difficulty in staying close to the subject matter—international regulatory coordination—necessarily eliding processes of globalisation per se, as well as other domains of global coordination such as security and normative debates on these issue areas. Despite these constraints, the model does include a wide range of theoretical considerations from these various approaches, and structures them into a hierarchical framework comprising four elements which can be individually examined.

135 Ibid.
136 Ibid.
Four elements

Step I: The great powers

With this methodological framing for context, Drezner’s central theoretical thesis comprises four elements. First, in line with realist tradition, states are the central actors. And, among states, the “great power” states “write the rules that regulate the global economy” and ultimately determine the type of regulatory outcome that will be achieved. He defines the great powers as those states with large “internal market size and reduced vulnerability to external disruptions” relative to all other state actors. Employing Keohane and Nye’s conceptualisation of ‘sensitivity and vulnerability’, Drezner argues that while the effects of globalisation can cause multiple and varied sensitivities in all market domains, states with large internal markets will be less dependent on international trade and will therefore be less vulnerable to exogenous shocks. That is, economies with a smaller proportion of total production relying on external trade will be less vulnerable to the effects of globalisation; however, these economies will likely still be sensitive to these effects.

To measure the great powers, Drezner presents a set of states’ economic attributes, what he calls ‘measures of great power status’. The primary variables include “aggregate market size” (GDP), share of global merchandise trade and proportion of this trade to GDP, and the size of capital markets. The measures of GDP and capital market size are therefore the central measures of ‘economic power’, while trade (merchandise) measures vulnerability to the exogenous forces of globalisation.

Using data from 2002, which was “a typical year for the time under study”, Drezner argues that the only two ‘states’ that meet his great power criteria were the US and EU and that all other states “fail one or both” of his other “prerequisites”. Drawing largely from the trade literature to underpin his position of treating the EU as a state/single actor, he writes, “[t]reating the European Union as a single actor in the coordination of global economic regulations is still a significant assumption, but it is hardly a heroic one.” Thus, throughout

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137 Ibid., 5.
138 Ibid., 35. See also Keohane and Nye, Power and Interdependence.
139 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 36.
140 It is important to note that Drezner does not further explicitly classify these variables in this way; however, this is the clear inference in reading his several case studies employing these metrics.
141 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 35.
his analyses and case studies, he postulates a world order where the US and EU are the
great powers that determine whether economic regulatory coordination occurs.

Step II: Initial domestic preference formation

Second, he argues that “the key variable affecting global regulatory outcomes is the
distribution of interests among the great powers”, and that these interests are a function of
domestic preferences. In turn, domestic preferences are influenced by domestic actors,
including both public and private actors and institutions. While Drezner does discuss
preference formation, especially in his expositional argumentation and case studies to
compare bargaining outcomes, his approach explicitly avoids modelling states’ domestic
preference formation processes. Rather, critically, the model assumes that state
preferences are only a function of the domestic political economy and takes these
preferences as “an ontological given for international interactions”, i.e., the initial
bargaining position on matters of international regulatory coordination is identical to its
domestic position.142

He does, however, acknowledge that domestic preference formation is not mutually
exclusive of international considerations143, especially forces of globalisation. He argues that
while globalisation fosters regulatory compliance, globalisation does not reduce ‘adjustment
costs’ (the political and economic costs of regulatory coordination) and that this is a key
consideration in domestic actors’ preference formation. Tipping his cap to Hirschman’s ‘exit,
voice, and loyalty’144 Drezner holds that these “[a]djustment costs are a function of the
ability of the affected domestic actors to use exit rather than voice in reacting to the impact
of regulatory coordination.”145 Drezner further argues that domestic private actors with few
exit options tend to “invest in assets specific to longstanding domestic legal and regulatory
structures”, and that this in turn increases the direct political and economic costs to
governments of engaging in regulatory coordination, especially where private firms and
institutions bear the brunt of costs that are not subsidised. Conversely, there are also

142 Ibid., 40.
143 In fact, he notes that the title of his book All Politics Is Global is an explicit reference to this and plays on Tip
O’Neill’s “all politics is local” (Drezner, 2008, 3).
144 As cited in Drezner, 2008, see Albert O Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms,
145 Drezner, All Politics Is Global Explaining International Regulatory Regimes.
indirect costs to governments in, for example, the reduction of competitive advantage for domestic firms (chiefly in less competitive sectors) resulting in reduced trade outcomes, lower tax revenue, and the potential need for future sectoral subsidies for affected domestic actors.\textsuperscript{146}

Still, and alongside other positive impacts of globalisation, he assumes that international regulatory coordination confers gross benefits (if not net benefits), especially to multinational corporations operating in several jurisdictions. He argues this is largely due to the benefits of conforming to single regulatory standards across jurisdictions for brand and reputation, as well as the relative cost mitigation this delivers compared to differing regulatory regimes and associated costs in each operational jurisdiction.\textsuperscript{147,148}

Step III: Great power concert and the bargaining core
The third core element in Drezner’s model is his claim that a “great power concert is necessary and sufficient for effective global governance over any transnational issue.” Following from the above element on preference formation, a great power concert is thus limited to the bargaining between great powers over their respective domestic preferences/positions, what he calls the “bargaining core”. Therefore, the preferences of small states and non-state actors are outside the scope of the bargaining core, and “do not affect regulatory outcomes, but they do affect the processes though which coordination is attempted.” He argues that the reason these actors do not matter in affecting the outcomes of great power concerts, is that the great powers will employ “forum shopping” strategies to achieve their preferred governance standards and mitigate the impact of competing preferences from these actors.\textsuperscript{149}

\textsuperscript{146} Ibid., 5, 48.
\textsuperscript{147} Ibid., 43.
\textsuperscript{148} In his case studies, Drezner argues against Vogel’s ‘California Effect’ as a comparative predictive theory (see e.g. Ch. 6, 2008), and does not mention it in the context of his own theory development, especially in discussing the gross benefits global standards offer states and private actors. Regardless, his description is congruent with Vogel’s theory, as well as real world practice. In interviews undertaken for this dissertation, financial institution executives and Financial Services Practice partners at international consultancies stated that their preference for regulatory implementation was almost always to implement the strictest regime in their global operating footprint, and to relax their operational standards in jurisdictions where it was profitable to do so. See, e.g. British Banking Executive, interview by Mateo Urquijo, 13 June, 2015; ‘Big 4’ Consultancy Partner, interview by Mateo Urquijo, 3 August, 2017.
\textsuperscript{149} Drezner, \textit{All Politics Is Global Explaining International Regulatory Regimes}, 5.
As to the outcomes of the bargaining core, this is where Drezner’s formal game-theoretic models come in. He presents two 2x2 games: a “simple standards game” that articulates the formal properties of coordination, and a modified game that introduces economic power. The conclusion from the “simple standards game” is that where the benefits of coordination outweigh the adjustment costs, coordination is an equilibrium outcome. And, conversely, if costs outweigh the benefits of coordination the only equilibrium is no coordination. He forms two hypotheses deriving from these outcomes: first, “ceteris paribus, economic globalisation increases the likelihood of international regulatory coordination”, however, second, “[r]egulatory coordination is less likely when the regulation directly affects mature or non-tradeable [sic] economic sectors—since these sectors are expected to generate the highest level of adjustment costs.”

The second game, introducing economic power, essentially demonstrates that economic power is only relevant where a great power is bargaining with a smaller, non-great power state. Still, there are a few important conclusions. First, for states with bigger markets than their counterpart, market power alone will generally enable the larger state to force bargaining outcomes in line with their preferences: “The likelihood of a coordination equilibrium at one country’s standards is an increasing function of that country’s market size.” For Drezner, this implies that at a certain point, a state will reach a sufficient market size such that it will only find equilibrium in using its own preferences. This further implies that positive coordination between great powers requires, as a precondition, a degree of matching preferences to achieve coordination. Indeed, Drezner argues that while the introduction of market power is a critical feature for great power vs non-great power games, and for non-great power vs non-great power games, it is irrelevant for great power concerts. This is because, “[g]iven the requisite for both economies to achieve great power status, the likelihood that any dyadic difference in market size sufficiently alters the payoffs enough to generate a single equilibrium outcome is mathematically impossible.” Last, he argues that while economic coercion and sanctions are powerful tools in other power

150 Ibid., 54-55.
151 Ibid.
152 Ibid., 56.
153 Ibid., 58.
constellations, it is not an effective tool that great powers can use against each other: “Between great powers, the effects of power largely wash out.”\textsuperscript{154}

Step IV: Regulatory outcomes and the standards typology

This leads to the fourth and final core element of the Revisionist Model: Drezner’s typology of global governance processes. Once the bargaining core between great powers is clear, Drezner defines a range of possible outcomes for regulatory coordination, or “regulatory standards”. Before articulating the standards, however, there are three important definitional distinctions to make between regulatory coordination, regulatory effectiveness, and global governance.

\textit{Regulatory coordination} “is defined as the codified adjustment of national standards in order to recognise or accommodate regulatory frameworks from other countries”, and does not imply “\textit{policy convergence}, which is defined as the narrowing of gaps in national standards over time.”\textsuperscript{155} Drezner does not further define ‘codified’ but it is inferred here that this means the creation or modification of a state’s legal framework to accommodate regulatory changes emerging from coordination.

\textit{Regulatory effectiveness} “measures both the extent of actor compliance and the magnitude of the adjustments that actors are required to make to meet the agreed-upon regulatory standard.”\textsuperscript{156} Drezner argues that the degree of difficulty of implementation is as important as degree of compliance. In his explanation of this term, however, it is unclear to whom this definition applies. Especially considering the outcomes of the standards games described above, for the great powers, the conditions of a concurrence of positions between the great powers would imply a fair degree of similarity to begin with, making implementation less difficult as a starting proposition. However, when considering other, smaller, states, who are expected comply with the combined outputs of such a concert, this measure makes more sense. Still, the rationale for including degree of difficulty in the definition seems to somewhat lack justification.

\textsuperscript{154} Ibid.
\textsuperscript{155} Ibid., 11. Italics in original.
\textsuperscript{156} Ibid., 13.
Last, *global governance* “refers to not only the codified adjustment of national rules and regulations; it encompasses the collection of authority relationships designated to monitor, enforce, and amend any transnational set of rules and regulations.”\(^\text{157}\) That is, once the regulatory framework has been codified and adopted by all relevant states, ‘global governance’ is the system and mechanisms of supervision and monitoring bodies and capabilities of the new regulatory regime/standard. An example of this would be the creation of the Financial Action Task Force (FATF) to supervise and monitor compliance with the global money laundering regulatory regime.

With these definitions clarified, the typology of global governance processes comprises two elements: convergence between great power interests (preferences), and convergence of interests between great powers and all other actors, including nongovernmental organisations (NGOs) and international governmental organisations (IGOs).

Here, again, Drezner uses a simple 2x2 matrix to describe the possible governance outcomes for the four possible convergences of interests (reproduced here for ease):

*Table 3.1*

<table>
<thead>
<tr>
<th></th>
<th>High conflict</th>
<th>Low conflict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divergence of interests among great powers and other international actors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High conflict</td>
<td>Sham standards</td>
<td>Rival standards</td>
</tr>
<tr>
<td>Low conflict</td>
<td>Club standards</td>
<td>Harmonized standards</td>
</tr>
</tbody>
</table>

Reproduced from Drezner, 2008

The typology shows how outcomes are predicated on the degree and type of preference convergence: first between great powers, and second, between the great powers and all other actors (small states, NGOs, IGOs). As aforementioned, Drezner argues that small

\(^{157}\) Ibid., 11.

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states, IGOs and NGOs do not affect great power preferences or convergence; however, they do play a role in governance. The way the model functions is that once the great power preferences are made clear through bargaining, one of these four outcomes will describe the ultimate form the regulatory coordination and subsequent governance (where applicable) takes. Depending on the outcome of great power bargaining, they will variously employ NGOs and IGOs, to create the global standards, supervise the implementation of those standards, and define the governing oversight of any emergent regimes. The latter would only apply where the outcome is coordination: i.e., either ‘club standards’ or ‘harmonised standards’.

Conversely, both ‘sham standards’ and ‘rival standards’ are not considered to be coordinated outcomes. That is, they are the “poor substitutes” that emerge where great power concert fails. Taking the standards in turn, the next section will briefly outline the outcomes and roles of the various actors.

**Explaining the standards**

**Harmonized standards** are standards that are considered universal, and as such, are managed by universal IGOs such as the UN or other IGOs with universal membership. There is strong coordination, effectiveness, and policy convergence of all parties on the issue, and “its management requires little enforcement.” Drezner gives the example here of the International Organization for Standardisation (ISO), which sets a range of technical standards for interoperability of equipment internationally. He notes that while it is a private organisation, both the US and EU have leveraged ISO standards to further their collective standardisation aims. Another example given of harmonized standards is the International Accounting Standards Committee (IASC), which Drezner argues was the organisation of choice to implement, coordinate, and manage the EU and US best practices in accounting and reporting. Critical to these examples is the universal convergence of

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158 Ibid., 72-84, 88.
159 A relevant alternative analysis on these specific examples comes from Büthe and Mattli, who give a book-length treatment (2011) to the IASC and ISO (in addition to the International Electrotechnical Commission) international standards. They argue that, contrary to Drezner’s interpretation, global private governance of these types of standards is “highly political” and that “[i]nfluence is not a function of the economic power of states, but of the ability of domestic standard-setters to provide timely information and speak with a single voice.” For more, see Büthe and Mattli, *The New Global Rulers*. 
preferences, not only the great power concerts’ preferences—but for all system actors—and the management of the standards through great power-approved, universal fora, again, such as the UN.

*Club standards* coalesce around the preferences of a great power concert where other states or groups of states have opposing preferences. Great powers will use NGOs and IGOs to the benefit of the concert and as a mechanism to induce smaller states (or groups of states) with competing preferences. The essential idea is that the combined market power of the concert is generally sufficient to “lock-in” and “induce most recalcitrant states into shifting their standards” over time.\(^\text{160}\) Drezner notes that while the great power concert would likely prefer to employ a universal IGO to provide global governance of the new standards, given the divergent preferences of small states and/or IGOs and NGOs, this would likely produce negative results. States with different preferences would vote against the implementation and easily derail the standardisation on a unanimous voting basis and/or IGOs and NGOs would likely seek to influence states to vote against any governance initiative. Therefore, the great powers will “forum shop” to identify the ‘club’ IGOs/NGOs that are most amenable to their objectives.

Drezner gives the example here of anticorruption standards that emerged “in the wake of several corruption scandals” in the US, ultimately resulting in the 1977 Foreign Corrupt Practices Act.\(^\text{161}\) He notes that while EU member states were “initially reluctant, by the mid-1990s, the combination of economic globalization, domestic corruption scandals, and U.S. diplomacy altered EU preferences.”\(^\text{162}\) The great power concert faced opposition from several states making a universal IGO, in this case the UN, untenable as a governance forum, and the US and EU eventually used the OECD to carry out this function. The OECD leveraged the combined power of the concert to exert additional pressure on recalcitrant states, such that, “by 2005, all G-7 members” had undertaken additional compliance measures.

*Rival Standards* result when there is high conflict between great powers, reaching a non-coordination equilibrium. Here, as expected, two or more different standards emerge, and

\(^{160}\) Drezner, *All Politics Is Global Explaining International Regulatory Regimes*, 75-84.

\(^{161}\) Ibid.

\(^{162}\) Ibid., 77.
therefore, no international coordination occurs according to the model. Drezner gives the example of whaling practices, where the US and EU plus Japan had material differences in preferences. Where the US preferred a total ban on whaling, the EU and Japan preferred selective bans on only certain species of whales. He argues the result was an “unstable equilibrium position” at the relevant IGO, the International Whaling Commission, where some states operate outside the scope of the commission, and where member states are in “persistent conflict”.163

The last outcome is *sham standards* which result when there is no concert, there are high adjustment costs, and there is not even a bargaining core. Here the great powers as well as other states will have a range of competing interests that do not align, and the costs to even attempt coordination will be high. The example Drezner gives here is labour standards. Writing on the period of 1990-2006, he argues that the “lack of agreement within the core and the periphery, the international regime governing labor standards is weak.”164 The two primary obstacles were the formation of coalitions around great power preferences, and the lack of buy in from appropriate IGOs. The most appropriate IGO was thought to be the WTO, which had been urged to act on the issue repeatedly. Simultaneously, the great power states, per the standards games, could employ a range of measures including coercive measures to induce smaller states to their side, but the adjustment costs for those changes, which did not have global buy-in, were sufficiently high that “[d]espite American efforts, opposition from developing countries and principal EU members stymied any attempt to formalize a WTO role in labor standards.”165

In the cases of both rival and sham standards, small states, NGOs, and IGOs may attempt to set their own standards, but this will lack both the legal basis (codification of international standards required under the model) and the global governance mechanisms to ensure effective coordination.

163 Ibid., 81.
164 Ibid., 83.
165 Ibid.
Summary and analysis of the model

Drezner’s Revisionist Model is deceptively simple in its framework; however, its simplicity masks the complexity of analysis required at each level. In simple terms, the framework itself argues that states are the primary actors in the international system; that great power states matter most of all, and great power concert is both necessary and sufficient for the coordination of any/all global economic regulation; that the key to determining whether the great powers will form a concert is the distribution of their domestic preferences; and that without a great power concert, global governance is not possible and any small- or non-state attempts to coordinate will be a ‘poor substitute’. However, unpacking the measures and actions at each level is more complex. The following paragraphs highlight constraints of the model that will be especially salient in the next part which formally tests the model with the emergence of the FATCA regime.

Identifying the great powers requires the measurement of economic power variables relative to all other states, and analysing the degree of vulnerability a state has to the exogenous forces of globalisation. Here, while Drezner does give a rationale for his independent variables, “[t]here is plenty of evidence to support the contention that economic power emanates from market size—most directly from the literature on economic sanctions”, 166 the individual variables seem to be largely drawn from existing analyses produced by the IMF. 167 While Drezner does not say this, his independent variables for defining great power also echo Krasner’s famous articulation of state power (itself based on the structure of international trade) 168, but curiously without the hegemonic elements. The independent variables also seem to be taken as read rather than the outcome of serious engagement with the question of whether they are still valid as time progresses. Indeed, as Drezner himself notes, “As long as the study of international political economy has been around, one of the basic measures of aggregate power has been relative market size.” 169 Still, this assertion leaves a range of critical questions unanswered. For example, it is unclear

166 Ibid., 34. It is worth noting here that Drezner is also citing himself and his work on sanctions effectiveness as a function of market size.

167 See, e.g., the IMF’s Global Financial Stability Report (GFSR) reporting for 2003, which is where Drezner pulls his data from for the timeframe under analysis.


169 Drezner, All Politics Is Global Explaining International Regulatory Regimes, xiii.
what evidence exists that trade measures should be a proxy for power dynamics in non-trade domains, such as regulation of the global financial system. Regardless, the strong implication is that the measures of great power themselves are fundamental to the model. On the one hand, again, this raises material questions about why these measures should be fundamental to power dynamics for all matters of global economic governance. Yet, on the other hand, this opens the door to further positive theory development: where elements of the model are demonstrably falsifiable, there is opportunity for new theorising, and is an especially welcome feature of the model in contrast to more purely qualitative or expositional models.

Once the great powers are thus identified, the model’s next step is to have the great powers bargaining on regulatory outcomes, each preferring their own status quo. This ‘bargaining’ however, is a set of undefined processes in the model, and the negotiations between states on international regulatory matters is notoriously opaque. Rather than formally model these processes, Drezner switches, understandably, to expositional argumentation and employs a case-by-case analytical approach. Still, that the methods for deriving bargaining outcomes are unclear is problematic since this step is critical to understanding outcomes of coordination of governance and outcomes. Where the great power preferences converge, there will be either club standards or harmonised standards depending on whether there are countervailing preferences from other (groups of) states or not. Again, this may or may not be obvious for any given case, and where little data is available to test there may be cases that the model simply cannot evaluate. Where great power preferences do not converge, there will be either rival standards where great powers compete against each other for primacy, or an equilibrium of no coordination, where the only standards possible are sham standards, which are developed by a one of the possible combinations of small states, NGOs, and IGOs. However, Drezner does not consider the possibility of transitional outcomes. For example, especially under the condition of rival standards, it seems probable, and indeed will be suggested in the analysis of FATCA, that whatever the process is for the development of these standards could easily be confused for convergence bargaining between great powers. That is, perhaps the development of rival standards is a transitional step to future harmonised convergence. Whatever the case, such notions would require further theory development and articulation as the model does not consider them.
The model also contains some inconsistencies in articulating the power dynamics between differing constellations of states. The entire framework is predicated on the notion that effective global governance is driven by great power concert. Given that Drezner identifies the EU and US as the only great power states, his formal models comprising two-player games to illustrate the logic of possible coordination outcomes are very convenient to that fact. However, the model does not seem to account for unipolar, or other hegemonic, accounts of power. One is left to infer that in a hegemonic power construct, this would need to be modelled as a series of two-player games (the hegemon against every other state in turn), or that other mechanisms come to play. Perhaps unusually for realist theory development, Drezner does not directly confront the question of balance of power in this model.\textsuperscript{170} His model does not, for example, speculate on the possibility of a coalition of small states as a single actor (other than the obvious fact that the EU can be construed as just such a coalition) in a two-player game against a hegemon. And yet, through another lens, a great power concert itself is a form of super hegemon where no balance of power against the concert is possible. Therefore, a reasonable inference from the model where an actual single hegemon existed in the international system, is that it would necessarily achieve its desired outcome with either club or harmonised standards, since its own preferences would be thusly sufficient. Falsifying this element of the model would require an example of a coalition of small states (or single other state), either creating a global regulatory regime, or, preventing a great power concert’s coordination at the international level.

Next, and especially salient to the case of FATCA, is how economic coercion functions in the model. In the second formal game, Drezner introduces economic power, and economic coercion as a function of economic power. He concludes coercion is only relevant for games between great powers and small states, or small states and small states: “The threat of economic coercion can accelerate the lock-in effect of coordinating at the great powers ideal point. However, between great powers, relative differences and market size do not

\textsuperscript{170} This position is consistent with his earlier work. In The Sanctions Paradox, for example, he writes that his logic “sidesteps” the debate on the influence of “variables such as polarity and the offense-defense balance to determine relative gains” of power. Daniel W Drezner, \textit{The Sanctions Paradox: Economic Statecraft and International Relations} (Cambridge University Press, 1999), 29.
have an appreciable effect on the outcome.”171 This conclusion will be heavily challenged in the development of the FATCA regime. As will be argued, without the coercive mechanism in the US regulation, the development of an international regime is unlikely to have been successful172. Further, as Grinberg notes, where the coercive methods guarantee an outcome that confers the benefit of an international standard, “the calculus regarding the [adjustment] cost of coercion would change.”173 Important to the analysis in the next section is also the type of economic coercion at play—something Drezner only address on a case-by-case basis. In the case of FATCA, the coercive elements are related directly to the targets of the regulation: financial institutions face a 30% punitive withholding tax on all US-sourced income for noncompliance. Counterfactually, it is difficult to imagine how, for example, trade sanctions or tariffs could have had the same effect.

Finally, as demonstrated in the section explicating ‘club standards’ the model lacks a temporal element. His example of the development of anticorruption standards ultimately fulfils the criteria of the model but cover a period of nearly 30 years. This may present analytical issues in examining cases and making parsimonious evaluations of causally linked events, since states’ domestic preferences obviously change over time. For example, dramatic changes to preferences within the US, which is a two-party system, can and do occur when a competing party takes administrative power through presidential elections. While the temporal element is a key consideration in historical and comparative analyses, it is not explicitly addressed in Drezner’s model.

Given the scope of the Revisionist Model to create a theoretical framework for all transnational regulatory issues, these few inconsistencies and inferences are expected174. Still, the model offers a very clear process for analysing cases, and if its predictions are correct, a more robust articulation of the facts than other models. If it is not correct, each element has falsifiable propositions that invite further hypothesising and theory

171 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 59.
172 See, e.g. Lukas Hakelberg, ”Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power,” Review of International Political Economy 23, no. 3 (2016).
174 And, as Drezner also readily acknowledges. See Chapter 8: Conclusions and Speculations in, Drezner, All Politics Is Global Explaining International Regulatory Regimes.
development. The next sections tests the full scope of the Revisionist Model using the emergence of the FATCA regime as a primary case study.

Testing the Revisionist Model

With the Revisionist Model fully explicated, including describing the most salient constraints and questions, this section will test the model using the FATCA regime as a primary test case. The aim is to test the robustness, replicability, and explanatory power of the model. The analysis will follow the steps that the model prescribes; however, it will also spend additional time on contentious elements that produce conflicting results. Subsequent sections will more thoroughly test those areas that cannot be easily resolved, or for which there requires additional theorising.

Chapter 4: Step I: Identifying the great powers

The initial question in the Revisionist model is ‘who are the great powers?’ Drezner uses a number of economic variables as his independent variables, where ‘great power status’ is the outcome, or dependent variable. The measures aim to determine which states have the largest markets and are least vulnerable to exogenous forces. In its original 2002 construct Drezner’s data table presents his ‘measures of great power status’, where the variables themselves are under the heading ‘measure of economic power’ for several candidate countries. The data represent three categories of information measuring market power. First, measures of ‘aggregate market size’: GDP (and population alongside), which is presented as both market prices and purchasing power parity (PPP), as well the natural corollary of GDP per capita. Second, merchandise trade data are representative of productive markets, including the respective share of global merchandise trade and merchandise trade as percentage of GDP. The central idea is that states with a relatively large share of the global merchandise trade, but proportionally (to GDP) smaller reliance on this trade represent large markets with relatively low market vulnerability. Last, Drezner’s measures of capital/financial markets are less clear than the others as he doesn’t define the composition of the variable. Reviewing his sources, however, Drezner draws most of the data and the definition of ‘capital markets’ for his table, from the statistical appendix of the IMF’s Global Financial Stability Report, which presents this data for the largest countries in
each world region, as well as on an aggregate basis for the regions themselves.\textsuperscript{175} The IMF uses three metrics for its capital markets measure: stock market capitalisation, debt securities (total of public and private), and bank assets. The updated table presented here similarly uses the IMF’s 2014/2015 GFSR capital markets table for its data on capital markets and includes the breakdown of the constituent parts. Further important to note is that the statistical appendix to the IMF report Drezner used includes only EU, select EU Member States, and US data. For the states not included in the report, Drezner presumably collected and created the data for the remaining states using the other sources he lists. Similarly, here, in updating his table, the version below draws from the same statistical index of a later version of the report, and for states not included in the report, creates entries to the missing capital markets data drawn from several additional sources for states not included in the report’s statistical table.

Throughout his articulation of great power measures, Drezner uses the term ‘market size’ to refer variously to each of these elements, as well as these measurements in aggregate. While he mentions that market diversification reduces vulnerability, he does not further clarify why these specific measures are the most salient, rather pointing to sheer size as the demarcating feature in his analysis of which states are great powers. In his more detailed expositional analysis of individual cases, he does point to several additional features such as cross-border positions of banks, and the growth of capital markets; however, these do not feature as core variables in the model itself. Still, as a heuristic, these measures, \textit{prima facie}, lead to very similar conclusions in those cases as Drezner drew based on the 2002 data for the model generally.

Table 4.1 reproduces Drezner’s table for measuring great powers using updated data from 2014, and extends the data in a few salient ways. First it is important to note that no new variables are added; in this way the table is true to Drezner’s own. However, the table does expand the data contained in the sections on merchandise trade and capital markets. It also includes the breakdown of both merchandise trade to include import/export, and the

\textsuperscript{175} IMF., \textit{Global Financial Stability Report: Market Developments and Issues September 2003} (International Monetary Fund, 2003), 121 of the statistical appendix. Confusingly, the IMF’s data in the statistical appendix differs from the data in the 2003 report itself. The measures that Drezner uses are actually from 2001, not 2002.
capital markets data are expanded as per the previous description. The table also includes additional states: in his original table, Drezner includes the EU, US, Japan, Russia, China, and India; this table adds the top five EU economies: Germany, the UK, France, Italy and Spain.

The year of enquiry, 2014, is also a function of the case at hand. While the FATCA legislation was enacted in 2010, and the first IGA signed with the UK in 2012, the formal and final regulations were developed through 2014 when the regulation went ‘live’ for the purposes of enforcement. 2014 was the year for the first round cut off for IGAs as well. Those states that had signed an IGA at that point were beneficiaries of the more advantageous terms the IGAs offered from that point. The majority of ‘first wave’ IGAs were also signed in 2014. Last, to avoid skewing the representation of data from the impacts of the GFC, the 2014 data is more appropriate. As the charts in the appendix show, by 2014 a recovery to pre-GFC levels were only realised for the US, but a levelling-off for other states is observed. Last, like-for-like data in the capital markets element was only available through 2013, the last year the IMF produced that statistical table. 176

Analysing the table, the first measure, GDP as a marker of aggregate market size, shows a clear lead by both the US and EU at market prices. Both these economies are nearly twice

176 In fact, it is the only table for this annual report where both the 2014 and 2015 IMF GFSRs use the 2013 data.
the size of the next largest economy, China, and roughly quadruple the next, Japan. The EU and US also represent 46% of global GDP, which is 5% more than the combined GDP of the remaining countries. GDP PPP shows an equalisation, potentially suggesting a three-player model with China larger than the US; but, similar to Drezner in his analysis, this measure is discounted since, “from the perspective of multinational corporations, the PPP conversion rate is not as important as the market exchange rate, since that is the relevant factor for a profit-maximizing actor.” Thus, from an aggregate market size perspective, the EU and US are clearly the only players. China’s change from 2002, however, is worth noting. In Drezner’s original table, China’s GDP was $1.3 trillion at market rates, and $5.9 trillion on a PPP basis. Just over a decade later, where the US and EU nearly doubled their GDPs, China’s rose by nearly a factor of ten. It is also worth noting that in Drezner’s table, Japan was in the third position for great power candidacy, again underscoring shifts in global dynamics during the timeframe.

Regarding merchandise trade measures, there is a clearer argument for a potential tripartite order. The EU, US and China are roughly on par regarding total trade. Again, China’s growth

Table 4.2
Measures of Great Power Status in 2014

<table>
<thead>
<tr>
<th>Measure of Economic Power (US$, billions, and percent)</th>
<th>World</th>
<th>EU (extra-EU)</th>
<th>United States</th>
<th>China</th>
<th>Japan</th>
<th>UK</th>
<th>Germany</th>
<th>France</th>
<th>Italy</th>
<th>Spain</th>
<th>Spain</th>
<th>India</th>
<th>Russia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population (millions)</td>
<td>7,259.6</td>
<td>507.96</td>
<td>318.86</td>
<td>1,364.27</td>
<td>127.13</td>
<td>64.60</td>
<td>80.97</td>
<td>66.22</td>
<td>60.79</td>
<td>46.48</td>
<td>1,295.29</td>
<td>143.82</td>
<td></td>
</tr>
<tr>
<td>GDP, Market prices</td>
<td>$77,960</td>
<td>$18,514</td>
<td>$17,419</td>
<td>$10,360</td>
<td>$4,601</td>
<td>$2,898</td>
<td>$3,868</td>
<td>$2,829</td>
<td>$2,141</td>
<td>$1,381</td>
<td>$2,049</td>
<td>$1,861</td>
<td></td>
</tr>
<tr>
<td>Percent Share</td>
<td>100%</td>
<td>24%</td>
<td>22%</td>
<td>13%</td>
<td>6%</td>
<td>4%</td>
<td>5%</td>
<td>4%</td>
<td>3%</td>
<td>2%</td>
<td>3%</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>GDP, PPP</td>
<td>$108,061</td>
<td>$18,755</td>
<td>$17,419</td>
<td>$18,017</td>
<td>$4,655</td>
<td>$2,997</td>
<td>$3,757</td>
<td>$2,604</td>
<td>$2,156</td>
<td>$1,563</td>
<td>$3,384</td>
<td>$3,359</td>
<td></td>
</tr>
<tr>
<td>Percent Share</td>
<td>100%</td>
<td>24%</td>
<td>22%</td>
<td>23%</td>
<td>6%</td>
<td>3%</td>
<td>5%</td>
<td>3%</td>
<td>3%</td>
<td>2%</td>
<td>9%</td>
<td>4%</td>
<td></td>
</tr>
<tr>
<td>Per capita GDP (market prices)</td>
<td>$10,730</td>
<td>$36,448</td>
<td>$54,629</td>
<td>$7,594</td>
<td>$36,194</td>
<td>$26,286</td>
<td>$47,774</td>
<td>$42,726</td>
<td>$35,223</td>
<td>$29,722</td>
<td>$1,582</td>
<td>$12,937</td>
<td></td>
</tr>
</tbody>
</table>

Market power

Global Merchandise Trade

| Total Merchandise Trade                               | $30,293 | $4,049       | $4,032      | $4,302  | $1,506 | $1,190 | $2,724  | $1,261  | $1,001  | $683   | $785   | $806   |
| Export                                               | $15,102 | $2,266       | $1,623      | $2,342  | $684   | $506   | $1,908  | $583   | $529    | $325   | $322   | $498   |
| Import                                                | $15,191 | $2,233       | $2,409      | $1,959  | $822   | $684   | $1,216  | $678   | $472    | $358   | $468   | $308   |
| Percent Share of global trade                         | 100.0%  | 14.9%       | 13.1%      | 14.2%   | 5.0%   | 3.9%   | 9.0%    | 4.2%   | 3.3%    | 2.3%   | 2.6%   | 2.7%   |
| Export                                                | 100.0%  | 15.0%       | 10.7%      | 15.5%   | 4.5%   | 3.4%   | 10.0%   | 3.9%   | 3.5%    | 2.2%   | 2.1%   | 3.3%   |
| Import                                                | 100.0%  | 14.7%       | 15.9%      | 12.9%   | 5.4%   | 4.5%   | 8.0%    | 4.5%   | 3.1%    | 2.4%   | 3.0%   | 2.0%   |

Per capita GDP (market prices)

| As a % of GDP, Market prices                          | 38.9%  | 24.3%       | 23.1%      | 41.5%   | 32.7%  | 39.8%  | 70.4%   | 46.6%   | 46.8%   | 49.4%   | 38.3%   | 43.3%   |
| As a % of GDP, PPP                                    | 27.9%  | 24.0%       | 23.1%      | 23.9%   | 32.3%  | 45.8%  | 72.5%   | 48.4%   | 46.4%   | 43.7%   | 10.6%   | 24.0%   |

Capital market size

| Total                                                 | $285,585 | $91,326      | $72,696      | $27,621 | $28,360 | $20,207 | $14,669  | $16,004 | $10,274  | $7,044  | $3,123  | $3,602  |
| Total (assets, equities only)                         | $159,841 | $42,611      | $56,775      | $7,454  | $16,860 | $9,786  | $6,387   | $4,705  | $3,164   | $1,774  | $1,279  |
| Market Capitalisation                                  | $62,552 | $12,646      | $22,281      | $3,361    | $4,599 | $4,055 | $2,080   | $2,140  | $631     | $775    | $1,189  | $771    |
| Debt Securities Total                                  | $97,289 | $29,964      | $34,494      | $4,094   | $12,261 | $5,751  | $4,357   | $4,744  | $4,074   | $2,389  | $635    | $508    |
| Bank Assets*                                          | $126,744 | $48,716      | $15,921      | $20,167  | $11,500 | $10,421 | $8,282   | $9,120  | $5,569   | $3,880  | $1,349  | $2,323  |

Sources: For “Economic Power” and “Merchandise Trade”, World Bank; for “Capital Market size” IMF, World Bank, Chinese Banking and Insurance Regulatory Commission; author's analysis and calculations for capital markets missing in th

* Drezner’s original table uses data from the IMF’s Financial Sector Assessment Program (FSAP). The FSAP table adds “bank assets” to the measure “Capital Markets size”. For consistency, this table uses the same approach; however, the inclusion of bank assets in this metric varies by reporting methodology, and other analyses (including elsewhere in IMF reporting) use only “market capitalization of listed domestic companies” and “debt securities”.

177 This is purely illustrative, not a global aggregate since the GDP of the EU states as individual economies would be double-counted.

178 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 36, at footnote 15.
here relative to the growth of the US and EU is striking. While China doubled its percentage of global trade from 6.2% to 13%, both the US and EU lost market share by 3.5% and 4% respectively. The total trade figures also mask variation in trade as a proportion of total trade (a factor missing from Drezner’s analysis): while EU and Chinese imports and exports are roughly equal, the US was importing 1.5 times more than it was exporting. This would suggest greater sensitivity to exogenous forces of globalisation, such as supply chains, for the US. Interestingly, the US is also the smallest of the three, with 1% less of global trade compared to China, and 2% less compared to the EU.

Still, as a percentage of total GDP (again at market prices), merchandise trade accounts for about a quarter of US and EU GDP, or half that of China, indicating that China is more dependent on trade than the other two candidates. Indeed, all other states in the analysis has international merchandise trade ranging from between 32% and 70% of total economic production.

Last, capital markets data again show clear EU and US domination. As aforementioned, the inclusion of bank assets into the measure is one of several methodologies employed by the IMF and others, so the analysis here will evaluate the various combinations of measures. Taking the total aggregate measure, the EU has the largest capital markets by a wide margin. This is largely due to the inclusion of the bank assets measure which accounts for more than half of its $92 trillion size. Removing bank assets and focusing on the more commonly combined metric of market capitalisation and debt securities, the EU drops to second place with capital markets nearly 20% smaller than the US. Still, by either measure, both the EU and US dwarf the states with the next largest markets. Including bank assets, China, Japan, and the UK form a kind of second tier of players, but this falls apart when looking at just market capitalisation and debt securities. On the latter basis, Japan is in third place with a lead of about $7 trillion over the fourth-placed UK.

Drezner offers no further methodology for comparing or using these measures to identify great powers other than apparently looking at who is biggest. However, in both aggregate terms (GDP) and capital markets, the EU and US clearly dominate. For merchandise trade, China is a vital and growing power, but given its dependence on trade at 40% of its GDP at market prices compared to 24% and 23% for the EU and US respectively, this variation in degree of vulnerability would cause it to fall out of candidacy on this measure compared to
the US and EU. Thus, on preliminary analysis, while the constellation of emerging powers had changed fundamentally from 2002, the world’s great power order in 2014 mirrors Drezner’s conclusion that the great powers are the EU and US across all measures.

This simple analysis leads to the next fundamental, and far more complex, question in identifying the great powers: the treatment of the EU as a single actor. Indeed, the model only seems to function if the EU is considered a great, unitary power. As aforementioned, while Drezner concurs with the literature that “[i]t would be highly problematic to describe the European Union as a unitary actor in matters of foreign and security policy”, but, treating the EU as a single actor for the purposes of global economic regulation is “hardly heroic”.179 This assertion is more problematic in the case of FATCA, for several reasons, and leaves the question of whether the EU is a single actor tenuously positioned.

After it became clear that the US FATCA legislation would not be repealed, the ‘bargaining’ on state preferences began between the US and the ‘Big 5’ EU states, specifically excluding the EU as an actor.180,181 Still, neither any EU member state, nor the European Commission or Council of the European Union intervened in the formal negotiation and adoption of the IGAs as a legal basis for implementation—processes that are core EC and Commission institutional competencies— which could be interpreted as tacit approval of the process that ultimately unfolded.182 In other words, the EU and its institutions de facto agreed, indirectly, to the FATCA regime and the IGA process as the legal basis for implementation. While evidence suggests that the Commission wanted a mandate from the Council, this was not forthcoming, likely due to the requirement of unanimous member state approval, a point that will be further expanded in the bargaining outcomes section.183

Indeed, there are clear reasons to reject the argument of tacit EU approval. First, the European Commission itself does not consider itself to be either an actor on the matter of

179 Ibid., 38-39.
180 The next section analysing the origin of state preferences relating to FATCA articulates individual states’ positions in more detail.
181 See, e.g. Department, “Joint Communiqué by France, Germany, Italy, Spain, the United Kingdom and the United States on the Occasion of the Publication of the "Model Intergovernmental Agreement to Improve Tax Compliance and Implement Fatca".”
182 Thanks to Dr Chad Damro for this point.
FATCA, nor the IGA development and implementation process. Responding to European Parliamentary Questions on the validity FATCA IGAs especially as they present competing compliance issues with the EU directive on data protection, the Commission wrote that it has regular contact with the US as relates to FATCA, “however, as the EU is not a party to these agreements, the Commission is not entitled to discuss or negotiate amendments to them with the US.”

The response to the question goes on to note that, “through the Directive on Administrative Cooperation, the EU has implemented within its territory the internationally agreed Common Reporting Standard (CRS) for reporting of financial account information.” This is especially interesting since the post-FATCA CRS framework was built on the back of the model FATCA IGA—again, negotiated by the US and EU Big 5—as the basis for the EU’s wider, multilateral legal framework ensuring it would be in line with FATCA reporting requirements. The Commission continues that any future coordination on these matters between the EU and US would require a further framework to establish a legal basis that would replace the existing system of bilateral IGAs. The Commission writes: “Any possible negotiation on behalf of the EU with the US for replacing the existing bilateral FATCA agreements would require not only a unanimous Council Decision mandating the Commission to engage in such negotiations, but also the preparedness of the US to adhere to CRS in place of FATCA.”

Conversely, another way to understand the EU as a single actor, is through the proxy of IGAs amongst EU member states, and the timing of their signing as shown in Table 4.2. From the first IGA signed by the UK in 2012 to the implementation, ‘go-live’, date of the legal framework on 30 June 2014, seventeen EU member states had signed an IGA, and all the rest were in the process. For its part, the US treated every EU member state as having an ‘in effect’ IGA as of the first wave deadline of 30 June 2014, with the single exception of Greece. The Greek government was, however, treated as having an IGA in effect for the

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185 This point will be revisited in the section analysing the Revisionist Model’s step on operationalising government preferences.
second wave, 30 November 2014. This meant that as of the first wave deadline, 69 states
that signed IGAs with the US, nearly half of which were EU member states. Again, this
would seem to underpin the claim that the EU can be treated as a single actor insofar as not
only was there no opposition from member states, indeed every state was party to an IGA,
all of which were completed by the end of 2014.

Therefore, there are two competing interpretations for the EU as a single actor with respect
to FATCA. First, based on the actions –or in this case, inaction–of the EU as a single actor
through its central institutions of the Council and Commission, it would be reasonable to
conclude that the EU was acting as a tacit, or de facto, party to FATCA. The de facto nature
of the role of the EU as a single actor is important because there was no formal legal basis to
claim that the EU and US have a FATCA agreement (there is no EU-level legal framework),
but it could be argued that in practice they do have an agreement because all the member
states had signed IGAs and implemented their respective domestic legal provisions. Another
important feature to note here is that the Commission has the legal authority to intervene
on any treat signed by any MS to ensure it abides by EU law; in the case of the FATCA IGAs,
the commission did not intervene on this basis. Second, and conversely, one could argue
based on the Commission’s own words, that while it did not intervene in the IGA process,
neither did it acknowledge the IGA standard as a legal basis for EU-US regulatory
coordination, instead favouring its own ‘domestic’ internal-to-the-EU preferences.

Indeed, the Commission’s response, written in January 2022 replying to a question posed in
October 2021, would seem to be setting the stage for a further negotiation process, or
perhaps signalling that the EU views the two frameworks, FATCA and CRS, as ‘rival
standards’ to use the language of the Revisionist Model. The scope of this analysis does not
extend to 2022; however, the great power concert analysis later in this chapter will again
revisit the idea that rival standards may be a step toward harmonised standards. For the purposes of identifying the great powers though, this example serves simply to interrogate the notion of the EU as a single actor.

While the circumstances surrounding the FATCA regulation itself present some uncertainty on the treatment of the EU as a single actor, according to the criteria in the Revisionist Model the EU is categorically a great power. However, it is also not acting the way the Revisionist Model would predict. Neither of the EU’s central institutions, the Commission and Council, invoked their roles in proposing and negotiating new laws and regulatory frameworks on behalf of the EU regarding FATCA. No member state, especially the Big 5, deferred to the competencies of the central EU institutions; rather they decided to go it alone. And last, the US did not seek to establish a bargaining core with the EU. This latter point leads to another critical observation: the US did not seem to be treating the EU like a great power counterpart.

Regardless, from the perspective of the model, the identification of the two great powers is clear, and these further questions require additional analysis to understand what this means for the overall validity of the model and its methodology, and indeed whether this case falsifies the model. The next stage of analysis is to understand the origins of domestic
preferences of the two great powers, where the motivations of the respective actors will shed light on these observations.

Chapter 5: Step II: Initial domestic preference formation

The Revisionist Model argues that the identification of great powers serves to limit the actors in the bargaining core, and once established, how they coordinate (or do not coordinate) will ultimately shape the type of regulatory outcome. However, aside from determining their place in the pecking order—that is, whether they are a great power—their respective power “is of little importance in determining great power preferences.” To determine what the preferences of the great powers in the bargaining core are, therefore, Drezner invokes Legro and Moravcsik’s two-step approach: first, “[i]dentify the domestic actors and institutions that explain the origin of state preferences”, then, “take those preferences as given for international interactions, and to explain the bargaining outcomes as a function of the distribution of interests and capabilities.” This section focuses on the former: the identification of domestic preferences which, in turn, comprise the starting positions of the respective great powers in the core.

The US and the EU are the great powers identified in the last section; however, in addition to analysing the origins of the domestic preferences of these actors, this section will also look at the preferences of additional actors who were key to the subsequent step of international bargaining. Given what is known about how the bargaining core unfolded, in addition to the EU, the analysis will cover states critical to EU preference setting, including both EU and non-EU states. Their inclusion here pre-empts some of the conclusions in the next section about the role of these states in the bargaining core; however, their role in managing offshore assets in the global financial system were also central to the calculus behind domestic preferences in the US. Indeed, the US FATCA law was in part a direct reaction to the UBS tax scandal, with comparable scandals having similar impacts on the EU: for example the LGT scandal’s impact on Germany. Similarly, in contrast to EU-led initiatives for tax information reporting, the EU’s large so-called offshore financial centres (OFCs)—also known as offshore banking centres or secrecy jurisdictions—have historically supported

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188 Ibid.
secrecy and rejected cooperation on automatic information exchange initiatives at the EU level. The member state most adamantly supporting secrecy is Austria, however other states have also historically operated in this vein: Belgium, Luxembourg, and Netherlands (the latter three sometimes called the ‘Benelux’ countries) and small secrecy jurisdictions alike (dependencies of the UK and Netherlands, including the UK Channel Islands). Further, non-EU European OFCs (e.g. Andorra, Liechtenstein, Monaco, San Marino) have tended to follow the lead of the Swiss when forming bilateral agreements on information exchange in line with, or against, the preferences of the EU and OECD. For these reasons, the analysis includes considerations of these other influences in addition to the great powers. The detail of the import of the two states is further explicated in the sections below on US and EU domestic preference formation, and again, is *prima facie* a contradiction to Drezner’s claim that small states do not matter to great power preference formation.

The analysis of each state’s domestic preference formation home-in on four key areas most salient to the bargaining core for the eventual FATCA regime. These focus on the international tax regulation and offshore finance issues most salient to the domestic preferences of the states in question. First, there are several historical analyses of tax competition and coordination that focus variously on, e.g. changing preferences as a function of new governments coming to power, the use and function of OFCs (also commonly referred to as tax havens, especially prior to 2010), and the emergence of international tax initiatives directed at OFCs. Second, institutional and regulatory capabilities in existing and developing new regulation features heavily in the tax

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coordination literature as a basis for domestic preferences. Scholars across disciplines tend
to think of regulatory development in illicit offshore flows as ‘evolutionary’ in that they build
on previous regulatory regimes and/or legal architecture.\(^{191}\) Third, states’ preferences are
influenced by international consensus views of them—that is, whether they are seen as
engaged in ‘Harmful Tax Competition’ or have been ‘blacklisted’ as an OFC in the
international arena by, for example, the OECD or FATF.\(^{192}\) And finally, the relative impact
participation in existing and related regulatory regimes has on emerging approaches such as
FATCA. This last area features prominently in the considerations of governments and
scholars alike when seeking to understand states’ preferences on regulatory development in
the area of financial crime and illicit financial flow, which includes offshore tax abuses.\(^{193}\)

There is significant overlap in the content of these literatures and consolidating these
approaches into these four themes is only to facilitate understanding of states’ preferences
that are most relevant to this case. The themes are drawn from the literature and insofar as
possible, do not favour any specific theoretical approach. Again, the Revisionist Model does
not include specific methods for the analysis of domestic preferences, nor favour any
specific theoretical disposition for doing so, only that they form the basis for states’ ultimate

\(^{191}\) See, e.g. "Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes
Changing and It's Crazy out There!."; Allison Christians et al., "Conceptualizing a New Institutional Framework

\(^{192}\) See Nesvetailova and Palan, "Offshore Finance and Shadow Banking: Regulation of the Dark Corners of the
Financial System."; Palan, "Tax Havens and the Commercialization of State Sovereignty."; Palan, Murphy, and
Nowhere: Shadow Banking and Offshore Finance."; Sharman, *Havens in a Storm: The Struggle for Global Tax
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Macro Evidence and Implications for Global Inequality."; Morten Bennedsen and Stefan Zeume, "Corporate
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Hines and Rice, "Fiscal Paradise: Foreign Tax Havens and American Business."; Salomone Picciotto, "Offshore:
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Abbot (London: Macmillan, 1999); Mara V. J. Senn and Giselle K. Fuentes, "International Asset Tracing: The
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Personal Wealth and Corporate Profits."

\(^{193}\) See, e.g. Finance Committee of the German Bundestag, Anonymous Withholding Agreements and the
Future of International Cooperation in Taxing Foreign Financial Accounts: Testimony before the Finance
Committee of the German Bundestag, September 24, 2012 (Statement by Associate Professor Itai Grinberg,
Geo. U. L. Center), 2012; Grinberg, "Beyond Fatca: An Evolutionary Moment for the International Tax System.";
Richard Eccleston and Felicity Gray, "Foreign Accounts Tax Compliance Act and American Leadership in the
Campaign against International Tax Evasion: Revolution or False Dawn?" *Global Policy* 5, no. 3 (2014).
bargaining positions in international negotiation, or the bargaining core. That is, Drezner takes the great power states’ domestic, status quo, preferences as their initial preferences when engaging in bargaining over transnational regulatory issues. Each state will aim to minimally adjust these preferences, favouring instead to have their counterpart great power make adjustments.

Part 1: The United States’ Initial Domestic Preferences

The domestic preferences of the US on international tax matters in the lead up to FATCA were influenced by several key considerations. The highest-level considerations are similar for every country: domestic sovereignty enables countries to set tax rates within their own jurisdictions; however, they have little control over other states’ tax policies—even when those policies undermine their own ability to collect tax domestically. This problem is known variously as tax competition or tax arbitrage. Individuals and corporations aiming to minimise the impact of taxation on their bottom line can seek other jurisdictions from their home, or residence, jurisdictions which offer lower tax burdens. Further, the most aggressive and complex tax planning and evasion arrangements will often include multiple companies (sometimes shell companies created for this explicit reason), and countries or jurisdictions that are virtually impossible for states to track through the web of flows. As Palan and Nesvetailova superbly articulate, these individuals and companies (or other legal entities) seek “to be located for tax and regulatory purposes elsewhere, or ideally, nowhere.”

Even where a great power state like the US can pressure a specific jurisdiction that it sees as a tax haven or otherwise engaged in what is viewed as HTC, capital can and will simply flow to another such jurisdiction. Further, enforcement action is also often limited to treaties, usually on a bilateral basis, that may or may not include provisions aimed at sharing information or cooperation. Thus, the problem of tracking these flows is both global in nature and requires a global response—what the OECD model tax treaty, for example, calls ‘mutual administrative assistance’. For the US, like other states, these are the basic conditions states face in responding to these issues.

As the Revisionist Model asserts, the responses states have to transnational issues are based on initial domestic preferences. For the US, its initial preferences for responding to

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offshore tax abuse, can be broken into four categories. These four categories of initial preferences, then ultimately led to the enactment of the FATCA law and its corresponding regulations.

First, the history and context of offshore finance and especially illicit financial flows and their impact on the tax base are issue areas the US has responded to with a range of regulatory measures and approaches, albeit, like most states, largely ineffectually. Until recently, even the ability to accurately track and calculate the scope of the problem was virtually non-existent, as well as the mechanisms of how these flows function. For states generally, the true nature of offshore tax evasion has therefore been opaque, or as several analysts conclude, “unknowable”. Understanding the relationship between illicit flows and the tax base is also complex and overlapping. These issues have framed international tax as a policy area in various US government administrations, but until FATCA, the US lacked the toolkit required to understand the global flows of US persons with domestic tax liabilities.

Second, domestic tax law shaped how the US viewed the international tax problem: the US policy of citizenship-based taxation is unique amongst developed nations and had a material impact on its approach to the problem.

Third, existing regulatory frameworks play a key role in the development of new regulation. The US has been the source of several regulatory regimes dealing with illicit financial flows and financial crime that constitute a regulatory architecture the US continues to build on. Two key examples are the anti-money laundering and counter-terrorist financing regimes, and the myriad due diligence and data-gathering measures they entail. The way the US built its approach to counter-terrorist financing enforcement (CTFE) on the back of AML, also influenced how it would develop FATCA.

Fourth, FATCA itself as a law, and then regulation, sets the US’ domestic preferences on this issue most clearly. In a literal sense, FATCA is the codified set of US domestic preferences on

international tax cooperation and enforcement. It articulates the outcomes the US sought with respect to international tax coordination and represents the most pressing policy issues to the US when it was passed into law. Once the act became law, the US Treasury was empowered to create the corresponding FATCA regulations which set out these preferences in detail for the purposes of implementation, oversight, and enforcement. This is a critical point that is often overlooked in analyses of regulatory regimes, but that will play an integral role in shaping the analysis of the regulatory outcomes in the chapter analysing the bargaining core.

US initial preferences: legal basis for addressing offshore tax abuse

*The size of offshore abuses and the ‘tax gap’*

The work undertaken by the US Senate’s Permanent Subcommittee on Investigations in 2008 set the stage and direction for the eventual FATCA laws and subsequent regulations. These investigations resulted from tax scandals at major European banks (UBS of Switzerland in particular) and exacerbated the impact these scandals had in the context of the GFC of 2008. The impact of offshore tax abuse was ultimately distilled into a single number: the US government’s calculation of the “offshore tax gap”⁹⁶, which represents the total tax liabilities otherwise payable to the US from monies held offshore that evade and/or avoid taxation on interest and earnings, as well as some, or all, of the principal.⁹⁷ The tax gap in question here is the offshore tax gap, which is the total taxable offshore wealth that is not taxed, and therefore lost to the US government.⁹⁸ At the time of the earliest

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⁹⁶ There is significant debate on the difference and legal nature of ‘tax evasion’ and ‘tax avoidance’. Generally, the former is seen as illegally failing to pay due tax, where the latter is a legal means to intentionally reduce tax liabilities. Of course, both can be at play simultaneously, for example, in the case of proceeds garnered through illicit activity that evade tax, including, tax evasion itself. For more on the debate and operational definitions, see United States, “Tax Haven Banks and U.S. Tax Compliance.”; Grinberg, “Academic and Journalistic Perspectives on Illicit Financial Flows.”; Richard Murphy, “Closing the European Tax Gap: A Report for Group of the Progressive Alliance of Socialists & Democrats in the European Parliament,” Tax Research LLP: http://www.socialistsanddemocrats.eu/gpes/media3/documents/3842_EN_richard_murphy_eu_tax_gap_en_120229.pdf [available on line March 2013.] (2012).

⁹⁷ This refers to accretive principal growth rather than simply taxing the principal, which would be a wealth tax. Thanks to Dr Iain Hardie for this point.

⁹⁸ This section refers only to the offshore tax gap. In general, calculations of the tax gap for any given tax administration would also entail the calculation of tax lost to the cash economy amongst other items. See, e.g. Victor van Kommer, "Cash Economy, Measuring the Tax Gap from the Tax Administrative Perspective," in Research Handbook on Money Laundering (Edward Elgar Publishing, 2013).
Congressional investigations, various analyses from the US Congress\textsuperscript{199}, private industry consultancies like Boston Consulting Group (BCG), and academics, had estimated that global, household, offshore wealth amounted to between $7.8 trillion\textsuperscript{200} and $21 trillion.\textsuperscript{201} The core assumption was that the entirety of offshore wealth could be evading tax in some form, both the interest that wealth earned, and potentially the entirety of the principal. Governments, including the US, sensationalised these figures, especially the highest estimates, to make their case that the problem required immediate and severe action, and to calculate the potential losses in tax revenue these numbers implied. Speaking at a conference in 2009, Nathan Hochman, former (in 2008) US Assistant Attorney General for the Tax Division of the US Department of Justice said, because of the GFC and the UBS scandal, “all of a sudden, collecting tax—which I wouldn’t say was a luxury before—became an imperative” since governments were squeezed by the fallout of the economic crash resulting from the GFC.\textsuperscript{202}

In the US, Senator Carl Levin, who led the US Senate committee’s investigation on offshore abuses, and who had been pushing for legislative action on these issues for years, famously claimed in 2006 that the US had a $100 billion tax gap due to the trillions in offshore wealth that was avoiding and evading tax. The number made its first appearance in the Senate in when he was chairman of the Senate’s Permanent Subcommittee on Investigations (PSI). In a statement on the PSI’s findings on the tax gap to the Subcommittee on Federal Financial Management, he cited a 2006 study by Guttentag and Avi-Yonah, which estimated US offshore tax losses of between $40-70 billion for individuals. Levin then gave another uncited figure of $30 billion in offshore corporate losses for 2001.\textsuperscript{203} Together, Levin

\textsuperscript{199} See, e.g. the full 2008 analysis produced by the committee: United States, “Tax Haven Banks and U.S. Tax Compliance.”

\textsuperscript{200} See, e.g. ‘Boston Consulting Group 2011’ as cited in Grinberg, “The Battle over Taxing Offshore Accounts.”

\textsuperscript{201} Henry, “The Price of Offshore Revisited.” Henry also claimed that the number could be as high as $32 trillion in the same report, although the $21 trillion number is the one most associated with him in reporting and academic analyses.


claimed, this represented a $100 billion gap. Two years later, a formal PSI report, ‘Tax Haven Banks and U.S. Tax Compliance’, (for which he again was the chairman) gave the same $100 billion figure in its opening sentence: “Each year, the United States loses an estimated $100 billion in tax revenues due to offshore tax abuses,” and that these matters were of “critical importance”. The figure itself, while tenuously derived, had political resonance and became the unofficial tax gap figure for politicians and corporate practitioners alike. Even as late as 2015, the same $100 billion tax gap number was being used in speeches by another Senator, Chuck Grassley, and in an interview for this dissertation, a senior partner in the tax practice at a Big 4 consultancy also cited the number as one of the key drivers for FATCA. When asked if they believed the number, the interviewee replied (laughing), “I can’t say I’ve calculated it, but that’s the ‘official’ number.”

Similar to the interviewee, in in his 2009 public comments, Hochman also humorously implied that the nature of the $100 billion was symbolic rather than literal:

Senator Carl Levin, who’s been banging this drum night and day for probably five or six years, says the US is losing $100 billion a year just on what’s sitting offshore. Whether its 40-70 billion of tax [sic], a hundred billion, every time Levin beats that drum it’s another billion dollars. If you see him on TV and he beats it twice, it’s a hundred and two billion by the end of the hearing.

Hochman goes on to say that regardless of the accuracy of the number, it underscored the importance of lost revenue that governments were “desperate” to collect and played a critical role in creating the circumstances where “international tax enforcement is first and foremost on the US and many different tax regimes’ agendas.”

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204 A footnote on the figure claimed the $100 billion was “derived from studies conducted by a variety of tax experts” including the well-regarded Guttentag and Avi-Yonah study, as well as a first issue student magazine from Florida International University, and several tenuously related articles in Tax Notes.


206 Big 4 Consultancy Senior Partner, Tax Practice, interview by Mateo Urquijo, 13 January, 2015, London.

207 Hochman. USD-PITI, "Off-Shore Compliance Initiatives - Current and Future."

208 Ibid.
Whatever the actual size of offshore tax abuses in 2008, the political impact of the $100 billion figure in US political circles was real. Referring to the UBS scandal, the editor of Tax Notes (the foremost tax journal in the US), Lee Sheppard said at a 2014 roundtable, that it was “embarrassing” for US authorities that Birkenfeld who blew the whistle on UBS’ practices, leading to the UBS scandal, “showed up”:

If he hadn’t shown up, this would all just be a huge lump underneath the rug at the edge of the room. It was embarrassing that he showed up because the IRS was looking the other way. We were not auditing rich people’s returns. Rich folks were not reporting their bank accounts. And the only reason we ended up taking extreme measures to combat this, like you see with FATCA, is because Congress was truly shocked by the extent of the problem.\(^{209}\)

In addition to the size of the tax gap due to offshore tax abuses, the other two critical items for the US, again as described in the 2008 Senate report, were the identification of the tax haven states where the majority of the offshore activity was happening, and “the extent to which financial institutions in tax havens may be facilitating international tax evasion.”\(^ {210}\)

Two of the key states in question were obvious as a result of the tax scandals involving banks in Switzerland and Liechtenstein and were the subject of the Senate report, but the scale had not been fully articulated. It was also well known and understood that the UK and both its Overseas Territories (OT) and Crown Dependencies (CD) played a major role in the offshore world. As Grinberg notes, again citing a 2011 BCG report, “more than 25 percent of the world’s offshore wealth [$7.8 trillion] is managed from Switzerland, while approximately another 25 percent of the world’s offshore wealth is managed from the United Kingdom and its dependencies.”\(^ {211}\)

These high-level figures have since been reviewed with more sophisticated and accurate analyses. Zucman’s approach (as discussed in the literature review in Chapter 2), now considered to be the standard approach for measuring offshore assets, found in 2014 that, “globally, around 8% of households’ wealth is held in tax havens”, compared to the 6% BCG


\(^{211}\) Grinberg, "The Battle over Taxing Offshore Accounts."
found previously for 2010. For 2014, Zucman calculated household wealth to be $95 trillion, arriving at $7.6 trillion in household wealth held offshore. Of this $7.6 trillion, Zucman estimates that roughly a third, or $2.3 trillion was held in Switzerland.\textsuperscript{212} Thus, within a reasonably close range, and over a 5-year timeframe, the consensus of these analyses would suggest that some 6-8\% of household wealth was held offshore and that between 25-30\% of that wealth is managed by Switzerland, with another c. 25\% managed by the UK and its dependencies. These findings are also congruent with the 2008 Senate committee’s investigations where Switzerland and the UK were seen as critical to the offshore problem by officials in the US.\textsuperscript{213} Importantly, whether formally evidenced in Senate reports or not, the US’ perspective was that both countries have long been identified as key offshoring centres and/or secrecy jurisdictions and were seen to be the primary facilitators of the US’ illicit offshoring issues.\textsuperscript{214}

Two of the key reasons the size of offshore assets was such a focus for the US, aside from the GFC and senate investigations, are how the problem of offshore tax evasion relates to the way the US taxes its citizens, and the view the US holds on its extraterritorial powers. Even as the US attempted to reframe the problem off offshore as a global issue and to harmonise an international approach—by passing the FATCA legislation—the US is itself an outlier to international tax policy harmonisation. This is because the US has a citizenship-based tax framework. As Mason describes, “[t]he Treasury Department lists conforming with international tax norms as a tax policy goal. But the United States stands alone in the world in taxing its citizens' foreign income, no matter how long they reside abroad.”\textsuperscript{215} The US therefore requires the cooperation of other states to enforce its own income tax regime. Indeed, one of the angriest criticisms of FATCA is that the US is acting “extraterritorially” and in its own interests, to the exclusion of the rest of the ‘developed world’.\textsuperscript{216}

\textsuperscript{212} Zucman, \textit{The Hidden Wealth of Nations}, 35.

\textsuperscript{213} Grinberg, "Academic and Journalistic Perspectives on Illicit Financial Flows."; United States, "Tax Haven Banks and U.S. Tax Compliance."

\textsuperscript{214} For additional information on the UK as a haven state, Palan and Sharman have especially good historical analyses. See, e.g. Palan, "Tax Havens and the Commercialization of State Sovereignty."; Palan, Murphy, and Chavagneux, \textit{Tax Havens: How Globalization Really Works}; Sharman, \textit{Havens in a Storm: The Struggle for Global Tax Regulation}.


\textsuperscript{216} See, e.g. Burgess, "Us Legislation: Industry Concerned at Extraterritorial Tax Clampdown Plan."
Extraterritoriality and citizenship-based taxation

The next fundamental concept influencing US domestic preferences for the development of FATCA is extraterritoriality. As a legal concept, extraterritorial jurisdiction is complex both in terms of defining ‘extraterritorial’ and ‘jurisdiction’. Other than to facilitate the understanding of how these concepts influence US domestic preferences, where and how the variations of these definitions apply is beyond the scope of this dissertation. The central idea with respect to US preferences for FATCA relies on the application of the concept of ‘choice-of-law’. Choice-of-law refers to the question of when to apply the laws of different states involved in a single incident. The two primary considerations are where the action took place and where the harm took place. As Colangelo describes, if a person in State A shoots a person in State B across a border, the principal questions are, which law applies (State A’s law, or State B’s laws), and where does each state have the right to enforce their laws: is it where the action took place (State A), or where the harm was felt (State B)?

With respect to FATCA—and financial crime in general—the US has tended to operate on the basis that since the harm of evading US tax liabilities offshore is felt in the US, the US’ choice-of-law is its own, where the harm occurs. Thus, US courts have tended to allow for the pursuit, prosecution, and adjudication of those infractions in the US regardless of where they took place—i.e. offshore. This is true in general as well as with respect to financial crime and illicit flows: as Putnam notes, “[t]he United States has been by far the most assertive state with respect to giving its domestic rules extraterritorial effect, with U.S. courts playing a key role. Since 1945, U.S. courts have considered a growing number of new claims involving extra territorial conduct.” She goes on to say that the exercise of “U.S. extraterritoriality is often equated with unilateral exercises of ‘economic statecraft’.”

Complicating the matter further, unlike other financial activity, taxation is fundamentally a power of the state and necessitates considerations of sovereignty even as a unilateral matter. While all crimes are arguably ‘against’ the state, resolving tax infractions that occur

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218 Colangelo, "What Is Extraterritorial Jurisdiction?.”
219 Putnam, “Courts without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere.”
offshore puts states in a position of potential conflict of sovereignty. As Grinberg explains, this dynamic is also a key problem in international tax coordination in general:

Policymakers commonly understand limitations on the extent to which a nation will provide [tax] collection assistance to another nation as a straightforward application of the principle of territorially limited state sovereignty. [...] Without strong contrary incentives, powerful states are highly unlikely to allow the erosion of their sovereign authority by facilitating the extraterritorial exercise of taxing power within their territory.220

Similarly, Ring argues that “[n]o significant issue in international tax can be discussed without raising the question of sovereignty” and that when conducting tax policy, “[e]ven purely domestic actions can have significant ramifications abroad.”221 This is to say, not only are individual crimes—e.g. a person committing tax evasion—seen to cause harm to the US, but the state enabling the crimes through the exercise of their own sovereignty are also seen to be violating the principles of US law, even where the actions of the individual and the state are legal in the context of that state’s rule of law. Thus, in the case of Birkenfeld and the UBS scandal, in addition to pursuing Birkenfeld and UBS, the US put direct pressure on Switzerland to change its banking secrecy laws that enabled the scandal in the first instance since this was the fundamental enabler of causing harm to the US. Of course, this is purely from the perspective of the US, and diametrically opposed to the Swiss view, but is fundamental to understanding the US’ perspectives on how it protects its interests.

These two dispositions—the US’ response to the scope, size and impact of offshore tax abuses, and its citizenship-based taxation—coupled with its operational concepts of extraterritorial jurisdiction and its view that its own sovereignty is primary in choice-of-law for tax matters, describe the US’ legal basis, approach, and justification for protecting its interests. With these interests set out, the next area to explicate in understanding the US’ domestic preferences is the regulatory architecture that existed in the lead-up to FATCA, and how it impacted the development of FATCA’s enforcement mechanisms. In terms of Drezner’s approach in the Revisionist Model, these legal precepts and the US own

221 Ring, “What’s at Stake in the Sovereignty Debate: International Tax and the Nation-State.”
interpretations of its interests help to elaborate the initial preferences—and drivers of these preferences—which will inform how the US approaches the bargaining core in Chapter 6.

US domestic preferences: the regulatory environment

As discussed above in the analysis of the Revisionist Model in Chapter 3, and in the introduction to this chapter, understanding the regulatory environment prior to the enactment of FATCA is essential since FATCA builds on existing laws, agreements, and regulation. In this vein, three key areas influenced the architecture and mechanisms by which the FATCA regulation would achieve the legislative aims of the FATCA laws. First, tax treaties, which are virtually always undertaken on a bilateral basis by the US, often contain information sharing provisions to further party-states’ ability to collect in each other’s jurisdictions, but this is often severely limited in scope and content. FATCA sought to enhance this tax information sharing mechanism. Second, a critical precursor to, and undergirding architecture for, FATCA came in the form of existing financial crime regulation. Specifically, Anti-money Laundering (AML) and Counter-terrorist financing (CTF)\textsuperscript{222} legislation and regulations, which contain Customer Due Diligence (CDD) and Know-Your-Customer (KYC) requirements fundamental to the implementation of FATCA in financial institutions. As mentioned previously when discussing the framing of the US political response to offshore tax abuses, tax evasion was framed as financial crime. As such, FATCA falls into the family of financial crime regulation not only politically, but also in its legal and regulatory architecture. Underscoring this point, industry and non-US governments alike understood this to be the case, even where not explicitly stated. This is critical to the understanding of both US and counterpart preference formation as well as the analysis of costs-benefits of coordinating regulatory standards as the Revisionist Model requires. Last, the US Qualified Intermediary programme (QI) was essential in creating the first legal basis for FFIs to act as cross-border tax intermediaries for the US. FATCA built on this framework, closing loopholes and abuses in this system and adding a coercive compliance measure.

\textsuperscript{222} Counter-terrorist financing is variously referred to by the acronyms CTF, CTFE (counterterrorist financing enforcement), and CFT (counter-financing of terrorism). The US generally prefers CTF, otherwise, CFT is most common.
Tax treaties

States have engaged in some form of tax treaties since antiquity. However, modern tax treaties are generally designed to address two key issues: first, to relieve double taxation largely resulting from cross-border capital flows, and second, to outline the kind of support the states will give each other in the form of “administrative assistance, or exchange of information, among tax authorities.” The vast majority of these treaties are bilateral in nature although there are some forms of multilateral treaties as well, notably in the context of the EU and proposed OECD initiatives. In the US, these treaties come in the form of double-taxation treaties, and where treaties do not exist, through Tax Information Exchange Agreements (TIEA). The US has tax treaties with 58 states; or, 67 if including the treaties agreed with former USSR states that are still in effect, referred to as the Commonwealth of Independent States. Information exchange provisions in US tax treaties have featured in some form “since at least World War II.” Information exchange is also vital to states’ monitoring and supervisory activity of tax law since, as described in the previous section, tax administration is a function of domestic sovereignty, to the exclusion of all other sovereign states. Treaties are therefore an entry point to mutual assistance, and this bilateral assistance is considered critical to states’ in enforcing their tax regimes.

While the US Treasury aimed to grow the development of its tax treaty network through the 1990s with the rise of globalisation, since at least 2005, it had also “place[d] a significant focus on negotiating” TIEAs. These have the advantage of including both domestic tax evaders who held assets offshore, as well as overseas citizens with tax liabilities at home. However, as Kirsch notes, TIEAs were not a comprehensive solution to the problem of tax evasion because they only “narrowly define[d] the circumstances in which an exchange

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225 These states include: Argentina, all three UK Crown Dependencies (Guernsey, Jersey, Isle of Man), Costa Rica, Ecuador, Cayman Islands (UK Overseas Territory), Hong Kong, Panama, and Singapore.
Further, in the first decade of the 21st century, the US TIEA and tax treaty information exchange approaches both were seen to be increasingly insufficient for the growth of information requests resulting from financial globalisation. Thus, as Keen and Ligthart argue in 2006, “[t]he exchange of information between national tax authorities has emerged in recent years as a—probably the—central issue in international tax policy discussions.”

There are several different types of information exchange possible depending on what the two states in question agree, but there are generally three types. First, and most common is ‘information upon request’, which is the form of information exchange in the OECD Model Tax Convention—the predominant “model tax treaty” globally. This entails the transmission of information at the “specific request from the residence country.” Second, ‘automatic exchange’ occurs when the party states have agreed to automatically exchange all negotiated tax information on a periodic basis. Third, ‘spontaneous’ exchange happens when information is passed from one state to another that may be relevant to the receiving state.

Given the bilateral nature of treaties and the varying preferences of all combinations of states and bargaining outcomes in each of those combinations, there are thousands of permutations possible—and in existence—between states. Further complicating this, tax treaties and TIEAs are changed and updated with changing state preferences over time. This environment creates the obvious problems of inconsistency of reporting and monitoring for all states. Unless any given state has comprehensive exchange agreements with all other states on a consistent basis, it is impossible to comprehensively supervise and monitor tax enforcement abroad. Indeed, there is even a literature on the conditions under which information exchange agreements emerge in tax treaties and what elements are contained in those treaties, largely as a function of state power dynamics. The 2000 paper from Bachetta and Espinosa is considered the seminal paper on this issue, highlighting that information exchange as a function of wider tax treaties can actually have suboptimal

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230 Ibid., 501.
231 Keen and Ligthart, "Information Sharing and International Taxation: A Primer," 81.
232 This paragraph summarises ibid., at 83, 'Types of Information Exchange'.
outcomes in models of asymmetric countries.\textsuperscript{233} They find, “no information exchange clause may be added to a tax treaty when there is a reciprocity requirement, when there is a high cost of negotiation, when there is a cost of providing information, or with one-way capital flows. It is also shown that an information clause increases the gains from a tax relief treaty, but may make it less sustainable.” This outcome is perhaps not surprising for asymmetric countries, but it points to a further and more complex issue of the so-called ‘third-country problem’ in bilateral treaties. Again, as Keen and Ligthart describe, since almost every tax treaty and exchange agreement is bilateral in nature, “[u]nless all countries are party to information exchange, the gains to any subset from agreeing to exchange information is likely to be reduced to the extent that third countries continue to provide an opportunity to invest without declaring the proceeds.” They go on to argue that such a consequence may even make information exchange agreements a suboptimal outcome, a conclusion supported by Bacchetta and Espinosa’s work.\textsuperscript{234}

Last, from a law enforcement perspective, the US and OECD tax treaties generally do not allow “fishing expeditions” where one state makes general requests from another, but rather require specific information for investigations including items like named individuals and associated information about why the request was being made. According to Grinberg, even the US was unable to change this dynamic, arguing that “[t]he chief obstacle was that four OECD member states—Austria, Belgium, Luxembourg, and Switzerland—were committed to bank secrecy as a bar to tax information exchange upon request.”\textsuperscript{235} In an interview with a former US IRS investigator for this dissertation, the severe constraints on, and different types of information exchange led to the “unreal set of circumstances where you know you’ve got a bad guy operating in three or four places [jurisdictions], but only two of them will give you information, and they want you to divulge your whole case. And even then, it takes years to get the info.”\textsuperscript{236} This point was further underscored by Hochman, who noted that only with the advent of modern secure information sharing protocols, and

\textsuperscript{233} Bacchetta and Espinosa, "Exchange-of-Information Clauses in International Tax Treaties."
\textsuperscript{234} Ibid. and, Keen and Ligthart, "Information Sharing and International Taxation: A Primer," 89.
\textsuperscript{235} Grinberg, "The Battle over Taxing Offshore Accounts," 315.
\textsuperscript{236} Former IRS Investigator, interview by Mateo Urquijo, 14 August, 2020.
enhanced treaties did limited information be exchanged faster, but that this did not solve the fundamental legal issue on the nature of exchange itself.  

Thus, while US tax treaties and TIEAs offer varying forms of information sharing, they are inadequate for harmonisation at the global level, vary too greatly on the types of exchange (with the main types being upon request, automatic, and spontaneous), and as bilateral measures treaties cannot solve systemic issues such as the third-country problem. To enable comprehensive supervision and enforcement of US tax interests, therefore, a consistent information exchange standard that is global in scope would be required. The learnings from the shortcomings and difficulties in the tax treaty framework prior to FATCA therefore formed the basis for the type of information that the US, and other states, would require to combat offshore tax abuses more genuinely. It is also worth noting that, given the nature of the model treaties, these concerns over sharing are similar for the EU (with states outside the EU), with the exception of the EU’s bank secrecy states, which will be the focus of this element of the EU domestic preferences section. Again, these structural similarities play a role in the later bargaining over the implementation of FATCA with the EU since it will impact how EU financial institutions are required to implement. Further, as will be detailed in Chapter 6, the lack of an existing information sharing mechanism meant that the adjustment costs for implementation would be higher than had there been an existing mechanism. For the Revisionist Model, these types of pressures on adjustment costs feature prominently in the cost-benefit analysis.

The treatment of tax treaties in the context of identifying initial domestic preferences also points to the analytical issue of temporality identified in Revisionist Model’s analysis in Chapter 3. The US has always designed its tax treaties to be in line with its preferences. However, in the two-party system these preferences change over time with new administrations mandating new approaches. Further, when the incumbent party is ousted, the US often sees significant changes to strategy in policy coordination at the international level, and certainly with respect to domestic regulatory preferences. As Hakelberg describes, Clinton viewed financial flows increases as reported by the IMF as harmful to US interests in

its ability to sanction, and the erosion of the tax base. The Clinton administration therefore pushed a comprehensive strategy to address offshore tax evasion and avoidance through the late 1990s, recruiting the OECD to build a framework for combating harmful tax competition (HTC) globally. Without congressional support due to massive industry pushback, however, the plan failed. Still, Clinton’s administration pursued “the toughening of information exchange clauses in bilateral tax treaties,” and threatened small OFCs with quasi sanctions and blacklists for non-cooperation. The Bush administration, from early 2001, by contrast, “buried” the OECD HTC programme, and while it continued to pursue TIEAs and information exchange in tax treaties, it preferred the ‘upon request’ means of information exchange. The Bush administration viewed curbing offshore abuses as potentially threatening corporate tax planning, thus shying away from touching this pro-business, anti-tax republican constituency. Further, the administration viewed tax evasion as the ‘actual’ problem, and felt that upon request exchanges, “enabled governments to enforce their tax laws without ‘stifling tax competition’.”

By 2006, in Bush’s second term, however, the tide had begun to shift and the Democrats lost no congressional seats in that year’s mid-term elections. From January 2007, the Democrats took back power in both houses. This timeline obviously coincides with the Democratically-controlled senate PSI investigations of offshore abuses under the chairmanship of Senator Levin. While Congress aimed to influence enforcement in the executive office of the presidency, its only power is legislative, thus the 2006 investigations set the groundwork for the further investigation in 2008, leading to the legislative framing work that would ultimately become the FATCA laws of 2010 under the new democratic administration of Barack Obama.

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238 This paragraph on US administrations’ preferences summarises Part 3 of, Hakelberg, “Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power.”
239 Ibid., 521.
240 For another, similar description to Hakelberg on the role of the Bush administration, and its disposition to tax havens and the role of civil society specifically, see chapter 10 of Palan, Murphy, and Chavagneux, Tax Havens: How Globalization Really Works.
242 There had been a democratic senate majority in Bush’s first term, however, the house was controlled by the republicans.
The two essential themes through these changes are that the biggest shift in administrations’ preferences happened at the international level (democrats generally pursuing broad international coordination, while republicans preferred a more laissez-faire approach), and that all administrations continued to pursue information exchange and regulatory enforcement frameworks—although the type of information exchange preferred did change (democrats preferring automatic forms, while republicans preferred upon request forms). Furthermore, under all administrations, the regulatory frameworks for related enforcement mechanisms grew markedly, leading to the second point of analysis here.

Financial crime regulation and the AML/CFT regime

The second key set of considerations for the FATCA regulations that informed US domestic preferences, are financial crime regulations. Several analysts have noted the relationship between the FATCA regulations and pre-existing regulations. Specifically, FATCA requires the identification of US persons at foreign financial institutions, along with an extensive set of account information, and uses existing regulatory controls to achieve these aims in part through the AML regime. The general principle is that financial institutions collect this type of identifying identification data at account opening as a function of due diligence processes as set out in AML regulations. While there are variations to these measures on a country-by-country basis, there is a great deal of harmonisation between AML frameworks globally. For example, the US regulations are very closely harmonised with EU regulations. In the EU, this is a function ‘hard law’ in the form of the AML directives and have extremely robust oversight at the international level through the FATF, MONEYVAL, and within EU member state domestic law. When considering the mechanisms that financial institutions would need to employ to carry out the requirements of FATCA, these existing frameworks played a key role in US Treasury defining the implementation of the regulations at the level of

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244 The Financial Action Task Force (FATF) is the IGO emerging out of the 1989 G7 initiative to create an independent body for the monitoring and supervision of international money-laundering and terrorist financing standards. MONEYVAL (Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) is the EU Council’s monitoring and supervisory body.
financial institutions. Specifically, FATCA built directly on pre-existing AML/CFT processes for customer identification, customer due diligence (CDD), and know-your-customer (KYC). This is an important point from an institutional perspective as well. In interviews for this dissertation, practitioners at banks, especially large multinational banks, practitioners recounted the initial conversations about where FATCA would sit in the context of regulatory governance in the banks’ operations. Some argued that it belonged in the tax function in global operations, others that it was a stand-alone initiative, and others still that it was a subset of financial crime. In the end, both the banks, and the consultancies working with banks on implementation, agreed that the formal properties of FATCA were most like AML/CFT operations, and indeed required overlap between the two, thus putting it in the family of financial crime regulation. This matters because the role of financial institutions’ in influencing the feasibility of implementation would also come to be a critical feature of FATCA’s success or failure at the bargaining table in later IGA negotiations, which will be discussed in Chapter 6.

Broadly speaking, the modern financial crime regime in the US has its origins in “The Currency and Foreign Transactions Reporting Act of 1970”, which is more commonly referred to as the Bank Secrecy Act (BSA). The BSA “requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering.” The act built the first infrastructure for addressing financial crime directly, by forcing domestic US financial institutions to play an enforcement role in financial crime activities they were advertently, or inadvertently, facilitating. The act “was intended to deter money laundering and the use of secret foreign bank accounts by improving the detection and investigation of


246 See, e.g. Executive, "Expert Interview: Banking Regulatory Operations."; Senior Partner, "Expert Interview: Regulatory Implementation."


criminal, tax, and regulatory violations.” This was initially a rules-based framework and introduced the basic features of modern due diligence and reporting in financial institutions for financial crimes relating to money laundering and transaction reporting. The BSA specifically included the reporting of transactions over $10k in value, currency transaction reporting, the identification of individuals undertaking the transactions, and the maintenance of the ‘paper trail’ for these transactions. Over the next several decades, the act has been modified and enhanced dozens of times. There are several excellent histories of the features and development of the AML regime, however, the aim here is only to demonstrate the trajectory of development and relationship to offshore tax abuses. The two themes investigated here, therefore, are specific elements of AML/CFT relevant to FATCA, and the relationship between AML and tax evasion per se.

After the BSA in 1970, the next major revision to the US domestic AML regime was the Money Laundering Control Act (MLCA), which was part of the Anti-Drug Abuse Act of 1986. This legislation criminalised the act of money laundering in several specific ways: financial institutions knowingly aiding a launderer; processing more than $10k where there is evidence or suspicion of the acquisition of those funds through criminal activity; and aiding a client in evading the BSA and MLCA rules through ‘structuring’. The MLCA was a key piece of legislation for the Regan administration’s ‘War on Drugs’ and its focus on ‘following the money’, since it was understood that the proceeds of the drug trade were largely being laundered in the US. Again, one of the key innovations of these new rules was

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249 Generally, for this section on the background and development of the US AML regime, Zagaris, "Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes after September 11, 2001, The.”


253 ‘Structuring’ is when payments are intentionally kept below the $10k threshold to avoid transaction processing: rather than a single large payment, for example, several smaller payments under $10k each would be made, and facilitated by the bank.
to put the onus of enforcement on the financial institutions themselves, and included the more severe consequences of criminal sanction, which could result in banks, for example, losing their federally backed depositor’s insurance (FDIC). The act also conferred critical powers to the US Treasury to,

oblige financial institutions to file additional, geographically targeted reports; requiring Treasury to negotiate bilateral international agreements covering the recording of large U.S. currency transactions and the sharing of such information; and increasing the criminal sanctions for tax evasion when money from criminal activity is involved.254

The association with the War on Drugs was also the administration’s gateway to international action through the US leadership of the G7 and select OECD member states to create the Financial Action Task Force (FATF) in 1989. The FATF subsequently produced the still-used ‘Forty Recommendations’, setting the global standard for AML regulations against which the FATF would enforce and supervise AML compliance through to the present.255

Further, Leimgruber and Farquet argue that the “setting up” of the FATF can be directly linked to investigations in the US dating from the 1960s on organised crime, and the US senate’s “Gordon Report” on tax havens and crime, which provided the “main thrust” for the G-7 and OECD to act, under US guidance: “This discussion about tax abuse, money laundering and organized crime (especially drug trafficking) was soon internationalized through UN and G7 channels and provided the momentum for the setting up of the FATF.”256

From 1989 to 1996, through the Bush and Clinton administrations alike, a series of enhancements were added to the regime strengthening domestic law and informed the development of a burgeoning international regime through the FATF and OECD. These moves also directly informed the first AML directive (1AMLD) in Europe in 1991—even

predating the legal reality of the EU itself through the Maastricht Treaty of 1992. Also in 1992, the US Housing and Community Development Act headlined its enhancements to the AML regime by describing its requirement on banks to report clients who are non-bank financial institutions’, as well as setting up BSA administrative committees with the aim of “develop[ing] harmonious private-public cooperation to prevent money laundering.” The real development to the regime, however, was the creation of AML’s due diligence standards:

The Act also gave Treasury the authority to require financial institutions to adopt AML programs that include internal policies, procedures, and controls; designation of a compliance officer; continuation of an ongoing employee training program; and an independent audit function to test the adequacy of the program.257

Another critical enhancement the Housing Act brought was the advent of Suspicious Activity Reports (SARs), which required banks and their employees to file reports to the government about suspicious client activity, while providing cover including protection from prosecution as a result of raising a report. In future years, the SARs programme would also be one of the key enforcement tools for administrations targeting specific crimes through the channel of financial institutions. As the IRS investigator interviewed for this research said, “SARs are how the [presidential] administration deploys the enforcement and [sic] investigative and prosecution power of the government for financial crime. The president can tell Treasury what to focus on. So, this quarter it’s terrorist financing, next month remittance fraud.”258

All of these elements taken together, Zagaris writes,

[...] comprise the due diligence standards imposed on institutions covered by AML laws. They represent far-reaching mandates of information-sharing between private entities and governmental law enforcement agencies. They override privacy statutes in the name of enhanced crime-fighting capabilities. They also erode the contractual and ethical principles of privacy and

258 Investigator, "Expert Interview: Irs Agent."
Then, the Money Laundering Suppression Act of 1994 formalised the compliance requirements in banks to include training, “enhanced procedures for referring cases to [...] law enforcement”. And the 1998 Money Laundering and Financial Crimes Strategy Act required enforcement agencies to formalise AML training procedures, as well as the creation of task forces to focus on “zones” where money laundering was a “primary concern”, whether geographically or by industry, including groups of financial institutions. However, the 1998 regulations were unable to deliver the proposed enhancements of the Know Your Customer (KYC) programmes due to severe push-back from both left and right, as well as bankers who, “knew what broad implications for private banking and offshore accounts the imposition of such requirements would have”, and the enhancements were therefore “withdrawn”. This was followed by significant additional defeats in 1999 and 2001. Indeed, despite the several important enhancements listed here, the 1990s saw no major new legislation focusing purely on AML or fundamentally revitalising the regime. Without downplaying the import of legislative and regulatory achievements in the previous decade, “throughout the 1990s, there was little [US] interest in pursuing matters beyond the FATF framework or in a way that would lead to additional legislation or reinforced AML functions for regulators.”

However, this fundamentally changed in 2001, following the events of 9/11, the US set out the USA PATRIOT Act which marked a major shift in the way the US, and international community, treated financial institutions and redefined their role as intermediaries in enforcement regimes for both money laundering and the new front-and-centre concern for

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260 Treasury, "Financial Crimes Enforcement Network: Fincen’s Mandate from Congress".
263 Ibid.
264 Ibid.
the Bush administration: counterterrorist financing. The Bush administration’s desire to act swiftly also breathed new life into the rejected AML legislative proposals of the late 1990s: “After September 2001 [...] these discarded bills formed the bulk of an AML package that was ready for speedy inclusion in the US Patriot Act, Title III.”265 As a function of the act, several major enhancements to CDD protocols were added to existing AML powers for the Treasury Department directly, as well as legislative modifications to the BSA conferring even further powers. The new powers were not, in their entirety, as severe as the original KYC proposals that were defeated in the late 1990s, but were nonetheless referred to as KYC rules in totality.266 The specific KYC elements included:

- enhanced due diligence on high-risk products, including those aimed at servicing persons on certain lists of designated terrorists and Senior Foreign Political Figures (also known as Politically Exposed Persons); private banking clients; certain financial intermediaries; foreign shell banks; foreign correspondent accounts; as well as transactions with non-cooperative countries and territories.267

The central argument behind these enhancements was the need to cut off terrorists (a term that was widely construed) from access to the global financial system. The Bush administration also understood that groups like Al Qaeda likely had little money in the US, and consequently, “announced to foreign governments that elected not to block these terrorists’ ability to access funds in foreign accounts, or to share information, that the United States has the authority to freeze a foreign bank’s assets and transactions in the United States.”268 In this same vein, the new US rules also required foreign investors in the US to disclose of the ultimate ‘beneficial owners’ of “complex structures that include multiple layers of businesses or else incur a 31% withholding tax on all receipts from their U.S. investments, including dividends, capital gains, royalties, and interest.”269

265 Ibid.
267 Ibid.
268 Ibid., 130.
269 Ibid., 128.
These last two features are especially recognisable in the FATCA legislation. In the case of FATCA, the locus is FFIs who are required to disclose whether the ultimate beneficial ownership of assets and accounts are US persons and to report this to the US; and, in general, failure to comply results in a 30% punitive withholding tax on all US-sourced income for the FFI. Further similar, is the fact that in the immediate aftermath of the new avalanche of US regulation following 9/11, countries were inundated with the requirement to comply with hundreds of pages of “complex rules” for KYC that ultimately resulted in “proliferation of model ‘Know Your Customer’ agreements with countries less than ninety days before the regulations took effect.” These circumstances and outcomes foreshadow the intergovernmental approach the US ultimately took to FATCA implementation that will be discussed in the section on bargaining outcomes.

In addition to these enhancements of both the AML and CTFE regimes in the US, Zagaris argues that these two regulatory regimes were effectively “merged” as a consequence of the PATRIOT Act due to the “similarity of their goals.” He argues that this was a function of the legal confluence and overlap of these regimes’ respective powers: the heightened powers of regulatory administration, criminalisation of multiple new areas and types of financial transactions, enhanced due diligence and sweeping KYC rules, and the “weakening of confidentiality and privacy laws”, coupled with new and enhanced non-compliance coercive measures for both domestic and foreign financial institutions and foreign governments alike. Thus, “[t]ogether, AML and CTFE regulations have coalesced into one regime constituting a new global financial architecture.”

Some analysts, however, find this link more tenuous in practical legal terms. For example, Unger argues that combining AML and CFT conflates the mechanisms of regulating licit and illicit activity. She notes that terrorist financing often entails processes separate from AML: “very often terrorism is financed with clean money by abusing donations and foreign aid. This involves a process completely different from money laundering: ‘money dirtying’ which

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270 Ibid.
271 Ibid., 124.
272 Ibid., 152.
is the reverse of money laundering. Regulating terrorism together with money laundering therefore poses an additional challenge.”  

A final, and further-complicating, challenge is the nexus of money laundering, terrorist financing, and tax evasion through the concept of predicate crimes. Money laundering is defined as “the processing of criminal proceeds to disguise their illegal origin.” Since the 1980s, the ‘crime’ element of ‘criminal proceeds’ has been most strongly associated with drug trafficking; however, the question more generally is whether the proceeds of any crime, where those proceeds are processed ‘to disguise their illegal origin’ can serve as a predicate to money laundering, and could potentially result in money laundering violations. Terrorism is considered a predicate crime to money laundering by most countries as well as the FATF and other AML/CTF oversight authorities’ frameworks. This is in large part because most countries treat terrorism as a criminal matter unambiguously; however, this is not the case for tax evasion. For example, Switzerland has historically protected the facilitation of foreign-based tax evasion by Swiss financial institutions, under Swiss federal law. For this reason, tax evasion as a predicate crime is not as straightforward as terrorism, however, over the last decade, “the US and the FATF have made a large effort to include tax evasion as a predicate crime for money laundering,” although again, the preferences from other states, including tax haven states, do not consider tax evasion a predicate crime. It is no surprise that the US would aim to include tax evasion in the global AML standards as a predicate crime, since doing so would open financial institutions

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273 Unger, "Money Laundering Regulation: From Al Capone to Al Qaeda."
274 A ‘predicate crime’ or ‘predicate offence’ refers to the proceeds of a crime that are then laundered into the financial system. With respect to tax evasion, proceeds from the crime of evading tax (e.g. earning unreported interest, or wilfully evading taxes through complex offshore structures) constitute a crime such that the proceeds of this crime, in the financial system, constitutes a money laundering offence.
276 There are several FATF affiliates who monitor specific jurisdictions around the world: e.g. MONEYVAL, CFATF, APG, EAG, and so on.
277 Sébastien Guex, "The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy," Business History Review 74, no. 2 (2000): 243. See also original, "Les Origines Du Secret Bancaire Suisse Et Son Rôle Dans La Politique Dela Confédération Au Sortir De La Seconde Guerre Mondiale," Genès (1999). As a matter of states in the international system, Harvey also makes the point that “If Switzerland wants to base its banking system on attracting tax evaders from around the world, such a decision is well within Switzerland’s sovereign rights.” Harvey, "Fatca-a Report from the Front Lines."
278 van Kommer, "Cash Economy, Measuring the Tax Gap from the Tax Administrative Perspective," 283.
to the regulatory pressures and global enforcement mechanisms of the AML/CFT regime, thereby allowing far greater cross-border enforcement actions by the US.

These seeming disconnects and additional questions about the technical legal application and overlap of these frameworks—and in which countries—points to the speed at which the convergence of these regimes happened. Case in point, in 2004, the time at which Zagaris argued the AML/CTF regimes converged, he observed that, “[t]he rapid pace of change in AML and CTFE law makes it difficult for international corporate lawyers to keep up with all the new regulations. For instance, two or three years ago the International Monetary Fund and World Bank had no money laundering departments or staff with an AML background. Now they both have both.”

This section demonstrates both the importance of financial crime in US financial regulation and the relationship of regulatory developments in AML/CFT to US international policy and preferences. It also gives some indication of how the US imposes its interest in the international regulatory architecture, uploading entire regulatory frameworks to international bodies and actively shaping policy on developments. The rapid convergence of AML/CFT into the financial crime regulatory architecture after 9/11 is a good example of where US domestic policy and interests are imposed on the wider system. This is despite complaints that the two regimes (AML and CFT) have related, but separate legal targets. The ability of the US to upload policy and influence international regulatory frameworks is an element that will become key in understanding how the US bargained for its preferences in the FATCA bargaining core.

The Qualified Intermediary Program (QI)

The political justification for the US Money Laundering Control Act 1986 was, in part, to win the ‘War on Drugs’; similarly, the USA PATRIOT Act of 2001 was in direct response to 9/11 and winning the ‘War on Terror’. However, these high-profile political justifications often overshadow another major consequence of the AML/CFT regime: over the course of 20 years, the regime shifted the locus, and burden of responsibility, of regulatory enforcement

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280 Qi is variously referred to as a ‘program’ and a ‘system’, both with be used here interchangeably.
to financial institutions. In addition to the extraordinarily high costs of implementation\textsuperscript{281}, the “the ever expanding [sic] due diligence requirements,” Zagaris argues, “constitute[d] a quasi-privatization of law enforcement.”\textsuperscript{282}

The US’ predilection for extraterritorial enforcement of its laws and the internationalisation of the CFT sanctions regime following PATRIOT notwithstanding, this ‘privatisation’ was largely centred on US domestic financial institutions from a regulatory perspective. However, in the same year as the PATRIOT Act was enacted, 2001, another US programme went live that would, for the first time, formally co-opt foreign financial institutions to report, cross-border, to the US: the Qualified Intermediary Program.

The programme was designed to ensure that US portfolio investments by non-residents through non-US financial institutions were properly taxed. The programme requires non-US financial institutions to identify whether its clients or customers, who are investing in the US, are US or non-US persons; and, if they are non-US persons, to determine which tax rates apply according to the person’s tax status, and whether they are therefore entitled to any reductions in US tax. As Grinberg, citing Shay, notes, “[b]efore QI, there was no practical regime in place by which the Internal Revenue Service (IRS) or U.S. withholding agents could make these determinations.”\textsuperscript{283} That is to say, since the investments derived from FFIs with no reporting requirements, the US had no mechanism by which to supervise the taxation of these investments, or whether they were being appropriately taxed at all according to US law.

Specifically, before the instantiation of the QI programme, “FFIs generally did not (i) collect U.S. tax documentation with respect to either U.S. or foreign taxpayers, (ii) withhold U.S. tax, (iii) file information returns with the IRS, or (iv) submit to IRS oversight.”\textsuperscript{284} This presented a range of problems from a US tax administration perspective, but as Harvey

\textsuperscript{281} See, e.g. Unger, “Money Laundering Regulation: From Al Capone to Al Qaeda.”


\textsuperscript{284} Harvey, “Offshore Accounts: Fatca Background, Developments, and Key Issues,” 474.
argues, there were two principal issues. First, “[a] U.S. taxpayer could invest in U.S. source assets with a [sic] FFI, but the FFI was not required to report anything to the IRS.” That is, a US person, engaging in US portfolio investments domestically would be reported by the domestic US financial institution through which they were investing. However, if that US person—with US tax liabilities—engaged in portfolio investments in the US, but made these US investments through an FFI, there was no way for the US to know the investor is a US person with US tax liabilities, which effectively enabled them to evade their US tax liabilities. Harvey argues that the second problem for US tax authorities was that “U.S. withholding agents (e.g., U.S. banks) were not obtaining adequate documentation from FFIs to document a reduced U.S. withholding tax rate on payments to foreign customers of such FFIs.” Since foreign nationals are entitled to reductions on US source income—depending on their nation of origin’s tax treaty with the US—the lack of verifiable information from the US withholding agent/bank meant that unjustified reductions in tax could go unchallenged. A further related problem is that an FFI, in reporting their client’s information for tax calculation and withholding purposes to their US counterpart, ran the risk of losing their client to that US counterpart/competitor.286

Thus, the QI programme solved several corresponding issues. It markedly improved information about the details of foreign-based investors’ US-source income through FFIs, since QIs were required to report this to the US; QIs could maintain their non-US clients’ identification anonymity “as long as the correct amount of U.S. withholding tax was imposed on any payments of U.S.”287; and QIs were required to undertake informal audits of their application of QI in order to “keep them honest”. For FFIs that were QIs this also critically meant that “other financial institutions in the chain of intermediation would not be able to steal its customers and could assure its customers that the IRS would not provide information to their home country’s tax authority.”289

285 Ibid.
286 See both Grinberg, "The Battle over Taxing Offshore Accounts."; Morse, "Ask for Help, Uncle Sam: The Future of Global Tax Reporting."
287 Harvey, "Offshore Accounts: Fatca Background, Developments, and Key Issues."
288 Ibid.
Citing O’Donnell, Grinberg also notes that when the proposed QI rules were being developed, becoming a QI was seen as essential to FFIs: “As one group of prominent practitioners wrote in the late 1990s, ‘because of the relative secrecy benefits provided to non-U.S. citizens or residents, the failure of a private bank to qualify as a QI would put that bank in a competitive disadvantage in the marketplace.’” However, in addition to protecting US interests in administering its own tax collection, the US did not endeavour to create an international regime. Later initiatives in the EU (most specifically corresponding to the QI programme was the EU’s Savings Directive) and OECD would use QI as a basis, but these largely failed due to the domestic preferences of European states—including Austria and the Benelux states in the EU, and Switzerland—welcoming of tax-evading capital. In this way, the US was not only protecting its interest, but forging a framework for itself that would make the US more attractive to its markets through anonymity. This arguably hypocritical stance—demanding information about its own tax liabilities whilst guaranteeing the anonymity of those with tax liabilities to other states—strongly foreshadowed a criticism that would later be levied against the FATCA regime.

However, in the intervening years between QI going live, and FATCA being enacted, several failings of the QI system became clear. Indeed, it was the UBS scandal made public through Birkenfeld’s testimony and the US Senate’s PSI investigation of offshore tax abuses that brought many of these failings to light. Harvey cites five major failings of the system that resulted from the QI system and that were revealed in the scandals of 2008. First, “foreign source income was not reported”. This meant that US persons engaging in portfolio investments in the US through FFIs would have their US-source income reported to the US, but not foreign-source income from other investments made through the same FFI. Second, there was “no requirement to determine the beneficial owner”. In practice, this meant that FFIs were not required to “look through foreign shell entities”. Thus, a US person could set up a foreign shell through which to make US investments, but from a QI reporting

290 Ibid. See also O’Donnell, Marcovici, and Michaels, “The New Us Withholding Tax Regime: To Be or Not to Be, a Qualified Intermediary.”

291 See, e.g. Christians, “What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on Fatca.”
perspective, this would not be a US person, but a foreign legal entity. Third, “QIs could represent only a portion of the worldwide accounts”. One example of a consequence of this was that US persons who only made foreign investments through an FFI would not be reported to the US authorities. Harvey notes that “this was done to avoid the QI having to perform detailed due diligence procedures on its entire customer base”. Fourth, “QIs were primarily banks”, which meant that US persons looking to avoid QI reporting could simply invest through a non-bank FFI. And last, the so-called “QI audits” were in fact not formal audits, but reporting on foreign banks’ procedures relating to QI. These audit provisions also did not “include any requirement for a QI auditor to look for, or report fraud”, nor did they require looking for avoidance of QI reporting.292

Regardless, from a regulatory development perspective, analysts agree the change QI brought “was a major advancement when compared to the pre-2001 world”.293 Grinberg has also written and spoken extensively about the cross-border nature of FATCA being the root of the ‘evolutionary moment’ in tax, and he argues that as a precursor, “QI effectively became the first major operational example of a cross-border anonymous withholding regime.”294 Harvey echoes this, saying, “from a reporting perspective, FATCA is effectively just extending the existing QI reporting rules to foreign-source assets.”295 In fact, the Obama administration in its development of the FATCA legislation and subsequent regulations specifically used the shortcomings of QI to frame their approach: “The statutory and regulatory components of FATCA meticulously avoid various deficiencies of the QI program.”296

Part 2: The European Union’s Initial Domestic Preferences

Following the discussion of the EU as a single actor, in the same manner as the US preferences above, this section focuses on the EU’s initial preferences. Although different to the US in its policy formation and legislative processes, the EU analysis will follow a similar analytical approach. One major difference is the treatment of individual Member States as

293 Ibid., 474.
294 Grinberg, “The Battle over Taxing Offshore Accounts.” See also, “Beyond Fatca: An Evolutionary Moment for the International Tax System.”
‘domestic’ actors in the context of the EU in articulating their impact and influence domestic preferences. Ultimately, as with the US preferences in the previous section, the EU’s “ideal point on regulatory issues is its domestic status quo.” Again, Drezner’s simplifying assumption is that the domestic status quo represents a state’s domestic equilibrium with respect to the regulatory issue in discussion. The idea is that any given state will have arrived at their status quo regulatory position through a domestic political process, and therefore any changes to the issue “would have already been enacted.” He argues that even where the actual preferences might be different from the status quo, this is due to the costs of changes to the status quo outweighing the benefits of those changes. The clear inference from this logic is that international coordination with the preferences of another state—in this case a great power state—would have to confer benefits large enough to overcome the cost of the coordination and changing the status quo.

This section describes the domestic status quo, or initial domestic preferences, of the EU in the lead up to the enactment of FATCA. This enables the subsequent section on bargaining outcomes to undertake the cost-benefit analysis of coordination from the perspective of the two great powers and derive their calculus for determining whether and how to coordinate. The Revisionist Model would predict that the outcome of coordination between the US and EU on FATCA would only occur where coordination confers gross benefits to both parties; that is, where the adjustment costs for the EU are lower than the expected gross benefits of coordination. Since coordination benefits are relative to the initial domestic preferences of both states, the details of the EU’s initial, or status quo, position matters which is what this section aims to articulate.

So, what was the domestic status quo for the EU when FATCA emerged, and what does this status quo say about the calculus of coordination adjustment costs to the EU? As with the US preferences in the previous section, the categories that make up the set of EU initial preferences put forward here are largely reverse engineered from the literatures on EU perspectives of FATCA and the EU regulatory environment at the time: 2010-2014. Both the EU and US literatures agree that two of the key considerations are the legal basis for

297 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 40.
298 Ibid.
299 Ibid.
coordination, and the regulatory environment; however, in the case of the EU, there is an additional question on the set of interests relating to the preferences of EU Member States (EU MS).

This last point raises two considerations, as an initial matter, for this analysis: first, what is the appropriate degree of analysis on domestic preference formation; and second, to what extent do EU MS preferences matter for this analysis? First, as aforementioned, Drezner’s model does not include a robust analytical framework for the analysis of domestic preferences, rather, relying on other theoretical approaches. Having said this, Drezner does argue that “[n]ational economic histories—and the embedded institutional structures that determine and are determined by these histories—will also affect the domestic status quo for governments.”300 On the historical element, he argues that the level of economic development will heavily impact preferences for regulatory coordination since, “[c]itizens in emerging markets will prefer lax regulatory standards. Citizens in developed countries will prefer stringent regulatory standards.”301 On the institutional point, he strongly aligns his view of domestic preference-setting with Soskice and Hall’s ‘Varieties of Capitalism’ (VoC) approach302 in describing the types of regulatory preferences that are likely to exist in different economies. Drezner also employs the VoC typology, dividing “advanced industrialized states into liberal and coordinated market economies”, arguing that the US is an example of a liberal market economy (LME), and the EU “and its prominent role in fashioning environmental and social regulation, can be thought of as a natural extension of coordinated market institutions”, or coordinated market economy (CME).303 From a regulatory perspective, he argues that LMEs—especially the US—should have “minimal government interference in the economy”, where in CMEs like the EU, “[g]overnment regulation of the economy [...] is common.”304 This results because in the VoC approach, firms are the central actors and will make robust efforts to protect their ‘comparative

300 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 41.
301 Ibid.
303 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 42.
304 Ibid.
which includes their investment in regulatory assets and infrastructure, and thus—depending on the type of economy—will variously influence their respective governments to regulate, deregulate, or maintain the status quo, as best meets a firm’s interests/comparative advantages. This would suggest that in the analysis of EU domestic preferences, there should be evidence of firms coordinating to influence EU MS—and, in turn, MS to influence EU-level preferences—to protect the EU’s comparative advantages in global financial regulation. Indeed, Drezner cites Hall and Soskice on precisely this point:

their [firm’s] stance towards new regulatory initiatives will be influenced by judgements about whether those initiatives are likely to sustain or undermine the comparative institutional advantage of their nation’s economy. Governments should be inclined to support such initiatives only when they do not threaten the institutions most crucial to the competitive advantage their firms enjoy.307

This leads directly to the second question of how much EU MS preferences matter in the model. Again, Drezner argues that the EU is a single-actor great power, but he does not engage with the question of MS per se in determining EU domestic preferences. In his case studies, he uses the term ‘EU’ seemingly interchangeably with individual MS such as Britain or Germany, but does not articulate their role in setting preferences at the EU level per se. As such, one is left to infer that, per Drezner’s articulation of ‘status quo’, EU-level preferences already bake-in the preferences of MS; otherwise, to his earlier point, changes “would have already been enacted”. This is a stark conclusion, but consistent with the central claim that the EU is a single actor, as well as Drezner’s argument that smaller states do not influence great power dynamics. Thus, in accordance with a purist reading of the model, in determining EU-level domestic preferences, individual MS’ influence should be treated the same as any other “domestic actors and institutions that explain the origin of state preferences.” This dynamic of Drezner saying little about the role of EU MS in the

305 At the national level, Soskice and Hall refer to this dynamic as comparative institutional advantage: “The basic idea is that the institutional structure of a particular political economy provides firms with advantages for engaging in specific types of activities there.” See, supra Hall and Soskice at 51.
306 Soskice and Hall’s original work does not, and arguably would not, treat EU MS as ‘domestic actors’ in the context of the EU, but as will be argued, the Revisionist Model does.
307 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 43.
Revisionist Model essentially elides multilevel approaches, the processes of EU consensus-building, and specific theories of EU integration (whether multilevel, constructivist, institutionalist, and so on). As discussed in the explication of the model in Chapter 3, Drezner identifies the VoC literature as a starting point for analysis. However, again as discussed, this has the potential to undermine the explanatory robustness of the Revisionist Model’s preference-setting step. At a minimum, one might have expected some element of discussion on the breadth of theory development specifically on EU integration as a subset of domestic preference formation and the power dynamics amongst EU MS, given the claim that the EU is a great power, and that EU is certainly unlike any other unitary great power. Even so, the model treats the EU as any other single actor\(^{308}\), regardless of the uniqueness of circumstances in setting its domestic preferences. The analysis should therefore support the claim that while EU MS may matter in initial domestic preference formation, they do not directly influence regulatory outcomes within the great power concert.

In summary, the EU, according to the Revisionist Model, takes its own status quo to be its ideal starting point for regulatory coordination. This status quo comprises the EU’s set of initial preferences with respect to fighting offshore tax abuses and to FATCA. These preferences are the function of historical and developmental processes of institutional embedding. In line with VoC descriptions, this embedding is a function of the EU as a CME where its firms coordinate to influence regulatory outcomes as a function of protecting their own, and the EU’s, comparative market advantage. This is as opposed to firms’ preferences for regulatory change being a function of forces of supply and demand in LMEs such as the US. Further, the evidence in analysing these initial preferences should support the claim that individual MS in the EU analysis are seen as ‘domestic actors’ rather than independent state actors and that their influence is baked-into the initial set of EU-level preferences. The preferences themselves, as in the US section, are based on the most salient issues emerging from the literature and interviews relating to the EU’s response to the emergence of FATCA. That is, the set of preferences that existed at the time FATCA emerged comprise the initial EU preferences in the model. Those preferences include the legal bases for regulation and

\(^{308}\) Drezner also does not include any considerations of the uniqueness of the EU as a single actor comprising multiple states in his game theoretic models. Even so, he does also allude to his models being more heuristic as opposed to hard mathematical models. See ibid. at 25, ‘The Methods’.
coordination, and the regulatory environment per se (the regulations in play at the time). The possible third set of preferences—the role of EU MS—is subsumed into the first two, as again, the Revisionist Model argues that their role in international regulatory coordination is only as domestic actors/influencers in the context of the EU as a single actor.

EU initial preferences: the legal framework for addressing offshore tax abuse

Drezner defines the regulatory preferences of states as the set of “codified standards” they employ to govern an issue area. He argues that this codification is important as otherwise there is no legal basis for the regulation, and this will likely impact the effectiveness of any emergent regime. The initial preferences of the great powers can therefore be understood as the collective sets of existing codified standards that form the legal basis for a state’s position on a given issue. From an EU perspective, this comes largely in the form of legislative tools: regulations and directives. Additionally, EU Treaty law and judicial case law, both underpin and clarify the application of the laws relating to the issue area. This section will briefly cover the three legal mechanisms of codified law in the EU and discuss their application with respect to the initial preferences of the EU in the time leading up to FATCA. The first part will cover the treaty and case law in brief detail, before turning to the more substantive codified standards in the form of several directive. The scope here is centred on the relevant codified standards that will relate to the specific provisions in FATCA.

In the time leading up to the enactment of FATCA, the EU approach to offshore tax abuses was largely disjointed and heavily influenced by individual MS preferences, leading to a less effective approach compared to the more ideal incremental, integrative norm-making of the ‘ever closer union’. This is largely a function of divergent MS preferences in the context of the requirement for unanimity in EU level law, coupled with the strong tendency of MS to disavow stringent coordination that would undermine any MS ability to control their own domestic mechanisms of taxation. The latter is an especially fraught topic in the EU’s legal canon. In 2018, for example, Irish Minister for Finance, Paschal Donohoe, responding to a question on EU tax harmonisation, stated that proposals to create an EU-level harmonised tax framework were “not new” and that while Ireland has and will continue to actively participate in EU tax directives and implement “international best practice”, Ireland would not do anything to fundamentally undermine its ability to operate its own mechanisms of taxation. The minister further clarified that, “[a]ny tax Directive at EU level leads to
convergence on some aspect of tax”, and that while “Ireland has supported the EU Anti-Tax Avoidance Directives, which standardise anti-avoidance measures across the EU [...] taxation remains within the competence of individual Member States and unanimity is needed before any tax changes can be agreed at EU level.”

The minister’s concise and sharp response subtly encapsulates several complex issues facing the EU relating to taxation generally and alludes to the importance of individual MS preferences in influencing outcomes at the EU level. Or, in the language of the revisionist model, the role of MS in setting EU domestic preferences matters. The two issues—MS tax sovereignty and offshore tax abuse as subset of taxation—are heavily intertwined but, as will be argued in this section, have very different treatment under EU law as a function of MS preferences. This is largely a due to MS mostly agreeing to coordinate on the need for tax information sharing to curb tax abuses, while simultaneously fiercely resisting tax harmonisation and fiscal policy coordination, preferring to retain control of these latter policies at the MS level. This constellation of preferences resulted in either overlapping or contradicting directives as solutions to the issue. The argument is that both issues—the ability of MS to set their income tax base and tax information sharing—are a function of state sovereignty and the principle of fiscal autonomy in the EU treaty frameworks: tax information exchange generally bolsters the primacy of MS domestic law vis-à-vis all other MS and is therefore a desired outcome for all but one MS (see the commentary on Austria in the bargaining outcomes section); however, for many MS, harmonising fiscal policy is not seen to be in their interest.

To understand the reason for the divergence of MS on these issues, it is critical to understand the legal basis and legislative mechanisms for addressing these issues. Generally, there are three legal frameworks governing issues at the EU level: the EU Treaties framework, the legislative framework, and judicial framework. All influence domestic

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preferences for addressing offshore tax abuse in the EU, but as will be argued, the legislative framework is generally considered to be the most important on these issues in the literature. This is also the case from the perspective of testing the Revisionist Model, as the legislative framework gives the clearest view of direct MS preferences in the form of codified standards, which in turn comprise the EU domestic preferences for the bargaining core. This section will briefly outline the three frameworks and their relevance to the issue of offshore tax abuse policy at the EU level; the subsequent section will outline the specific legal instruments that comprise the status quo of EU domestic preferences when FATCA was enacted. Together with the US’ domestic preferences, this will set the stage for the analysis of the great power concert’s bargaining core.

Legal Frameworks

Treaty law is primary in the EU and comprises two foundational treaties: the Treaty on the Functioning of the EU (TFEU), and the Treaty on the European Union (TEU). The former sets the principles, internal policies, and fundamental freedoms and rules for the EU. The latter contains provisions on EU funding, the legal basis for the EU and its institutions, and the common foreign and security policy. It is the TFEU therefore that contains articles relating to the treatment of tax and capital in the EU that, as a matter of primary law, are relevant to the initial preferences of the EU for FATCA. Since the first version of what would become the TFEU, the Treaty of Rome in 1957, there have been dozens of amendments to the TFEU, but it is a more recent addition, the free movement of capital in and across the Union, that is relevant here. Indeed, of the fundamental freedoms in the TFEU (free movement of people, goods, services, and capital), the free movement of capital contained within Article 63 is the most recent, having only been introduced with the Maastricht Treaty in 1992 and coming fully into force in 1994. It is also important to note that, like other TFEU freedom of movement provisions, it does not require implementation at the MS level; it “directly


312 Strictly speaking, while Article 14 TFEU defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", it is Article 63 that specifies the details of the freedom of movement of capital: see European Union, "Part Three - Union Policies and Internal Actions, Title Iv - Free Movement of Persons, Services and Capital, Chapter 4 - Capital and Payments, Article 63 [Freedom of Movement of Capital and Payments] (Ex Article 56 Tec)," (2016).
confers rights on individuals which they can rely on before national courts.” These rights contained in Article 63 expressly prohibit the “restrictions on capital movements and payments not only within the EU, but also between EU countries and countries outside the EU”; however, there are several exceptions including “to prevent problems related to taxation, prudential supervision of financial institutions, public policy and security.”

The freedoms conferred in Article 63 are relevant to the eventuality of FATCA in a couple of ways: the supervision of taxation across the Union (between MS) where capital must be free to flow cross-border, and the application of limitations on these freedoms. As an EU Parliamentary report from the Directorate-General for Research described in 2000, “[p]rogress in removing barriers to trade within the EU, together with monetary union, have focused attention on aspects of the Single Market which are still incomplete: notably taxation.” This incompleteness, the report argues is due to “the free movement of capital on both a European and global scale, which has made the taxation of capital increasingly difficult”. The battle over Article 63 exceptions on taxation and its interpretation in the courts is also relevant, since this frames the way the European courts apply territoriality in the case of MS fiscal sovereignty as well as the rights of individuals. At the time of its full implementation across the Union in 1994, Article 63’s free movement of capital also made clear the need for EU-level regulation to manage illicit financial flows across the Union especially in the domains of money laundering, fraud, and tax evasion, which leads to the second legal framework: legislation.

The TEU lays out the EU’s governance and legislative processes, including the mechanisms for creating new law at the EU level. These laws generally come in two forms of rules: ‘hard’ or binding law, and ‘soft’ or non-binding law. EU-level hard-law provisions come in the

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314 Ibid.
form of regulations, directives, and decisions: regulations are “binding legislative acts” that “must be applied in [their] entirety across the EU”; directives are legislative acts setting “out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals”; and decisions are “binding on those to whom it is addressed (e.g. an EU country or an individual company) and is directly applicable.” The soft law, or non-legally binding rules come in the form of ‘recommendations’ and ‘opinions’, in the supranational environment, but have no legal consequence. While each of these legislative outcomes are potentially useful in understanding the EU’s domestic preferences for addressing offshore tax abuse, the two most relevant categories are regulations and directives. This is because they comprise the status quo regulatory environment, but also because they represent the formal positions of the most critical domestic actors in the EU, the MS, on the issues. In other words, regulations and directives represent the hard law, legally binding, codified standards that are unanimously agreed for a given issue across the full extent of the EU.

The influence of Article 63 TFEU notwithstanding, decades of Commission reports on ability of the Treaties to address the question of intra-EU cross-border tax abuses—e.g. “the Neumark Report of 1962; the Van den Tempel Report of 1970; and the Ruding Report of 1992”—proved fruitless at delivering solutions: “[l]ittle by way of a legal base for such action is to be found in the Treaties, however; and it has generally been the assumption in all Member States that direct, as opposed to indirect, tax should remain the preserve of national fiscal sovereignty.” Rather, as aforementioned, solutions had to be found in the form of hard law initiatives. As such, for this analysis the next section, ‘Regulatory

Trubeck gives a helpful account of the effectiveness of hard and soft law in the ‘Open method of coordination’ in the EU, which can be seen to support the types of coordination expected in the VoC approach for CMEs: David M Trubek and Louise G Trubek, “Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-Ordination,” European Law Journal 11, no. 3 (2005).


environment’, will briefly outline the five critical directives which form the core of EU
domestic preferences that relate to both the EU’s own solutions to cross-border taxation
and information exchange, as well as law relating to other salient elements of FATCA
provisions. The first four directives relate to taxation and financial crime: the Directive on
Mutual Assistance (1977), the EU Savings Directive (EUSD, 2003), the 2011 Directive on
Administrative Cooperation, and the several Anti-money Laundering Directives (1MLD,
2MLD, and 3MLD). The last directive that specifically relates to FATCA—and indeed, causes
the fundamental conflict of law problem for the EU and US—is Directive 95/46/EC, the
predecessor to the General Data Protection Regulation (GDPR) of 2016. These together
comprise the clearest picture of the EU’s initial preferences in responding to the US’ FATCA
legislation.

Last, the European Court of Justice (ECJ) has, through case law, also played an important if
more indirect role in setting the EU’s domestic preferences through the clarification of
existing law and its application across the EU. The scope of cases considered here, however,
are only those that are most relevant to FATCA, and not on taxation generally. Specifically,
since FATCA relies on cross-border information exchange to identify US persons, the
question of existing legal frameworks at the EU- or MS-level for identifying and reporting
foreign-source income, and sharing such information, is relevant. This is on a MS-by-MS
basis as each will have their own domestic tax policies for defining income taxes, and
whether they include foreign-source income. The two sets of case law most obviously
relevant, therefore, relate to the application of territoriality as a tax matter. Here, again
Article 63’s free movement of capital find itself centre stage in the ECJ’s decisions on the
application of its taxation exceptions.321

At the time leading up to FATCA, the ECJ held that MS rules employing an Article 63
exception is permissible where “such rules are an appropriate means of attaining the
objective of combatting tax evasion and avoidance.”322 The case law within scope, however,

321 On the EU’s application of fiscal territoriality at the time of FATCA’s enactments, see e.g. Otto Marres, "The
322 European Commission, “Case Law Guide of the European Court of Justice on Articles 63 Et Seq. Tfeu, Free
Movement of Capital,” ed. Financial Services and Capital Market Union Secretariat Financial Stability
(ec.europa.eu: European Commission, 2015), at 45 (C-282/12 - Itelcar, § 12 and 35).
also strongly supports the proposition that to safeguard fiscal oversight and to prevent tax evasion, MS can adopt measures that may infringe on the fundamental right to the freedom of movement of capital for individuals; however, this must be specific in its application and MS cannot assume that all cross-border financial activity is necessarily related to tax fraud or evasion:

As the Court has already held [...] the requisite measures to prevent certain infringements in the field of taxation referred to in Article 73d(1)(b) of the Treaty include measures intended to ensure effective fiscal supervision and to combat illegal activities such as tax evasion. As appears from Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2 [1997] ECR I-4161, paragraph 44, a general presumption of tax evasion or tax fraud cannot justify a fiscal measure which compromises the objectives of a directive.323

More generally, the ECJ has held that the need for MS to be able to supervise their fiscal rules vis-à-vis other MS is a sound justification for infringing the free movement of capital. The Court wrote in Centro di Musicologia Walter Stauffer, for example, that it “has, on many occasions, held that effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty.”324 This finding is further supported by cases where the court held that the “cohesion of the tax system can justify a restriction of the fundamental freedoms guaranteed by the Treaty”, but that there must be a clear and direct link between the issue and the tax system: “where there is no such direct link, the argument based on the cohesion of the tax system cannot be relied upon”.325 Thus, “the European Court of Justice (ECJ) has accepted the principle of territoriality as a criterion for the division of the authority to tax”.326

This set of findings is relevant to the second issue in case law: the rights of individuals. While MS can employ the tax exception to Article 63 to protect their own fiscal interests, this is

323 Ibid., at 41 (C-478/98 - Commission v Belgium, § 38 and 45). Emphasis in original.
324 Ibid., at 45-46 (C-386/04 - Centro di Musicologia Walter Stauffer, § 47). Emphasis in original.
325 Ibid., at 46 (C-242/03 - Weidert and Paulus, § 10 and 20-22).
326 Marres, "The Principle of Territoriality and Cross-Border Loss Compensation."
limited by the principle of non-discrimination. In several cases where MS domestic tax laws put individuals in disadvantaged tax positions with respect to tax rates on income—either offered by, or in, other MS—the court has ruled that where these disadvantages violate the non-discrimination principle, territoriality is not an argument MS can rely upon. As Marres writes, the ECJ has sided with MS applications of territoriality regarding their own fiscal sovereignty, however, “[f]or individuals, the non-discrimination principle seems to override the recognition of sovereign assumption of fiscal jurisdiction.”

This very limited case law demonstrates the willingness of the ECJ to allow the Article 63 exception based on the MS fiscal sovereignty of the MS (territoriality) in limited cases where their efforts to supervise and combat tax evasion and avoidance cross-border vis-à-vis other MS. However, his does not extend to situations where MS policies violate the non-discrimination principle for individuals, thus limiting fiscal sovereignty and requiring equalisation of policies between MS. Critically, to accommodate both legal realities, some form of coordination and information exchange is strongly implied, and as a practical matter, required.

Within the context of the EU, these findings also echo the justifications for FATCA in US law on the choice-of-law question for cross-border tax abuses. That is, the US courts, in the ‘extraterritorial’ application of US law, argued that where the harm occurred in the US for offshore tax abuses (of US law), the US had the right to adjudicate those crimes in the US. In a similar way, the ECJ was grappling with the question of when and where territoriality applied in EU law as a matter of MS tax sovereignty—again, vis-à-vis other MS—when reviewing both tax sovereignty/territoriality cases, as well as tax abuse/evasion cases. The Court repeatedly held that MS laws protecting and supervising their fiscal interests against cross-border tax evasion warranted the Article 63 exception. A fundamental difference to FATCA, however, is the narrowness of application in the case law. FATCA, of course, is

327 Article 65 contains similar provisions: “Tax differentiation Art. 65(1) TFEU allows for different tax treatment of non-residents and foreign investment, but with the reservation that this must not represent a means of arbitrary discrimination or a distinguished restriction in the sense of Art. 65(3) TFEU.”


330 The ECJ repeats in most of these cases that their core relevance is due to the cross-border nature of the issue and that where this cross-border element is missing, the court would not review these cases.
universal in its scope: all US persons are subsumed by its provisions *without cause*—that is, unlike the EU case law, the US did not limit its scope for information collection to cases of, for example, tax evasion. Specifically, the non-discrimination principle in the EU means that, despite MS fiscal sovereignty, MS are unable to apply their fiscal policies without some coordination since this will likely lead to individual discrimination. This dynamic, according to Marres, sets up the further debate on source vs residence taxation and the fact that while the latter is preferable in nearly all cases, this is “only doable if there is a sufficient amount of information.” These few examples from case law demonstrate that at the time leading up to FATCA, the emerging realisation across the EU was that even where tax harmonisation was off the table as a matter of EU law, there was still the clear requirement for tax information exchange implied in the existing legal frameworks, and perhaps ironically, to protect individual MS fiscal sovereignty (vis-à-vis all other MS) within the confines of EU law. In some sense, the EU debates were a sort of microcosm of the broader global debate on combating offshore tax abuses; the latter comprising the scope of the US’ FATCA. While the EU debates focused on building *intra-EU* solutions, FATCA forced the EU’s, and the world’s, hand toward a global solution.

In summary, all three legal frameworks of the EU (treaties, hard law, and case law) are relevant to setting the EU’s initial preferences. However, only hard law directly addresses the issues that FATCA presents for the purposes of the Revisionist Model. This is because the Revisionist Model understands initial preferences as the codified set of standards a state employs. While the treaties and related case law give some degree of understanding on the broader issues, it is the hard law in the form of regulation and directives that form the legal basis for the automatic exchange of tax information in the EU: that is where the codified legal requirements such as due diligence, KYC, and beneficial ownership identification are found. In the language of the Revisionist Model, EU hard law represents the outcomes of

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332 In the context of EU law making, harmonisation has a slightly different meaning to the definition Drezner uses in the Revisionist Model: harmonisation here refers to the “[c]onvergence of systems as a result of legislative action at Community level. We can distinguish between Full Harmonisation, which produces identical tax bases, rates, systems, etc.; and Partial Harmonisation or Approximation, which involves something less: for example, minimum or maximum tax rates, the elimination of double taxation, etc.” See Patterson and Serrano, “Tax Co-Ordination in the European Union, Working Paper,” xvi. Emphasis in original.
the EU’s own bargaining core of its concert of MS, and therefore reflect most clearly the EU’s initial preferences. As such, the next section turns directly to the hard law measures that more fundamentally comprise the initial domestic preferences of the EU.

The EU’s Regulatory environment
Since the Revisionist Model defines regulatory coordination as the adjustment of codified standards to the preferences of the other (or a new concerted regulatory effort from both), looking to existing legal architecture is a critical first step. Indeed, the necessity of adjustment to the legal architecture of the great power concert is inherent to the model: if no adjustment were required for coordination, the status quo would already be coordinated. Understanding the respective legal frameworks also gives an indication of the likely political and economic costs of adjustment. Where codified standards for elements of a new regulatory regime already exist, adjustment costs will be lower; where they do not exist or require major change, adjustment costs will be higher. FATCA requires foreign financial institutions to capture, categorise, and report a range of information on accounts—including beneficial ownership, whether the account holder is a US person, as well as a range of information about the content of the account itself—directly and automatically to the US’ Internal Revenue Service (IRS). As demonstrated in the description of US domestic preferences, the US built FATCA on its existing regulatory architecture (HISTORICAL INSTITUTIONALISM): the US Treasury looked specifically to regulations that would ease implementation of its provisions (again, e.g. including due diligence and KYC measures from the AML/CFT regime). The radical idea behind FATCA, however, is that while domestic financial institutions act as intermediaries for their governments, FATCA required wholesale intermediation on a cross-border basis. Specifically, domestically, financial institutions in most developed countries report a range of information to governments on customers as a function of existing law, especially in the domains of tax reporting (especially on interest income), and financial crime. Again, as in the section on US domestic preferences, in the EU and globally from the 1990s, the locus of regulatory implementation and ‘first line’ enforcement has shifted to financial institutions. However, enforcement of domestic regulation on an international/cross-border basis essentially did not exist. As Grinberg notes,
At the start of the twenty-first century, outside of information exchange upon request, there were few mechanisms in place by which governments or financial institutions automatically provided effective assistance to a foreign sovereign attempting to tax assets held offshore by the foreign sovereign’s residents. This situation persisted despite the fact that financial institutions had served as tax intermediaries domestically in almost all major developed economies for decades and despite large, wealthy economies’ longstanding concerns about evasion of domestic taxes through offshore accounts.333

This dynamic is especially interesting in the EU since it speaks directly to the question in the Revisionist Model of treating the EU as a single actor. If the EU is a single actor, this type of cross-border information exchange would be no different to the domestic intermediation that existed in each MS as a function of their respective domestic laws—or as it functions in any other country including the US. Indeed, the question of exchange of information between MS on both bilateral and multilateral bases had been formally considered since the enactment of the ‘Mutual Assistance’ Directive in 1977334. Since then, a range of initiatives attempted to move the EU to exchange information between MS, but this has generally failed to gain the unanimous agreement required for establishing EU hard law. This is largely due to several MS—primarily Austria, but also Belgium and Luxembourg—with strong domestic bank secrecy and privacy laws who felt that such efforts would undermine their local economies.335 These ‘hold out’ states argued that diminishing banking secrecy in any form would immediately make them less attractive to global capital especially relative to other non-EU European states that also operate as bank secrecy jurisdictions—namely,

335 There is consensus on the ‘hold out’ states’ reasons for rejecting information exchange hard law, these will be described in more detail below, especially in the section on the EUSD. Generally, on this point, see Anonymous Withholding Agreements and the Future of International Cooperation in Taxing Foreign Financial Accounts : Testimony before the Finance Committee of the German Bundestag, September 24, 2012 (Statement by Associate Professor Itai Grinberg, Geo. U. L. Center); Grinberg, "The Battle over Taxing Offshore Accounts."; Zucman, "Taxing across Borders: Tracking Personal Wealth and Corporate Profits."; Christians, "What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on Fatca."; Christians et al., "Conceptualizing a New Institutional Framework for International Taxation."; Palan, "Tax Havens and the Commercialization of State Sovereignty."; Palan, Murphy, and Chavagneux, Tax Havens: How Globalization Really Works; Palan and Wigan, "Herding Cats and Taming Tax Havens: The Us Strategy of ‘Not in My Backyard’."
Switzerland, Liechtenstein, San Marino, Monaco, and Andorra. The central claim in their argument is that diminishing bank secrecy provisions in EU MS would create a competitive disadvantage vis-à-vis these five jurisdictions, but also relative to other global OCFs including the US.

This context again points to how the EU functioned as a kind of microcosm of a broader global problem of information exchange: it was grappling internally with its own cross-border intermediation problem and facing the same issues and arguments that reflected the broader global discourse on the use of sovereignty, and the applicability of territoriality in the context of the Union. In terms of the EU’s approach prior to the enactment of FATCA, EU hard law in the form of regulations and directives most accurately describe the EU’s status quo regulatory preferences. While a huge number of existing laws could bear on the EU’s position on FATCA, as briefly described above, the EU regulations and directives considered here are only those that relate to the core subject matter of FATCA: the exchange of information for tax purposes, the mechanisms of collection and control of this information (identification due diligence, KYC, and identification of beneficial ownership); and those that present any other legal obstacles to the EU’s adoption of the substantive provisions contained within the FATCA regulations (e.g. bank secrecy and data protection).

However, the analysis of these directives also presents an analytical conundrum: since directives are goal-based, each MS must formally adopt the content of the directive into local law. As long as domestic laws provide for the achievement of the directives’ goals, there is little other formal requirement as to how this is accomplished. As described in the explication of the Revisionist Model, large MNCs operating across multiple MS, the Commission, and both NGOs and IGOs often do facilitate the process of coordination/harmonisation in the domestic implementation of EU-level directives in MS, but this process is not always uniform, and indeed can and does lead to divergence in MS implementation. Since the Revisionist Model treats the EU as a single actor, however, MS implementation of EU directives is beyond the scope of this analysis except where individual MS preferences affect the overall domestic preferences at the EU level. This is apparent in two areas relevant to FATCA: in the adoption of the EU’s money laundering directives

336 Again, these jurisdictions receive more detailed treatment in the section on the EUSD.
(AMLD)\textsuperscript{337} there is divergence and a lack of harmonisation in the implementation at the MS level due to the legal basis used for the MLDs; and in the area of tax information exchange, individual MS preferences caused a general lack of harmonisation at the EU level—e.g. the rejection by Austria, Belgium, and Luxembourg of EU legislative proposals.

As to the regulations themselves, as Marres describes, after Maastricht the EU had free movement of capital which immediately presented the issues of managing financial crime risk across the Union: the realisation of full capital liberalisation across the EU “made apparent first the need to counter money laundering, and secondly to counter tax evasion”\textsuperscript{338}. EU money laundering directives will therefore be addressed first. Then, the analysis will turn to the directives that specifically address the exchange of information for tax purposes, and finally, the to the compatibility of the FATCA provisions with the EU’s Directive 95/46/EC, which addresses data protection.\textsuperscript{339}

The EU Money Laundering Directives

This section will argue that the development of the EU’s money laundering regime is precursory and necessary to understanding its response to FATCA. It demonstrates that, in line with the US’ example, the EU saw a convergence of AML and CFT, and that this convergence eventually extended to tax crimes (specifically the problem of tax evasion). This is important to understanding the bargaining core of the US and EU on FATCA, as well as the domestic dynamics at play in the EU during the timeframe of 2010-2014. Below, the analysis focuses on the most salient elements of the EU’s AML/CFT regime including the critical overlaps with FATCA provisions, especially due diligence, beneficial ownership, tax evasion as a predicate crime, and the convergence of the US and EU AML/CFT regimes.

Since the first money laundering directive in 1991 (1AMLD), the development of the EU’s money laundering regime “has been linked inextricably with the parallel development of

\textsuperscript{337} The EU money laundering directives are generally referred to with a number and acronym: e.g. 1AMLD and 1MLD. For consistency, the former format is used here.


\textsuperscript{339} Directive 95/46/EC was repealed and replaced with the GDPR in 2016.
global standards in the field”. Specifically, the influence of the US and the creation of the FATF in 1989 have guided the evolution of the regime in the EU, which is not surprising since, “[m]uch of the activity at the global level is initiated by the United States, which first led the way in the criminalization of money laundering in the 1980s.” What is more surprising, however, is the degree to which the EU and US regimes converge. As Unger argues, “[w]ith money laundering, the EU basically implements US policy rather than export its own policy to other countries.” While FATCA, and not the AML/CFT regime, is the focus of the analysis here, there are important parallels and examples of soft law standards creation and adoption at the international level that subsequently become EU hard law; and, the subsequent implementation of this hard law in the form of the AML Directives, in turn, has a strong influence on the international system.

In addition to the international influences on EU-level hard-lawmaking on money laundering, the evolution of the content of the AMLD iterations is also important to understanding how the EU would respond to FATCA. The two critical items here are the inclusion of tax violations as predicate offences, and the overlapping capabilities codified in the AMLD and the EU’s own tax information sharing directives (these are covered in subsequent sections). Both AMLD and tax information exchange directives include an increasing focus on data collection standards, and the question of which states are included in the groups of states sharing this information. As alluded to previously, the EU has tended to focus on itself first; that is, the EU has taken its primary scope to be the creation of EU hard law, rather than attempting to directly influence the international system. These intra-EU standards are important because they set the tone for how the EU operates information exchange between its own MS, but only indirectly influence standards for global cooperation. Citing Schimmelfenning, Unger describes the dynamic:

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343 Ibid.
The regulatory powers of the EU provide it with the means to increasingly shape international standards (Schimmelfenning, 2011). While money laundering legislation is only, and can only be, soft law at the global regulatory level in the Financial Action Task Force, the EU can and does use hard law and imposes it through Directives on its member states.

A clear example of this is the inclusion of a very robust information sharing principle in the 2015 4AMLD that was first introduced as an enhancement under the FATF. 4AMLD required that “[MS] must be able to use the whole range of their available powers that they would normally use domestically for receiving and analysing information when it applies to a request for information from another [MS]”. 344 This mirrors a report from the FATF in the same year which argues that “[c]oordination, cooperation and information exchange with other national and international authorities on AML/CFT issues and financial sanctions may be ensured through mechanisms such as: legislation authorising sharing of supervisory and/or compliance information, information exchange agreements”. 345 This observation that in addition to MS preferences as domestic actors, the EU’s preferences on AML/CFT are heavily influenced by both the US and the FATF is shared by Mitsilegas and Vavoula, and Unger. This observation is also important to Drezner since he argues that while small states and non-state actors do influence the way great powers coordinate, “non-state actors do not affect global regulatory outcomes.” 346 Referring to the Revisionist Model, Unger even describes the FATF as having a ‘club-like character’ in terms of the management of standards for the AML regime. 347 However, while this is instructive as an example of ‘great power concert’ bargaining, the key focus here is to understand factors determining the EU’s initial preferences for FATCA, not AML; still, the observation is salient in that this theme

346 Drezner, All Politics Is Global Explaining International Regulatory Regimes.
347 Unger, "Money Laundering Regulation: From Al Capone to Al Qaeda," 23.
348 For a more comprehensive history of the EU’s approach to the AMLDs, see Mitsilegas and Gilmore, "The Eu Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards."; Mitsilegas and Vavoula, "The Evolving Eu Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law." For the relationship between the US and EU on money laundering specifically in the context of global regime development, see Unger, "Money Laundering Regulation: From Al Capone to Al Qaeda."; Unger and Van der Linde, Research Handbook on Money
runs through both the EU’s AML/CFT regime formation as well as the tax administrative assistance regime.

With this background, the next paragraphs very briefly outline the emergence of the EU’s AMLDs and their relationship to, and influence on, EU domestic preferences regarding FATCA. As such, this section addresses the salient parts of AMLDs 1-3, but focuses on 4AMLD as the most relevant AML directive to FATCA. In the discussion of 4AMLD, the analysis will also cover the question of the legal basis for AML in the EU and the concept of ‘without prejudice’ applications of the AMLD where it overlaps with other directives—specifically those relating to tax evasion and information exchange that were developed in similar timeframes (especially the 2011 Directive on Administrative Cooperation (DAC)).

Last, while 4AMLD was formally agreed in 2015, the negotiations for its included provisions were taking place at the same time as the US enacted FATCA and established its IGA approach (2010-2014). The literature suggests strong overlap in the disposition of the MS, Commission, and Council to include in 4AMLD the provisions relating to tax as a predicate crime and information exchange, directly because of the focus on tax evasion in the post-GFC world, and the enactment of other related legislation such as DAC 2011. While it could be argued that the enactment of 4AMLD post-dates both FATCA, and the implementation of the IGA framework, its content and negotiation timelines are such that it should be included here.

The US passed the MLCA in 1986 in response to its ‘War on Drugs’, leading to the call for a global approach to money laundering at the UN Convention in 1988. In turn, this led to the creation of the FATF in 1989. In 1990, the FATF released its 40 Recommendations, setting the new global standard for AML oversight and governance. As a response to the rapidly developing global AML regime, in 1991 the European Community passed the first money laundering directive in line with the 40 Recommendations—largely aimed at the


349 See previous section on US initial domestic preferences, ‘Financial crime regulation and the AML/CFT regime’.

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proceeds of drugs trafficking—and “called on Member States to prohibit such money laundering”. The directive itself mirrored the US model and, “introduced a series of obligations for credit and financial institutions, including duties to identify customers and keep records, to refrain from transactions they know or suspect are linked with money laundering, not to tip off [sic] customers that they are being investigated for money laundering, and a proactive duty to report suspicious transactions to the competent national authorities.” While the legislation contained mechanisms to ensure compliance with the international principles, it stopped short of criminalising money laundering at the Community level; however, following Maastricht, several MS did criminalise the provisions in the mid-1990s under the Third Pillar.

While 1AML D included “a duty for credit and financial institutions to report suspicious transactions to the competent national authorities,” unlike the US’ Housing Act of 1992, it did not contain any provisions on either the protection of staff and financial institutions for raising suspicious transactions or how these reports should be dealt with. Mitsilegas and Gilmore argue that this led to divergence among MS in how reporting was handled along three primary avenues:

- the independent/administrative model, where financial institutions report suspicions to an independent unit or a unit based within a government department (such as the Ministry of Finance);
- the police model, where suspicions are transmitted to a police/intelligence agency (such as NCIS in the UK);
- the judicial model, where responsibility lies with the Public Prosecutor’s office.

This in turn led to a Decision for each MS to create a Financial Intelligence Unit (FIU) which would become the administrative centre for financial crime-related reporting, and information sharing amongst MS.

351 Ibid.
352 Ibid., 122.
Despite the Maastricht Treaty’s newly ensconced free movement of capital, which was effective from 1994, there was little legislative forward motion on AMLD in the 1990s, again echoing the US’ relative legislative inaction. The FATF, meanwhile, had positioned itself as the global institution for money laundering and in 1996 revised its 40 Recommendations to reflect newly emerging typologies of financial crime (the same year the US introduced SARs as a requirement in financial institutions, and as an administrative tool for law enforcement). These changes included, “the perceived vulnerabilities resulting from technological advances, or the profits derived from non-drug-related criminal activity”, with the “main aim of extending the list of predicate offences for money laundering”.353 Mitsilegas and Gilmore note that the Commission followed these developments as a member of the FATF, and that the changes to the FATF recommendations prompted conversations to update the 1AML in 1999. These negotiations “dragged on for more than two years” primarily due to MS disagreement over the inclusion of the legal profession having money laundering obligations (i.e. they would be legally culpable for facilitating money laundering), on the grounds that it would impact “the right to a fair trial and the principle of lawyer-client confidentiality.”354 Further, in 1999, the FATF adopted a “’naming and shaming’ campaign beyond the scopes of its membership and identifying countries and territories considered guilty of non-cooperation”,355 with the first list of recalcitrant countries published in 2000: the Non-Cooperative Countries and Territories (NCCT) list.

The sluggish dynamic for developing a second AMLD changed in dramatically in 2001, however. As Zagaris describes it,

Ten days after the September 11 attacks on the United States, officials from the European Union (EU) member states met to show their solidarity. At the meeting, the European Council called for the broadest possible global coalition against terrorism, to act under the auspices of the U.N., and approved over thirty measures to expand the AML/CTFE regime in Europe.

353 Ibid., 123.
354 Ibid.
By December 2001, the EU adopted the second money laundering directive. Mitsilegas and Gilmore argue that 2AMLD was heavily influenced by the FATF in both its “operative text” and “the number of preambular provisions”, and that the main thrust of the changes related, again, to the inclusion of the new predicate offenses outlined in the FATF’s 1996 enhancement of the Recommendations.356 The desire to adopt the 2AMLD with rapidity also resolved the debate on the inclusion of members of the legal profession, as 2AMLD now applied the 1AMLD provisions to “auditors, external accountants and tax advisors, estate agents, art dealers, and to casinos.”357 It also included lawyers, but mitigated the concerns over fairness and confidentiality by leaving MS to define exceptions.

In addition to these changes to the EU AMLD regime in 2001 which were based on the 1996 Recommendations, a second major change occurred, again mirroring the US approach: the incorporation of CFT into the EU’s AML regime. Changes here included,

agreements to introduce a Europe-wide arrest warrant, adopt a common definition of terrorism, create a list of known and presumed terrorists, establish joint investigative teams and make combating terrorism and its financing a higher law enforcement priority, implement all international AML/CTFE agreements as soon as possible, and support the Indian proposal to draft a comprehensive U.N. convention on international terrorism.358

More generally, 2AMLD also embedded the shifting locus of AML/CFT activity to private actors. As Tsingou observes,

the [AML/CFT] regime is at first glance state-driven, state-focused and framed on the basis of inter-state [sic] cooperation and institutions, with the emphasis on states and the role of state agencies intensifying further since the terrorist attacks of September 2001 [...y]et while most of the public AML

357 Ibid.
discourse refers to countries and criminals, the actors to be found at the forefront of AML activities are, in practice, mostly private.\footnote{Tsingou, "Global Financial Governance and the Developing Anti-Money Laundering Regime: What Lessons for International Political Economy&Quest," 620. This observation was strongly underscored by financial services practitioners in interviews for this dissertation.}

These rapid legislative responses further spurred new FATF activity, and in 2003—the same year 2AMLD began to be enforced—the FATF started the task of formally incorporating CFT into AML through its recommendations, leading to a further ‘Eight Special Recommendations on Terrorist Finance’ by including new Special Recommendations.\footnote{In 2008, the eight recommendations were expanded to nine. See Financial Action Task Force (FATF), "Fatf Ix Special Recommendations (Incorporating All Subsequent Amendments until February 2008)," (faftgafi.org2010).}

These enhancements in turn prompted governments to begin conversations on legislating the terrorism elements into domestic law. As a result—and while it took ten years to move from 1AMLD to 2AMLD—the EU began the legislative framing of 3AMLD almost immediately. Salas argues that the incorporation of the CFT regime as well as filling the gaps in 2AMLD by aligning definitions of serious crime to the Justice and Home Affairs Council framework decision, resulted in the remarkable speed of 3AMLD: “It [took] less than 12 months since the presentation of the Commission proposal to reach an agreement on a text” which was tabled in 2004 and which specifically addresses the US’ ‘War on Terror’.\footnote{Mariano Salas, "The Third Anti-Money Laundering Directive and the Legal Profession" (paper presented at the a Conference Organized by European Association, Lawyers, Brussels, May, 2005), 2.}

In 2005, the 3AMLD was adopted, repealing the previous AMLDs.

In addition to codifying the merging of AML/CFT, the major provisions of 3AMLD relating to FATCA are its enhanced obligations for Customer Due Diligence (CDD) relating to customer identification and beneficial ownership. Both concepts are critical to the tax evasion discourse since a key tool of tax criminals is the use of (among other investment vehicles) anonymised/numbered shell companies to hide beneficial ownership. The treatment of CDD (to which an entire chapter is devoted in the 3AMLD) “was expanded to introduce various levels of diligence, which may range from simplified due diligence to enhanced due diligence, in particular when cross-frontier correspondent banking with third countries, transactions with politically exposed persons, or the use of shell banks is involved.”\footnote{Mitsilegas and Gilmore, "The Eu Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards," 127.}
3AMLD also explicitly prohibited the use of “anonymous accounts or anonymous passbooks […] which one Member State, Austria, was defying for a large part of the 1990s, resulting in the Commission referring the case to Luxembourg and the near-blacklisting of the country by the FATF.”363

The changes in the 3AMLD subtly but importantly foreshadowed the more explicit convergence of tax crime into the AML/CFT regime that would occur with 4AMLD. However, in stark contrast to the rapidity with which adoption of 3AMLD was enacted, it would be a decade before the adoption of the 4AMLD. While this period was not devoid of additional work by the FATF and EU Working Groups on AML/CFT, the global financial crisis 2008-2009 was the primary focus during this intervening period, resulting in little additional formal activity on this regime. As will be described in the next section, however, there were other regulatory regimes coming to fruition following the events of 2008-2009—both in terms of the GFC but also in terms of the global tax scandals that put tax centre stage. Playing on the theme that regulatory innovations in financial crime, and corresponding legislative action on these issues, follow global ‘wars’ (e.g. the 1980s’ War on Drugs, and the 2000s’ War on Terror) the 4AMLD alongside other key initiatives are part of what Kaye calls “the War on Tax Evasion”.364

While the operational AMLD during the GFC, the enactment of FATCA, and during the negotiations on IGA approach to FATCA compliance was the 3AMLD, the fourth AMLD is highly relevant to the analysis of Revisionist Model with respect to the eventual standards that emerged from the FATCA regime. As previously discussed, it is also relevant, as the specific provisions in the 4AMLD were being negotiated at the EU level at the same time that MS were deciding on whether to take an EU-level approach to FATCA; the content of the EU AML/CFT regime directly overlaps with, and was influenced by, EU-level tax coordination directives developed in 2011; and, the specific provisions in the 4AMLD relate directly to tax evasion, directly bringing it into the AML/CFT financial crime regime.

While many enhancements and updates were adopted in the 4AMLD, the most relevant for the purposes here relate to the expansion of tax evasion as a predicate crime, and the

363 Ibid.
364 Kaye, "Innovations in the War on Tax Evasion."
beneficial ownership provisions in Article 30 of the 4AMLD. Indeed, as Mitsilegas and Vavoula observe, “[t]he fourth AML Directive has continued the trend towards the extension of the money laundering predicate offences by expressly including in this list tax offences defined as tax crimes relating to direct taxes and indirect taxes.”365 This inclusion contained the risk of divergence in implementation in MS however, since there was no EU-level definition of what constituted ‘tax crimes’. Consequently, rather than create the definitions, the inclusion of tax crimes was brought in under the same ‘serious crimes’ threshold as other predicate offences under the 3AMLD. Mitsilegas and Vavoula also point to the Commission’s Impact Assessment of the proposals for the 4AMLD, which indicated that while the inclusion of a specific definition of tax crimes was an option for inclusion (and one preferred by the Parliament), that such definitions “would potentially come at the cost of substantial delays due to political difficulties to agree on a common list of types of tax evasion behaviour which would need to be included”.366 Unfortunately, the impact assessment does not indicate which MS were its primary concerns, but the report does go on to say that its approach was to forgo the “optimal option” of including the definitions to avoid the “risk of jeopardising agreement on the broader AML/CFT legislative package”.367 This is perhaps most strongly underscored by the legal basis used for AMLDs 1-3: rather than use the criminal law legal basis (Article 83(2) TFEU) for the AMLDs, the internal market legal basis was used. While this was strongly at odds with other “criminal law measures with a financial law dimension”, the proposed use of criminal law as a basis for AML/CFT raised conflicting MS preferences and as such, “[t]he use of [the internal market basis under] Article 114 TFEU as the sole legal basis for the fourth AML Directive ensure[d] maximum participation by EU Member States in its provisions.”368

366 SWD(2013) final, as cited in ibid., 271.
Another legal concern with the inclusion of tax offences in the 4AMLD is that it would lead to a “catch-all, undifferentiated crime control strategy which fails to distinguish between the distinct features and rationale behind the criminal and regulatory response to tax offences on the one hand and serious and organized crime on the other.”369 The idea being that tax crimes are distinct from other crimes generally associated with AML, and that as previously noted, even the inclusion of CFT risked creating an overly broad and incoherent framework. Mitsilegas and Vavoula go on to argue that,

[from a criminal law perspective, this development may have seriously adverse labelling implications. The catch-all approach of the fourth AML Directive – which seems to have adopted a purely functionalist model of criminalization by inserting tax predicates in order to ensure maximum intelligence sharing – would thus undermine key principles of criminal law.370

This is a remarkable claim that deeply underscores the tendency of financial crime regulation—e.g. AML/CFT as well as FATCA regimes—to prioritise information gathering and exchange above even what would seem to be more salient issues such as criminal prosecution. In fact, nearly identical claims were made about FATCA: that FATCA is fundamentally an information sharing regime and not a tax regime, and that the framing as a data collecting tool was a clear decision by the enacting legislatures and regulatory authorities in their concerted global efforts to stem tax crimes, to the disbenefit of the collection of actual tax revenue.371

The second salient feature of the 4AMLD is its treatment of beneficial ownership and corresponding data protection issues. The concept of beneficial ownership is slightly different to customer identification: “Beneficial owners are natural persons who ultimately hold or control the customer and/or the natural person on whose behalf a transaction or

369 Ibid., 271.
370 Ibid. Emphasis added.
371 This theme emerged in my interviews with both financial services practitioners, and Big 4 consultancies. It was also echoed by the Commission’s Head of Unit Company Taxation Initiatives, Bert Zuijdendorp in his 2012 remarks at an NYU symposium on FATCA. See, Bert Zuijdendorp. Panelist in NYU, “Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part 2.”
activity is being conducted.” The identification of beneficial owners is important to closing loopholes to a wide range of cross-border financial crimes and illicit flows afforded by anonymous accounts, anonymous or numbered shell company accounts, and other investment vehicles such as some trusts. For example, national of State A could register an anonymous company in State B. An controlling employee of the company, who is also a national of State B, could then open a bank or investment account for the company in State B which would require due diligence measures to verify the identity of the employee. However, the beneficial owner of the company, the national of State A, would not be identified and thereby be left out of the identification and verification processes under AML/CFT’s due diligence provisions.

The corresponding challenges to beneficial ownership include the right to privacy and limits to data processing afforded under EU law. The beneficial ownership provisions in the 4AMLD included a limitation principle such that data can only be processed in line with the directive, and, “the collection and further processing of the data should be limited to what is strictly necessary and data should not be further processed in a way that is incompatible with that purpose.” There are also fundamental legal concerns on the right of access to this data, which is problematic for AML/CFT since one of the core precepts of AML regulation is not tipping-off individuals who are the subject of AML investigations or SARs. Still, despite these limitations, the incremental progress on beneficial ownership in the AML/CFT regime played a key role in tax administration directives in subsequent years. Indeed, the Commission specifically identifies 4AMLD as one of the legal bases for the later Directive on Administrative Coordination in taxation (see next section), saying, 4AMLD “ensures tax authorities have access to beneficial ownership information collected pursuant to the anti-money laundering legislation.”


375 Ibid.

These issues regarding the balance of fundamental rights, and the application of financial crime regulation, are nearly identical to the challenges brought under FATCA; however, what is especially interesting in the 4AMLD is that its requirements for the identification of beneficial ownership are less onerous than required under the FATCA IGAs. While the FATF rules aim to harmonise the due diligence procedures for its constituent member states to include standards for beneficial ownership identification, FATCA goes further by requiring indicia that individuals might be US persons (e.g. financial institution records that include a US phone number, US mailing address, or US tax identification number (TIN)). Thus, while the issue of beneficial ownership is inherent to both AML/CFT and tax evasion, the standards applied seemingly vary on a regulation-by-regulation basis. As alluded to above, this is likely a function of the EU’s preference for minimising provisions in the AMLDs where individual MS object, to preserve the legislation agenda. Further, the EU’s use of directives as opposed to regulations, leaving MS to implement as is domestically most feasible, creates divergence amongst MS in implementation and practice. However, this is also a persistent domestic problem for non-EU countries employing these standards, including the US who was pushing for more robust beneficial ownership provisions to be legislated internationally whilst facing its own domestic issues achieving the same. While this situation invited criticisms of hypocrisy, it also enabled domestic political challenges to the US’ own AML regime. Speaking at a round table conversation in 2014, Grinberg describes the perceived hypocrisy of the US position:

Look at the United States' actions on the question of beneficial ownership in the context of the International [sic] Financial Action Task Force. You might suggest that a lot of people in the United States were concerned about the beneficial ownership problem in [domestic] state law, and have been happy to see the United States take criticism in that regard. Part of the reason is that these are fair criticisms, but it also seems there is utility, in terms of domestic political dynamics, in having international norms with respect to which the country is not fully compliant.

The upshot of these dynamics is the persistent reality that as the AML/CFT regime grows in complexity and scope, minor differences in implementation at the domestic level create international discourse on standardising implementation. In turn, these inconsistencies are
reviewed and incorporated into both domestic legislatures, FUIs, and at the international level through, for example the FATF, who make recommendations on updating the regime. In this way, these inconsistencies become the basis for further change and an overall tendency of the regime to move toward global harmonisation.

Further, as will be explored in the chapter on bargaining outcomes, this dynamic seems to be at play specifically with the exchange of information as well. Within the EU, for administrative and law enforcement purposes, AML/CFT information exchange is treated between MS as if it were domestic (as previously discussed), albeit, it is heavily caveated with limitations and strict interpretations under the law. These narrowly defined provisions are challenged under FATCA, creating the new discursive ‘space’ for the debate to centre on. In the EU context, the AML/CFT regime helps to establish the codified practice of financial institutions acting as cross-border intermediaries for MS; however, for those same financial institutions to send customer information relating to identification, beneficial ownership, tax residency, and account details, directly to a third-country government was still, as Grinberg describes it, “flat out illegal”.377 Of course, under the Revisionist Model, this ‘cross-border intermediation’ within the EU would be considered domestic intermediation; however, until legislative development under AML/CFT (and other directives), this intermediation was not codified, hence the multiple regulatory regimes incrementally moving in this direction. Therefore, even within the EU, codifying the sharing of information between MS was an evolutionary, and overlapping, process.

In 2010, FATCA sought to piggyback on this existing EU practice (under both the AML and Administrative Cooperation directives) and create a global framework for financial institutions to act as cross-border intermediates as a standard—albeit with the US at the centre of this network, and not in the context of a multilateral framework.

In summary, the AML/CFT regime in the EU has several interesting features to both the Revisionist Model, as well as for FATCA. In terms of the Revisionist Model, the impact and influence of the FATF is unexpected since the model states categorically that IGOs and NGOs do not influence regulatory outcomes. Rather, it argues the dynamic is the reverse: that

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377 Grinberg, "Academic and Journalistic Perspectives on Illicit Financial Flows."
great power concerts leverage IGOs and NGOs to drive their coordination and harmonisation agendas. In the case of AML, the consensus in the literature is that the FATF has an outsized role in framing EU law. Mitsilegas and Vavoula, for example, strongly argue that for AMLDs 1-4 that, “EU law has been revised to take into account developments in the FATF Recommendations. The more these standards develop in this manner, however, the more likely it is for the EU legislator to face constitutional and fundamental rights objections.” This is the opposite of what the Revisionist Model would predict, since FATF soft law recommendations have been the basis for EU hard law. These incremental, or evolutionary, processes in the EU for developing the AML/CFT regime also foreshadow the process of creating the FACTA regime as an international standard and indicate the processes to look for in the bargaining core for FATCA.

Second, with respect to FATCA, the EU’s AML regime likewise offers some critical observations about how EU-level institutions, including the Council and Commission, have clear mandates to ensure the EU consistently developed the regime in line with international standards, even where there are risks of legislative derailment due to divergence in MS preferences. Indeed, the EU’s consistent ability to adopt new directives—and in the case of the 3AMLD even implementing (narrowly defined) comitology procedures to ensure consensus—positions the EU as a critical actor in the global AML/CFT regime. Of course, in the case of FATCA, there was no Commission mandate, despite the Commission’s desire for one, so the bargaining core should reveal what material differences exist between the EU’s consistently cooperative AML/CFT regime and FATCA. This is an especially compelling puzzle since both globally, and in the context of EU legislation, the trend was very much the convergence of AML/CFT and tax evasion/crime and their overlapping provisions.

As with other financial crimes—like those covered under AML/CFT—to be effective both domestically and internationally, addressing tax evasion requires some form of cooperation and ideally regulatory coordination since states cannot ‘go it alone’. The EU saw very strong convergence within the Union and internationally (through the FATF, for example) on its AML/CFT regime, albeit with relatively few and only minor roadblocks (in the form of rejecting the inclusion of certain provisions in the AMLDs), as well as some divergence of MS in implementation that is inherent to directives as legislative instruments. While this type of coordination is expected CMEs generally—with coordinated regulatory efforts—it is questionable whether the EU as a single actor should be considered a CME, since this interpretation elides fundamental differences in the financial systems of EU MS. As Hardie and Maxfield write, the UK (along with the US) is archetypal of both a market-based financial system and a liberal market economy. The impact of these differences within the EU between MS with more CME type systems, versus the UK as a leading LME, suggest EU-level policy is the lowest common denominator amongst states with competing interests.

This differentiation is clear on tax issues, both as a function of fiscal policy and any tax related matters including the exchange of information. Despite clear overlap with AMLD provisions as the previous section detailed, the divergence in MS preferences on the issue of tax information exchange to curb tax crime resulted in the strong rejection of provisions that would bring the Union closer together on the issue—even if only in the form of administrative assistance through information sharing. This was largely the result of three MS (Austria, Belgium, and Luxembourg) who prioritised their own domestic preferences for banking secrecy and competitiveness vis-à-vis non-EU European counterparts (chiefly Switzerland) above the Union’s desire for coordinated efforts on tax administrative assistance to stem tax evasion and other tax crimes. Since EU domestic preference formation in the form of hard law requires unanimity, this created a major cleft in the legislative approach.

381 Hardie and Maxfield, "Market-Based Banking as the Worst of All Worlds: Illustrations from the United States and United Kingdom."
The key difference between the two regimes hinges on what MS consider to be categorically illegal in their own domestic law. No EU member states, for example, have domestic laws that expressly enable the facilitation of money laundering or terrorist financing. On the contrary, especially in the post 9/11 world and the ‘Global War on Terror’, virtually every major developed economy agreed to, and codified in domestic law, the AML/CFT regimes provisions. Actually, within a few years, initiatives under the FATF and OECD would even ‘name and shame’ recalcitrant states. On the other hand, several bank secrecy jurisdictions, including EU MS, do have laws expressly permitting, even encouraging (in the case of Switzerland) the facilitation of tax evasion of third country nationals in their domestic legal frameworks. As opposed to their broad acceptance of the AML/CFT regime, Austria, Belgium, and Luxembourg viewed agreeing to the exchange of information as “a competitive disadvantage unless other jurisdictions such as Switzerland and the United States” agreed to similar provisions. Furthermore, while there were efforts by the OECD in the late 1990s and early 2000s to drive action on HTC and OFCs, there was no counterpart to the FATF for tax evasion that was leading the charge and setting international standards that could be easily codified at in national legislatures. This is therefore a surprising and problematic story for the Revisionist Model since, again, small states should hold no influence or power against a great power state in the bargaining core. The idea that Switzerland, a non-EU state, could both directly and indirectly influence the preferences of a great power like the EU (vis-à-vis MS domestic actors)—indeed limit its ability for intra-EU legislative coordination—as well as the bargaining core itself, is definitionally not possible in the Revisionist Model. Again, referring to VoC, this lack of coordination based on competition in specific financial markets more resembled LMEs whose regulatory outcomes reflect market pressures. The critical issue facing the EU

382 Kaye, "Innovations in the War on Tax Evasion," 363.
384 On the development of the OECD’s failed initiatives during this timeframe, see generally, Sharman, Havens in a Storm: The Struggle for Global Tax Regulation. It is also important to note that the role of the OECD changed markedly on these matters in its facilitation of the Multilateral Convention in 2010; however, prior to this, its only major impact was the reporting it produced suggesting that the EU was failing in the area of harmful tax competition and curbing offshore tax evasion, which according to some commentators, did spur the EU into action and ultimately to deliver the EUSD. In addition to the OECD reports, see Otto Marres. Panelist. NYU, “Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part 2.”
therefore, was not only the global problem of cross-border tax information exchange, but—in the language of the Revisionist Model—how would the EU set its domestic preferences on the issue against the backdrop of clearly divergent MS preferences?

This section reviews the legislative initiatives in the EU to address this dynamic. While there are myriad legal instruments on the topic of tax generally, here the focus is purely those relating to FATCA’s provisions: EU legislation on tax information exchange. At the time FATCA was introduce by the US, the EU had two primary sets of legislation (in addition to the provisional contributions of the AML/CFT regime) to this end represented by the EU Savings Directive (EUSD)385, and the Directive on Administrative Cooperation in Taxation (DAC).386 The EUSD is widely regarded as the EU’s most serious legislative effort to address information exchange and tax evasion, is often likened to the US QI program, and will be the primary focus of this section.387 In addition to the EUSD, this section will briefly cover the first legislative initiative aimed at the problem of tax evasion and the need for coordination in the EU, which was also the direct precursor to the 2011 DAC: the 1977 directive on ‘mutual assistance’ in tax matters. It will also briefly cover the subsequent enhancement to the DAC in 2014; however, in terms of detail and timeline, this will be more comprehensively addressed in the Standards chapter.

The dynamics relating to tax evasion in the European Community, and then Union, have played out since at least 1977 with the introduction of the Council Directive 77/799/EEC concerning mutual assistance in the field of direct taxation.388 While the directive pointed to most of the salient issues relating to tax evasion and avoidance (including identifying information exchange as the most effective tool to combat these issues389), the directive lack clear regulatory outcomes relating to these provisions. Still, its logic was the same as was employed in subsequent decades and is largely reflected even in FATCA. For example,

387 See Part 1 of this chapter on US Initial Domestic Preferences, The Qualified Intermediary Program.
389 Grinberg, one of the leading voices on this issue, for example, consistently argues that information exchange is the single most effective strategy to combat offshore tax evasion.
there was clear recognition that, “the international nature of the problem means that national measures, whose effect does not extend beyond national frontiers, are insufficient [...and...] collaboration between administrations on the basis of bilateral agreements is also unable to counter new forms of tax evasion and avoidance, which are increasingly assuming a multinational character.” The directive itself is also structured along the types of information sharing previously discussed here: exchange upon request, automatic exchange, and spontaneous exchange, but appears to spend most of its efforts in detailing its own limitations. The primary limitation it addresses is data privacy whereby it requires that all exchanged information becomes ‘secret’ under each MS domestic legislation. The other main area of focus—and arguably the primary reason for its ineffectiveness—is Article 8(3) of the directive, which exempts exchange where it is prohibited, or impractical, under local law: “The competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information.” While the impracticality element can be offered a fair degree of sympathy given the real limitations to largely paper-based exchanges of information at that time, the domestic legal prohibitions effectively kill any genuine efforts to coordinate. While deeply inadequate as a legislative measure, the 1977 directive did set out the core problem and offer solutions that would come to be the basis for future legislation. Last, the directive was prescient in its recognition of the multilateral and international scope of the problem and the impossibility of individual states to address the problem on their own. While seemingly obvious, this point is important enough to be repeated in nearly all the literature on international tax coordination: perhaps the most entertaining version of which comes from the title of Morse’s article Ask for Help, Uncle Sam. In the article, Morse argues that even “FATCA almost certainly cannot solve the problem of U.S. taxpayers’ offshore accounts without the cooperation of non-U.S. governments.”

390 Directive, “77/799/Eec of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation.”

391 Ibid.

The EU Savings Directive

The conceptual seeds for the EUSD were planted in 1989 with a proposed directive to impose a Community-wide withholding tax on interest earned from certain account deposits, but it was withdrawn after disagreement in the Council. Subsequently, “[i]t was re-tabled, in a new form, as part of the Monti package” in 1997, proposing the so-called ‘coexistence model’ where MS could either levy a tax or notify corresponding MS of interest tax paid.\(^\text{393}\) However, this new version “also encountered vigorous opposition, notably from the UK, which objected to the inclusion of the London ‘eurobond’ market, and Luxembourg which wished to preserve banking secrecy.”\(^\text{394}\)

One year later, in 1998, the OECD released its first of two reports on harmful tax competition which prompted the EU to take more assertive action on the issue. Two years later, and concomitant with the second OECD HTC report, which was an embarrassment for the EU\(^\text{395}\), “[p]rotacted discussions led, eventually to the compromise agreement […] under which exchange of information between tax authorities, rather than withholding tax, became the long-term model.”\(^\text{396}\) The scope of the EUSD centres on taxation of savings interest including, “income from fixed-income sources, such as interest from debt claims, including bank deposits and redemption/distribution payments from stocks, bonds, and mutual funds, it does not apply to dividend payments or capital gains.”\(^\text{397}\) The goals set out in the directive were to “counter tax evasion by exchanging information on non-resident investors within the EU”, which would “put an end to bank secrecy, at least for the types of earnings that fell within the scope of the Directive.”\(^\text{398}\)

After these several years of “bitter debate”\(^\text{399}\) between MS, final decision date was set for 2002 on the formal directive language, and in 2003, the EUSD was adopted with MS to implement to its goals in local law by 2005.\(^\text{400}\) However, the decision to adopt the EUSD was

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394 Ibid.
397 Ayadi and Arbak, Financial Centres in Europe: Post-Crisis Risks, Challenges and Opportunities, 42.
398 Ibid.
predicated on three critical provisos from MS with banking secrecy traditions, which feared capital exit beyond EU borders due to EUSD and a competitive disadvantage compared to “non-EU European neighbours that would undermine the attractiveness of EU Member States.” First, Austria, Belgium, and Luxembourg negotiated an indefinite transition period during which they would impose a withholding tax rather than exchange information. Second, the same three MS, “took the firm position that they would only agree to the proposal if both small banking centers like Liechtenstein and the Channel Islands, as well as major non-EU financial centers like Switzerland and the United States, agreed to adopt equivalent measures.” Third, Austria, Belgium, and Luxembourg agreed that the effectively indefinite transition period “would end when the Commission convinced Andorra, Liechtenstein, Monaco, San Marino, Switzerland, and the US to exchange information upon request in cases of tax fraud and other criminal acts.” Grinberg, citing Gilligan, summarises the negotiating dynamic thusly:

In June 2000 Luxembourg Prime Minister and Finance Minister Jean-Claude Juncker epitomized the EU bank secrecy jurisdictions’ unflinching opposition to cooperating in the absence of non-EU member cooperation by stating that “there would be blood on the table if certain other delegations do not change their point of view.”

While this was the formal agreement in the Commission to enable the legislation to progress, the non-EU states in question understandably “were not amenable to the EU bank secrecy jurisdictions’ demand.” Still, after several months of negotiations and “substantial coercive pressure and important financial incentives” relating to the EU Parent-Subsidy
Directive, Switzerland agreed to the withholding provisions on the same basis as the three EU MS, but rejected information exchange. Following the Swiss lead, Andorra, Monaco, San Marino, and Liechtenstein negotiated virtually the identical bilateral agreements with the EU . Additionally, EU MS overseas territories belonging to the Netherlands and UK, as well as the UK’s Crown Dependencies (CDs) also adopted the withholding model. The US, however rejected participation of any kind. As Grinberg recounts, “in 2002 Glenn Hubbard, the chairman of the White House Council of Economic Advisers in the Bush administration, announced definitively that the United States would not agree to EU requests for across-the-board sharing of information on U.S. savings accounts held by EU residents”, making further discussion of the EUSD “mostly about the parameters of an ever-closer European Union.”

This final point underscores the previous discussion that from a US perspective, the enactment of the USA PATRIOT Act took centre stage, and that while the US was still very much concerned with information exchange, its focus had shifted to CFT in light of 9/11. From a Revisionist Model perspective, this also marks the first critical point of divergence on great power preferences for information exchange regulation since the EUSD was the EU’s first major regulatory foray into information exchange beyond EU borders, albeit at the behest of three divergent MS. Somewhat ironically, the US rejected the EU’s first attempt at an international information exchange regime for tax; less than a decade later, the US would introduce its own in the form of FATCA. On the one hand, the Revisionist Model would accurately predict that with the US’ rebuff of the EU proposal, the tax information sharing regime did not result in coordination, but rather in something approximating ‘rival standards’. On the other hand, the EU was only engaged in the international aspects of the EUSD as a function of its own MS competitive provisos, which forces the question of whether the EUSD is a genuine attempt at international coordination.

407 Ibid.
408 Ayadi and Arbak, Financial Centres in Europe: Post-Crisis Risks, Challenges and Opportunities, 43.
409 In addition to those jurisdictions listed these include Gibraltar, Netherlands Antilles, and the Turks and Caicos Islands.
Still, in the intervening period between the effective implementation date of 2005, and the 2010 enactment of FATCA, the need to revise the EUSD became evident. The EUSD contained provisions for its own review every three years, and in 2008, the report “found that the EUSD’s definitions of interest, paying agent, and beneficial owner were deficient in fulfilling the goal of effective taxation.” The second report in 2012, was even starker on the inadequacy of the EUSD in achieving its objectives, finding that “between the years 2000 and 2010, an average of thirty-five percent of non-bank deposits in Member States and applicable jurisdictions are held by untaxed offshore structures that are being used to hide the actual beneficial owner.” This was especially evident in the fact the EUSD provisions could be easily avoided: since the EUSD was focused only on taxing interest, a primary loophole was for financial institutions and account holders to restructure assets into vehicles that were similar to, but not legally defined, as interest and often through the use of interposing entities outside the EUSD’s scope. Consequently, in 2009, an announcement from ECOFIN made recommendations “agreed to by all twenty-seven Member States as well as the opinions of the European Parliament and the European Economic and Social Committee.” By 2012, debates were still persisting with the hope that a revised EUSD would emerge. However, change did not come to the EUSD until 2015, when a new version of the law was introduced with the explicit aim of pointing to the “overlap of scope” and supersession of content in the DAC 2011 which had been updated in 2014. Still, changes in the 2015 directive include two interesting points. First, it notes that,

[i]n relation to withholding tax levied under the transitional period referred to in Directive 2003/48/EC, in order to protect the acquired rights of beneficial owners, Member States should continue to give credit or refunds

411 Kaye, "Innovations in the War on Tax Evasion," 400.
412 Ibid.
414 Kaye, "Innovations in the War on Tax Evasion."
as originally envisaged and should issue certificates on request to enable beneficial owners to ensure that withholding tax is not levied.\textsuperscript{416}

The inclusion of this provision is especially interesting given the problems in defining beneficial ownership both in the context of AML/CFT, and in the EUSD following its 2008 and 2010 reviews. While the interpretation and definition would be left to the MS under directive implementation, it remains an obvious quirk: MS struggled for decades to define beneficial ownership for the purposes of financial crime including tax evasion, but insisted on the protection of their acquired rights for withholding tax credits.

The second interesting point in the 2015 directive was the protection of Austria’s right to a derogation under DAC 2014, as defined in the EUSD: “Account should be taken of the fact that, in view of structural differences, Austria has been allowed a derogation under [DAC 2014] which allows it to delay the application of that Directive by one year until 1 January 2017.”\textsuperscript{417} This point demonstrates the knock-on impacts limiting coordination at the EU-level by more than a decade after the exceptions were made in 2003 in the original EUSD. Still, the DACs would address some, if not all these issues.

The Directives on Administrative Cooperation

Nearly simultaneous with the failed proposal to enhance the EUSD and the US Senate investigations on tax evasions and HTC in OFCs, another proposal emerged in February 2009 with the explicit aim of updating the 1977 Mutual Assistance directive which had been the first legislative attempt to frame the issues of tax evasion and avoidance in the Union (see above discussion in the EUSD section). Indeed, as Kaye notes, in the EU “[p]rogress toward administrative cooperation was accelerated by the global financial crisis that highlighted the need for more effective exchange of information to combat tax avoidance and tax evasion.”

This 2009 proposal was adopted in 2011 as the first Directive on Administrative Cooperation (DAC) in the field of taxation and repealed the 1977 directive.\textsuperscript{418} Also referred to as the ‘February Directive’ following the month of its adoption, the law set out the legal framework for the exchange of information in the EU between member states with the key justification

\textsuperscript{416} Ibid. at (10). Emphasis added.
\textsuperscript{417} Ibid. at (11).
for these measures being the potential harm to the internal market of tax abuses. These in turn were seen to be a growing function of globalisation. The preamble to the directive recognises MS’ “need for mutual assistance in the field of taxation is growing rapidly in a globalised era” and citing the growing complexity and mobility of capital and EU citizens’ financial lives, argues that “a single Member State cannot manage its internal taxation system, especially as regards direct taxation, without receiving information from other Member States”; as such, the directive recognised that “the mandatory automatic exchange of information without preconditions is the most effective means of enhancing the correct assessment of taxes in cross-border situations and of fighting fraud.”

According to the law itself, the DAC therefore “establishes a system for secure administrative cooperation between the national tax authorities of the European Union (EU) Member States and lays down the rules and procedures for exchanging information for tax purposes”; however, rather than a robust legal mandate for the automatic exchange of information across all categories of income, the directive was seen to be more of “a roadmap to automatic information exchange among EU member states for categories of income other than interest”, since unlike the EUSD it did not mandate participation in automatic exchange within the EU, “let alone provide incentives to any country outside the European Union to participate.” While the DAC 2011 contained no direct provisions for engaging with third countries, it did contain, in Article 19 (and perhaps in the expectation of the likely impact/influence of the US enactment of FATCA from the year before) detail that,

[w]here a Member State provides a wider cooperation to a third country than that provided for under this Directive, that Member State may not refuse to provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State.

419 Ibid., at (2) and (10) of Preamble.
420 Ibid., at (1) of Preamble.
Still, the directive was not entirely toothless and did include important provisions—seemingly aimed at previously obstructive MS like Austria—such as the conditions and requirement to comply with requests and that “[r]efusals [could] no longer be based on the grounds that the requested information is held by a bank or other financial institution.” It also widened the range of reportable information categories well beyond EUSD to include income from employment, director’s fees, life insurance products not covered by existing law, pensions, and the ownership and income of immovable property. Additionally, it sought to expand the range of provisions on the methods and legal basis of exchange, and that this exchange be automatic where possible for the participating MS. Further, the more specific major goal of the directive was “to implement the OECD Standard on exchange of information that is set forth in Article 26 of the OECD Model Convention.” The OECD model was, as aforementioned, developed in 1988 and updated in the late 1990s and early 2000s, albeit, not always adopted by OECD states into local law as it “proved to be of limited applicability and no practical import.” This time, however, the update to the Convention was a direct result of the 2009 G20 summit, and provided a “general legal framework” for the automatic exchange of information beyond OECD states. The 2009 G20 (London) Summit, held in the midst of the GFC and following the UBS and LGT tax scandals from the year before, was also the source of the now famous assertion by attending leaders, in their joint statement, that “the era of bank secrecy is over” and argued that tax information exchange was the best instrument by which to address “non-cooperative jurisdictions, including tax havens.” The impact in the EU was clear following both the G20 commitment and the call on the OECD to revise its Model Convention. Indeed, as with the AML/CFT regime and its reliance on the FATF for the generation of policy to ‘download’ into EU hard law, the OECD wording from the updated OECD Model Convention was directly incorporated into the EU’s February Directive. A clear example of this is the concept of

425 Kaye, "Innovations in the War on Tax Evasion," 06.
426 Grinberg, "The Battle over Taxing Offshore Accounts," 34.
427 Ibid.
“foreseeable relevance”. The language in both Article 26 of the OECD Model Convention and the February Directive (2011/16/EU, preamble (8)) are identical except the definition of the included states—MS in the case of the EU and ‘contracting states’ in the OECD:

The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States [OECD Contracting States] are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.430

The inclusion of the text itself is not altogether remarkable given the overlap of EU MS and OECD ‘contracting states’, however it does indicate that the OECD’s new role in leading international tax matters was growing in influence in this timeframe and that the EU was once again using language created in soft law provisions in its own hard law directives. This also becomes important in both the bargaining core analysis and the discussion on standards in the Revisionist Model, since Drezner argues that IGOs and NGOs do not directly influence global regimes, only that they are used to further refine and implement standards once coordination has been achieved by the great power concert through the bargaining core. This concept is challenged here as both the OECD and G20 were clear precursors to the creation of EU hard law, not the reverse as the Revisionist Model would predict.

Still, while the DAC 2011 contained material shortcomings—it offered MS an ‘opt out’ of both sending and receiving; the scope of the law was directed only at MS, eliding provisions or requirements for third countries; and it did not contain provisions for “categories of capital and income [...] to include capital gains, dividends, and royalties”431—the directive was seen as “a clear indication of the political impetus behind enhanced tax cooperation among the EU countries.”432 Addressing these items would have brough the DAC 2011, and therefore the EU, substantially in line with FATCA: “If the European Council were to require mandatory information reporting on these categories of income, in addition to interest

432 Ayadi and Arbak, Financial Centres in Europe: Post-Crisis Risks, Challenges and Opportunities, 92.
reported through the Savings Directive, EU information reporting would generally overlap with the income reporting, but not the asset reporting, required under FATCA.”

This direct comparison to FATCA, which had been enacted less than a year before in March of 2010, was also the reason most writers on international tax did not generally regard the DAC 2011 as a substantively important development in shaping the direction of the emerging AEoI regime. Rather, while DAC 2011 was largely the EU’s response to the post-crisis (and post-first-wave tax scandal of UBS and LGT) desire to be seen to be acting on offshore tax evasion, it was a series of events after FATCA—as well as FATCA itself—that forced the EU’s hand in updating the DAC formally in 2014. This context for the updated DAC as well as the FATCA IGA framework, form the basis of the EU-US bargaining core negotiations and this will be the focus of the next chapter on the bargaining core and outcomes.

Chapter 6: Step III: Great Power Concert and the Bargaining Core

With the initial preferences of the great powers detailed, the Revisionist Model maintains that the great powers will determine whether to coordinate on a regulatory issue as a function of these preferences. Drezner employs a simple game-theoretic model to show that coordination, in turn, is a function of the relative costs and benefits to the great powers in adopting the regulatory preferences of the other or rejecting them. To adopt the preferences results in great power concert where there is agreement to coordinate on a regulatory issue; alternatively, the choice to reject the preferences of the other necessarily results in a lack of coordination. For Drezner, a great power concert is both necessary and sufficient for coordination on any global regulatory issue, and failure to achieve concert means that no global regulatory standard can emerge.

The questions this chapter addresses are whether the EU and US formed a great power concert, and if so, what is the nature of the bargaining core considerations? How do the initial preferences of the US and EU manifest into the bargaining core? And what is the

result of the negotiated positions that describe the eventual standards that emerged? To answer these questions, chapter the is divided into four sections.

First, since the Revisionist Model argues that coordination is a function of the cost-benefit analysis between the great powers, an analysis of the costs and benefits—both political and economic—will show the respective positions of the US and EU (or, as will be described, EU MS). For the US, the FATCA legislation itself represents US preferences; for the EU, the analysis will explicate the implications of FATCA for the EU’s initial preferences. This chapter first undertakes the political cost-benefit analysis, followed by the financial/economic cost-benefit. These two positions comprise the starting point for the bargaining core. Following the Revisionist Model’s predictions, each great power should prefer the status quo: the US should prefer not to modify the FATCA legislation, and the EU should prefer to not incorporate the FATCA legislation into EU law. The determining factors for whether each great power should adjust its preferences will be analysed in the next section, which will explicate both these starting positions and the relative costs and benefits for each in adjusting preferences. While the Revisionist Model argues that for great power states, coercion is not possible since both exert similar power, the coercive mechanism should be ineffective in the case of FATCA. The third section tests this hypothesis, analysing the effect of coercion on the cost-benefit calculations for adjustment.

Second, while the Revisionist Model predicts a bargaining core, there is unfortunately no such definitive formal process for this bargaining in reality. Rather, this section will give a brief overview of the timeline of events from 2012 to 2014 that describe where and how negotiations on FATCA, and great power concert took place and their outcomes. The outcomes are clearly divergent from the processes described in the chapters on both US and EU initial preference formation. In direct contrast to the glacial pace of change and inability to instigate meaningful international tax evasion initiatives in the US, the EU and internationally over the 30-year period prior to the enactment of the FATCA legislation, the post-FATCA world saw an unprecedented flurry of activity that would ultimately result in a global FATCA regime in a 2-year timeframe—by the middle of 2014. It is in these events that the evidence of the interplay of the preferences of the US and EU, the negotiated adjustments of their respective preferences, and the outcomes of their compromises. In other words, these events comprise the bargaining core.
Then, because the Revisionist Model requires the adoption of new, codified standards to
demonstrate coordination, the third section analyses both the resulting IGA framework,
along with several short case studies about MS preferences. It also briefly discusses the EU’s
2014 DAC updates (henceforth referred to as DAC2), which were a direct reaction to the US
FATCA legislation and the only direct EU-level hard law outcome of the FATCA regime (to
the year 2014). This analysis leads to the last element in the model, standards, which will be
discussed in the next chapter.

Cost-benefit analysis

Cost-benefit analysis is the first step in the process of determining whether the great
powers will form a concert with the aim of establishing a coordinated regulatory approach
and consequently global standards. The Revisionist Model argues that initial domestic
preferences, which are influenced by a range of domestic factors and actors, comprise the
status quo preferences for the great powers in the bargaining core. Each great power state
will prefer its own status quo and will not adjust these preferences to the other great power
unless the benefits of doing so outweigh the costs. Drezner includes both direct
financial/economic costs as well as political costs in his adjustment calculus. Beyond the
preference for each state’s own status quo, globalisation is the primary exogenous factor
influencing adjustment bargaining. As previously described, this leads Drezner to two
central hypotheses: 1) “ceteris paribus, economic globalisation increases the likelihood of
international regulatory coordination”, and 2) “[r]egulatory coordination is less likely when
the regulation directly affects mature or nontradeable [sic] economic sectors—since these
sectors are expected to generate the highest level of adjustment costs.”

FATCA and AEoI affect financial services, which is a tradable sector; however, since FATCA (like AML/CFT and
other similar regulations) is crime-related regulation, it affects some non-tradable sectors as
well. This is true of both foreign government enforcement/administration requirements, as
well as the FATCA’s requirement for some non-financial foreign entities (NFFEs) to “disclose
information directly to the IRS […] or face harsh penalties”. Financial services in the EU
would also be considered a mature sector, although despite Drezner’s correctly predicted

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high adjustment costs, financial services are the locus of a great deal of globally coordinated regulatory change, especially in the realms of financial crime, and particularly in the years following the GFC, financial stability.

With these considerations in mind, this section focuses on the Revisionist Model’s game-theoretic ‘standards games’ as the framework for analysing the cost-benefit analysis in the bargaining core, to understand the EU’s considerations in adjusting its preferences to the US’ FATCA law. Drezner employs two standards games. The first is a pure application of costs and benefits of adjustment; the second introduces economic power as a coercive measure. Drezner argues that in a great power concert, economic coercion of one power over the other is not possible. FATCA proves a good test case for this hypothesis since it includes a measure of extreme coercion in the form of restriction of access to US markets through its 30% punitive withholding tax for recalcitrant FIs—or as Wigan says, with FATCA the US was “dropping what is effectively a ‘nuclear bomb’ on the institutional architecture”.436 Thus, in addition to the cost-benefit elements, the analysis will also specifically test the effects of coercion in the bargaining core.

As mentioned, the analysis itself comprises two key elements central to the considerations of the great powers in the bargaining core: the political costs and economic/financial costs of regulatory adjustment, and therefore, coordination. The first section will discuss the political costs and benefits, focusing primarily on the issues FATCA presented in the context of the EU’s initial domestic preferences, and the reaction of domestic actors to FATCA itself. The second section will discuss the direct financial and economic costs of adjustment and coordination. This includes estimates of financial costs to FIs and compares FATCA to other existing financial crime regulations—namely the AML regime, which is the best comparator from both cost and FI implementation perspectives. Last, it will address FATCA’s coercive mechanisms and the effect on the bargaining core.

It is also important to note that the time under consideration for this analysis is between FATCA’s enactment and the negotiated IGA approach. This period is important for the analysis since it demonstrates the concerns about the FATCA law in the international

domain before the negotiated IGA approach. The model does not directly address the process for the emergence of the bargaining core, but in the timeline for FATCA, the events seem to nicely line up for a two-step analysis: the international reaction based purely on the initial domestic preferences of the great power actors, and the bargaining core itself, which is represented by the Joint Statement and Communiqué indicating a coordinated approach for FATCA implementation. The second step is especially interesting in the context of the Revisionist Model, since both sides adjusted their preferences. While it is presumed that not all regulatory initiatives will follow a similar trajectory, the case of FATCA serendipitously lends itself to this degree of detail. It also gives a clear indication of where, precisely, each party was willing to negotiate. In the Revisionist Model this period is described nearly by the first game—the simple standards game—which asks whether the costs outweigh the benefits. This section demonstrates that the costs of implementing FATCA did indeed outweigh the benefits, leading to a bargaining core—including the coercive elements detailed in the second standards game—whereby the preferences of both the US and EU (or five EU MS de facto acting on behalf of the EU) were adjusted to enable coordination.

This process also very closely tracks the legal process of US regulatory development. Again, FATCA comprises Chapter 4 of the HIRE Act, which was signed into law 18 March 2010. In the act itself, the US Treasury was delegated authority to “prescribe such regulations or guidance as may be necessary” for the objectives of law to be met. As most commentators have noted, FATCA is a very complex law, and this is starkly demonstrated even in the length of the regulatory framework Treasury developed: the law itself comprises 51 pages; the first draft of the regulations was a 400-paged proposal, published 15 February 2012 that was met with a great deal of concern and pleading for simplification. In July of 2012, both the Joint Statement and Communiqué were released, indicating the new IGA approach agreed by the ‘bargaining’ parties. Six months later, and after additional modifications, “[o]n January 17, 2013, Treasury and the IRS published final regulations under chapter 4” which, “provided for a phased implementation of the requirements of

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FATCA, beginning on January 1, 2014, and continuing through 2017. In these distinct timeframes, there is opportunity to understand the bargaining mechanism in more detail. While the actual negotiating positions are not publicly available, the changes at discreet moments gives an indication of the areas of debate and the outcome of the adjustments made.

Political Costs and Benefits

This section explicates the political cost-benefit analysis of FATCA for the EU. These political elements of the analysis draw directly from the EU’s initial domestic preferences detailed in the previous chapter. Since, under the Revisionist Model, the US and EU are the primary actors, the analysis will focus on the EU reaction to the enactment of the US law. There is clear evidence that supports the idea that EU MS, and Switzerland, were the most vocal and important voices in the international community to begin with, but the criticisms of the law were largely uniform in any event.

As early as 2003, through the EUSD, the EU demonstrated a clear desire to move to an intra-EU model of AEOI, although it lacked the unanimity from MS with banking secrecy traditions (primarily Austria and Luxembourg) to push the EU to a FATCA-style model for automatic reporting standards that included all income types. Despite heavy global opposition to the FATCA legislation in 2010 and 2011 from financial institutions and states alike, as described in the earlier chapter on FATCA, by the end of 2011 financial institutions had become the biggest lobbying group in favour of states resolving local conflict-of-law problems that the US’ FATCA legislation presented. In the EU, this came in two forms. First, several individual MS lobbied the US directly, and second, MS lobbied both the Commission and Council to engage with the US to negotiate a mechanism that would resolve these issues. As Zuijdendorp describes, “[there were] serious concerns expressed by Member States and industry, and Member States asked the Commission to discuss FATCA with the US.” These concerns were broad, but generally related to “disproportionate costs as well as

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infringement of privacy and constitutional laws of certain states.” Specifically, financial institutions were concerned that FATCA compliance forced them to break both domestic and EU laws, and that “clients can litigate if they get it wrong”; that FATCA’s obligations to withhold US tax on so-called ‘passthru payments’ were incompatible with many MS’ domestic laws, and “unworkable” with the EU’s principle of freedom of movement of capital; and the requirement to terminate the accounts of recalcitrant account holders would violate MS’ contract law. The clearest examples of this were the withholding and account closure (for recalcitrant account holders refusing to provide information to FFIs under FATCA’s enhanced due diligence processes) provisions in the law, which would violate the EU’s fundamental principle of the free movement of capital. Consequently, bargaining of some description would be required to accommodate the US law, since the only other option would require a change to a foundational EU principle.

Financial services across the EU also had concerns about competitiveness, since their primary competitors, mainly located in the US, would not have to implement what were understood to be major regulatory programmes to come into compliance. Likewise, MS were concerned that the US law was one-sided, with huge implementation costs they would have to bear for nothing in return: since the costs of implementation are generally tax deductible for individual financial institutions, MS would suffer losses through tax revenue erosion. The other area of one-sidedness was reciprocity. Where the US demanded information about US account holders, FATCA contained no provisions for sharing information on foreign-owned US accounts.

Another fundamental issue was economic sovereignty and its relationship to taxation. As a formal issue area in EU taxation (alongside foreign policy, defence, membership applications, and election rules) is not subject to qualified majority voting (QMV), and thus requires a unanimous vote. As Ring notes, “[t]he need for unanimous decision making in certain areas can be traced back to the infancy of what has become the EU and can be seen

443 Ibid. This paragraph summarising Zuijdendorp at mins 20-22.
as a national veto on matters that an individual state deems important.”444 The debate largely hinged—and continues to hinge—on “the tensions states face in deciding whether to surrender sovereignty to a multilateral body” since individual MS tax preferences vary greatly across the Union.445 The variation is perhaps most noticeable in the difference between MS like Germany and France who desire to “protect their higher tax regimes from the competitive rates of EU newcomers”, versus the UK and Ireland who have traditionally held concerns about tax harmonisation threatening global business attractiveness.446 For example, in the late 1990s, Germany was forced to “change its regime for taxing capital income when its citizens found it too easy and tempting to evade German taxes by holding assets through a foreign account in another EU jurisdiction.”447 The outflows were primarily to Luxembourg but also other EU MS, and Germany “was forced to repeal that tax to staunch the losses.”448 Similarly, the UK and Ireland alike have been vocal about protecting their sovereignty in tax matters, and through successive derogations contained in the EUSD, and the DAC regime, Austria has maintained its independence from the otherwise unanimous EU moves toward exchange of information to ensure competitiveness against non-EU European states—especially Switzerland.

In modern times, virtually all financial institutions act as tax intermediaries in some form for their domestic governments. However, since some EU MS did not want their FIs to act as intermediaries cross-border for more than a handful of tightly restricted income classes within the EU (e.g. as under the EUSD), it is easy to understand the initial opposition to the US demand for FIs to act as such for the US. Still, and in addition to the sovereignty concerns, for the categories of information that were shared, again as in the EUSD, the model employed in the EU context was from the financial institution to its respective MS government, and from that government to other MS governments. This model of reporting is the so-called B2G2G model—bank to domestic government to foreign government—and

445 Ibid., 206.
446 Ibid.
448 Ibid., at footnote 54.
was the preferred mechanism in the EU as codified under the EUSD.\textsuperscript{449} FATCA, however, requires FIs to identify accounts held by US persons (natural and legal persons who beneficially own the account and who have tax liabilities to the US) and to directly and automatically report this info an a B2G basis (bank to foreign government): FIs are required under FATCA to contract with and send information to the US IRS directly, which is a violation of, among others, Directive 95/46/EC which protects data privacy and handling in the EU. This sets up a more general conflict of reporting models since the B2G model is common in the US, and it has precedent internationally under the QI programme. Still, as Morse notes looking purely at the FATCA regulations as implemented (that is, as a matter separate and apart from the IGA framework), “the lack of any involvement by non-U.S. governments in FATCA’s B2G reporting infrastructure makes FATCA enforcement unrealistic.”\textsuperscript{450} Morse’s observation is also foreshadowing of the limits of the US’ markets power: is access to US markets enough of a coercive mechanism to force compliance without the need to the US to adjust its own preferences?

As Frasher observes, a similar conflict of legal approach exists in the way data is handled under the US and EU systems. Part of the conflict regarding data and the mechanism of transmission is the differing legal views on data ownership between the US and EU systems. Where EU directive 95/46/EC protects individual rights to personal data (the individual owns the data), “American law bestows ownership to the holder of the data, not the individual”.\textsuperscript{451} To address some of these issues, the EU and US negotiated the Safe Harbour Act in 2000, but this did not include provisions for financial services, thus leading to data sharing between the US and EU operating “under a moratorium”, until the GFC forced both parties back to the negotiating table. While it is beyond the immediate scope of this dissertation, data privacy regulation is another great power regulatory issue that increasingly impacts financial services, not only through financial crime regulations, but also though the EU’s 2016 GDPR, and the Dodd-Frank Act in the US. Again, Frasher argues that


\textsuperscript{450} Morse, “Ask for Help, Uncle Sam: The Future of Global Tax Reporting,” 542.

solutions to these differing data and “privacy cultures” require “adaptations” from both great powers since US firms want to keep data “from the preying [sic] eyes of their competition”, while the EU wants to defend its “privacy laws and protect the rights of their clients”. 452 Regarding FATCA, both its B2G model for information exchange and its data ownership model presented fundamental legal impediments for the EU and its MS. For the EU, the political adjustment costs for these two items were high since they would both require EU-level hard law adaptation to permit FATCA’s demands.

The next major impediment to EU implementation of FATCA was the concept of extraterritoriality. Especially in the early days of 2010 and 2011, this concept was employed to encourage the US to rethink or repeal the law. In interviews for this dissertation, a partner at a Big 4 firm who was a former US Treasury official, argued that the law was written purely as domestic law with no extraterritoriality or jurisdictional overreach. Their position was that people who argued that the US was acting extraterritorially were “missing the point of the law”, since from the perspective of the US, the law’s enforcement mechanism was purely in the US. 453 They offered the analogy of children playing a ball game at the house of the kid with the best yard (garden) in the neighbourhood: “if you want to play at my house, with my ball, then you have to follow my rules. Otherwise, you can play somewhere else.” 454 FATCA demanded information exchange and if this was something that a firm in a foreign country did not want to do, or was unable to do, they could pay the punitive withholding tax of 30% on all their US-sourced income, or ‘play somewhere else’. Whatever their choice, the interviewee argued the law itself could only be enforced in the US, which is where the punitive withholding tax was located, and consequently could only be viewed as any other domestic financial crime law. Others obviously argued the opposite. Bean and Wright, for example, write that “[t]he legislation is by far the most egregious example of extraterritorial overreach in history and has been harshly criticized by individuals and entities alike”, claiming tacitly (through the title of their article) that FATCA is an act of “American legal imperialism”. 455 Specifically, they argued that,

452 Ibid., 794.
453 Partner, “Expert Interview: Regulatory Implementation.”
454 Ibid.
Eschewing the traditional practice in international law of limiting national legislation to the territory of the sovereign, the U.S. Congress explicitly crafted FATCA to impose egregious, continuing due diligence and reporting obligations on more than 100,000 financial institutions, each of which is organized and operates outside the territory of the United States.456

The obligations under FATCA would mark, they concluded, “the end of the centuries old practice of sovereigns refusing to enforce revenue laws of other sovereigns as the developed world joins together to arrange mutual FATCA-like reporting to enhance tax collection efforts globally.”457

Regardless of the legal interpretation, the extraterritoriality problem created a raft of perception problems for the EU since it amplified the other issues the initial FATCA law presented: illegality of cross-border intermediation for tax information sharing; the B2G model under FATCA; an EU sense of a loss of sovereignty, at the national (e.g. UK, Ireland, Austria), EU (Germany, France), and EU institutional (Commission and Council) levels; and the general conflict-of-law problems relating to domestic and EU-level data privacy and banking secrecy laws. Further, it risked undermining the authority of the EU and any other state that acquiesced to the US’ demands in FATCA. Again, as Bean and Wright argued, with FATCA, “[t]he choice is simple, or rather, there is no choice at all. […] Thus, we will continue to see FFIs succumb to the ‘hegemonic’ might of the United States.”458

The last major political ‘cost’ to the direct implementation of FATCA was the political cost of the financial costs—which will be discussed in more detail in the next section. Pointing to the learnings from the implementation of other major financial crime regulations such as the AML/CFT regime, “[y]et another criticism of FATCA is that its requirements place a high financial burden on FFIs”, with the Institute of International Bankers estimating initial implementation “might cost international banks over $250 million.”459 In addition to the imposition of such high costs on the FIs, these costs also presented problems for EU MS governments since costs for the implementation of regulatory problems are generally not

456 Ibid., 334.
457 Ibid.
458 Ibid., 349.
459 Dhanawade, “I Got 99 Problems and They’re All Fatca,” 151.
taxable and could, ironically, result in tax revenue losses. However, FIs choosing to divest all US assets, which many critics argued would be a natural consequence of FATCA, was not practicable either, nor would it be possible for some financial services such as asset managers and hedge funds—as well as other financial sectors who depend on their services such as pensions providers—who could not function effectively entirely outside US markets. Neither was it conceivable for FIs to remain recalcitrant to FATCA and pay the defined punitive withholding tax of 30%. As one banker at a UK ‘big-4 high street’ bank informed this dissertation, “[not complying with FATCA] would cost upward [sic] of a billion dollars a day. It would cripple us.”

The political adjustment costs of implementing FATCA in the EU were very clearly high; however, there were some political upsides to coordination, even prior to the negotiated IGA framework. As discussed previously (EU initial domestic preferences), the EU had attempted to address tax evasion and avoidance through legal mechanisms for decades. The efforts in this direction focused on the exchange of tax information cross-border but were stifled largely by EU MS with divergent preferences that made unanimity, which is required for directives, impossible. Even the pioneering automatic exchange of information mechanisms built into the EUSD were curtailed by both the number and kinds of financial assets to be reported, and the derogations achieved by Austria, Luxembourg, and Belgium, to protect what they saw to be their own interests vis-à-vis competition from the Swiss, who were only subsequently targeted by the EU to ensure even competition. Further, while the EU relied on the FATF to create the framework for the AML regime, in the tax domain the OECD had neither the international support, nor the rigour, of the FATF, and consequently the EU did not ‘download’ regulations the way it had in the case of AML from the FATF. Thus, even in its raw legislative form, FATCA presented some potential political wins for the EU.

460 Executive, "Expert Interview: Banking Regulatory Operations."
461 Ibid.
462 Again, Sharman (2006) gives the most comprehensive account of the failings of the OECD on the fight against tax havens over the prior 30-year period.
First, after global banks’ initially “scathing”\textsuperscript{463} criticism of the law, when it became clear that the law would not be repealed, the banks themselves suggested a multilateral framework with consistent standards that would enable the implementation of a single set of standards, rather than differing standards across all operational jurisdictions. This is a theme found in the literature, in wording from global banking associations, and in interviews for this dissertation with banking executives. Grinberg, citing the British Bankers Association (BBA) gives a clear articulation of the position global banks took as early as 2010 (the same year FATCA was enacted) that accords with both the literature and interviews:

> In what counts as a moment of shocking clarity by the standard of financial industry submissions to tax regulatory processes, the BBA, only months after FATCA was enacted, suggested that

> [i]n the longer term, we urge the U.S. and other nations to work towards an alternative global multilateral solution, where there would be reciprocal arrangements for all jurisdictions, and where information could be collected and exchanged between governments. We propose that consideration of a multilateral solution be an agenda item for upcoming meetings of the G20 since this is clearly an issue of international concern that requires a coordinated response.

This proposal came from the leading association for banking and financial services in the United Kingdom, which represents banking organizations headquartered not only in the United Kingdom but also around the world.\textsuperscript{464}

In essence, the banks were pleading for an intentional ‘California Effect’ in the development of global standards. As discussed in the next section on the financial and economic costs of FATCA implementation, the financial costs to states and FIs alike were enormous; having to implement differing standards for AEoI in multiple jurisdictions would have been untenable for the large banks. In the research for this dissertation, interviews with banking executives who represented their organisations at the BBA indicated that a global standard was their

\textsuperscript{463} Grinberg, “The Battle over Taxing Offshore Accounts,” 344.

\textsuperscript{464} Grinberg citing the BBA. See ibid.
single biggest point of contention with the law.\textsuperscript{465} The ability to achieve such a standard would therefore be a political win for the EU via the Commission or Council if they were able to achieve such a feat.

Second, since tax coordination, even only for the exchange of information in the EU, had largely been a failure, delivering any outcome on this issue would also have been a win. It would enable all parties to claim to be addressing tax evasion in a globally coordinated way for the first time. It would also rectify some of the failures of the previous EU-level and OECD attempts. This would be especially politically salient given the promises and claims emerging from the OECD, G20, and G8 alike. Of course, this would need to be predicated on some form of reciprocity from the US since FATCA in its original construct is purely unidirectional (information flowing to the US only). If a coordinated approach that included reciprocity could be achieved, such a coordinated effort would be a political win for the EU-level institutions, but also across the EU MS.\textsuperscript{466} It would also put enormous pressure on recalcitrant EU MS such as Austria to make domestic adjustments of their own.

Third, assuming such a coordinated approach could be achieved, AEoI would bolster tax administration, enhance financial crime enforcement, and curb HTC within the EU. Further, the EU would have a robust regulatory platform upon which to build demands with key third countries as it had done with both AML and EUSD standards.

Last, assuming all the elements above were effective, presumably such coordination would result in the substantial political benefit of reducing the EU’s tax gap (EUR 1 trillion). The ability to credibly make such a claim would be another major political win. Indeed, in the years after FATCA and CRS implementation, a handful of studies emerged to determine whether it was empirically demonstrable that these regimes reduced tax gaps. Ahrens and Bothner, for example, found that FATCA and CRS were effective in their implementation, and jointly represent a 67% reduction of the anticipated household offshore flows in their

\footnotesize{\textsuperscript{465} Executive, "Expert Interview: Banking Regulatory Operations."

\textsuperscript{466} Zuijdendorp made a similar point in his remarks at a 2012 conference on FATCA and the EU’s perspective. See, NYU, “Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part 2.”}
model\textsuperscript{467}, resulting in “the first effective international cooperation against tax evasion.”\textsuperscript{468} Their analysis presents aggregate estimates for the effects of implementation rather than an EU-centric perspective, but are still politically salient to the EU cost-benefit analysis over time.

Financial and Economic Costs

Referring to Drezner’s two central hypotheses (coordination increases with globalisation and adjustment costs increase with non-tradable and mature sectors), as with much global financial crime regulation—including as demonstrated here with the development of the AML/CFT regime—globalisation indeed increases the likelihood of coordination between the US and EU, even though the economic adjustment costs relating to financial crime regulation are enormous. Indeed, while the costs related to financial crime compliance are a constant source of complaint from the financial services industry globally and within the EU, they do not seem to have directly impacted the EU’s preferences in coordinating internationally. For example, since at least 2017,\textsuperscript{469} LexisNexis has produced its annual study on the “true cost of anti-money laundering compliance”, detailing implementation and running costs for a wide range of financial institutions.\textsuperscript{470} The study found that across five European markets (Germany, France, Italy, the Netherlands, and Switzerland) the average annual cost of AML compliance for each financial institution in those states was $21.6 million. In total for these five markets the estimated AML expenditure was $83.5 billion annually.\textsuperscript{471} Further, these annual reports consistently find that costs are directly proportional to the size of assets held by the FI. In 2019, the report indicated that the worldwide financial crime compliance costs for the year were $181 billion. Of this, the UK had the highest compliance costs of any country at $50 billion and Germany at $48 billion—each

\textsuperscript{467} To be clear, they note that this is not a net reduction; rather, it is a flows figure that is 67% lower than was projected under the model where FATCA and CRS, as dependent variables, were removed.

\textsuperscript{468} This will be discussed in greater detail in the standards section referring to the requirement under the Revisionist Model that ‘effectiveness’ is a critical measure of coordination. See Leo Ahrens and Fabio Bothner, “The Big Bang: Tax Evasion after Automatic Exchange of Information under Fatca and Crs,” \textit{New Political Economy} 25, no. 6 (2020).


\textsuperscript{470} These studies in subsequent years were rebranded to include all financial crime regulations, not just AML/CFT.

nearly twice what the US spent at $26 billion.\textsuperscript{472} The report’s rationale for this counterintuitive disparity is twofold. First, while the US had the most FIs (6000 compared to 2200 in the UK and 1600 in Germany), it also had the most FIs with the lowest asset thresholds; and second, “[a] number of factors make financial crime compliance more costly in Europe, including increasingly complex regulations, data privacy limitations, sanctions violations and labor costs”.\textsuperscript{473} In other words, regulatory operations are more expensive in the EU as a function of other regulatory constraints in the single market.\textsuperscript{474} This holds true of the other top spenders: after the US, UK, and Germany, France and Italy had the highest costs at $21 billion and $16 billion respectively. Thus, for 2019, of the $181 billion spent on financial crime compliance, $135 billion, or 75\% was spent in the EU’s top 4 economies. Further, these costs tend to significantly increase year-on-year, and especially when governments refresh or amend the regulations: the 2021 report estimates the annual cost for global financial crime compliance to be $213.9 billion, or a nearly 18\% increase from 2019.\textsuperscript{475}

This matters for FATCA because, as discussed in the chapter on both US and EU preferences, FIs saw FATCA to be akin to AML from a compliance programme and implementation perspective, thus assuming costs would be similar to the set-up and ongoing costs of their existing AML/CFT programmes.\textsuperscript{476} As Brodzka, citing a 2012 Deloitte report writes, the estimated “costs of implementing FATCA in global financial institutions may be as high as

\textsuperscript{474} In an interview with a UK, Big 4 high-street banking executive, this point was reiterated with the executive indicating that increasing costs are a key driver for large multinational banks in offshoring compliance operations to locales like India and Eastern European states where those states are building robust IT and compliance competencies. In fact, financial services outsourcing is so prevalent in India due to wage arbitrage and infrastructure development that “mini-cities” like Gurgaon, Jaida, and Noida (alongside Pune, and parts of Chennai), have developed into IT and banking hub outsource centres to meet the FS demand of large, developed economies. The executive also indicated the bank’s intention to offshore most of the BAU FATCA operations in future years.
\textsuperscript{476} As previously mentioned in the analysis of the US’ initial domestic preferences. For an in-depth examination of the similarity of treatment of the AML and FATCA regimes in their technical implementation at a bank, Al-Abdullah offers the only such study this dissertation is aware of at time of writing. See, Muhammad Al-Abdullah, An Actor-Network Theory Approach in Investigating the Information Systems Perspective of Anti-Money Laundering Compliance through a Case Study of the Foreign Account Tax Compliance Act (Fatca) Implementation in a Jordanian Local Bank (Virginia Commonwealth University, 2015).
200 million EUR”, the majority of which would “have to be spent within 2-3 years.”

This is consistent with the interviews undertaken for this dissertation where both bank executives and senior partners in Big 4 consultancies estimated FATCA and CRS would cost between £120m-£180m for implementation costs alone. Interviewees expected, however, that after the first few years, costs would level out to less than AML programmes as most of the remediation needed for FATCA would happen first, before largely becoming an automated reporting process in later years. Further underscoring the impact of these costs is a 2009 EU-commissioned report by Europe Economics to review the costs of six EU directives to financial institutions. The study found that AML was the third costliest regulatory regime for EU FIs, behind the 2000 Capital Requirements Directive (CRD, aka CRD I) which was effective from 2006, and the 2007 Markets in Financial Instruments Directive (MiFID, aka MiFID I). Thus, as a comparator, large banks expected their implementation costs for FATCA to have a similar financial impact as AML/CFT.

The financial and economic costs of FATCA implementation were therefore clearly at the forefront of considerations for not only the bargaining core, but for every state whose financial institutions had business in US markets. This is true both in terms of implementation and the ‘stick’ the US employed in the legislation itself of the 30% punitive withholding tax for recalcitrant FFIs. While this section has largely focused on the implementation costs as the key driver of the financial and economic consideration in the first of the Revisionist Model’s standards games, the coercive mechanism and its role in framing the considerations of adjustment costs is the focus of the next section.

Economic Coercion in the Bargaining Core

The second standards game in the Revisionist Model introduces the elements of economic power and coercion. Both have fundamental effects on equilibrium outcomes compared to the simple standards game. First, “[t]he introduction of market power alone increases the

478 The CRDs (I-IV) are the EU’s legislative response to the Basel capital standards.
likelihood that coordination will take place at the larger country’s preferred set of standards”, since “coordination equilibrium at one country’s standards is an increasing function of that country’s market size.”\textsuperscript{480} In other words, the larger the market size a state has, the greater the chance of coordination in line with its preferred standards. Second, for bargaining states, to encourage coordination at their preferred set of standards, “there is strong empirical evidence that the threat or use of sanctions can yield significant concessions in regulatory disputes.”\textsuperscript{481} The introduction of a coercive mechanism further changes the equilibrium calculation of the game, since “[f]or the targeted state, the preference to switch standards is no longer a question of whether the benefits exceed the adjustment costs. The question is whether the benefits exceed the costs such that switch is less costly than suffering from economic coercion.”\textsuperscript{482}

In the case of FATCA, both mechanisms are at play. With the world’s largest markets, the US is, under the Revisionist Model, the leading great power. Second, again as Grinberg so succinctly puts it: FATCA demands that states comply, “or else—with the ‘or else’ being punitive withholding taxes that, as a practical matter, would mean loss of access to US financial markets for any non-complying institution.”\textsuperscript{483} As such, FATCA represents a massively expensive—and for many of its targets, a legally tenuous—set of regulations for the world to implement, at the behest of the world’s leading great power, and under the threat of built-in economic sanctions that, for recalcitrant actors, effectively revoke access to the world’s largest markets. Still, while this presents an overwhelming exertion of force for smaller target states, under the Revisionist Model, this should not impact the equilibrium calculations for the EU. This is because, Drezner argues, “[b]etween great powers, the effects of power largely wash out.”\textsuperscript{484} That is, it is generally not possible for great powers to coerce each other since their comparable market sizes give them similar

\textsuperscript{480} Drezner, \textit{All Politics Is Global Explaining International Regulatory Regimes}, 56, 55.

\textsuperscript{481} Ibid., 65. See also generally, Drezner, \textit{The Sanctions Paradox: Economic Statecraft and International Relations}.

\textsuperscript{482} Drezner, \textit{All Politics Is Global Explaining International Regulatory Regimes}, 57.

\textsuperscript{483} Grinberg, “Academic and Journalistic Perspectives on Illicit Financial Flows.”

\textsuperscript{484} Drezner, \textit{All Politics Is Global Explaining International Regulatory Regimes}, 58.
bargaining power over each other. As Drezner notes, “[e]mpirically, sanctions among great powers have generated meager results at best.”

For FATCA then, does the coercive mechanism make any difference in the bargaining core (with the EU), and if so how? Is it the case that power between the US and EU ‘washes out’? In the language of the model, in the enhanced (coercive) standards game, how valuable is access to US markets versus the financial/economic costs of compliance to FFIs and the political costs to states of ‘giving up sovereignty’ to satisfy US law? On the other side of the coin, the question for the US becomes, how far would the US be willing to go in enforcing its ‘sanctions’ against recalcitrant FFIs, and would it risk actors exiting US markets *en masse*?

These questions have emerged in the literature on FATCA in recent years with varying perspectives on the role of sanctions and the ability of the US to ‘go it alone’ as Drezner puts it. Specifically, three authors have addressed the questions of the adequacy of US power in forcing the FATCA regime, the limits of coercive power and its domains of effectiveness, and the role of FATCA’s coercive element in the EU context. The next paragraphs briefly cover these in turn before summarising the arguments and offering a perspective.

Morse argues that despite its own power, as a function of law and logic, the US nonetheless requires substantial international cooperation to make FATCA a success. She argues this is largely due to the limits of US jurisdiction in enforcing compliance in non-US jurisdictions. Coercive mechanisms are helpful in driving action on the issue and indicating the priority the US places on the issue; however, in terms of regulatory effectiveness, the US would necessarily require the continued cooperation of other states for the regulation to deliver the desired outcomes. She writes,

> FATCA’s status as a unilateral piece of legislation facilitated its innovations. U.S. policymakers immersed in the UBS case and responding to the revealed deficiencies of the QI regime crafted an audacious statute that goes right to the doors of FFIs to demand needed information. [...] But the United States almost certainly cannot enforce FATCA all by itself.\(^{486}\)

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\(^{485}\) Ibid.

\(^{486}\) Morse, "Ask for Help, Uncle Sam: The Future of Global Tax Reporting," 537.
Morse further argues that, as with other financial crime regimes, reputation signalling might become another driver for FFIs and states to embrace FATCA. Writing in 2012, she suggested that the signal “might grow in strength as more banks comply with FATCA and as compliant banks increasingly commit to FATCA compliance through their very acts of due diligence and reporting.” She does not explicitly make this same argument for states but given that FFIs necessarily operate under the jurisprudence of their local jurisdictions, this is a reasonable extension of her idea. Indeed, she gestures to this in her further suggestion that even where FFIs are cooperating with FATCA outside the IGA framework, there would be a requirement to audit the FFIs to ensure minimum compliance standard adherence (and thereby determine whether to invoke the sanctions) that would typically be undertaken by a Big 4 audit firm. Even so, “[t]he potential of the audit firm gatekeeper enforcement strategy for FATCA is limited by the extent to which audit firms perceive that compliance will attract reputational benefits […] and by such firms’ capacity to execute their responsibility within the limits of local confidentiality requirements.” As a consequence, again, she argues that even “to the extent that a reputational strategy works, the United States will require the cooperation of other governments to enforce FATCA.” Following the lines of these two arguments, Morse seems to be arguing more generally that while the coercive element in FATCA might force states into comply, and even to derive potential benefits for signalling compliance, effective ongoing regulatory compliance would remain in need of cooperation with the foreign jurisdiction in question.

Hakelberg undertakes an analysis of coercion in FATCA employing, like this dissertation, the Revisionist Model as his analytical framework. Focusing on the use of US power against tax haven jurisdictions, he argues that tax havens will never find equilibrium in the simple standards game since the benefits of coordination against “foregone profits is a hard sell” to the local economy, and “[c]oercion by a great power thus seems to be a prerequisite for

487 This exact argument is also employed in the AML/CFT literature at multiple levels—club membership (e.g. OECD), regional, national, industry, and at the level of individual institutions—to demonstrate market and institutional regulatory soundness as an attractant for capital (especially foreign capital). See discussion in this dissertation on US initial preferences and the AML/CFT regime.
489 Ibid.
490 Ibid., 538. Grinberg makes a similar point: “[l]t was clear even before enactment that the United States could not unilaterally achieve near-comprehensive financial institution participation with FATCA.” See, Grinberg, “Taxing Capital Income in Emerging Countries: Will Fatca Open the Door?.”
successful international cooperation in tax matters.” 491 Similar to this dissertation, Hakelberg finds that despite Drezner’s great power identification schema pointing to the US and EU as the world’s great powers, this is problematic for the EU due to divergent preferences among EU MS. He gives two key examples to support the claim that the EU should not be treated as a great power, and that therefore, the application of coercive mechanisms by the US makes sense in that this is the most likely route to ensuring coordination at US preferences.

First, he notes that “the common market absorbs even more FPI [foreign portfolio investment] from three out of the five top secrecy jurisdictions than the US.” So, as a preliminary matter, the EU and EU MS have material cause to be concerned about HTC and the mitigation of HTC practices especially in the EU. Yet despite the EU being considered a great economic power, “[i]n bargaining over cooperation against tax evasion, [...] the EU has been unable to translate market size into power.” Again, similarly to the discussion here, he argues this is “because decisions on sanctions and taxation require unanimity in the Council of Ministers.” 492

Hakelberg goes on to give the example of historic corporate tax initiatives in the EU aimed at curbing base erosion and profit shifting (BEPS). Citing Pinkernell, Hakelberg writes,

Large EU members need the consent of Ireland, Luxembourg, and the Netherlands for EU-wide anti-avoidance measures. Yet, these countries serve as gateways through which US firms channel profits out of the common market. In return, they profit from an important inflow of US FDI in the form of holding companies. 493

The consequence, he argues, is that the EU is “once more constrained by internal disunity ad European law.” 494 Further, the framing of the non-discrimination laws in the EU mean that even where Luxembourg, Ireland, and the Netherlands enable large corporates to shift profits to these jurisdictions, large EU MS cannot employ effective countermeasures.

491 Hakelberg, "Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power," 511.
492 Ibid., 516.
493 Ibid., 517.
494 Ibid.
Consequently, Hakelberg concludes, “[t]he US thus emerges as the single great power also in bargaining over cooperation against tax avoidance.”\footnote{Ibid.} Unfortunately, he does not go on to articulate whether he views the Revisionist Model as requiring further explication in the event of a single great power. As discussed in the explication of the model here, Drezner’s model only accounts for a two-great power system, eliding both hegemonic and multipolar possibilities. Regardless, Hakelberg concludes that the coercive elements in FATCA were requisite to enable a globally coordinated outcome.\footnote{While Hakelberg does not comment on this directly, in a purist reading of the Revisionist Model, a failure of the EU and US to coordinate would necessarily result in no global coordination, which Hakelberg does not seem to be arguing. Rather, he writes that the US is the sole great power and that its use of coercion is effective.}

Last, several authors argue that FATCA was anomalous due to both the coercive element and the enormous expenditures required to comply; however, there is a persistent strain of thought through the FATCA literature, arguing that despite its universal unpopularity, FATCA acted as a catalyst for the EU and others to be able to act. As Vermeiren and Lips write, “[s]o how can the rise of AEoI as a new global norm be explained? While the EU pioneered AEoI with the Savings Directive, it was a US law that would serve as the catalyst for the multilateral shift to AEoI.”\footnote{Vermeiren and Lips, “The Panama Papers and the International Battle against Tax Havens: Lessons for the EU.”} Similarly, Bean and Wright argue that “[i]t is difficult to imagine a situation where the United States would get away with something so internationally invasive and draconian as FATCA without the rest of the world wanting to reap the benefits as well.”\footnote{Bean and Wright, “The US Foreign Account Tax Compliance Act: American Legal Imperialism,” 362.} Writing in 2014, they continue that there is a broad expectation that other states and groups of states will learn from and emulate FATCA, and that, “[a]s FATCA comes into effect and the benefits more fully realized, new programs and initiatives are likely to develop in other nations.”\footnote{Ibid., 363.}

To summarise, and answer the questions posed at the beginning of this section, understanding coercion in the Revisionist Model’s game as it applies to FATCA is complex. FATCA contains the coercive element in its original legal framing. As such, counterfactuals about how the law would have been received without it are impossible. However, as
discussed here, several authors make direct comparisons to similar attempts to garner international support in tax matters, to no avail for nearly 30 years prior to FATCA, largely through the OECD. In the case of the EU, even the EUSD, which innovated the AEoI mechanism and created a legal basis for it, was heavily constrained by Austria and Luxembourg on the types of information sharing it contained (limited to interest on savings accounts, narrowly defined). It is therefore reasonable to infer that without the coercive mechanism built into FATCA, states like Austria—which could not even be compelled by the EU to engage in broad-ranging AEoI—would not voluntarily comply with an expensive and complex regulatory regime that is patently against its own preferences.

Still, as Morse argued, regardless of the coercive power of a given state, coordination with smaller individual non-US jurisdictions is required for an effective FATCA regime to form. This simple point is a critical challenge to the Revisionist Model’s claim that small states do not impact the bargaining core or regulatory outcomes, since without local regulatory administration in all jurisdictions, global enforcement by the US is impossible.

In terms of whether coercion is effective in the bargaining core, and whether power between the US and EU ‘washes out’, the evidence would seem to suggest otherwise. Hakelberg’s observation that the “EU has been unable to translate market size into power” on international tax matters ironically put enormous pressure on Austria and Luxembourg to conform. Since the EU was not an effective counterbalance to the US coercion, Austria and other EU secrecy jurisdictions would be left to fend for themselves. As will be seen in the next section on the IGA approach, the EU was still, unfortunately, not able to grasp this opportunity, but in theory it was available. Thus, coercion, rather than a meaningless power play between great powers, was the critical element in the initial responsive calculus of the EU.

Last, and following from this concept, as Bean and Wright described, precisely because of the strong coercive element in FATCA, other states could use it as a foundational legal basis for their own initiatives. Indeed, this is precisely what occurred in the case of the UK and EU. As Bean and Wright, again, nicely summarise,

FATCA has gone where no U.S. law has gone before. It has brought on a new age of international cooperation (read: coercion) in tax enforcement and
information exchange, and while its objectives may be the same as prior initiatives, the impact of FATCA will reach well beyond the offshore accounts of U.S. persons and into the dark corners of the banking world.500

The simple conclusion of this analysis is that coercion itself isn’t enough to achieve a global FATCA regime; but without coercion, the FATCA regime would not have been possible: “Internationally, automatic information reporting now has substantial momentum, largely as a result of the United States’ willingness to aggressively leverage its financial markets to coerce asset management jurisdictions into accepting automatic information reporting.”501 This momentum is due in part to the law itself, but also because of the negotiated approach to its implementation in the world’s largest economies. Precisely to address the issues presented by the law and its proposed regulations—"implementation costs and compatibility with the national laws of several countries, and with EU primary and secondary law"502—in late 2011, the US, UK, Germany, France, Spain, and Italy gathered to negotiate a way forward. Once again, the EU was denied a mandate, and would not formally negotiate FATCA for the EU; instead, the IGA approach would be developed by this group of six, and would set the stage for the bargaining core.

The Bargaining Core and Intergovernmental Agreements

Drezner argues that the initial domestic preferences of the great powers set the scene for the bargaining core. Indeed, the cost-benefit calculus indicates to the great powers—prima facie—whether they are likely to coordinate with their counterpart by adjusting their standards. The FATCA timeline gives this analysis a unique opportunity to isolate the initial reaction from the EU (and the world) from the bargaining stage. This is instructive as it allows a more detailed analysis of the ‘red lines’ that each side has in entering negotiations. In the most distilled form, the preferences of the US were to have their FATCA law implemented with as few changes as possible, and ideally no changes to the law itself. The EU, conversely, needed to overcome the challenges FATCA presented to EU and MS laws (primary and secondary conflicts of law), and to reduce the costs of implementation:

500 Ibid., 359.
specifically, FFI cost reduction, simplification of the regulations, solving the conflict of law and routing issues, and reciprocity.

Since the proposed FATCA regulations, produced by the US Treasury, did not mitigate these issues for the EU, another approach was required. At this stage, the expected outcome both in the Revisionist Model and reality would be for the Commission to receive a mandate to negotiate on behalf of the EU. Such a mandate would validate the Revisionist Model’s claim that the EU is a single actor in international regulatory coordination over the global economy and would emphasise the two great power system envisioned by the model. Alas, this was not to be. As previously discussed, despite individual MS directly requesting the Commission to intervene and their advocacy for the invocation of the Commission’s negotiating powers, the Commission did not receive a mandate for FATCA. The reasons for this are unclear but based on the historical evidence it is reasonable to infer that this is due to the EU’s secrecy jurisdictions (specifically Austria and Luxembourg) preventing unanimity, as they had done within the EU in response to similar legislative efforts.

Whatever the cause, this lack of a FATCA negotiating mandate was much lamented both at the time and subsequently. In 2013, for example, the European Parliament (EP) issued a resolution on the “Fight against Tax Fraud, Tax Evasion and Tax Havens” saying that while it welcomed the US FATCA regulation’s attempt to address tax evasion as a global issue, it regretted that MS had chosen an individual, rather than EU-level approach, in the bilateral IGAs with the US. It wrote that the EP,

[w]elcomes the US Foreign Account Tax compliance [sic] Act (FATCA) as a first step towards an automatic exchange of information between the EU and the US to fight trans-border tax fraud and tax evasion; [it] regrets, however, that a bilateral/intergovernmental approach has been taken in the negotiations with the US rather than a common EU negotiating position[.] 504

Indeed, already at the end of 2011 the five largest EU MS had entered discussions with the US on the development of a bilateral, intergovernmental agreement framework (the IGA

504 Ibid., At section U., par. 15.
framework) to mitigate the fundamental issues presented by the FATCA legislation. This was despite the fact that then Council President Herman Van Rompuy had sent a letter to then US Secretary of the Treasury, Timothy Geithner, in April of the same year to discuss the practical implications of FATCA for the EU.505 Seven months later, in July 2012, the group of six states—the US, UK, Germany, France, Spain, and Italy—issued two documents, a Joint Statement and a Joint Communique, outlining the compromise position they had reached to enable EU MS to implement FATCA through the IGAs which, “address these legal impediments to compliance, simplify practical implementation, and reduce FFI costs.”506 At the same time, and as aforementioned, this group specifically rejected an EU-level approach, noting only that they would work, “in close cooperation with other partner countries, the OECD and where appropriate the EU”.507

While an embarrassment for the Council and Commission, the decision of the EU G5 to engage in direct negotiation with the US was also pragmatic and mindful of the aggressive timelines to implementation the US was pushing. In 2012, Zuijdendorp was far more candid in his articulation of both the disappointment and pragmatism felt in the Commission at the situation:

We don’t have a mandate to negotiate an EU-US solution. I’m not going to lie to you and say that we wouldn’t have wanted to have a negotiating mandate; obviously we would have preferred to negotiate on behalf of the Member States and have a single solution. […] certainly given the very tight deadlines there is a need for a pragmatic solution […] however, the Commission will review bilateral treaties to ensure compatibility with EU law and this is a role we take very seriously.508

505 The fact of this letter was given by Zuijdendorp, himself dealing with this issue at the Commission at the time, although no record could be found in the public domain (EU and US). Zuijdendorp. NYU, "Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part 2."
506 Department, "Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing Fatca."
507 "Joint Communique by France, Germany, Italy, Spain, the United Kingdom and the United States on the Occasion of the Publication of the "Model Intergovernmental Agreement to Improve Tax Compliance and Implement Fatca"."
As opposed to the typically very long timelines to negotiate and adopt EU directives, the UK was the first country to sign an IGA with the US just seven weeks after the issuance of the Joint Communiqué was published. By the end of 2014, all EU MS had either signed an IGA or had agreed an IGA ‘in principle’.

In a purist reading of the Revisionist Model, the US and the EU did not therefore form a concert since the Commission did not receive a mandate to negotiate on FATCA directly with the US. There was, however, this ‘proxy concert’ that emerged nonetheless with the US and the 5 biggest EU MS—to the exclusion of all other state actors. A more open reading of the model would allow that this group of EU MS, and the exclusion of any other states, underscores a strong US-EU-centric approach. This would also underscore historic arguments that the largest economies in the EU have disproportionate impact on EU policy and harken to the 2003 formation of the EU’s G5 (and subsequent G6 in 2006 when Poland joined the EU). As then French presidential hopeful Nicolas Sarkozy asserted in 2005, the G6 was the “new engine of Europe” and should therefore be seen as the de facto EU leadership. Furthermore, as Zuijdendorp indicate, the Commission still had a role to play since it is the ultimate arbiter of legality for any negotiated agreement between a third country and an EU MS. In other words, if the Commission did not intervene in the implementation of the bilateral IGAs between the US and EU MS, this would amount to tacit approval of the approach under EU law.

This leaves the analysis with the possibility of competing interpretations under the Revisionist Model. What is clear, however, is that the IGA negotiations did occur and IGAs were ultimately signed by every EU MS. As such, the rest of this section will focus on the content of the IGAs, and the negotiating—or bargaining core—outcomes. The question of

509 12 September 2012
510 Hereafter, G5 will refer to the EU’s bargaining core ‘representatives’: the UK, Germany, France, Italy, and Spain.
511 “Sarkozy : Les Six Grands Etats De L’union Doivent Devenir Le « Nouveau Moteur De L'europe,“ *Euroactiv*, 27 September 2005. Sarkozy argued that France and Germany should open their close alliance to the other four major EU states which altogether represent 75% of the EU’s population: “Il faut ouvrir le couple franco-allemand aux quatre autres grands pays, qui représentent avec lui 75% de la population européenne.”
512 Gratitude to Dr Chad Damro for this point.
‘the EU as a single actor’ will then be more closely analysed in the conclusion to this chapter, as well as in the conclusions to this dissertation.

As argued in the previous section, there were several critical negotiating points the EU would require in order to implement FATCA under the constraints of EU and MS law. The actors influencing the negotiations were not limited to states, however, as the Revisionist Model would demand. According to Grinberg, financial institution lobbying of all six governments “substantially benefitted” the Joint Statement, and thereby the IGA process: “the legislation’s infirmities, when juxtaposed with its political force, forced financial institutions to lobby foreign governments for a more workable regime.”513 The US willingness to compromise is also likely a function of the logical conclusion that the US could not ‘go it alone’ in its effort to achieve a global regime as argued in the cost-benefit section above. As Bean and Wright argue, “[i]t is difficult to imagine a situation where the United States would get away with something so internationally invasive and draconian as FATCA without the rest of the world wanting to reap the benefits as well.”514 Still, as the delegated authority for FATCA implementation and enforcement, the US Treasury was bound by the law as written, making any agreements that were beyond the reasonable interpretation of the law’s objectives impossible. Even so, the Treasury had total authority, within these constraints, to negotiate a way forward. Indeed, one of the more telling impacts of these negotiations is that the US Treasury did not issue the final FATCA regulations until after the model agreements negotiated with the G5 were issued and agreed. Again, these temporal elements are instructive in understanding the impact of the bargaining core.

As to the actual agreements, it is important to note that there exists a substantial technical legal and tax literature on both the IGAs, the regulations, and the law itself. While some of this detail is relevant to the analysis here, a technical explication of the model agreements and the technical workings of the regulations is beyond the scope of this dissertation.515

515 For a more comprehensive treatment of the agreements, see generally, Christians, "What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on Fatca."; Grinberg, "Taxing Capital Income in Emerging Countries: Will Fatca Open the Door?,"; DeBlis, "Making Sense of the Model 2 Fatca Agreement between Switzerland and the United States and What’s on the Horizon."; Tanenbaum and Ripley, "Fatca Model 2 Intergovernmental Agreement."; Somare and Wöhrer, "Two Different Fatca Model
Rather, the elements that are salient to this analysis centre on the negotiations, their outcomes, and the inferences that can be drawn about the power dynamics of the bargaining core due to the adjustments made by the parties involved. As such, the Joint Statements, which detail at a high level the general concessions made by both sides, will be the focus, with a few notable exceptions where relevant.

The intergovernmental agreements were delivered in the form of Model Agreements. These were designed to be standard agreements, as the name would imply, that would be used as the basis for states to negotiate bilateral agreements on FATCA implementation with the US. There were two Model Agreements: Model 1 (which in turn had a 1a and 1b variations) was the result of the bargaining core between the US and the G5. The Model 2 agreement was the result of the negotiations between the US and Switzerland. Much of the analysis below will centre on the Model 1 agreement for reasons that will become clear, but put concisely, the Model 2 agreement is more accurately described as a further variation on the Model 1b agreement. However, the idea that Switzerland was able to unilaterally engage the US in a secondary bargaining core separate and apart from the G5, but simultaneously, is remarkable and warrants discussion since this is impossible under the Revisionist Model. As such, after the Model 1 analysis, there will be a brief overview of Switzerland, the Model 2 agreement, and the states that negotiated based on Model 2.

The Model 1 IGA was the standard agreement negotiated with the G5 and was the outcome of the Joint Statement between the six states, which “committed to work together to achieve common reporting and due diligence standards for financial institutions in order to support a move to a more global system to combat offshore tax evasion.” The Statement also directly indicated that the US was aiming to create a more global reporting standard rather than collect tax:

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Intergovernmental Agreements: Which Is Preferable? A Comparison of Fatca Model 1a and Model 2 Intergovernmental Agreements.”

In the literature, IGA is the general term for all Model Agreements; the terms Model 1, 1a, 1b and 2 refer to the specific versions of IGAs.

Because the policy objective of FATCA is to achieve reporting, not to collect withholding tax, the United States is open to adopting an intergovernmental approach to implement FATCA and improve international tax compliance.518

This was an important assertion since even practitioners in financial services working on FATCA implementation as late as 2017 insisted that FATCA was fundamentally about tax rather than information collection and exchange.519

In terms of the material concessions, the first major political victory for the G5 was the US acceptance of a change to the “routing” of information under the FATCA statutes to the EU model under the EUSD. This meant that instead of the B2G model the FATCA law envisioned, under the Model 1 IGA, the reporting would be B2G2G. This solved the conflict-of-law issues that had plagued the EU since FATCA’s inception, by having the exchange of information take place between governments rather than financial institutions and the US. In other words, the Model 1 IGA “enables foreign governments to act as intermediaries on behalf of their financial institutions, by having the institutions report to their own governments, followed by government-level automatic information exchange with the United States.”520

The next major EU victory was the US willingness to reciprocate, and send the G5 states information on their resident’s US accounts: “the United States is willing to reciprocate in collecting and exchanging on an automatic basis information on accounts held in US financial institutions [...which] would enhance compliance and facilitate enforcement to the benefit of all parties.”521 Importantly, the Model 1a IGA, is the only agreement that offers reciprocity from the US, and the reciprocity under Model 1a is not equivalent:

518 Department, “Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing Fatca,” At A. (4).
519 This point was conveyed in two separate interviews. Executive, “Expert Interview: Banking Regulatory Operations.”; Partner, "Expert Interview: Regulatory Implementation."
520 Christians, "What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement on Fatca," 2.
521 Department, "Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing Fatca," At A. (5).
Specifically, the IGAs generally commit U.S. partner countries to collect information on all income earned through financial accounts of U.S. persons, gross proceeds received in those accounts, and the balance of those accounts. U.S. reportable accounts are generally defined to include depository accounts, securities accounts, and interests in hedge funds, private equity funds, and other investment arrangements. In contrast, the U.S. obligation to report is limited to those types of accounts on which the United States has authority to collect information under current U.S. law and regulations.522

In other words, not only did the US not commit to reciprocate with the same information contained within the FATCA statutes, but the information required under FATCA goes beyond what the US collects from its own financial institutions domestically. Still, as a political matter, this was a win for the G5 and the EU since reciprocity in any form enabled politicians to credibly claim a concession from the US, that FATCA was therefore also to the benefit of the EU (G5), and that the basis for a future multilateral framework was set.523

Indeed, as will be described in the next section on Standards, this is precisely what happened within the EU and OECD in subsequent years. Further, as Grinberg also notes, in the Model 1 IGA the US acknowledges the need for “equivalent levels” of reciprocity in time.524

Christians argues, however, that this equivalence in reporting is unlikely to materialise.525 This is due to strong, domestic political opposition to undermining the flow of capital to the US, in the ironic form of what other states would perceive to be harmful tax competition. She argues, “The message is clear that while preventing Americans from sheltering their

523 In addition to those cited below on the import of reciprocity, see Zagaris, “Bilateral Agreement Alternative to Fatca Implementation Brings New Twist to International Tax Cooperation,” 115.
525 While Grinberg and others have also written on the US’ “political constraints” in delivering full reciprocity due to domestic support for deepening the US’ role as a tax haven state, Christians has written and spoken on her scepticism of US support for a multilateral system most frequently and consistently. For example, Christians argues with point with Grinberg and several other leading international tax experts directly in, Christians et al., “Conceptualizing a New Institutional Framework for International Taxation.”
taxes abroad might be a worthy goal for the state, it is not so clear that a preferred strategy
would include eliminating those services at home in order to attract foreigners.” Writing
in 2013, and citing a 2010 report from Global Financial Integrity, she notes that the three
jurisdictions with the largest amount of non-resident deposits are the UK, the US, and the
Cayman Islands, “with the US leading with over $2 trillion in private, non-resident
deposits.” She goes on to argue her scepticism of the US’ intentions at fostering a truly
multilateral international framework, noting that the reality of the US position is that its
attraction of foreign capital and lack of meaningful reciprocity “puts the United States in
‘the role of Switzerland’ for other countries.” Further, as Zagaris highlights, and
underscoring Christians’ scepticism, “in order to reciprocate, the U.S. would need to finalize
the proposed bank reporting regulations (REG-146097-09) under section 6049”, which
would in turn require congressional buy-in.

Even so, the critical point of reciprocity in the bargaining core was largely political. As
Zuijdendorp explained in 2012 after the announcement of the IGA approach, “Member
States will have to pass legislation to implement FATCA IGAs. In order to be able to do this,
being able to say that they will get reciprocal outcomes will be critical. The end point should
be a balanced situation; this doesn’t mean identical information needs to be exchanged […]
but it needs balance.”

The next major victory in the Model 1 IGA for the EU is the effective removal of “passthru
payments” which, under the FATCA law would have “required that participating foreign
financial institutions withhold on payments to nonparticipating foreign financial institutions
in cases where the funding for those payments could be attributed to withholdable [sic]
payments.” In other words, this was an additional coercive mechanism designed to
prevent, or strongly dissuade, FATCA-participating FFIs from facilitating financial activity

526 Christians, “What You Give and What You Get: Reciprocity under a Model 1 Intergovernmental Agreement
on Fatca,” 7.
527 Ibid.
528 Ibid., citing a Time Magazine article.
529 Zagaris, “Bilateral Agreement Alternative to Fatca Implementation Brings New Twist to International Tax
Cooperation,” 113.
530 Zuijdendorp. NYU, “Nyu School of Law: Fatca from a U.S. And E.U. Perspective: Where Are We Now? Part
2.” Making a similar point, see also Zagaris, “Bilateral Agreement Alternative to Fatca Implementation Brings
with nonparticipating FFIs since payments from the nonparticipating FFIs would be subject to the 30% withholding tax, to be collected by the participating FFI. This element presented a number of issues for EU law, not least of which was free movement of capital. Further, and a counterpart to free movement of capital under EU law, FFIs in Model 1 IGAs would not be required to “impose passthru payment withholding on payments to recalcitrant account holders.” This meant that if an account holder refused to prove they are not a US person (recalcitrant), the FFI would not be liable to withhold against them directly.

Next, and again supporting the future possibility of genuine global multilateralism (notwithstanding the US domestic political constraints described above), the Model 1 IGA contains a “most favoured nation” clause, “something rare in double tax agreements, since it prevents differential treatment across nations, the sine qua non of such agreements.” Further to this argument, through the wide ranging concessions offered to the G5, the US Treasury, if not all of its politicians, seemed to be “opening the door” (as the title of Grinberg’s article suggests) to the possibility of a future global multilateralism with the Model 1 IGA as the basis of its standards. As Grinberg argues,

The decision to modulate these most coercive (and most clearly extraterritorial) parts of FATCA with respect to Model I IGA countries is consistent with the joint statement declaration that a collaborative approach to incentives and mandates was under consideration to ensure that other countries and institutions join an automatic information exchange system.

Finally, the EU and G5 had a fundamental concern about the financial/economic costs of FATCA implementation, which drew comparisons to the AML/CFT regime in terms of both implementation and ongoing business expenditures in its enormous financial costs. To this end, the Joint Statement noted that all six states were “cognizant of the need to keep

532 Department, “Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing Fatca,” at 3. (b).
compliance costs as low as possible for financial institutions.”535 While the changes offered in the negotiations may not have materially minimised the costs, the model agreement did enable the G5 states to use “more principles-based techniques developed for anti-money-laundering purposes to identify account holders and the country of residence of their controlling persons.”536

At the same time, the US entered similar discussions with Switzerland to negotiate a similar intergovernmental approach to implementing FATCA. The result of these negotiations was the Model 2 IGA. The Swiss model was substantially similar to the Model 1 IGA, but without reciprocity, and in using the original B2G routing mechanism under the FATCA statute. However, as DeBlis noted, while, “the Swiss-U.S. Model 2 IGA provides for direct reporting of specific accountholder information by FFIs to the IRS, [this was] subject to one very important condition: the consent of the U.S. accountholder.”537 This mattered to the Swiss because under Swiss Criminal Code, “Article 271 (1) explicitly states that, ‘[a]ny person who carries out activities on behalf of a foreign state without lawful authority ...’ commits a crime.”538 By adding the requirement of accountholder consent, the Swiss could credibly argue that their banking secrecy laws remained intact. Thus, if an FFI were to transmit the accountholder’s information to the US IRS without consent, the FFI would be in violation of the Swiss banking secrecy laws, i.e. the Swiss Criminal Code. Any accountholder who refused to give consent to the FFI to transmit their data was not off the hook, however: “Recognizing that there will always be accountholders who refuse consent, Model 2 IGA [sic] contains a built-in procedure for dealing with what FATCA refers to, in not so flattering terms as, ‘recalcitrant accountholders.’”539 The ‘procedure’ provided in the IGA is that the

535 Department, “Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing Fatca,” at A. (6).
538 Ibid. To clarify, the Swiss Criminal Code does not specify that a person would be “committing a crime” as DeBlis puts it, but rather that they are liable to a “custodial sentence” or “monetary penalty” (see terms with added emphasis): “wird mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe, in schweren Fällen mit Freiheitsstrafe nicht unter einem Jahr bestraft”. See Art. 271 (1) in, Die Bundesversammlung der Schweizerischen Eidgenossenschaft, "Schweizerisches Strafgesetzbuch," in 311, ed. Die Bundesversammlung der Schweizerischen Eidgenossenschaft (fedlex.admin.ch 1937).
539 DeBlis, “Making Sense of the Model 2 Fatca Agreement between Switzerland and the United States and What’s on the Horizon.”
FFI will report non-identifiable ‘aggregate information’ on the recalcitrant account, and “[o]n the basis of that information, the IRS is allowed to make group requests about non-consenting US accounts to the authorities of the FATCA partner country”. 540 This is an important clarification since the US-Swiss tax treaty as amended in 2009, under Article 4 of the treaty “does not allow the Contracting States to engage in so-called ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.”541 Fishing expeditions are a consistent theme in administrative assistance in tax matters, and as previously discussed were a specific limitation on the broad AEoI-style arrangements under FATCA and EUSD. In the Model 2 IGA, since there is a legal basis to make a specific request (‘group request’), these would not amount to a fishing expedition. In turn, these ‘group requests’ enable complete information on the recalcitrant accounts to be handed to the US government by the Swiss government.

This confusing structure existed essentially only to allow the Swiss to maintain their secrecy laws by giving accountholders a ‘choice’ on whether to consent, and thereafter enable the usual reporting that is like the Model 1 IGAs, through the group request mechanism. As Grinberg notes, “the end result for the United States is much as if the Swiss agreed to provide information automatically to the IRS, albeit through a more cumbersome routing mechanism.”542

There is an obvious question for the Revisionist Model in the US-Swiss negotiations of why the US would agree to negotiate with Switzerland at all. After all, the model would predict that the US would make no adjustments for the Swiss; in fact, due to the dramatic disparity in market size, the model predicts the US would be able to coerce the Swiss into adjusting to US preferences on any regulatory matter. This question, alongside the obvious questions implied by the G5 negotiating on behalf the EU, will be addressed in the Analysis and Conclusions chapter. For the purposes of this analysis, however, in addition to a case that

542 Grinberg, "Taxing Capital Income in Emerging Countries: Will Fatca Open the Door?," 14.
could falsify the Revisionist Model, the Swiss Model 2 IGA had a material impact on the outcome of the overall negotiations for the EU. Namely, as individual states negotiated their IGAs with the US, they were presented a choice of the Model 1 family or Model 2 family of IGAs. Perhaps to no one’s surprise, the only EU MS to choose a Model 2 agreement, was Austria, following once again in Switzerland’s footsteps.

With the general conclusion that the IGA negotiation process results in a great power concert—with the G5 in lieu of the EU as a single actor—for the regulation of tax information exchange, the next and final step in the Revisionist Model is to analyse the Standards predicted to emerge from this concert.

Chapter 7: Step IV: Regulatory Outcomes and the Standards Typology

As argued in the last chapter on the bargaining core, a great power concert was formed, and agreement on international coordination for the implementation of FATCA resulted in the IGA framework. So, what kind of standards emerged? To answer this question, it is critical to evaluate the actions that occurred after the IGA framework was agreed. The Revisionist Model’s typology for standards (see Table 4.1) allows for a range of four possible outcomes for the bargaining core: harmonised standards, club standards, rival standards, and sham standards. In addition to the terms agreed in the great power concert for the adjustments that each power will make, Drezner argues that the conditions for regulatory coordination, effectiveness, and governance should generally be met (for the definitions, see above, in the explication of the Revisionist Model, ‘Explaining the Standards’). In short, after the agreed IGA approach is there evidence of codified adjustments to national policy (coordination); is there evidence that these adjustments were widely adopted, and that the adjustments were of a large magnitude (effectiveness); and did an independent monitoring and global surveillance system emerge to manage the standards (governance)? The answers to these questions will inform which of the four standards FATCA likely falls into.

To describe the analytical process here, it is also important to note the temporal aspect of the emergence of the new FATCA standards. As with several of Drezner’s own case studies explicating how the Revisionist Model works in practice, there is often a temporal element to consider when evaluating standards. As previously discussed, Drezner does not directly address the temporal element in these considerations, and variously applies the model to
short time spans of just a few years, and equally to examples spanning more than thirty years. For the analysis here, the timespan under investigation is the years 2010-2014: from the enactment of the FATCA legislation to its ‘go-live- date in mid-2014, and finally to the end of 2014 when the last EU MS was considered to have an IGA in principle. The period from 2010-2012 takes the analysis from FATCA’s enactment to the end of the initial IGA negotiations; the remaining years, 2012-2014 are therefore the period under consideration for the formation of standards. While this is a short time span, and there have continued to be significant developments on the international tax issue area up to the present, in the case of FATCA, this is surprisingly enough time for a sound analysis on standards. Further, while international tax has continued to develop since 2014, interestingly, the developments have had little impact on the claims that will be made on the standards here. Citing Stephen J. Gould’s famous concept of “punctuated equilibrium”, Grinberg argues that international tax is “particularly susceptible” to its machinations: “There are short periods of advancement, separated by long periods of stasis.”

The next section describes the whirlwind of events that led to the formal go-live date for FATCA, laying the foundation for the subsequent section which draws conclusions about what types of standards emerged.

Timeline of events: 2012 to 2014

Perhaps ironically, the lack of a role of EU-level institutions in the development of the bilateral approach to the IGA framework gave the EU the impetus to legislate a FATCA-like framework on an intra-EU basis culminating in updates to the DAC in 2014 with the adoption of the so-called DAC2. The global focus on legislative action relating to tax evasion stemming from FATCA, G20 and G8 summits, as well as the new mandate (from the G20) for the OECD to create standards, “provoked” the EU to produce a proposal for an updated DAC in 2013, four years ahead of the original 2017 timeframe for its review. Several specific events led to this ‘provocation’. First, the Joint Statement and Communiqué in July were followed by the UK’s IGA in September. Then in December, the Commission issued a

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543 Ibid., 21.
communication on an “Action Plan” to “strengthen the fight against tax fraud and tax evasion” which appeared alongside two Commission recommendations: the first on aggressive tax planning, and the second “regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters”.

Then, just four months later, in April 2013, a damning study emerged from the EP on the size of the EU’s tax gap. Where the US tax gap had been estimated to be USD 100 billion, the European Parliament’s report stated a figure of up to EUR 1 trillion in tax losses across the Union per year. As described in a Parliamentary resolution the following month, May 2013,

 [...] an estimated and scandalous EUR 1 trillion of potential tax revenue is lost to tax fraud, tax evasion, tax avoidance and aggressive tax planning every year in the EU, representing an approximate cost of EUR 2 000 [sic] for every European citizen each year, without appropriate measures being taken in response.

This same resolution also added two surprising acknowledgments in its text: the resolution cited FATCA directly for the first time in a piece of EU legislation; and, it specifically welcomed in its proposed actions to “be at the forefront of the EU tax gap strategy” the Commission’s “inclusion of the listing of tax crimes as predicate offences to money laundering in the scope of the new Anti-Money Laundering Directive” and called for its

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548 See chapter above on the US’ initial preferences.
550 See (A) of preambular remarks in, Parliament, "European Parliament Resolution of 21 May 2013 on Fight against Tax Fraud, Tax Evasion and Tax Havens (2013/2060(INI))."
“swift implementation”. This signalled for the first time the formal convergence of the underlying import of the AML/CFT architecture and due diligence framework to tax-related legislation (albeit through a soft law mechanism), while simultaneously hinting at the provisions in the Model 1 IGAs for the use of the ‘lesser’ AML due diligence standards. Further, this acknowledgement in the context of the direct reference to FATCA was a remarkable structural development for the EU in building its own regulatory framework for the automatic exchange of information that would be in line with the international standard. In other words, the EU was using FATCA to make codified adjustments to its own standards. The language in the resolution further reproaches the five MS who agreed the IGA approach with the US directly. The EP wrote that it,

[c]onsiders it of paramount importance that Member States authorise the Commission to negotiate tax agreements with third countries on behalf of the EU instead of continuing with the practice of bilateral negotiations producing sub-optimal results from the point of view of the EU as a whole and often also of the Member State concerned.

The EP’s frank resolution preceded, by a day, the proposal for the DAC2 which further drove the message of AEoI as the EU preferred coordinating point as it “requested the extension of automatic information exchange at Union and global levels with a view to combating tax fraud, tax evasion and aggressive tax planning.” Prior to these strong admonitions from the EP, the relative incapacity of the EU to legislate on international tax matters had been caused by MS who aimed to protect their banking secrecy and privacy laws above the administrative tax concerns of both other MS and third-party states by simply denying unanimity to hard-law directives. The convergence of the AML/CFT regime and the exchange of information regime, the latter of which was forming at pace, meant that the

551 Ibid. At section U., paragraph 27.
552 There are now six versions of the DAC, the most recent being DAC6 which was adopted in 2018. DAC5 finally realised the firm join-up of tax enforcement and the AML/CFT regime by mandating the “access by tax authorities to beneficial ownership information as collected under AML rules.” See Commission, "Administrative Cooperation in (Direct) Taxation in the Eu" Emphasis in original.
regulatory elements existed to build such a framework within the EU, and the growing international and EU pressure to conform to emerging standards was forcing legislative action in the EU. Indeed, the IGA framework was building momentum with 19 IGAs signed by January of 2014 including all five of the negotiating EU MS (G5), plus Ireland, Denmark, Malta, the Netherlands, as well as all the UK’s Crown Dependencies (Jersey, Guernsey, and the Isle of Man) and the UK Overseas Territory, the Cayman Islands. These latter agreements were seen as foundational since the UK, its Crown Dependencies, and several of its Overseas Territories have traditionally been regarded as tax haven jurisdictions.555

In addition to the IGA framework, the international political landscape was also experiencing a strong focus on these issues from 2012 to 2014. Both the academic literature and the content of EU law recognise the roles international bodies played in shaping the regime—especially the OECD and both G20 and G8 summits—by adding momentum to the emerging AEoI regime as well as to the EU legislative agenda. Before describing the role of the OECD and its mandate from the G20, it is important to again note that the Revisionist Model argues IGOs and NGOs do not affect great power preferences, however, they do play a role in governance. Drezner argues that great power states will use IGOs and NGOs to facilitate their preferred outcomes but that the organisations themselves do not affect those preferences. This claim is very much supported by the role the OECD played and especially the timing of their centrality in framing the resulting FATCA/AEoI international regime. While the OECD would become the locus of administration and development for the international regime, this came only after the US and G5 agreed to implement FATCA based on the IGA framework. The OECD’s role was initially to build the IGAs into an international standard. In other words, it was acting in a governing capacity which is exactly the type of role the Revisionist Model would predict. However, there are two important caveats to this interpretation. First, this interpretation accepts the US and G5 as the de facto bargaining core for FATCA in lieu of the Commission or Council. And second, the adoption of the DAC2—the key intra-EU legislative outcome of FATCA—essentially downloaded the

standards for AEoI directly from the OECD exactly as it had downloaded the AML/CFT standards from the FATF. Still, even with these caveats, the preponderance of evidence leads to the conclusion that EU preferences were already set to AEoI as a function of the IGA bargaining core and EUSD, and that these preferences were not a consequence of OECD or any other IGO/NGO’s actions. That is, the EU had already cross-loaded its preferences to the OECD in the form of the Model 1 IGA.

In 2012, the G20 Los Cabos Leaders Declaration concluded that, “[i]n the area of tax, we reiterate our commitment to strengthen transparency and comprehensive exchange of information”, and further recognising the convergence of the tax information exchange and AML/CFT regimes, noted that the group welcomed the FATF’s developments in “using AML/CFT tools in […] increasing cooperation against tax crimes, addressing the risks posed by tax havens”.\(^556\) Part of this declaration was in response to a request from the previous year’s G20 summit (2011) for the OECD to develop a report on AEoI and the G20’s commitment to “consider” implementing AEoI “on a voluntary basis”. While the intention of the 2011 request for the OECD report was not formally stated, in an interview undertaken for this dissertation, a senior partner at a Big 4 consultancy who had worked directly with the OECD on the development of the AEoI regime, indicated that the request, “was where the G20 was testing the waters for FATCA because everyone hated it. They basically wanted to see, A) if people would do AEoI without the big stick of FATCA and then they could convince the US to repeal it, and 2. [sic] if FATCA was really going to happen, which countries would fight it.”\(^557\) At the 2012 summit, however, it was clear that FATCA was indeed ‘happening’; in fact, less than two weeks later the US and EU MS issued their joint statement on the IGA approach.

The development of international consensus on AEoI as the new global standard persisted in 2013, becoming a focal point for both G8 and G20 summits. The June 2013 Loch Erne G8 Summit\(^558\) famously focused explicitly on these issues with half of its declarations aimed at


\(^{557}\) Senior Partner, “Expert Interview: Regulatory Implementation.”

\(^{558}\) The G8 states represented were Canada, France, the UK, the US, Italy, Japan, Germany, and Russia. There was also representation from the EU (both the Council and Commission presidents) and Ireland attended as a guest.
implementing AEoI globally to curb “the scourge of tax evasion” and keeping the theme of converging the AML/CFT and AEoI regimes through beneficial ownership: “Companies should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily.” Three months later at the St. Petersburg G20 Summit the agenda had an entire section devoted to the topic, where again the commitment to AEoI was clear and the expectations were global in scope:

we fully endorse the OECD proposal for a truly global model for multilateral and bilateral automatic exchange of information. Calling on all other jurisdictions to join us by the earliest possible date, we are committed to automatic exchange of information as the new global standard[.] The G20 declaration also formally called on the OECD to present “a new single global standard for automatic exchange of information by February 2014 and to finalizing technical modalities of effective automatic exchange by mid-2014.” Both the language of bilateral agreements in the declaration and the timing of mid-2014 were direct references to FATCA’s IGA framework and its US Treasury-mandated go-live date of 1 July 2014.

The OECD did indeed produce a global standard in February 2014. In the words of the Revisionist Model, the governance mechanism was taking ownership of the new global standard that emerged from the regime. Its version of these standards, “dubbed the Common Reporting Standard (CRS)”, contained an updated formal pledge mechanism, the Multilateral Competent Authority Agreement (MCAA), and required states to share information automatically following the G20 dictates of automaticity as the preferred international form. By June, the full CRS standard was delivered and approved by the OECD, and later fully endorsed at the September G20 summit in Brisbane. Alongside the full CRS standard, the OECD produced an implementation handbook, which included a

561 The MCAA is recognised as an international legal mechanism into a FATCA IGA. That is, if a state does not have either a bilateral tax treaty with the US, or a TIEA with the US, it can formally accept the requirements of the MCAA, which would qualify it to negotiate an IGA with the US and the emerging multilateral CRS scheme.
comparison of the FATCA requirements to the CRS framework. This comparison is instructive since all publicity surrounding the G20 and G8 summits’ declarations on these matters clearly indicated a multilateral consensus. The reality, however, was that the FATCA IGA model was the core of the CRS: “the Standard was designed to build on FATCA Model 1 IGA, given that many of the jurisdictions implementing the Standard will also be implementing their FATCA Model 1 IGA.” This is notable for two reasons. First, the Revisionist Model argues that a great power concert is both necessary and sufficient for global regulatory coordination on any issue. The fact that the IGA framework, as an outcome of the bargaining core, formed the basis of the CRS would strongly indicate not only a great power concert, but that this central claim in the model holds true—under the condition that the G5 represent the EU as a single actor. Second, despite repeated scrutiny and, ostensibly, multiple opportunities for both ‘small states’ within the G20 and G8 and IGO’s (including the OECD itself) to influence the preferences of the bargaining core, this apparently either did not occur, or attempts had little impact. Rather, the IGA framework as an outcome of the great power concert was adopted as the new standard, forming the basis of a new global regulatory regime.

Following these developments, the EU intended to adopt the new CRS standards formally, requiring new EU legislation. This was accomplished, as Somare and Wöhrer describe, “[t]he momentum provoked by FATCA has brought about the need for a new amendment of the Directive on Administrative Cooperation (DAC) earlier than envisaged. One of the main reasons for the efforts to amend the DAC was the most favoured nation clause provided for in Article 19.” Specifically, Article 19 stated that,

Where a Member State provides a wider cooperation to a third country than that provided for under this Directive, that Member State may not refuse to

564 Here, for obvious reasons, Switzerland, and the other Model 2 IGA signatories (Japan, Bermuda, Chile, and Austria) who had signed by mid-2014 are treated as part of the overall FATCA regime. Challenges to this claim based on the EU as a single actor will be addressed in the analysis and conclusions chapter.
provide such wider cooperation to any other Member State wishing to enter into such mutual wider cooperation with that Member State.\textsuperscript{566}

Again, by the end of 2014, every EU MS had either signed an IGA with the US, or had an IGA negotiated “in substance”. Using Article 19\textsuperscript{567}, this meant that the EU now had a legal basis for legislating an intra-EU framework that mirrored the IGA framework. The mechanism for this was to update the DAC 2011, which, as previously discussed had already attempted to approximate the requirements under FATCA in the EU but failed largely due to Austria and Luxembourg holding out to protect their banking secrecy interest. In the new context, the DAC was the obvious legislative starting point. Indeed, “[i]n order to comply with the OECD’s CRS and apply the multilateral standard to its internal market, the EU had to amend its” DAC 2011.\textsuperscript{568} The adoption of the new DAC2 which mandated AEoI in the field of taxation, and closely approximated FATCA came in December of 2014.\textsuperscript{569} One critical difference, however, is that the DAC2 contained additional data protection measures as discussed in the cost-benefit analysis: “One important distinctive feature of the DAC 2 [sic] is that it explicitly provides for the protection of taxpayer rights by referring to the Data Protection Directive – a dedicated legal instrument safeguarding the protection of personal information.”\textsuperscript{570} As described in the Political Costs and Benefits section, the EU and US treat data ownership differently both generally and for the purposes of AEoI. Thus, codifying this preference into the DAC2 was a signal from the EU about the import of its own legislative framework, as well as the issue of data privacy more generally.\textsuperscript{571}


\textsuperscript{567} The use of Article 19 to force an intra-EU legislative framework was correctly predicted by a number of scholars at the time the DAC 2011 was adopted. See, e.g. Wigan, "Offshore Financial Centres."

\textsuperscript{568} Vermeiren and Lips, "The Panama Papers and the International Battle against Tax Havens: Lessons for the Eu."


\textsuperscript{571} While it is beyond the scope of this analysis, the 2016 GDPR is considered a key example of EU law setting the international standards for data protection, and more generally an example of the EU translating its power to global regulation. Notably, the Commission’s first proposal for GDPR was 25 January 2012, so was well known by the time the DAC2 proposal was issued. On the emerging GDPR literature, see, e.g. the 2020 Policy Studies Special Issue (Vol. 41, Issue 5), as well as, Michelle Goddard, "The Eu General Data Protection Regulation (Gdpr): European Regulation That Has a Global Impact,” International Journal of Market Research 59, no. 6 (2017).
Thus, within the span of two years, every EU MS has agreed a FATCA IGA with the US, played a significant role in establishing the OECD as the monitoring mechanism for global governance or the standard, and the EU—whether a single actor in the bargaining core or not—incorporated the new CRS standard into its legal framework in the form of the DAC2. Furthermore, the EU, as it had done previously with the AML regime when downloading and cross-loading regulations from the FATF and US, took the CRS a step further by codifying EU-specific data privacy protections.

As noted above, if the EU pioneered the legal basis for AEoI in the EUSD, and FATCA provoked the EU and the world to create and implement a global standard, it was again the EU who set the standard for AEoI as a multilateral regime. Since the instantiation of the DAC2, the intra-EU model has been considered the premier example of multilateral AEoI. Of course, the CRS framework has also grown, but in a perhaps unsurprising irony, the only major state to remain outside the growing global multilateral framework is the US.

Rivalling Standards
Following the standards typology in the Revisionist Model, the analysis of standards emerging from a bargaining core that resulted in coordination should yield either club standards or harmonised standards. In the case of FATCA, or AEoI more generally, the previous analytical distinctions/difficulties on whether the EU ought to be treated as a single actor matters most here. This leads to at least two competing interpretations under the model, depending on the role of the bargaining actors, and the definition of policy/regulatory convergence. As a starting point, the first two interpretations will address the treatment of the EU as a single actor in the model. The third and fourth interpretations address the degree of convergence in the regime. The latter two specifically analyse whether the different versions of IGA Model Agreements constitute a harmonising framework for policy, and whether the multilateral, intra-EU DACs and CRS frameworks constitute a break from the coordinated equilibrium.

First, the EU treated as a single actor (via the G5) bargained with the US to reach a coordinating equilibrium through the IGA mechanism. For the US, fundamental changes to the law and regulations that remove the most coercive and legally untenable elements of FATCA for the EU demonstrate adjustment of US initial preferences toward the coordinated
equilibrium. Similarly, for the EU, the IGAs, once codified in national law, fill the model’s requirement for adjustment to the status quo preferences of the EU and demonstrate adjustment to the coordinated equilibrium. Further, taking all variations of FATCA outcomes (compliance through the regulations for non-IGA jurisdictions, or any one of the five Model IGAs) as part of the intended regime, there is still sufficient variation that under the definition of harmonised standards, this could not be considered universal policy for all states. Thus, club standards, being the only other coordinated outcome must be the result. However, club standards also present some variation to a purist reading of the Revisionist Model. For example, club standards predict high conflict with small states whose preferences are outside the preferences of the great power concert. As a result, the great powers will forum shop for IGOs to build standards and move toward harmonisation. This in fact occurred through the development of the CRS in the OECD, but linking this as a causal mechanism to the great power concert’s motivation for harmonisation is tenuous.

Hakelberg observes, referring to the Revisionist Model, that based on market size alone, the great powers would be able to coerce any recalcitrant states into cooperation. However, IGAs are a mechanism that force the US to adjust its preferences to the benefit of the counterparty, and is not necessarily the US preferred approach for all states, especially developing economies. Implementing the regulations as opposed to negotiating an IGA, therefore, is representative of the US’ policy aims. As such, Hakelberg is correct since, regardless of the route (IGA or regulations), no states escape the requirement to comply with the US regime in some form (unless, of course, all their financial institutions operate entirely outside US markets). Further, as discussed previously, from 2012-2014, the US focused on IGAs with larger states and tax haven jurisdictions, leaving out many developing states. Grinberg argues that many of these developing states, who potentially stood to benefit most in curbing tax evasion, were left out due to limitations in their regulatory capacity, not as a function of conflicting interests. The club standards therefore seem most appropriate as an outcome in this framing, albeit with some unresolved

573 See generally, Grinberg, "Taxing Capital Income in Emerging Countries: Will Fatca Open the Door?."
methodological limitations in the typology’s ability to explain the outcomes and preferences of all states fully.

Second, if the EU is not treated as a single actor, an initial reading of the Revisionist Model would suggest that there was no great power concert formation. This leads to a conclusion that no coordination occurred, and coordination is a prerequisite for club and harmonised standards. Consequently, the only standards applicable are rival and sham standards. However, neither of these is representative of the outcome for the EU or internationally since every EU MS signed an IGA in the first and second waves, and the Model 1 IGA, through the CRS, eventually became the basis for intra-EU law. This interpretation would imply that rather than a literal bargaining core where formal negotiations take place, states making mutual adjustments to meet an equilibrium over time, and independent of a formal process, is also possible. This is a variation of what Drezner notes in his discussion on the limitations of the model: “The presence of a bargaining core does not guarantee that a bargain will be struck, however—it merely indicates that a bargain is possible.”

Conversely, a reasonable inference from the evidence is that the absence of a bargaining core does not mean that a bargain will not be struck.

Third, it is important to consider the form of coordination required under the model. Noting that “[o]perationalizing a common measure of the dependent variable—effective regulatory coordination—across issue areas is extremely problematic”, Drezner does not give a formal explication or definition of his ‘dependent variable’ beyond his assertion that coordination (presence of codified adjustments), effectiveness (extent of compliance and magnitude of adjustment), and governance (presence of ongoing authority relationships and monitoring) are the key considerations in ‘effective regulatory governance’. For all models of IGA, the regulations, the CRS and the DAC, these definitions are seemingly met since under all these forms, there are costly and extensive codified adjustments, and varying degrees of authority relationships (bilateral) and oversight/monitoring (OECD’s management of the CRS, and EU oversight of the DACs). While its clear that there are forms of global coordination, all based on versions of FATCA and/or its IGAs, policy convergence at the state level is variable. From

574 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 208, emphasis in orignal.
575 Ibid., 25.
this perspective, the Revisionist Model’s typology does not seem to have an appropriate overall category that robustly explains the type of coordination present under the FATCA regime.

Last, and following from the above, another explanation of the problematic application of standards to describe ‘effective regulatory coordination’ under the FATCA regime focuses on the form of application: bilateral versus multilateral systems for the same policy standards. Since the whole world is affected by bilateral arrangements (either through state-led bilateral IGAs, or contracting on a B2G basis under the regulations), at a minimum, club standards are an appropriate description. Taking this to its logical extreme, from the perspective of the US, the FATCA model is essentially globally harmonised. However, from the perspective of multilateralization of the AEoI policy standard, there is a strong argument for rival standards, since the US has so far declined to engage in CRS. Further, even the US promises of reciprocity under the IGAs is largely unratiﬁed an not in practice on the US’ side.576

In two papers as early as 2013 and 2014, Eccleston (with Gray and Woodward respectively)577 argues a very similar point. In 2013 Eccleston and Woodward note that competing interests to inﬂuence OECD outcomes in establishing the CRS meant that there was a risk of the OECD becoming a “victim of ‘forum shopping’” with rival standards emerging. However, the following year, with Gray, he notes that despite scholars’ “traditionally lament[ing] the emergence of rival standards” that this can lead to positive regulatory competition and innovation. If the rift of bilateralism versus multilateralism is read as rival standards, not of policy, but implementation and scope, then an interesting question for further research would be whether this will indeed lead to further innovation, or set the stage for a second bargaining core this time led by the EU to force a multilateral approach on the US. In other words, it remains to be seen whether the emergence of a global multilateral framework based on the OECD’s CRS (itself based on the Model 1 IGA)

will enjoin the US to trade its essentially unidirectional, US-centric model for the new global standard.

The discussion on the standards resulting from the bargaining core is inconclusive, and predicated on both the treatment of the EU as a single actor (or not), variation in the interpretation of the dependent variable, and the question of whether it is the structure (bilateral versus multilateral) rather than the policy that is most important. A final interpretation is that it could simply be too early to tell. Perhaps the debate over multilateralism is the next iteration of a bargaining core for global AEoI. Following from the previous discussion on Christians, however, one is not hopeful of these prospects, and wonders whether the US will indeed be allowed to transform itself to the world’s premier tax haven or if the EU will be able to develop a coordinated multilateral system.

Chapter 8: Analysis and Conclusions

This final chapter will analyse the findings in the process of testing the Revisionist Model, taking the same stepwise approach as the testing itself, and summarising the overall findings at the end. Then, the conclusion to the dissertation will address the research question, the contribution the research makes, and the key areas for further research.

It is also important to note that Drezner details his own reflections on the limitations of the model and the intention is not to rehash those reflections here, except as they relate to findings and outcome from the tests. Rather the analysis here aim to address more clearly some of the limitations through the case study of FATCA, and ultimately, to understand the benefits of the model’s future use as a tool for global regulatory governance and possible enhancements.

Analysis

Step I

As discussed in Chapter 3, there were consistent methodological issues in the testing relating to the identification of the ‘great powers’. Drezner’s market-size-based independent variable definition for the model encountered to primary issues. First, the EU as a single actor presents multiple interpretive issues throughout, and second, focusing only on the
great powers misses the role of small state actors that have critical impact on international coordination.

In each step, analysing the EU as a single actor was problematic. In the identification of the great powers, based on the market-size analysis, the US and EU were still clearly the two great powers. However, this construct missed the possibility for a multipolar power dynamic, as evidenced by real world events in this case study. This was evident in the research here on global tax regulation in the role of the G5 as well as the role of states that are critical to the issue of tax competition. Drezner’s central claim that small states are not important to the question of whether international regulatory coordination occurs was demonstrably false in this case study. As a result, while the research did attempt to consistently address the impact of these states, since these states are not central to the model, there is a risk that individual states’ influence and impact on global regulatory issues in future research.

The model would therefore benefit from a more diverse approach to independent variable creation. As previously noted, Quaglia, for example employs regulatory capacity as the explanatory variable of financial regulation in the EU, which could be employed as a counterpart variable in the Revisionist Model. As she observes, “[a] large market and a strong regulatory capacity are two necessary and complementary conditions for a jurisdiction’s ability to influence international regulatory convergence in finance.”

It is also likely the case from the evidence presented here that in addition to market size and regulatory capacity, a state’s power can also derive from its relationship to the issue area. As evidenced in both domestic preference setting, as well as the development of the IGA approach, and the resulting multilateral developments at the EU and international levels, the role of Switzerland impacted, at every stage, the ability for even the great powers to coordinate. This is something that the model not only dismisses but rejects as a possibility. As evidenced in the development of the EUSD for example, Switzerland had an outsized impact on the EU’s own ability to legislate on an intra-EU basis. This was due to the threat that the EUSD placed on EU banking secrecy jurisdictions (primarily Austria and

Luxembourg), since they would be at a competitive disadvantage compared to Switzerland, and to a lesser extent, Andorra, Liechtenstein, Monaco, San Marino, and the UK’s Crown Dependencies. As Grinberg and Morse observed, these jurisdictions seemed to follow the Swiss lead on all regulatory developments that affect banking secrecy and privacy. Thus Switzerland had a direct impact on the EU’s ability to establish stricter rules in the EUSD.

Conversely, as Hakelberg notes, the EU was able to force Switzerland to capitulate to an EUSD-type bilateral agreement, however the Swiss managed to negotiate preferential terms and a long implementation timeline. In turn, this timeline impacted the EUSD in the form of derogations for Austria and Luxembourg. Again, while the EU arguably managed to translate its power in the Swiss negotiations, this power did not have an immediate effect, nor was the EU able to consistently translate its power vis-à-vis non-EU European secrecy jurisdictions.

Similarly, the US was able to force a negotiated approach to FATCA implementation with the Swiss but was required to make significant adjustments in the process of the developing the Model 2 IGA. For the Revisionist Model, the possibility of such an occurrence—a small state forcing concessions on an international regulatory issue from a great power concert—is flatly precluded. This leads to the next question of why they Swiss were able to exert such influence. The evidence would suggest that this is directly related to the issue area, and a more detailed analysis will be shown in the next section.

Last, the bargaining core for the development of the IGAs is the single biggest challenge to the Revisionist Model’s identification of great powers. Indeed, as discussed above, there is clear evidence that, at least in this case, power derives from issue areas themselves. Here the role of the UK in leading the G5 negotiations and response to the US is likewise diminished by the model. The UK was arguably the single most important state for the US in negotiating the IGA framework. In interviews, this view was repeated by regulators and banking executives on both sides of the Atlantic. As described in the literature review, the model might also benefit from issue area-specific considerations in financial regulation such as how financial systems affect regulatory preferences. The VoC literature points to broad

579 Hakelberg, "Coercion in International Tax Cooperation: Identifying the Prerequisites for Sanction Threats by a Great Power."
categorisations of states as CMEs and LMEs, which may go some way to understanding systemic differences. However, again, as Hardie et al note, the US and UK as the “archetypal” LMEs, but with material differences. Further, through the lens of MBB, the UK is heavily intermediated which may have impacted the preference formation for the UK with respect to FATCA. Interviewees suggested that the primary objective for the UK through, for example the BBA and influence at the OECD, the IGA negotiation process was to remove the coercive mechanisms, and especially the passthru mechanism envisioned in the FATCA legislation. This would support a view that the UK had more to lose, and gain, from being a ‘first mover’ on the IGA process.

Thus, in addition to market size and regulatory capacity, issue area-derived power is an area for consideration in future research. Certainly, for global tax regulation, this plays a material role in understanding the power dynamics for global coordination. This leads to Drezner’s acknowledgement “the theory presented here does not assume that state preferences are derived from the structure of the international system.”580 The evidence here suggests that research in this direction is warranted, since both tax coordination generally, and combating harmful tax practices specifically, as Morse argues, cannot be successfully achieved, even by a hegemon.581

Perhaps the most compelling research in this direction comes from network theory, which constructs models to identify systemic importance. The critical difference between systemic and structural approaches is that systemic approaches quantify the power of a given state not only in reference to another state, but in relative to the entire system of actors. As an output of the FSAP process, the IMF developed three such models to help articulate systemic importance in the stability of the global financial system.582 The focus on

580 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 209.
581 Morse, “Ask for Help, Uncle Sam: The Future of Global Tax Reporting.”
interconnectedness yields compelling results. Their ranking of the most systemically important financial actors identified a list that far better predicts the actors important to FATCA than purely market-size-based approaches. The IMF’s 2013 ranking of the top ten systemically important financial centres comprises a list of actors familiar to the research presented here:

1. United Kingdom
2. United States
3. Germany
4. France
5. Japan
6. Italy
7. Canada
8. China
9. Switzerland
10. Spain

It is important to note that the approach employed by the IMF still finds market size to be a critical and central component of their analysis, alongside interconnectedness. Still, prima facie, this list better approximates the states most critical to the emergence of the FATCA regime—compared to the Revisionist Model’s bipolar approach—as it includes all G5 states, as well as the US and Switzerland.

In summary, while the market-based approach in the Revisionist Model is a helpful and reasonable heuristic, modifying the construct of the independent variable to include, for example, regulatory capacity, issue-area import, and systemic importance, could produce a more targeted and relevant set of actors. Therefore, these approaches are strong examples of further research opportunities in enhancing the Revisionist Model. Encouragingly, there

are some early examples of the use of network theory in IPE addressing questions related to financial regulation (amongst others).[^584]

Step II

Since the Revisionist Model uses, in part, codified adjustments (as well as extent and magnitude of adjustments) to determine outcomes, this analysis started from the premise that existing codified standards relating to the issue area was the best place to begin in examining initial preferences. At the time it was enacted, FATCA was a radical regulatory innovation, however several of its internal mechanisms had been discussed in the EU, US, and international fora (namely, the OECD) for decades. The automatic exchange was not new, nor was the need for broad-ranging international cooperation for a successful regime. And while the concept of limiting market access as a coercive measure was well known, it had not been deployed on an extraterritorial basis as a global tactic. It was rather the combination of these elements that made FATCA unique.

To understand the initial preferences of the great powers with respect to FATCA, this research identified three focus areas. First, existing legislation for the range of related regulations was easy to access through both the EU and US governments. These gave insight to the trajectory of the regulatory development in the case of the merging of AML and CFT, and subsequently the convergence of both tax information exchange and tax crime as predicate offenses into the AML/CFT framework. Second, primary sources relating to governments preferences were also often straightforward to access through formal statements, working group outputs, legislative proposals, and statements to the press. Third, interviews and academic literature offered a wealth of information often directly from practitioners in regulatory development government, or legal experts on the issue areas.

Further, and following from Grinberg’s invocation of Gould’s ‘punctuated equilibrium’, since the FATCA legislation was a direct response to both he tax scandals of 2008 and the GFC, following the position of all states—the US, EU, and the G5 states—was straightforward and

offered consistent insight to changing perspectives over time. Still, not all regulatory regimes will relate to such politically salient and widely publicised initiatives, and the model could benefit from additional guidance therefore on the mechanisms of analysis in determining initial preferences.

Especially in the context of the EU, the role of Member States in collectively forming the EU’s preferences is entirely omitted from consideration in the model. These considerations should be brought back into the model to enable more robust explanations of preference development. Here, Damro’s consideration of interest contestation in MPE serves as an example of the role of Member States in the EU. Exogenous forces in the form of structural constraints and third states were also obviously critical to the understanding of EU preference formation through intra-EU legislation. Switzerland is a key example here, and the sway that the Swiss system held over similar jurisdictions and offers critical insight to the understanding of why the EU could not translate its market power to regulatory preferences in the bargaining core.

Step III
The Joint Statement and the resulting Model IGAs were remarkable in their implications for the power dynamics at play for the negotiating parties. Reading the G5 as a proxy single actor on behalf of the EU, the EU was able to significantly reduce the force of the FATCA legal requirements. Indeed, as evidenced here, the most coercive and controversial elements were essentially fully mitigated. The EU was able to force the US to adjust to its routing model to accord with the EUSD, thereby eliminating the fundamental conflict-of-law issues; they were able to remove the withholding and passthru requirements that would violate the free movement of capital principle; to negotiate the specific types of institutions considered reportable under FATCA; and to simplify and somewhat reduce costs (leveraging the existing AML/CFT due diligence standards rather than FATCA’s enhanced requirements). Further, the EU was able to force—in principle—reciprocity on the US. Even if reciprocity from the US is unlikely in practice, the US was willing to capitulate the political point.

In terms of the Revisionist Model, this set of outcomes with the EU as a single actor would support Drezner’s standards games: where the cost-benefit ratio is not conducive to either party, there is either a bargaining core to determine whether coordination through a concert is possible, or there is no possibility of global coordination. In this case, obviously
the former case prevails in the IGA negotiations. The negotiations also demonstrate, as posited by the Revisionist Model, that neither great power holds material leverage over the other. It shows rather that the most untenable elements in the great powers’ respective initial domestic preferences were indeed the most salient issues in bargaining, and that even on these elements, both powers were willing to compromise in the effort to achieve a coordinated outcome: the US was willing to remove the most unacceptable, coercive, and extraterritorial elements of FATCA; and the EU was willing to implement the US law at their own great financial expense on an essentially unidirectional basis, but with the international legal basis to pursue a multilateral framework within, and beyond the EU.

However, reading the bargaining core as five EU MS and not the EU, these achievements effectively falsify the Revisionist Model’s standards games and underlying understanding of large-state vs small-state power dynamics. First, the Revisionist Model does not account for groups of states using their collective market power to form a ‘great power’ in an economic version of balance of power theory. Such ‘band-wagoning’ to countervail a great power (the US) when its counterpart (the EU) was unwilling, or unable, to form a great power concert would render the prospect of coordination moot under the model, which would categorically argue that no international coordination was possible in these circumstances.

Even assuming the model would allow for coalitions of states to act as great powers, referring to Table 4.2, the combined the G5 still would not match the US. While the total GDP of the G5 is greater than China, it is still only 75% that of the US. The combined merchandise trade of the group (including intra-EU trade) is significantly larger than the US, however, so is the combined vulnerability. And last, the combined capital market size of the G5 including bank assets is comparable to the US; yet, when assessing only bonds and equities, the capital markets of the G5 are just over half the size of the US. If the G5 were a state, against the EU and US, it would not be considered a great power. Even assuming the EU did not exist, the Revisionist Model would predict the US would accept no adjustments in a bargaining core with the G5 as a single state.

Collectively, these observations present the Revisionist Model with material challenges, stemming from the framing of ‘great powers’ in the independent variable. As discussed in Step I, redefining the great powers to account for salience of issue, systemic import, and
regulatory capacity would likely yield greater explanatory power, and is an area for further research.

Step IV

Last, Drezner’s standards typology struggled to account for the outcomes of the FATCA bargaining core. While the simplicity of the typology may have intended to be an example of possible outcomes based on actor preferences rather than an absolutist construct, it nonetheless limited the interpretation of outcomes, or forced multiple competing explanations. Here, perhaps especially, the model would benefit from a more diversified understanding of possible standards. Theoretically, the causal mechanism between the dependent variable—effective regulatory coordination—and the standards as forms of coordination, is missing. Again, it is expected that the choice of different sets of independent variables may suggest, or require, different types of standards.

Last, the case study presented here suggests that adding a temporal element to the standards typology may be insightful. In the analysis of the two emerging systems for AEoI, namely the bilateral FATCA and IGA approach, versus the multilateral EU DACs and CRS systems, there is the likelihood of further bargaining and the possibility of great global convergence in future. This would suggest that in the case of AEoI, rival standards may be a precursor to club or harmonised standards. Adding a temporal element to the model would therefore benefit its explanatory power.

Summary

Revisionist Model is a compelling theoretical framework and provides a testable stepwise process for analysis that is reproduceable. It also presents a series of related, and testable postulates that should apply to any international regulatory issue, however, there were issues both theoretically and methodologically demonstrating their validity at multiple steps. The mode of great power identification, in limiting the actors to a bipolar set, undermines the explanatory power of the theory overall. However, though the choice of independent variable may be falsified, this does not necessarily impact the structure of the theory. The further research recommendations made here could test whether explanatory power can be enhanced by employing different independent variables and whether the model is still sound.
Second, the identification of the initial set of domestic preferences would also benefit from an enhanced set of theoretical guidelines. While an open interpretation of initial domestic preferences is certainly helpful in addressing the wide variation implied in the totality of regulatory issues the model aims to addresses (any international regulatory matter), this lack of additional precepts means different approaches will likely yield different explanatory outcomes. The approach taken here, in adhering strictly to the model, focused on legal precedent and direct evidence in the form of primary sources and interviews to understand, as directly as possible, states’ preferences. This is not to argue for a highly prescriptive approach; rather, to inform means of analysis for future research. The type of analysis conducted on initial preferences will also likely be influenced by the ‘great power’ actors involved. Last, while FATCA was a radical regulatory innovation, it nonetheless benefited from a raft of existing financial crime-related regulation, and a great deal of public interest which drove state governments to speak openly and consistently about their states’ political commitments to the issue. For regulatory issues that do not benefit from these circumstances, identifying the initial preferences could raise potential issues.

Third, treating the EU as a single actor with no mechanism for the further influence of EU MS, or exogenous actors resulted in the falsification of the model. The events that transpired saw the G5 forming a bargaining core with the US, which is not possible under the Revisionist Model. Still, the outcome of this bargaining core led to the broad adoption of the Model 1 IGA as the ‘gold standard’ for AEoI across the resulting bilateral and multilateral frameworks. As such, widening the scope of the model to consider additional actors in the bargaining core is an essential area for further research.

Last, Drezner writes, “[t]he revisionist model presents a unified theory that explains both the processes through which regulatory matters are negotiated at the global level, and the outcomes that are likely to take place.”585 The present study argues that while the Revisionist Model is a powerful framework for analysis of international regulatory regimes, several falsified elements of the theory invite additional theory building. This is especially the case in defining the great powers, which has knock on methodological impacts in the

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585 Drezner, All Politics Is Global Explaining International Regulatory Regimes, 208.
model’s stepwise process. This opens the model to additional research and the opportunity to engage in further theory-building using the framework established by Drezner.

Conclusions
Research question
This dissertation had two key objectives: to answer the primary research question, and, in so doing, to comprehensively test the Revisionist Model as a grand theory of IPE. In the analysis, both objectives benefitted the other. The explication and analysis of the research question in a robust, stepwise methodology greatly benefitted the understanding of FATCA as a law and regulatory regime, the US and EU roles in the creation of a new regulatory regime, the way preference formation occurred as domestic processes for each great power, and how to understand the various emergent standards. Similarly, the model benefitted from a case that is sufficiently complex to warrant such an in-depth analysis, the efficacy of its proposed dependent and independent variable, how some of its elements can be falsified, and the generation of several areas for further research and theory building.

Crucially, this approach also enabled the dissertation to answer the primary research question. This dissertation asks: Why was the US’ FATCA law successful in spurring a global regime, when other attempts had failed? The analysis under the Revisionist Model suggests four reasons. First, the US was able to translate its market size into a credible coercive mechanism with the force of domestic law, globally operationalising the threat. Second, at the height of the furore over FATCA, the US opened itself to negotiating FATCA’s implementation (bargaining core) with other large developed economies—namely the G5 (variably as a proxy for the EU) and Switzerland—it acknowledged that despite its enormous power asymmetry – including that of the EU who was unable to translate its size to regulatory power—it could not solve the problem of global tax evasion, even for itself, on its own. At the critical juncture of implementation, it was willing to cooperate, negotiate, and capitulate on its coercive mechanism, even using political capital to promise to engage in reciprocity. Third, the overwhelming structural commonalities between the US and EU financial regulatory architecture, made implementation expensive, but enabled the US to leverage existing financial crime regulation to build on. Last, the political salience as a function of major tax scandals and a post-GFC international appetite for regulatory
coordination with the EU and other key actors in the financial system, led to as Grinberg called it, ‘an evolutionary moment’, or ‘punctuated equilibrium’\textsuperscript{586}.

The research also enabled a comprehensive test of the Revisionist model, resulting in several findings about its benefits and current limitations. While the model offers an effective, clear, and replicable process for regulatory case studies the research here shows that the model could benefit from additional theory building. In addition to the enhancements discussed above, this case study demonstrated that, contrary to the Revisionist Model’s claim, there is at least one case for which great power concert is not necessarily enough to ensure effective international coordination: global tax coordination and information exchange requires essentially universal application to work effectively.

Contribution

This dissertation contributes to three bodies of literature. First, it contributes to the regulatory theory literature in international political economy by comprehensively testing the Revisionist Model, analysing the validity of the model, and offering further areas of research for its continued development. While the model and its postulates has been widely read and used, there are few detailed analyses that examine the structure, limits, and strengths of the model in a purist application. Further, by adhering to the model strictly, the approach demonstrated the specific postulates of the model that appear to be falsified by the case. This is important for theory building in focusing attention on those elements which are most in need of further research, and which might be complemented or replaced by other existing approaches.

Second, the research contributes to the growing global tax regulation literature. In the aftermath of the GFC and the regulatory changes investigated here (FATCA, CRS, and the intra-EU framework under the DACs) this literature is enjoying a renewed focus in IPE. Much of the most recent research employs quantitative methods to understand the efficacy of the regimes, and their likely trajectories. These draw from many of the same sources here (e.g. Christians, Grinberg, Kaye, Morse, and so on) to clarify the technical components of the regulatory frameworks. The research developed here develops this literature by examining

\textsuperscript{586} Or, as Hochman called it, “luck and fortuity”. Hochman, USD-PITI, "Off-Shore Compliance Initiatives - Current and Future."
the historical regulatory drivers which led to the US and EU initial preferences on implementation, new insights on the bargaining core and its formation, investigating and articulating the critical role of small states in influencing international regulation, and offering several areas of further research on these topics.

Last, this research develops the tax haven, offshore illicit finance, and financial crime literature by offering a view of great power preferences. As discussed in the literature review, much of this literature focuses on the mechanisms of illicit offshore financial flows and the ways tax haven jurisdictions function. In the tradition of Sharman and Palan who are pioneers of this literature in political economy, this study contributes a perspective—through the study of the emergence of FATC—on the other side of the coin: how great power states have started to deal with the global problem, and the fundamental realisation that the great powers must coordinate and cooperate with these small jurisdictions to successfully achieve regulatory outcomes. Both Sharman and Palan have suggested this in earlier works, and the research here contributes to the understanding of how great powers have come to understand this.

Further research

There are two categories of further research developed in this research: theory development, and issue area research. In theory development, the most compelling findings in this research relate to the definition of great powers, and which states can be demonstrated to matter in influencing and implementing international regulatory regimes. To this end, a critical first step is to examine the contribution that network theory has to offer in developing a model of systemic importance for international financial regulation. Further, and related, the dependent variable and independent variable alike have been shown to lead to falsifiable claims in the model. As such, research on replacement or complementary approaches would enable future case study research to use the model and achieve greater explanatory power. The quantification of cost-benefits analysis under Step III of the model would also add rigour and consistency to these considerations. While both political and financial/economic costs are reviewed, further research might yield either a typology, a taxonomy, or process for replicability of this element. Last, the standards typologies in the model could likewise benefit from introducing complementary approaches.
such as Quaglia’s regulatory capacity model. More recently, Janský et al\textsuperscript{587} have developed a model modifying Drezner’s typology to help explain small states’ preferences for CRS. These should be tested in the context of the overarching theory. Further, the relationship between the independent variable, dependent variable, and standards as an outcome of variations in the form the dependent variable takes also requires further clarification. As a theory, if these propositions do not align for a case, as happened in this research, the explanatory power of the model is significantly reduced or falsified. Further research could help ensure consistency in the theory.

Second, in the issue area of FATCA, and global tax administrative regulation, there are several interesting areas and new puzzles that emerged in the research. First, in the analysis of the standards in Step IV, the analysis identified that the bilateral system under FATCA versus the multilateral system under CRS and the EU’s DACs may lead to a real-world scenario that sees the EU leverage its capacity as a regulator for persuade or coerce the US into joining the multilateral framework. As developed here, the initial preferences of both great powers with respect to bilateralism and multilateralism, and a further area for both issue area development and theory building would be to test hypotheses on what would be required to coerce the US to become multilateral. Next, an interesting puzzle emerged when comparing the AML/CFT and FATCA regimes. On the one hand, from a regulatory implementation perspective, the regimes are clearly converging. On the other hand, where the EU and international community at large actively downloaded AML/CFT regulatory standards from the US via the FATF, both EU MS and other major developed economies strongly rejected FATCA. One hypothesis emerging from this dissertation is that, unlike other financial crime, state preferences on offshore tax evasion and avoidance vary greatly. Whereas no state in the G20 has constitutionally codified provisions for the enablement of international money laundering and terrorist financing, there are states with legal, even constitutional, provisions for the enablement of tax evasion. Switzerland is the premier example of this. Even where AML/CFT might be more costly than beneficial to some states in implementation terms, especially small developing nations with low regulatory capacity,

\textsuperscript{587} Petr Janský, Markus Meinzer, and Miroslav Palanský, "Is Panama Really Your Tax Haven? Secrecy Jurisdictions and the Countries They Harm," \textit{Regulation & Governance} (2018).
they endeavour to meet minimum standards as table stakes to operating in the global financial system. Coordination on administrative assistance in tax matters (to say nothing of tax policy coordination), on the other hand, produces strongly opposing preferences in the international system. Echoing Ring, a further hypothesis is that the explanatory variable for the opposition is the introduction of sovereignty to the debate over tax competition; nowhere is this more evident than Switzerland which would be an ideal case study.

The last puzzle also relates to Switzerland. Why were the Swiss excluded from the talks between the G5 and the US? This puzzle would require more evidence than is currently available to develop robust hypotheses; however, speculatively, the research suggests that the US sought to bargain with a core of states that could facilitate a quick resolution to the implementation problem by isolating the key actors: G5 and Switzerland. This would enable the US and G5 to put additional pressure on the Swiss, like how the EU was able to extract a bilateral agreement with Switzerland on the EUSD. Further, it may have allowed the US to operate the negotiations as a prisoner’s dilemma between the Swiss and G5. Again, while direct evidence is scant, it is telling that there were no further Model agreements that emerged than those negotiated with the G5 and Switzerland (Japan too but after Switzerland), again alluding to the power of the Swiss (at least in this case).

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