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Dual Taxation - Unbalanced and Arbitrary

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DUAL TAXATION – UNBALANCED AND ARBITRARY

Dr. Benjamin Simon[1]

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I. Abstract

"Dual Taxation" in Indian Country happens when a state assesses taxes on private, non-tribal activities or transactions on tribal land in addition to taxes assessed by a tribe. Some analysts suggest that dual (or double) taxation puts tribal governments and citizens at a disadvantage, but the situation may be more nuanced. While dual taxation has been analyzed in depth from a legal perspective, this paper analyzes its economic consequences. With taxation, the stakes can be high. State tax revenues generated on tribal lands are revenues that tribes forgo collecting, limiting the tribal resources available for economic development and social programs. Indian Country is largely rural, and the lack of population centers and infrastructure makes economic development challenging. Many tribal areas have high levels of unemployment and a high percentage of populations with incomes below the poverty level. Thus, any loss of potential tribal revenue can exacerbate existing challenges. This paper sketches the evolution of dual taxation in case law, discusses the economic implications of those decisions and suggests a systematic way to undertake a balancing analysis.

II. Introduction

Anyone trying to figure out what federal, state, and tribal governments can tax in Indian Country must examine a bewildering body of authority. Jurisdictional overlaps between state, local, and tribal governments can create tax disputes as governments seek to tax the same transactions. This overlapping state/tribal tax jurisdiction may result in double taxation, a generally undesirable circumstance. Double taxation can also occur when federal and state governments impose individual income taxes on the same income, or when income earned and taxed in foreign countries is also taxed domestically. By taxing income or economic transactions at rates higher than what otherwise might be the case, double taxation can affect investment and spending decisions and incentivize tax avoidance behavior.

"Preemption" occurs when federal law "preempts" state law. Preemption is an important component of federal, state, local, and tribal relationships and is at the heart of many of the tax disagreements between tribes and states. Dual taxation becomes more complicated when the governments involved are sovereign, as is the case for tribes.

The federalist system provides a framework for the U.S to have a sovereign-to-sovereign relationship with tribes. Tribes, however, still have similar functions to local governments, including providing local public goods. Having tribal tax revenues and business operations sufficient to pay for these public goods (e.g., social services, education, health care, housing, etc.) enhances self- sufficiency and reduces tribal member dependence on the federal, state, and local safety net.[2]

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[2] *See* Broadman, Anthony, *Know Your Enemy: Local Taxation and Tax Agreements in Indian Country*, 0 AM. INDIAN L.J., 7, (2012).

Tax policy can drive investment decisions. The possibility of double taxation can be a disincentive to non-tribal investment in Indian Country. A state's power to tax transactions in Indian Country depends on who bears the tax's legal incidence, whether the tax infringes on tribal self-government, and whether federal law preempts the tax.[3] Economic incidence is the burden of taxation measured by the change in the resources available to any economic agent because of taxation. Economic incidence includes tax payments and price changes caused by the tax, and economic incidence does not always correspond to legal incidence. For example, the economic incidence of a corporate income tax is shared between capital and labor.

The most common argument behind extending the reach of state taxes or regulations is to "level the playing field" by imposing comparable taxes on similar transactions. For example, states often object to tax-free tribal sales of cigarettes to non-Indians. In economic terms, this is a form of "tax arbitrage" (i.e., exploiting different tax rates). In the context of federal Indian law, it is often characterized as "marketing the exemption."[4]

Multiple sovereigns' tax the same activity in many contexts without raising preemption problems due to federal law preempting state and local laws. In American Indian law, federal "preemption" of state or local taxes can constrain a state's imposition of taxes. From the tribal perspective, the fact that not all state or local taxes are preempted may constrain tribes' ability to raise tax revenues and pay for local public goods.

This paper reviews the legal issues and key court decisions associated with taxation on reservations, then focuses on those issues in an economic context, highlighting the core issues and suggesting how these tax disputes might be resolved. It also compares similar issues in the international context and in other individual countries.

III. THE LEGAL ENVIRONMENT WITH RESPECT TO TAXATION ON RESERVATIONS

This section will briefly review the legal environment with respect to taxation on reservations and some of the key court decisions that created it. The literature on taxation issues associated with reservations and American Indians is extensive, reflecting the many court decisions at the federal and state levels. There is tension between state and federal objectives, which is reflected in court decisions. There is uncertainty, inconsistency, and ambiguity across all the decisions, creating incentives to strategically design taxes at the state level. At the tribal level, inconsistency and ambiguity affect the investment environment on reservations and tribes' ability to raise revenues and fund public goods. The uncertainty and ambiguity create incentives for litigation at all levels.

At an elementary level, most legal issues have to do with how much states can tax economic activities on reservations (conducted by both tribal and non-tribal members) occurring on

[3] The statutory burden of a tax does not describe who really bears the tax. The side of the market on which the tax is imposed is irrelevant to the distribution of the tax burdens. Parties with inelastic supply or demand bear taxes; parties with elastic supply or demand avoid them.

[4] John Fredricks III, *State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword through the Heart of Tribal Self-Determination,* 50 MONT. L. REV. 49, 51 (1989).

reservations. Both tribes and states have an economic interest in these transactions. American Indian tribes are generally exempt from state taxation within their reservations unless Congress has indicated otherwise. However, outside the boundaries of their reservations, American Indian tribes can be subject to taxation by states.[5] Many of the tax disputes derive from the federal laws that established Indian Country, which generally preempt states' ability to tax tribal members, lands, and some activities.[6] While states cannot tax tribal members, tribes do have the power to tax property, individuals, and transactions within their territories. Tribal governments may have the power of taxation, but they are not taxed regardless of the extent to which their activities occur on or off-reservation.[7]

Tribal corporations have the same tax status as American Indian tribes. Because federally recognized tribes are not taxable entities, they are exempt from United States income taxes.[8] In general, businesses owned and operated by tribes in Indian Country, the personal property of tribes, and their members cannot be taxed by state and local governments.[9]

The Supreme Court has prevented states from taxing transactions where the tax's legal incidence was on a tribe or tribal members inside Indian Country.[10] However, states may be able to tax transactions involving non-members within Indian Country, depending on a preemption analysis that seeks to balance state, federal, and tribal interests. [11] This preemption analysis is the so-called "*Bracker* analysis."[12]

Courts have struck down state taxes on non-tribal members in Indian Country, including state taxes on non-member retailers' sales to tribes and tribal members. However, the courts have upheld state taxes on tribal cigarette sales to non-members, state severance taxes on oil and gas

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[5] Worcester v. State of Ga., 31 U.S. 515 (1832); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) (quoting Powers of Indian Tribes, 55 I.D. 14, 46 (1934)).

[6] RSCH. Mary Davis, American Indians, Indian Tribes, and State Government, Minnesota House Research Department, 85 (2023).

[7] This notion is similar to the United States not taxing foreign countries.

[8] The tax exemption applies regardless of whether the income-producing activities are commercial or noncommercial or are conducted on or off the reservation. Tribal corporations organized under section 17 of the Indian Reorganization Act of 1934 share the same tax status as an American Indian tribe. They too aren't taxed on income from activities carried on within the boundaries of a reservation. *See* Joint Committee on Taxation, Description of the Tax Provisions of Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (JCX-12R-20), April 23, 2020.

[9] *See, e.g.,* Bryan v. Itasca Cnty., Minnesota, 426 U.S. 373 (1976); Moe v.); Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, (1976), and Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

[10] *Id.* This has included all manner of state and local taxes: income taxes, real property taxes, personal property taxes, sales taxes, transaction taxes, vendor taxes, use taxes, mineral royalty taxes, and hunting and fishing license fees.

[11] *State and Federal Tax Policy: Building New Markets in Indian Country, Oversight Hearing Before the S. Comm. On Indian Affairs,* 112th Cong. (2011) (Statement of Steven J. Gunn, Attorney and Professor of Law, Washington University in St. Louis).

[12] *State and Federal Tax Policy: Building New Markets in Indian Country, Oversight Hearing Before the S. Comm. On Indian Affairs,* 112th Cong. (2011) (Statement of Steven J. Gunn, Attorney and Professor of Law, Washington University in St. Louis). White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145, (1980).

produced by non-members in Indian Country, and other "state taxes on non-Indians doing business in Indian Country."[13]

States are clearly limited in their authority over Indians and Indian Country. However, in many cases state taxes have been allowed on economic transactions involving non-tribal members on reservation lands. The text below and the Appendix provide information on some of the key court decisions:

1. *Mescalero Apache Tribe v. Jones* (1973)[14]):[15] *Mescalero* involved a ski resort operated by the Mescalero Apache Tribe on off-reservation land leased from the Federal Government. The court upheld a gross receipts tax levied by New Mexico on tribal income earned outside the reservation. Balancing tribal, federal, and state interests was unnecessary because the Tribal business was not on reservation land and was treated similarly to any other non-Indian enterprise. The court stated, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[16]

2. *Washington v. Confederated Tribes and Bands of the Colville Indian Reservation* (1980):[17] The Supreme Court held that although state taxation of non-members can affect tribal revenues directly or indirectly, a negative effect on tribal revenue is not enough, by itself, to result in preemption. In this case, the court found that a state "[…]"[…] does not infringe the right of reservation Indians to make their own laws and be ruled by them merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving."[18] The Supreme Court also held that tribes could not "market the [tax] exemption."[19] The court relied on this doctrine in later cases. This doctrine has some exceptions, namely "tribes may 'market the exemption' if they can prove that they have added value to a product from the reservation or created some 'reservation-based value.'"[20]

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[13] Judith Royster, *Decontextualizing Federal Indian Law*, 34 TULSA L. J. 329, 336 (1999)
[14] 411 U.S. 145 (1973).
[15] 411 U.S. 145 (1973).
[16] *Id.* at 148.
[17] 447 U.S. 134.
[18] *Id.* at 136.
[19] The court held that, "What these smoke shops offer the customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155.
[20] Matthew Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 789 (2004).

3. *White Mountain Apache v. Bracker* (1980):[21] the White Mountain Apache Tribe and Pinetop Logging Co., a non-Indian business, filed for a refund of a motor carrier license tax and fuel taxes paid for logging activities conducted solely on tribal land. They argued that the taxes were preempted by federal law and interfered with tribal self-governance. The court found that the state could not tax a non-Indian logging company for using roads built by the tribe and federal government on Indian lands. The court based its decision on a finding that the tax would harm the Tribe's purpose of earning logging revenues. This case established the "balancing test" for determining whether a tribal tax imposed on non-tribal members is legal. The balancing test mandated by a preemption analysis requires weighing federal and tribal interests (including tribal sovereignty) against state interests.

4. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico* (1982):[22] the Supreme Court found that the state could not tax the gross receipts received by a non-Indian construction company which built an on-reservation school, paid for by the tribal school board. The court found: (1) the federal regulation of construction and financing of Indian schools was comprehensive (with a "detailed regulatory scheme governing the construction of autonomous Indian educational facilities"[23]); that (2) Federal law encouraged tribal self-sufficiency in education; (3) the economic incidence of the tax was on the Tribe; (4) paying the tax could affect the Tribe's ability to fund tribal schools; (5) the state provided no services on the reservation to the Indian school children or the non-Indian taxpayer.

5. *Montana v. Blackfeet Tribe of Indians* (1985):[24] The Blackfeet Tribe challenged the imposition of Montana state taxes on the Tribe's mineral royalty interests in oil and gas produced under the authority of the Indian Mineral Leasing Act of 1938.[25] The Supreme Court prohibited Montana from taxing Indian tribes' royalty interests and noted that the tribe's exemption from state taxes could be lifted only by Congress.

6. *Cotton Petroleum Corporation v. New Mexico* (1989):[26] the Supreme Court held that the state's tax, unlike the tax in *Montana v. Blackfeet*, was not preempted by federal law, as it was not a tax on any tribe.[27] This decision allowed states to tax non-Indians extracting resources on Indian lands. This has created double taxation in some states, with both the state and the tribe imposing taxes on extracted minerals.

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[21] 448 U.S. 136.
[22] 458 U. S. 832.
[23] *Id.* at 841.
[24] 471 U.S. 759.
[25] 25 U.S.C.S. § 396a et seq.
[26] 490 U.S. 163, 109.
[27] *Montana* and *Cotton* dealt with the distribution between the state and tribe of economic rents from mineral extraction on tribal land. New Mexico's tax was levied on non-Indian mineral extraction companies that were operating on reservation land. Montana's tax was levied on the tribe. However, in the long run the economic effects of the taxes would be identical whether the tax is on the extraction company or on the tribe.

7. *Wagnon v. Prairie Band Potawatomi Nation* (2005):[28] Kansas imposed a fuel tax on fuel delivered to a tribe-owned gas station. The fuel distributor paid the tax on its initial receipt of fuel and passed along the cost of the tax to the tribe. Because the legal incidence of the tax fell on the non-Indian fuel distributor who was operating off-reservation, the court held that balancing federal, tribal, and state interests was unnecessary, even though the economic incidence of the tax fell on the tribe. This case set up a two-part test: (1) whether the legal incidence falls on a tribe or its members within Indian Country, and (2) whether the tax is assessed on or off tribal land.

8. *Tulalip Tribes v. Washington* (2018)[29] (retail sales and use; business and occupation; and personal property): The Tulalip Tribes developed a commercial retail center which included the Tulalip Casino and Tulalip Resort, other retailers, restaurants, and an outlet mall. This commercial center bordered a major interstate highway and attracted customers from outside the reservation. The State of Washington and Snohomish County collected an 8.9% sales tax from non-Indian retailers. The Tribe believed the sales tax should be preempted because the tax infringed on tribal sovereignty. The district court allowed the general state taxes of the non-Indian retailers within Tulalip's commercial center after a balancing analysis that considered tribal economic development as one of the balancing factors. The federal government provided substantial funding to support the development. However, the court did not view the state taxes on sales, business, and property as interfering with tribal economic development because the taxes did not reduce the lease payments the tribe would continue to collect from the businesses. The court recognized that the taxes were paid by non-Indian customers on non-Indian goods. Preempting the state sales tax would require the tribe to have an "active role" in creating value in the property being taxed. The court dismissed the tribe's argument that because of the imposition of the taxes, the tribe could not collect its own sales tax. The tribes' argument presumed that if the tribe imposed its sales taxes in addition to the state tax, the goods would be subject to double taxation, creating a disincentive for customers to shop on the reservation.

The court viewed the tribe's inability to impose its tax as an indirect and insubstantial impact. The state taxes were not preempted even though the tribe provided services such as law enforcement, fire protection, medical services, utilities, and road maintenance to the businesses and patrons at the commercial center.[30] In spite of this court decision, in January, 2020, the Tulalip tribe and Washington state established a tax-sharing compact, which is a way to ameliorate dual taxation and share tax revenues between tribes and states. Compacts are discussed later on in this paper.

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[28] 546 U.S. 95.
[29] 349 F. Supp. 3d 1046, 1048 (W.D. Wash.).
[30] The interests of the state that were at least partially funded by tax revenues included education, social and health services, and worker safety.

9. *Flandreau Santee Sioux Tribe v. Terwilliger* (2020):[31] The tribe sued South Dakota's secretary of revenue and governor over the state's excise tax imposed on general contractors. The federal district court undertook a *Bracker* analysis and found that the state's tax was preempted. The court considered whether the tax was preempted under federal law and unlawfully impaired the tribe's sovereignty. The court relied on *California v. Cabazon Band of Mission Indians,*[32] where the Supreme Court held that California's gambling regulations were preempted by the Indian Gaming Regulatory Act (IGRA), and on *Ramah Navajo School Board*, where the Supreme Court held New Mexico's state gross receipts tax was preempted by federal regulation of Indian educational institutions.[33] The court noted that IGRA limited a tribe's ability to construct and maintain gambling facilities and required federal oversight to ensure the protection of the environment, public health, and safety. As in Ramah Navajo School Board, the court held that the state's excise tax undermines the objectives of IGRA because the tax was passed on to the tribe and reduced its ability to profit from the gambling operation.[34] The court also pointed out that the state did not provide "substantial services" to the tribe or the contractor, because the excise tax revenue was deposited in the state's general fund to fund various services. The court also found that the tribe's interest in economic development through the casino operation outweighed the state's interest in raising revenue. [35]

10. *Agua Caliente Band of Mission Indians v. County of Riverside* (1971),),[36] and *Agua Caliente Band of Cahuilla Indians v. Riverside County*:[37] This pre-*Bracker* case was originally decided in 1971, but additional litigation continued through 2019. The unpublished 2019 case involved California's ability to impose a Possessory Interest Tax (PIT) on non-Indian lessees of Indian trust lands on the Agua Caliente reservation. The court considered the congressional intent regarding Indian law, the PIT's legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members. The court found that this tax was permissible because the state provided substantial services to the lands in question.[38]

11. *Salt River Pima-Maricopa Indian Community v. State of Arizona* (1995):[39] In this case, the Court of Appeals affirmed a District Court decision in favor of the state's collection of taxes on sales and rentals by non-Indian businesses to non-Indian customers at the Scottsdale Pavilions shopping mall, located on reservation land. The Ninth Circuit approached the sales tax in Salt

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[31] 496 F. Supp. 3d 1307 (D.S.D.).
[32] 480 U.S. 202 (1987).
[33] Ramah458 U. S. 832, 843-846 (1982)).
[34] The fact that federal regulation of Indian education was comprehensive and did not involve the state, the state could not impose its gross receipts tax on the non-Indian contractor building a school on a tribe's reservation. The tribe argued that the excise tax revenue could have been used to purchase additional slot machines which would have generated an annual revenue stream for the tribe.
[35] *Terwilliger*, 496 F. Supp. 3d 1307, at 1322 (D.S.D.).
[36] 442 F.2d 1184.
[37] No. 17-56003 (9th Cir. Jan. 28, 2019) (casetext).
[38] The argument that a tax on non-Indians operating on Indian land could not be preempted without express congressional intent was rejected by *Bracker.*
[39] 50 F.3d 734 (9th Cir.).

River similarly to the way the Supreme Court had approached other "smoke shop" cases. In 1980, the Supreme Court in *Colville* concluded that the tribe's sale of cigarettes to non-Indians was not preempted because the state's taxes were "reasonably designed to prevent the tribes from marketing their tax exemption to non-members who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations."[40] The Ninth Circuit found that the state's tax was not preempted because "the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non- Indians."[41]

12. *Ute Mountain Ute Tribe v. Rodriguez* (2011):[42] The five New Mexico taxes that were the subject of this case were the same taxes challenged in *Cotton Petroleum*,[43] in which the taxes were upheld. The court applied similar reasoning as *Cotton*, undertook a *Bracker* balancing analysis, and found that the state taxes were not preempted.

The outcome of balancing tribal and state interests is not predictable and could be linked to confusion about or, in some cases, strategic ignoring statutory versus economic incidence of taxation.[44] Courts have applied the balancing test and struck down some state taxes on non-members in Indian Country while upholding others. The key issue in many Indian tax cases is where the legal incidence of a state tax falls. In general, a state or local government may not impose its taxes on an Indian tribe or its members in Indian country.[45]

State taxes are generally inapplicable to tribes, federally chartered tribal corporations, tribal property, and tribal members if the activity or property that would otherwise be taxed is within Indian Country. However, there are some exceptions.[46]

One complication stems from the way some state taxes are administered. For instance, some taxes are imposed at the distributor or wholesaler level (e.g., excise taxes on cigarettes, tobacco products, alcoholic beverages, and highway fuels), which are typically non-Indian businesses located outside of Indian Country.[47] However, part or all of the economic burden of the tax may still fall on tribes or American Indians who are immune from state tax.

Tribal immunity may make it difficult for states to collect taxes on transactions in Indian Country where the tax burden falls on non-Indians. While the obligation to collect falls on a tribal business, the legal immunity of the tribal business may make it hard to collect the taxes owed. For example, the Supreme Court has held that purchases by non-Indians from tribal businesses in Indian Country are subject to sales tax. However, the tribe is immune from both

[40] 447 U.S. 134, 157.
[41] *Salt River Pima-Maricopa Indian Community*, 50 F.3d 734, 737 (9th Cir.).
[42] 660 F.3d 1177 (10th Cir.).
[43] 490 U.S. 163, 109.
[44] William McClure & Thomas E. McClure, *Rebalancing Bracker Forty Years Later.* 9 AM. INDIAN L.J., 333, (2021)).
[45] Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 458-59 (1995).
[46] In cases like *County of Yakima v. Confederated Tribes* & *Bands of the Yakima Indian Nation*, 502 U.S. 251, (1992) and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), courts have permitted state taxation of tribal land in special circumstances.
[47] RSCH.OFDAVIS, *supra* note 5.

lawsuits and most of the standard legal collection mechanisms used by the state to collect its taxes.

When a state seeks to tax the on-reservation activities of non-Indians, federal preemption is supposed to be determined by a fact-intensive inquiry, though the specifics of exactly what information should be collected and evaluated are not specified.[48] The *Bracker* test has been interpreted to require weighing the extent of federal regulation involved, the regulatory and revenue-raising interests of the tribes and states, and the provision of tribal or state services to the party the state seeks to tax.

The *Tulalip* case referenced above had little to no federal law governing the activity the state sought to tax.[49] In contrast, *Flandreau Santee Sioux* involved a state tax imposed on an activity subject to federal regulation.[50] The *Bracker* preemption analysis sometimes works out in favor of tribes and other times in favor of states. State taxes on logging, gambling and school construction have been preempted (*Bracker Flandreau Santee Sioux; Ramah*).[51] In other situations involving commercial leasing (*Tulalip Tribe*) and mining (*Cotton*), state taxes have not been preempted.[52] As for economic development, the lack of certainty regarding preemption could create a disincentive for investment in Indian Country.[53]

IV. Dual Taxation in the US and Abroad

A. *The United States*

Double taxation typically results from state sales taxes. Sales tax is complicated in the United States because there are thousands of different taxing jurisdictions where dual taxation could be present. In addition to the differing rules between states, cities and counties often also have distinct rules. The many differing rules can increase tax compliance costs and potentially have incentive effects. The economic implications of double taxation caused by overlapping federal, state, and local taxes are similar to those caused by overlapping tribal and state taxes.[54]

Virtually all states with sales taxes tax business purchases of goods and services because of the significant revenue potential. Subsequent transactions involving those inputs are often assessed sales tax as well. This is effectively dual taxation or, as referred to in economics literature, "cascading taxation," since tax is paid on both inputs and outputs.[55] Although inclusion of business inputs in the sales tax base violates a key principle of an efficient and effective

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[48] Mishell B. Kneeland, *State Taxation of On-Reservation Purchases by Non-Indians*, 48 THE TAX LAWYER, 883-896 (1995).
[49] 349 F. Supp. 3d 1046 (W.D. Wash.).
[50] 496 F. Supp. 3d 1307 (D.S.D.).
[51] 448 U.S. 136; 496 F. Supp. 3d 1307 (D.S.D.); 458 U. S. 832.
[52] 349 F. Supp. 3d 1046 (W.D. Wash.); 490 U. S. 163.
[53] See discussion above for cases, pre- and post-Bracker, that have yielded decisions for and against preemption.
[54] Broadly speaking, American Indians do not have to collect or pay sales tax on their own reservations, except if their tribe collects sales tax. Sales tax compliance is not identical on all tribal lands.
[55] "Cascading" of sales tax involves taxing both inputs and outputs in the same related transactions.

consumption tax and contributes to the cascading of sales taxes, the practice is common in United States sales tax systems.

In many cases, sales taxes are pyramided across jurisdictions. This layering of taxes often involves taxing intermediate goods and services. This can be distinguished from situations where localities may add-on to state taxes (e.g., the state retail sales tax is X% and localities can add Y%). This is simply another form of dual taxation. However, localities are typically not able to use a different tax base than used by the state.

B. International Taxation

1. United States Taxation of Foreign Income

Dual taxation commonly occurs in the international tax arena as well. Marginal tax rates vary considerably between countries, from essentially 0% in tax havens to over 60% in certain high-tax countries. The definition of income and the tax base also vary from country to country; the use of non-income taxes can vary; taxpayers may be taxed only on domestic source income or may be taxed on worldwide income. While the United States taxes income earned by citizens internationally, it mitigates dual taxation of foreign income by offering credits for the income taxes paid to foreign governments as well as income deductions for foreign income.

In general, dual taxation arises because the Foreign Tax Credit (FTC) does not eliminate dual taxation and because the definition of taxable income varies widely across taxing jurisdictions. The FTC applies only to income taxes, while many jurisdictions outside the United States rely heavily on non-income taxes such as the Value Added Tax (VAT). VATs often apply a zero-tax rate on exports meaning the destination where the good or service is consumed applies the tax. In the Middle East, many countries apply a severance tax on oil but characterize it as an income tax so that United States oil companies can receive the FTC. While those mineral severance taxes are not creditable against United States taxes, they can be deducted as business expenses.

Assume a United States taxpayer earns $100,000 in country X and that the taxpayer is liable for a flat United States tax rate of 30%. The taxpayer potentially faces $30,000 United States tax liability. If country X also taxes income at 30%, the taxpayer faces an effective rate of 60% (even before considering any local taxes in either country). To the extent that foreign taxes are creditable against United States tax liability, a United States taxpayer may be indifferent about foreign taxes. The foreign taxes may not cost the taxpayer any additional money because the taxpayer would have paid the United States $30,000 in taxes if there were no foreign taxes, although some United States taxpayers might prefer their tax monies go through the United States rather than a foreign country.

While the foreign tax credit approach may seem no different than allowing United States taxpayers to exempt their foreign income, there is an important difference because the foreign tax rate may be less than 30%. For example, if the foreign tax rate is 10%, under the tax credit method, the U.S. would impose a $30,000 tax on the $100,000 of foreign income and then allow

a $10,000 tax credit for the foreign tax paid. The U.S. would still collect $20,000 of tax revenue, and the overall tax burden on the United States taxpayer is the same as it would be if the income were earned domestically.

2. Tax Treaties

Tax treaties are international agreements that facilitate international trade and investment by lowering tax barriers to the international flow of goods and services. Lower overall taxation encourages trade and investment. Tax treaties typically allocate taxing authority over specified types of income to the treaty partners. Once a treaty has allocated taxing authority to a treaty partner, the domestic tax laws of that partner govern the ultimate tax treatment. Treaty partners can assert the right to tax residents as well as nonresidents who earn an income within the state. Treaties also provide certainty and predictability so taxpayers can arrange their affairs. Most countries have domestic laws governing international transactions that provide at least some relief from double taxation, but jurisdictional overlaps remain.

U.S. bilateral income tax treaties serve to eliminate international double taxation. Once income has crossed borders it is hard to tax, and countries typically apply withholding taxes to mitigate incentives for individuals to shift their income to lower tax jurisdictions. Treaties typically lower these withholding tax rates. Since withholding taxes can be on a gross basis (before expenses), these can be quite high.

U.S. income tax treaties contain reciprocal commitments by each state to provide either a foreign tax credit for tax paid in the source state or to exempt income earned in the other contracting state. For example, the U.S. grants a credit for any foreign tax paid on income earned in a foreign state while often the other contracting state exempts from its taxation business income earned in the United States and grants a credit for source state taxation of investment income.

3. Harmonization

Dual taxation commonly occurs within countries or regions with multiple levels of government. For example, Canada (with federal and provincial levels of government) and the European Union (with the EU level of government and the governments of individual countries) face similar issues. Countries address the issue in a variety of different ways.

Canada imposes a consumption tax system at both the national and provincial levels. At the national level, it levies a goods and services Tax (GST), which is a Value Added Tax (VAT). The GST is administered at the national level, except in Quebec, and imposes a broad-based tax on household goods and services at a rate of 5%. Five of Canada's ten provinces have adopted the harmonized sales tax (HST) with a tax base much like the national GST and centrally administered by the national government. Each province has its own tax rate and some limited control over what is included or excluded from the harmonized tax base. The province of Alberta

and Canada's three territories are included in the GST but impose no HST or separate provincial or territorial sales taxes. Canada's GST/HST system is administered by a single tax authority on behalf of both the federal and provincial governments — at least for those provincial governments and territories (making up over one half of the population) that have elected to harmonize with the federal GST/HST system. At a practical level, this means that a business registered for GST/HST purposes files a single GST/HST return.[56] Filing a single return could lower administrative costs (which is an important consideration) but does not eliminate the cost of dual taxation.

When a province harmonizes with the federal GST/HST system it repeals its provincial sales and use tax, and the federal government agrees to increase the GST/HST rate in the province based on the rate determined by the provincial legislature. For example, while the national federal rate of tax in Canada is 5%, when Ontario harmonized in 2010 it eliminated its 8% provincial sales and use tax (Ontario PST) and asked the federal government to increase the GST/HST rate in Ontario by 8%. Thus, the GST/HST rate in Ontario is 13%, with 5% going to the federal government and 8% to the province. The three remaining provinces that impose a retail sales tax — British Columbia, Manitoba, and Saskatchewan — all administer their sales tax at the provincial level. No coordination exists between the provinces in terms of developing harmonized rules for sales tax administration nor do these provinces harmonize with the national government regarding GST administrative rules. At a minimum this increases overall tax administration costs.

The twenty-seven EU member states are sovereign jurisdictions with autonomy to determine their own domestic tax policy. Even so, every EU member state must use a VAT that conforms to the definitions of goods and services and the common tax base described in the EU VAT directives. Thus, comprehensive harmonization of the VAT base exists across all the EU member states.[57] While harmonization does not eliminate double taxation, it does promote consistency.

V. TRIBAL/STATE TAX COMPACTS

More than 200 tribes have entered tax compacts with eighteen states.[58] Tax compacts can make the overall tax system more administrable and benefit both tribes and states. Compacts

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[56] See *generally* Karl A. Frieden & Douglas L. Lindholm, *U.S. State Sales Tax Systems: Inefficient, Ineffective, and Obsolete*, 98 Tax Notes State 895 (2020); Richard M. Bird & Pierre-Pascal Gendron, *Sales Taxes in Canada: The GST-HST-QST-RST systems*, 63 References.
ALL. 3 (2010); Michael); Smart & Richard M. Bird, *The Impact on Investment of Replacing a Retail Sales Tax with a Value- Added Tax: Evidence from Canadian Experience*, 62 NAT'L TAX J. 591 (2009). The administration of the QST is different from the five provinces with HSTs. The Minister of Revenue of Quebec administers both the federal GST and the QST for all businesses based in the province. The federal government administers GST/HST and QST for all selected listed financial institutions based in Quebec (and in the rest of Canada). Businesses located outside Quebec that are registered for both GST/HST and QST purposes must file separate returns — GST/HST returns with the national government and QST returns with the province.
[57] LINDHOLM, *supra* note 2456.
[58] SUSAN JOHNSON ET AL., GOVERNMENT TO GOVERNMENT MODELS OF COOPERATION BETWEEN STATES AND TRIBES, at 67 (Sia Davis ed., 2nd ed. 2009).

regarding sales taxes exemplify this benefit. Typically, state sales tax is imposed on all transactions regardless of whether a purchaser might otherwise be subject to tax. That tax revenue is then remitted to the state by the seller. The State refunds to the tribe the estimated sales tax revenues attributable to tribal member purchases. In some states, e.g., Minnesota, an additional payment representing a portion of the tax revenue associated with non- member transactions may be shared with the tribal government. In Minnesota, 50% of the revenue associated with non-member transactions is shared with the tribe.[59] This approach avoids forcing sellers to separate out transactions between customers at the point of sale or asking individual tribal members to seek refunds for the tax they paid. The revenue sharing also recognizes that both governments have jurisdiction over certain transactions and any corresponding revenue. Comprehensive data on tribal/state compacts is not readily available.[60]

VI. BALANCING THROUGH AN ECONOMIC LENS

Hedden-Nicely discusses how the Supreme Court in *Bracker* "…only gave 'weight" to state assertions of authority that did not affect tribal sovereignty or jeopardize the rights of individual tribal members."[61] In cases such as the 1987 *California v. Cabazon Band of Mission Indians*, the Court introduced balancing when it found that the State regulatory authority over gaming had been preempted by federal law.[62] The Court used the precedent of Bracker to support its holding that the state interest was sufficient to justify the assertion of state authority.[63][64]By 2005, the Supreme Court referred to the "Bracker interest-balancing test," which it stated was formulated "… to address the 'difficult questio[n]']"]" that arises when 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation..'"[65]

A. *Tax Incidence*

Before considering what balancing means, it is useful to note that the concept of tax incidence has often been misinterpreted by courts. There is a key distinction between legal, or

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[59] Minnesota's sales tax agreements also account for an estimate of the tax revenue associated with sales made off-reservation to tribal members that would have been subject to tribal use tax. *See* DAVIS at 85, *supra* note 5.; Cynthia Bauerly, *Tax Agreements Between the State of Minnesota and Tribal Governments*, CICD Policy Discussion Paper Series 2021-01 (2021).).

[60] Detailed information on ten such compacts can be found at Mark J. Cowan*, State-Tribal Tax Compacts: Stories Told and Untold*, CICD Policy Discussion Papers 2021-01 (2021).

[61] Dylan R. Hedden-Nicely, Bringing Bracker into Balance: Recentering Tribal Treaty Rights as a Bar to State Civil Authority Within Tribal Homelands, (In Progress Draft submitted to the Antonin Scalia Law School at George Mason University Law & Economics of Tribal Sovereignty Research Roundtable in 2022, quoting Bracker, 448 U.S. at 144-45 (citing Lee, 358 U.S. at 219)).

[62] The court stated that "the sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime" and rejected this reasoning. 480 U.S. 202, at 220220.

[63] David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573 (1996).

[64] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110 (2005) (quoting Bracker, U.S. at 144-45.).

[65] *Id.*

statutory, incidence, which falls on those legally obligated to submit tax payments to the government, and economic incidence, which falls on those who bear the burden of a tax. Consider sales tax: the statutory incidence of a sales tax falls on the retailer, but the consumer bears the economic incidence. Economic incidence and balancing are related because the balancing analysis should reflect the economic, not statutory, incidence of the tax. *Blackfeet* and *Cotton* dealt with taxes on minerals where the statutory incidence differed but the economic incidence was on the tribes in both cases.[66] Economic incidence also depends on the elasticity of demand and supply for the goods or services. When the demand curve for minerals is perfectly elastic (as would be the case for oil and gas because individual producers cannot affect prices on the world market), and the tribes' supply curve for oil and gas is upward sloping, the economic incidence of a tax on mineral production would fall on the tribe.[67]

Economists typically characterize "balancing" as a type of "tradeoff" analysis. If an economist were asked to evaluate the desirability of a proposed action, she would probably begin by attempting to identify both the gains and losses associated with the action. If the gains exceed the losses, then supporting the action would seem appropriate. Key issues in any tradeoff analysis involve identifying the options, comparing the options based on measurable attributes, defining the region impacted, and, where possible, valuing in monetary terms the net benefits of each option. In the context of state tax preemption, evaluating the net economic gains is challenging because it is difficult to evaluate the extent of net benefits without knowing how the tax revenues would be spent. A comprehensive accounting would also subtract the deadweight loss associated with the tax from the net benefits.

B. Non-market values

1. Sovereignty

One factor that makes the analysis particularly complicated is that preemption would likely strengthen tribal sovereignty, which is difficult to value in economic terms. Changes to tribal sovereignty clearly have an economic value, but such values – loosely termed "non-market values"—are challenging to quantify and monetize. Further, sovereignty can be considered a "public good" in economic terms. Public goods are non-rival and non-excludable which implies that they are typically under-provided by private markets. Because a good like sovereignty is not typically bought and sold in the market, the measurement of its economic value is complicated. When the market associates a dollar value with a good or service it is a relatively straightforward task to estimate the value of changing the quantity of that good or service. With no price, however, a public good's economic value is more elusive. .[68] While "sovereignty" itself may be

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[66] Cotton Petroleum Corp. v. New Mexico, 490 U. S. 163, 183-187 (1989); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759.

[67] A perfectly elastic demand curve is horizontal. Supply curves are typically upward sloping to the right. In this setting, the incidence of a tax would fall on the producer.

[68] See JONATHAN GRUBER, *PUBLIC FINANCE AND PUBLIC POLICY (*5th ed. 2016) for a discussion of the economic issues associated with public goods.

difficult to value in economic terms, the flow of goods and services resulting from public goods funded by an enhanced ability to raise revenues could potentially be valued.

2. Public Infrastructure

If tribal tax revenues are used to finance public infrastructure projects that improve transportation or communications, this may reduce the costs of production for private firms in some industries by reducing their expenditures on inputs and have spillover regional benefits. These cost reductions may, in turn, have indirect effects on markets for consumption goods by reducing market prices. These indirect effects are similar to secondary market effects, which occur when a government policy influences prices in a primary market which in turn influences demand in secondary markets that sell goods that are complements or substitutes for the primary market.

3. Social Surplus

Whether the change in social surplus[69] that results from the government funded project can be measured by focusing on the market where the intervention takes place remains unclear. In cases where the markets that are indirectly affected are not distorted by market imperfections or government interventions, the social surplus can be approximated by the market where the intervention occurs. This basic situation is illustrated in Figure 1. The supply curve shifts to the right due to a reduction in the marginal costs of providing the good. If prices remain constant, there is no change in consumer surplus. The change in producer surplus corresponds to the trapezoid *eabd*. This can be considered a gross change since the costs associated with the infrastructure project are not accounted for. That said, questions about the effects in other markets remain. Competitive pressures could result in firms paying lower prices on, for example, inputs shipped along a new road. This could cause the cost curves in the markets in which those firms sell their goods to shift downward and to the right. If prices fall in those markets, consumer surplus will increase.

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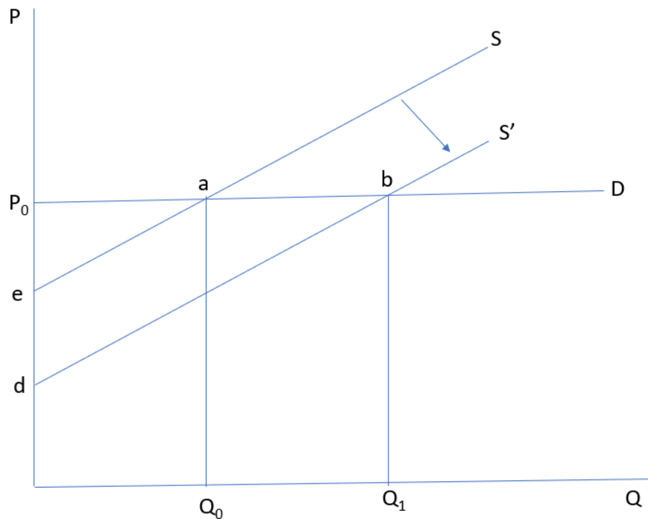
[69] Social surplus is the net benefit to society which can be expressed as: change in SS = total benefits – total costs. ANTHONY BOARDMAN, DAVID GREENBERG AIDAN VINING and DAVID WEIMER, *COST-BENEFIT ANALYSIS*, 59-65 (5th ed. 2018).

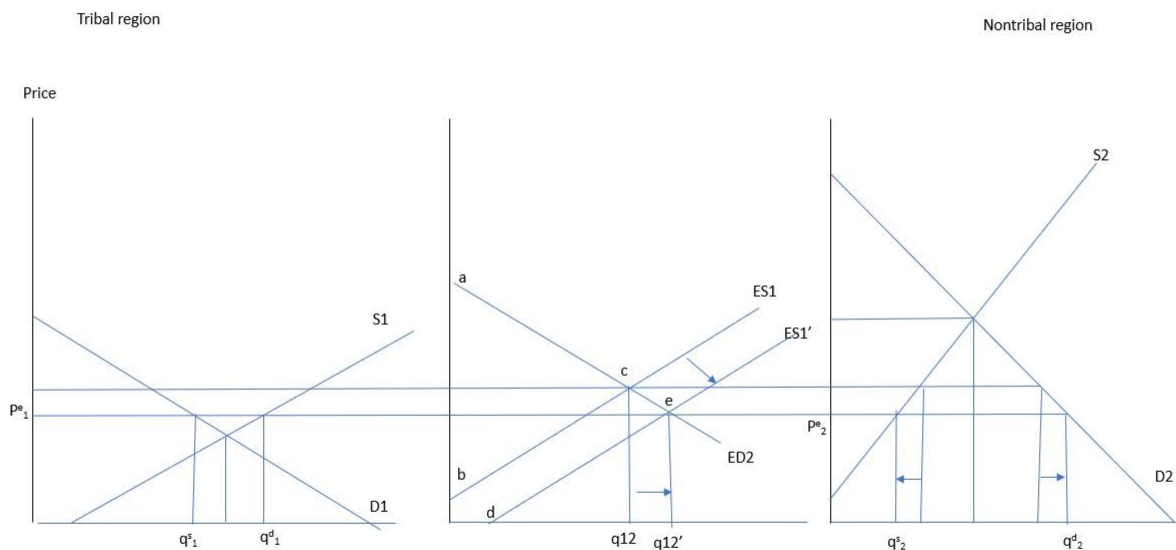
Figure 1. Productivity Improvement



4. Productivity Shock

Another way to illustrate these economic concepts is by modeling supply and demand in one tribal and one non-tribal region with one commodity. This is shown in Figure 2, comparing supply and demand between a reservation and a nearby non-tribal area. The figures illustrate how a productivity shock might impact a reservation and adjacent region using a simple graphical approach with supply and demand curves for each region. Post shock, each region is better off. The supply and demand functions in each region are S1, D1, S2, and D2. The quantity offered for trade in region 1 is the difference between the quantity producers supply and what consumers demand at prices higher than the equilibrium price. Figure 2 represents the two-region model with a productivity supply shock that shifts ES1 to ES2. In this example, the productivity shock is linked to infrastructure spending. The center panel shows the excess supply and demand functions. Price is equal in each region. Equilibrium is reached for region 2 at P_e2, q_s2 and q_d2 and for region 1 at P_e1, q_s1, and q_d1. With the productivity shock, consumer plus producer surplus increases in the center panel from abc to aed. The increase in consumer plus producer surplus represents an improvement in societal welfare.

Figure 2. Two-region Model



C. Other Perspectives on Bracker

While this conceptual-level analysis clarifies the basic economics of the situation, it is less helpful for articulating a practical balancing analysis. The Bracker test has been interpreted to require "balancing" the extent of federal regulation and control,; the regulatory and revenue-raising interests of the tribes and states, and the provision of state or tribal services" to the party the state seeks to tax.[70]

1. Economic Analysis

Courts have not provided any specific guidance on how the balancing required by *Bracker* should be done, and this lack of guidance has led to inconsistency.[71] However an economic analysis could be readily undertaken in a standardized fashion. Standardizing the analysis would involve the use of consistent approaches and methods to value benefits and costs, display distributional impacts, and treat issues involving streams of costs and benefits that accrue over time. Results of such an analysis would be comparable across analyses, geographic areas, and over time. The federal government currently has several sets of guidance for conducting

[70] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 707 (2012 ed.).

[71] In cases before and after *Bracker*, the balancing analysis has yielded decisions for and against preemption: in *Cotton Petroleum Corp. v. New Mexico*, 490 U. S. 163, 183-187 (1989) the state was permitted to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production; in *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154-159 (1980) the state was permitted to tax non-Indians' purchases of cigarettes from on-reservation tribal retailers; in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 481-483 (1976) the state was permitted to tax non-Indians' purchases. Other cases have resulted in decisions that preempted state taxes: in *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U. S. 832, 843-846 (1982), for example, a state was prohibited from imposing a gross receipts tax on a non-Indian contractor constructing an on reservation tribal school.

economic analysis. These include OMB Circular A-4 and the Principles and Requirements for Federal Investments in Water Resources.[72] Federal agencies are required to conduct a regulatory impact, or benefit-cost, analysis following the guidance in Circular A-4. Similarly, federal agencies undertaking water resource investments must analyze those projects following the guidance in the Principles and Requirements. It is notable that both Circular A-4 and the Principles and Requirements address approaches for quantifying and monetizing non-market benefits.

2. Endangered Species Act

The Endangered Species Act (ESA or the Act) provides another high-profile example of balancing.). "..).". [73] ESA provides a balancing, or tradeoff, analysis process for exempting development projects that have received a jeopardy opinion if a Cabinet- level "Endangered Species Committee" (the Committee) decides the benefits of the project clearly outweigh the benefits of conserving a species. The Committee also includes a state representative.

Exemptions to the ESA may be granted if, the Endangered Species Committee deems that four threshold criteria have been reached based on a report from the Secretary of the Interior, the hearing record, and other testimony or evidence that it may receive, the Endangered Species Committee deems these four threshold criteria have been reached: (1) there are no reasonable or prudent alternatives to the agency action; (; (.2) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its habitat, and such action is in the public interest; ((.3) the action is of regional or national significance; and (4) the agency has not made any irreversible or irretrievable commitment of resources.

For an exemption to be granted, all four of the criteria must be satisfied. As required by the Act, following a determination that all threshold criteria are met, the Secretary of the Interior must hold a formal hearing on the application for exemption. In addition, if the Endangered Species Committee decides to grant an exemption, it must also establish "such reasonable mitigation and enhancement measures, including but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects . . ."[74]

Obviously, the ESA exemption process is not a perfect match for Bracker balancing, but it shows that a systematic process could be designed to balance tribal, federal and state interests.

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[72] The White House Office of Management and Budget, Circular A-4 (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/; the White House Council on Environmental Quality, Department of the Interior, Principles and Requirements for Federal Investments in Water Resources (2013), https://www.doi.gov/sites/doi.gov/files/uploads/principles_and_requirements_march_2013.pdf.
[73] 16 U.S.C. 1531-1544 (2012).
[74] *Id.* at §1536 (h)(B).

VII. BRACKER BALANCING

The balancing analysis required by Bracker is neither well defined nor systematic. AA standard set of criteria for conducting the balancing analysis would create greater certainty.

A. *National Environmental Policy Act*

A systematic balancing analysis could be somewhat akin to National Environmental Policy Act (NEPA) compliance, which requires federal agencies to disclose impacts of their actions in a standardized format through a public process.[75] A "lead agency" is required to determine the scope of the federal action. During the scoping process the lead agency must: (1) Identify and invite the participation of affected parties, including federal, state, or local agencies or Indian tribes; proponents of the actions; and other interested persons; (2) identify significant issues to be analyzed in depth in the EIS; (3) identify and eliminate issues that are not significant or have been covered by prior environmental review from detailed study; (4) allocate assignments for preparing the EIS to relevant agencies; and (5) Identify other environmental review and consultation requirements so that analyses and studies required under other federal, state, local or tribal laws may be prepared concurrently, rather than sequentially, with the EIS.[76]

B. *Elements of a New Balancing Test*

In the context of Bracker balancing, greater certainty would promote economic development both on and off reservations. Some useful components of the analysis could include:

Definition of the affected region. The magnitude of the economic impact is affected by the definition of the geographic area impacted, as well as how impacts are stated. A basic guideline of economic impact analysis is the larger the economic region, the larger the absolute impacts and the smaller the relative (percentage) impacts. This highlights that the regional delineation must be defined appropriately for the policy purpose for which it is being used and that all numbers should be presented in both an absolute and a relative sense.

Socio-economic data. Identification of a defined set of the socio-economic data for the affected region, broken out by tribal versus non-tribal areas.

Tax data. Annual data on tax revenues collected, in both tribal and non-tribal areas as well as estimates of revenue changes with and without the tax changes under consideration. This would include information on tax incidence and price effects.

[75]U.S.C. 4321 et seq. (2020). NEPA requires federal agencies to identify and evaluate impacts of “major Federal actions significantly affecting the quality of the human environment.” *Id.* §4332 (2)(C).
[76] 40 C.F.R. § 1501.7 (2017).).

Federal interest. The nature and extent of the role and interest of the federal government in the activities potentially affected by the tax should be defined in a consistent manner.

Regional economy. An analysis of the tribal and regional economy to evaluate the welfare effects of potential tax changes.

Distributional analysis. In the context of benefit-cost analysis, there is a long tradition of distributional analysis, which can involve weighting the benefits received by different groups. This type of analysis requires that a set of weights be identified, which might reflect the values of the decisionmaker.

VIII. CONCLUSIONS

Dual taxation frequently occurs common in the U.S. and internationally. Agreements or treaties between contracting parties to establish tax rates, define the tax base, handle tax administration, and allocate revenues commonly function to solve the problem of dual taxation. Currently, a case -by-case approach drives the analysis of taxation issues in Indian Country. This case-by-case approach creates uncertainty for tribes, states, and non-Indians seeking to do business in Indian Country.

Tribes and states could solve issues of dual taxation by working collaboratively to enter tax compacts, then negotiate tax revenue allocations and administrative responsibility. Making comprehensive data on state-tribal tax compacts readily available would aid in understanding the scope and magnitude of such agreements and provide examples for tribes and states.

The Bracker balancing analysis would create more certainty if conducted systematically with standardized standard criteria which could include: definition of the affected region; identification of the socio-economic data for the affected region, broken out by tribal versus non-tribal areas; collecting time series data on the existing annual levels of tax revenues collected, both tribal and non-tribal and with and without the tax changes; defining in a consistent manner the nature and extent of the role and interest of the federal government in the activities potentially affected by the tax; an analysis of the economic incidence of the tax and price effects; and an analysis of the tribal and regional economy to evaluate the welfare effects of potential tax changes.

Alternatively, Federal legislation could resolve the dual taxation dual taxation problem, but since *Cotton Petroleum* was decided in 1989, Congress has not addressed it. Some states have responded to the problem of dual taxation by exempting tribal sales from state sales taxes; adjusting state tax rates so the total tax imposed by the tribe and state does not exceed the state rate; and providing credits or partial refunds for taxes collected on sales in Indian Country.

A federal legislative solution would establish source rules which might allow tribal taxes to preempt state taxes and would require conformity with state tax bases and rates, clarify administration issues to minimize administrative costs, require data collection and disclosure of tax revenues by source. If state taxes are not preempted, federal legislation could at least clarify how tribal, federal, and state interests should be balanced.

Appendix

Case	Year	Type of tax	Preempted
Mescalero Apache Tribe v. Jones, 411 U. S. 145	1973	gross receipts tax on tribal income earned outside a reservation; real property tax on the off-reservation property where the business was located	Not preempted
Washington v. Confederated Tribes and Bands of the Colville Indian Reservation, 447 U.S. 134	1980	Cigarette tax	Not preempted
White Mountain Apache v. *Bracker*	1980	Motor carrier license tax and fuel tax	Preempted
Ramah Navajo Sch. Board, Inc. v. New Mexico Bureau of Revenue	1982	gross receipts tax on non-Indian construction company	Preempted
Montana v. Blackfeet Tribe of Indians	1985	tax on tribal oil and gas royalties	Preempted
Cotton Petroleum Corporation v. New Mexico	1989	Oil and Gas Severance; Tax; Oil and Gas Conservation Tax; Oil and Gas Emergency School Tax; Oil and Gas Ad Valorem Production Tax; Oil and Gas Production Equipment Ad Valorem Tax	Not preempted
Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95	2005	fuel tax	Not preempted
Tulalip Tribes v. Washington, 349 F.Supp.3d 1046 (W.D. Wash.)	2018	retail sales and use; business and occupation; and personal property	Not preempted
Flandreau Santee Sioux Tribe v. Terwilliger	2020	Excise tax on general contractors	Preempted
Agua Caliente v. Riverside Cnty.	1971	Possessory Interest Tax	Not preempted
Salt River Pima-Maricopa Indian Community v. Waddell, 50 F.3d	1995	Sales tax	Not preempted

Case	Year	Type of tax	Preempted
734			
Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir)	2011	Oil and Gas Severance; Tax; Oil and Gas Conservation Tax; Oil and Gas Emergency School Tax; Oil and Gas Ad Valorem Production Tax; Oil and Gas Production Equipment Ad Valorem Tax	Not preempted

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