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Promoting Transparency and Effectively Fighting International Money Laundering

Antoine Cousin and Jean Albert

Abstract

Offshore Financial Centers (OFCs, often referred to as “tax havens”) play a critical role in international money laundering and fraudulent financial activities. While favorable tax practices are not objectionable in a competitive world, the combination of these regimes with corporate and regulatory devices that allow for investor anonymity and non traceability of assets and capital unavoidably leads to the sheltering of criminally tainted money. A nation’s decision to implement such a regime cannot be accidental. The recent OECD-led attacks on so-called “non-cooperative” OFCs have thus been justified, although not free of ambiguities and only partially effective. This article attempts to identify these ambiguities and formulate a viable strategy to tackle this issue more forcefully.

Introduction

“The future of offshore will be marked by a collective attack by the OECD and other high tax countries, and the resistance to this attack by both offshore countries and onshore tax payers.”

To some extent the developed world has already engaged in such an attack. Most noticeably, the Financial Action Task Force on Money Laundering (FATF), an “inter-governmental body whose purpose is the development and promotion of

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1 BARRY SPITZ, INTERNATIONAL TAX HAVENS GUIDE: THE PROFESSIONAL’S SOURCE FOR OFFSHORE INVESTMENT INFORMATION (Harcourt, 2000).


3 See id. The twenty-nine FATF member countries and governments are: Argentina; Australia; Austria; Belgium; Brazil; Canada; Denmark; Finland; France; Germany; Greece; Hong Kong, China; Iceland;
policies, both at national and international levels, to combat money laundering”, has played an instrumental role since 1989 in building cooperation among the G-7 and OECD countries in the fight against money laundering and “problematic” Offshore Financial Centers (OFCs). The FATF is a policy-making body working towards the adoption by all countries of a set of forty recommendations designed to help combat money laundering, and applying a range of countermeasures to the so-called “non-cooperative” OFCs. However, while heading in the right direction and requiring substantial effort, the FATF approach seems far from sufficient in that it lacks implementation tools and remains too heavily based upon the goodwill of OFCs’ governments, financial institutions and law enforcement bodies.

Furthermore, one should not overlook that the anti-money laundering endeavor also serves as a tool for the developed world to try and thwart international tax competition, as it is at least equally concerned about potential “losses of tax revenues onshore” as it is with international crime. Also, by stigmatizing “offshore countries”, the industrialized world (to which we will indistinctly refer as “the OECD countries”) fails to recognize its own many faults in terms of the legalization, use and protection of OFCs and its own domestic low tax financial centers.

This article seeks to clarify the issues pertaining to the definition and existence of OFCs and explain why international crime and tax competition should be regarded as separate issues. It considers the ambiguous position of the OECD countries with respect to OFCs and affirms that the OECD countries yield somewhat equivocal arguments and may appear to have a weak case against OFCs (Part I). It contends, however, that OFCs - through their deliberately poor regulatory oversight of financial activities and legislative devices allowing for the sheltering of criminally tainted money - pose a considerable threat to both the developed and developing worlds. It asserts that it is incumbent upon all countries, as well as in their best interest, to act against them as early and effectively as possible. To that end, it aims to assess the most relevant recent anti-money laundering initiatives and formulate a viable strategy to more forcefully address the issue of problematic OFCs and money laundering (Part II).

Ireland; Italy; Japan; Luxembourg; Mexico; the Kingdom of the Netherlands; New Zealand; Norway; Portugal; Singapore; Spain; Sweden; Switzerland; Turkey; the United Kingdom; and the United States.


5 “The Interim Committee, together with the FSF and the G7, have expressed concerns about offshore finance and offshore financial centers. These reflect anxieties about ineffective financial supervision, strict bank and corporate secrecy rules that hinder investigation, arrangements that facilitate money laundering and other financial crimes, and loss of tax revenues onshore.” IMF, Offshore Financial Centers – The Role of the IMF. International Monetary Fund, Monetary and Exchange Affairs Department (June 23, 2000), at http://www.imf.org/external/np/mae/oshore/2000/eng role.htm (at 1.5.)

6 In this document, references to “countries” or “nations” should be taken to apply equally to “territories” or “jurisdictions”.
I. OECD countries vs. OFCs: an ambiguous relationship and a weak case?

A. Background on OFCs.

Quantifying assets accumulated in OFCs is hard, if not impossible. The IMF, on the basis of data provided by the Bank for International Settlements (BIS), finds that “for selected OFCs, on balance sheet cross-border assets reached a level of U.S.$4,600 billion at end-June 1999 (about 50 percent of total cross-border assets), of which U.S.$900 billion in the Caribbean, U.S.$1,000 billion in Asia, and most of the remaining U.S.$2,700 billion [is] accounted for by the International Financial Centers, namely London, the U.S. International Banking Facilities (IBFs) and the Japanese Offshore Market (JOM).” However, the smaller OFCs (for instance, Bermuda, Liberia, Panama, etc.) “do not report for BIS purposes, but claims on the non-reporting OFCs are growing, whereas claims on the reporting OFCs are declining.” As for money laundering and the amounts of “dirty money” placed into the world’s financial systems each year, estimates are equally difficult but these amounts are thought to be in the range of U.S.$500 billion to $U.S.800 billion, or 2 to 5% of the world’s annual GDP. The number of banks located in OFCs is estimated to be in excess of 4,000 (this figure does not include non-bank financial institutions, nor does it begin to encompass the myriad OFCs-based firms providing financial, tax-planning, investment, corporate and trust services).

As far as the definition of OFCs is concerned, the IMF considers that OFCs have five core features: (i) financial institutions carrying-out business primarily with non-residents, (ii) financial systems with external assets and liabilities out of proportion to domestic financial intermediation designed to finance domestic economies, (iii) low or zero taxation, (iv) moderate or light financial regulation and (v) banking secrecy and anonymity. We prefer the following definition: (i) favorable fiscal policy,
(ii) poor regulatory oversight and purposely limited controls on financial activities and
(iii) secrecy pertaining to real and beneficial ownership of assets designed to attract
foreign assets resulting in high volumes of financial transactions initiated directly or
indirectly by non-residents and (iv) disproportionate relationship between the volumes of
financial transactions and the output of the local economy. Our definition thus relies
more on causality and places the emphasis on opacity and weaknesses of regulatory
practices. It is in our view more appropriate because it allows deductive dissection and
provides for a better understanding as to why money is laundered through OFCs and how
this could be avoided. By acting on points (ii) and (iii) OFCs would be able to cope with
the money-laundering problem whilst remaining competitive to attract foreign assets.
We believe that the opacity resulting from legislation permitting full secrecy on, prohibiting
disclosure of, corporate, bank account and securities ownership information (among other
things) invariably leads to the sheltering of criminally tainted money. Opacity constitutes
the link between OFCs and criminal activities. Low or nonexistent taxation might be
sufficient to characterize “tax havens”, but our focus here is on the OFCs that chose to
not exercise regulatory oversight of business activities and welcome assets and capitals
without concern for their origin or the purpose for which they might be used, and also
aim to obfuscate information relating to such assets. In short, while we think that a low-
or no-tax regime is not necessarily objectionable as such, the combination of such a
regime with corporate or legislative devices allowing for investor anonymity and non-
traceability of assets and capitals makes it a heaven for international criminals. It should
further be noted than the harm done to developing countries by OFCs engaging in
“harmful tax practices” (i.e. inducing tax evasion), fraudulent financial activities and
money laundering is in fact more decisive than the harm done to industrialized nations, as
the rise of developing economies is directly conditioned upon better tax collection,
healthier public finances and lower corruption. OFCs also play an important role in
worsening the damage done to developing nations by economic crisis and currency and
markets turmoils.11

intermediation designed to finance domestic economies; and more popularly, centers which provide some
or all of the following opportunities: low or zero taxation; moderate or light financial regulation; banking
secrecy and anonymity.”

11 See id. (at II.A.15.): “Offshore banking operations have, however, played a role in the recent financial
crises of Latin America and Asia. In Latin America, offshore establishments were used as alternatives to
domestic financial institutions that were often subject to strict prudential regulations and high reserve
requirements. Moreover, tax advantages as well as political and economic uncertainty onshore fueled the
use of offshore establishments. The absence of effective consolidated supervision by onshore supervisors
proved to be the most important factor in permitting the exploitation of regulatory arbitrage offered in some
OFCs through the transfer of assets and liabilities between offshore establishments and parent banks
onshore. In Asia (for example in Thailand), regulatory and fiscal advantages as well as lower borrowing
costs, offered in some OFCs induced many Asian banks and corporations to tap international capital
markets through offshore establishments ... Large, undetected, and poorly accounted for offshore funds
contributed to credit expansion in the region, led to increasing exposures to liquidity, foreign exchange, and
credit risks, and had systemic effects on the financial systems of individual countries concerned.”
B. OECD countries vs. OFCs: ambiguities and weaknesses.

1. Internal and external promotion of OFCs by the OECD countries.

A comprehensive overview of the legal mechanisms whereby the OECD countries have acknowledged and promoted the use of OFCs would far exceed the scope of this article. We will only briefly mention the U.S. Foreign Sales Corporations (FSCs) mechanism and the subsequent regulatory devices adopted by the United States that directly or indirectly rely on OFCs.

The FSCs mechanism gained attention when the E.U. filed a complaint with the WTO with respect to it in September 1998. The WTO ruled against the U.S. on March 20, 2000. On August 20, 2001, a WTO panel held that the FSC Replacement Act introducing the Extraterritorial Income Exclusion Act (ETI) and enacted by the U.S. on November 15, 2000 to comply with the previous WTO ruling on FSCs (i) constitutes a prohibited export subsidy (ii) violates the WTO Agreement on Agriculture and (iii) discriminates in favor of U.S. goods. The WTO panel also concluded that the U.S. breached its WTO obligations by maintaining the FSC scheme in force beyond November 1, 2000.

The FSC rules allowed a tax exemption to U.S. companies for a portion of the trade income derived from their qualifying foreign subsidiaries. Such portion could be repatriated as a tax-free dividend by the U.S. parent corporation. A U.S. company could benefit from the regime if it had a foreign presence, respected specific control conditions over the subsidiary and had products designated as exports that were partly American made. In effect, the U.S. created a tax loophole purposely. All a U.S. company had to do was create a subsidiary in a tax haven and have all financial transactions linked to the export of its products go through that de-taxed subsidiary.

The ETI exclusion or loophole was enacted by the U.S. in November 2000 to replace the U.S. foreign sales corporations (FSC) regime, which had been found by the World Trade Organization (WTO) to be an illegal export subsidy in violation of GATT.

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14 Had the U.S. had a strong case against the E.U. with respect to the E.U.'s tax regime, which it claimed justified its adoption of the FSC mechanism, it could have challenged it before the WTO. See Robert Goulder, U.S. Will Comply With WTO Ruling on FSC, But Details Remain Unclear, 2000 TNT 70-3 (April 10, 2000) (quoting Rita Hayes, the then U.S. Trade Ambassador, comment that "it is the intention of the
The main difference between the two regimes is that the ETI exclusion is broader and does not even require that a foreign subsidiary exist. Its focus is on exports rather than on export procedures.

OFCs have prospered tremendously under both regimes. Under the FSC regime, U.S. companies set up subsidiaries in tax havens to benefit from the clement tax framework. Since the tax havens would not tax the profits from the sales of the products, profits from exports would be virtually tax-free for U.S. companies. Even if it became unnecessary, under ETI, U.S. companies kept their subsidiaries in tax havens for various other purposes. Debts and profits could be easily transferred to these subsidiaries with no fiscal consequence. Enron was one of many U.S. companies that learned to creatively use all the advantages provided by OFCs during the FSC period. Further, given that the ETI exclusion does not require subsidiaries in tax havens to benefit from export exemptions, these offshore centers may also be used to exempt what would otherwise not qualify as an export. OFCs also make it easier for less scrupulous management to forget portions of profits. Finally, the opacity created by the use of OFCs defies the purpose of the U.S. legislation on disclosure of information for publicly traded companies.

It is fair to conclude that mechanisms such as the ETI and the FSC regimes have greatly contributed to the dramatic growth of OFCs over the last twenty years, given the amounts placed in OFCs by U.S. companies taking advantage of those regimes – and this had most frequently occurred in the course of perfectly legitimate businesses.

2. International tax competition and competitive advantage.

While it is perfectly legitimate for the OECD countries to severely punish tax evasion, the attractive taxation offered by OFCs may not provide such an easy basis for criticism. The United States has acknowledged the advantages of attractive taxation for international fiscal competition, and legitimized the use of friendly or affiliated territories such as the Bahamas for tax purposes. Certain U.S. states such as Delaware have relied on taxation as much as attractive corporate laws to attract business, capitals and assets. In the European Union, where harmonization of tax policies is deemed to be a critical aspect of the Union’s economic integration, there currently is a substantial degree of criticism among member countries with respect to “unfair tax competition”. Countries such as Luxembourg, the Netherlands, Ireland, Belgium, the United Kingdom and Austria have been most noticeably singled out, whether as a result of certain provisions in their internal tax frameworks or those of their “affiliated”, “protected”, “dependent”
territories and historical partners (such as the Netherlands Antilles, British Virgin Islands, Aruba, Bermuda, Monaco, Jersey, Guernsey\textsuperscript{15}, Isle of Man, Madeira and the Turks & Caicos Islands). Therefore, the OECD countries may be said to have significantly weakened the rationale for possible future recourses against OFCs on the sole ground of “harmful tax competition”. Or is international fiscal competition only harmful when it profits a group of otherwise powerless islands? With trillions of dollars leaving the shores of the developed world\textsuperscript{16}, the OECD countries are now left with no choice but to compete with OFCs, which means creating incentives to keep companies and individuals from using them. OECD countries have at their disposal an arsenal of possible measures to attain that goal. Some of these are: (i) creating OFCs structures within their borders, (ii) discrediting OFCs by associating them with international crime, (iii) adopting more stringent anti-tax evasion rules, (iv) coercing OFCs’ cooperation, (v) prohibiting all transactions with OFCs. OECD countries seem to have so far chosen all five routes without actually focusing on any one of them.

Further, the OECD countries make the case for international liberalization of trade by arguing that it benefits all participants, following the “competitive advantage” theory. As a result, “competitiveness has become one of the central preoccupations of government and industry.”\textsuperscript{17} The wealth of a nation is strongly associated with its ability to be competitive in specific areas, and competitiveness is often the result of government’s policy and influence.\textsuperscript{18} OFCs are no less than other countries in the race to acquire wealth. They have chosen tax policy as a means to influence specific industries and to hedge on other countries’ tax regimes. In essence, if it is acceptable and even desirable for the greater good of international trade that the OECD nationals use the cheap and available labor provided by emerging economies such as Pakistan or Indonesia (who themselves use this labor force to their own competitive advantage so as to integrate

\textsuperscript{15} Britain is responsible for the external affairs of Jersey and Guernsey, in particular their “exclusion from the policy of harmonizing taxation within member states.” See, Barry Spitz, supra note 1.

\textsuperscript{16} The OECD report entitled Harmful Tax Competition: An Emerging Global Issue “indicates that in 1994 the G7 countries invested over US$200 billion in various Caribbean and South Pacific Islands – a more than 500 percent increase over the aggregate amount invested in 1985 ... while traditional tax havens only account for 1.2 of the world’s population, and, only three percent of the world’s GDP, they account for 26 percent of U.S. multinationals’ assets and 31 percent of their net profits. That the international tax base is eroding thus seems clear, lest there would be little need to invest such large amounts in these small islands.” Mitchell B. Weiss, International Tax Competition: An Efficient or Inefficient Phenomenon?, 16 Akron Tax J. 99 (2001). See, Organization for Economic Co-operation and Development, Harmful Tax Competition: an Emerging Global Issue (1998), at http://www1.oecd.org/daf/ifa/harm_tax/harmfultax_eng.pdf

\textsuperscript{17} MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 1 (Free Press, 1998).

\textsuperscript{18} See id. p. 126 ("Many see it [Government] as a vital, if not the most important, influence on modern international competition. Government policy in Japan and Korea is particularly associated with the success these nations’ firms have enjoyed.") See also, id. p. 269 ("The large US foreign aid program undoubtedly helped as well.").
in world trade and eventually develop more advanced skills) it is equally acceptable that remote Caribbean territories attract capital inflows by means of competitive taxation.¹⁹

Globalization has undoubtedly intensified international tax competition and, as is so often the case, those who are on the losing side attempt to impede its progress. The OECD is no exception. As earlier noted, it is at least equally concerned about potential losses of tax revenues onshore as it is with international crime. This has led it to adopt on April 9, 1998, a report entitled “Harmful Tax Competition: An Emerging Global Issue” ², which clearly suggests that OFCs’ tax regimes pose a threat to the OECD that needs to be eradicated. It also evidently draws no distinction between fair tax competition and financial crime. It assigns the blame to “tax havens” but appears much less critical toward tax dumping and tax-free zones within the OECD. In short, one should infer from the OECD findings that OFCs engage in a reckless and virtually criminal fiscal race to the bottom whereas the OECD countries want nothing more than a fair and level playing field.

More realistically, the OECD countries have found fierce adversaries in the world of economic competitiveness. The extent to which OFCs’ reduce the tax revenues of the developed and developing countries, however, remains unclear. The report argues that “preferential tax regimes” are eroding the member states’ tax bases and are thus “reducing the taxes that would otherwise be payable to them.” There is some evidence to the contrary. ²¹

Further, while the OECD rightfully makes the point that the amounts accumulated in OFCs are far disproportionate to their population sizes and real economic

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¹⁹ “That there are now so many tax havens on earth is a direct consequence of the promotion of flexibility and deregulation in all economic activities made by the OECD for decades ... the OECD pretends that low taxes, flexibility and competition are the panacea for all economic situations. The organization has also been claiming that all markets should be deregulated, and that free competition promotes universal welfare ... Now these very same principles are supposed to be illegitimate for the small countries that profit from financial globalization.” François Chesnais (Professor of Financial Economics at Villetaneuse University, France). Quoted in Godoy, Julio, Offshore Financial Centers Continue to Resist OECD Pressure, IPS, (Mar. 4, 2001), at http://www.twnside.org.sg/title/offshore.htm

²⁰ See supra, note 16.

²¹ See Reuven S. Avi-Yonah, Globalization, Tax Competition and the Fiscal Crisis of the Welfare State, 113 HARV. L. REV. 1573, 1586 (2000). (“There is no evidence that overall revenue from the personal or corporate income tax in OECD member countries has declined either as a percent of GDP or of total tax revenue from 1965 to 1995.”), See also, A Survey of Globalisation and Tax, THE ECONOMIST, Jan. 29, 2000, at 17 (“In most developed countries tax revenues as a proportion of GDP have in fact risen over the past 30 years, and the share of taxes on corporate profits in overall tax revenues has remained much the same.”). See also Vito Tanzi, The Nature and Effects of Globalization on International Tax Policy: Globalization, Technological Developments, and the Work of Fiscal Termites, 26 BROOK. J. INT'L L. 1261 (2001). But, see supra, note 16.
importance\textsuperscript{22}, it fails to acknowledge the striking disproportion between the enormous wealth accumulated in the OECD member countries and their relatively small weight in the world population.

OECD countries are also ill equipped for international tax competition, which is likely to intensify significantly with or without OFCs. In addition, the very concepts of "harmful" or "unfair tax practices" do not necessarily have substantial theoretical and economic grounds (for instance, many international taxation experts have somewhat provocatively noted that the difference in total tax pressure between Sweden and the United States is roughly equivalent to the "spread" existing between the total tax pressure in the U.S. and in certain OFCs, thereby making the case that there is no such thing as an economic "standard" for tax pressure).\textsuperscript{23}

The capital export neutrality theory (CEN) is often used in arguing that international tax competition is inefficient.\textsuperscript{24} This theory's premise, however, is not based on efficient allocation of world resources but on the inefficiency of the allocation from the perspective of the country of initial income. In fact, the theory is primarily relevant to argue that there exists today no conceptual analysis of what would be an efficient allocation of the world's resources as a result of globalization. The assumption is still that an efficient allocation of world resources is the sum of an efficient allocation of each states' resources within themselves. These traditional theories seem both outdated and inapplicable in a world without barriers and where free international trade is promoted. There will be discrepancies and arbitrages and in the end the free flow of capital and people will define the efficiency of the allocation of world resources. The OECD is less concerned by inefficiencies than it is with preserving its member states' tax bases and the allocation of the world's resources as it is. OECD countries favor international trade. They are eager not to share the world's resources with developing countries but to create more resources and riches so that their increased wealth benefits not only them but the developing world also. OFCs and international tax competition do not achieve that. They take resources away from the developed world and place these resources in the hands of corporations and "rogue" states that may not share the view that the richest states of the world should remain richer or for that matter that they represent the will of the "world population".

\textsuperscript{22} See \textit{supra}, note 16.
3. Existence of grounds for action against problematic OFCs.

A key element in the debate over OFCs is whether the OECD countries have grounds for action against the problematic, so-called "non-cooperative" OFCs.

OFCs usually have not violated any bilateral or multilateral agreements on trade or otherwise by virtue of their adoption of corporate devices and regulatory frameworks making money laundering less difficult than in other jurisdictions.

However, this does not mean that problematic OFCs have no obligations under international law in respect of money laundering nor that they have not violated those obligations. All countries may well have an obligation to fight against international crime. This obligation may be deemed to have been created by consensus and to have become customary international law, which would mean that the fight against international crime – in all its forms and including the laundering of its proceeds – requires adherence. In addition, if the fight against international crime has been so widely acknowledged as necessary and legitimate that it has become an obligation under international law, OFCs’ pure national interests must yield to international public interest and public order.

Accordingly, it must be determined whether such a consensus exists in order to ascertain whether international law provides for an obligation to fight international crime.

Consensus has traditionally been the mode of decision-taking in the international economic and financial arena, and most countries have declared that they oppose international crime and its corollary, money-laundering. If there is a consensus that countries should not participate in international terrorism, crime, money laundering and the likes – whether directly or indirectly – then this consensus creates an obligation for every state not to participate in or promote such activities. In fact, many organizations worldwide have recognized this obligation. The G7’s “Actions Against Abuse of the Global Financial System” provides for sanctions against countries that

25 Failure to precisely identify an international obligation may arise from various causes, such as: (i) the international obligation is such and so obvious that it need not be identified expressly (such as compliance with basic international public order requirements); (ii) there is no violation of an international obligation; (iii) the international obligation that was violated has been determined but has not been expressly labeled as such; (iv) there is no need to characterize the obligation as the imposition of sanctions is not contemplated; (v) the sanctions that might be taken would lack effectiveness; and (vi) there is no need to determine the international obligation that was violated since those bringing action are in fact a party, the legislator, the judge, and the executor.

"demonstrate failure to meet certain standards and are not committed to enhancing their level of compliance with international standards."27 The United Nations, the IMF, the Asian Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV Committee), the Organization of American States (OAS), and CARICOM have all expressed their position against money-laundering.28 The FATF, of course, issues recommendations and minimum standards of compliance and aims at fostering consensus among its members, OFCs and third parties. These organizations combined represent most of the world’s countries.

One may thus conclude that there is a clear consensus on this issue and that states have created for themselves an obligation to fight against money-laundering. This obligation may be invoked as a rule of international law, because the two fundamental requirements that the rule must be a general principle common to the major legal systems of the world and not be inappropriate for international claims are satisfied.

It should be noted, though, that (i) no such consensus has been reached with respect to international tax competition (which is another reason why it is critical to distinguish between international money-laundering and tax issues) and (ii) the existence of a state’s obligation under international law does not necessarily provide other states with a right to bring action in the event of a breach by this state of its obligation.29 We will discuss this issue in connection with our proposition that the OECD countries eventually take repressive measures against problematic OFCs.

The arguments set out in this Part I suggest that the OECD countries would have a rather weak case against OFCs if they were to narrowly focus on tax competition for purposes of their fight against these jurisdictions. In addition, the OECD countries’ attitude toward low-tax jurisdictions would likely seem paradoxical if not blatantly hypocritical in light of the very free-trade principles they most frequently embrace. Yet, the proven involvement or leniency of OFCs toward international crime — and the consequences of it on an international scale — makes it necessary and legitimate to try and undermine them. Having said this, we need to identify more viable means to thwart problematic OFCs. It is our view that the OECD countries will better succeed in this difficult endeavor by making their fight a struggle against money laundering and fraudulent financial activities rather than whining about OFCs’ diverting a share of their tax revenues. As indicated above, cracking down on OFCs on the ground of their willful support of financial crime is (a) economically more relevant than attempting to impede

28 CARICOM represents the Caribbean community. See http://www.caricom.org.
29 See discussion, infra, Part II.C.
international tax competition, (b) both legally and practically feasible and (c) will incidentally help address the issue of unfair tax competition to the benefit of the OECD countries. While the obliteration of all problematic OFCs is probably not feasible, it is certainly possible for the OECD countries to coerce a handful of them to become actual partners and greatly destabilize the others.

II. How to effectively fight problematic OFCs? Toward a more forceful approach.

We should first mention that while the existence of a myriad of OFCs creates the illusion that it would not be unfeasible to thwart them, the fact that there are so many of them provides the OECD countries with considerable leverage power. Indeed, it results in harsh competition between OFCs, given investors' ability to quickly relocate their assets to other jurisdictions offering comparable incentives. OFCs are consequently wary of being publicly singled-out and labeled “non-cooperative”. They also dislike the prospect of facing sanctions from developed countries. Indeed, even when the OECD countries have merely contemplated sanctions or mentioned possible retaliatory measures against designated OFCs, apparently little more than rhetorical threats with limited potential effects, the result has been significant losses of assets and capital for the concerned OFCs. The OECD countries should always keep in mind this leverage power when dealing with problematic OFCs and trying to obtain their cooperation.

A. Furthering anti-money laundering initiatives within the OECD countries.

If the developed world really intends to tackle the issue of international money laundering and financial crime, it must naturally make an effort at home before dealing with offshore jurisdictions. We can only briefly mention certain U.S. and E.U. anti-money laundering initiatives in this article, but it is important to note that the two economic superpowers have recently taken bold domestic steps against money laundering. The extent of the current U.S. administration’s support for concerted multilateral anti-money laundering approaches, however, remains unclear.

The E.U.’s anti-money laundering framework is arguably more inclusive than its U.S. counterpart, and recent European initiatives in this regard are likely to widen that gap. As noted above, there is a substantial degree of criticism among E.U. members currently with respect to “unfair tax competition” issues. That criticism frequently stems from competing fiscal interests, intra-E.U. tax dumping and the existence of several onshore or offshore low-tax or no-tax financial centers that are affiliated territories and historical partners of a fair number of E.U. member countries. These tax policy issues, however, are not exclusive of genuine concern over money laundering and financial crime. Such concern has led to the adoption of very stringent anti-money laundering regulations – starting most visibly with the adoption of the 1991 “Directive on prevention
of the use of the financial system for the purpose of money laundering”.30 (Many E.U. members had in fact endowed themselves with comprehensive anti-money laundering regulations before the enactment of the Directive and have since exceeded its requirements.)31 The scope of the Directive has recently been substantially widened. The obligations it provides in terms of client identification, record keeping and reporting of suspicious transactions have been extended to external accountants and auditors, real estate agents, notaries, lawyers,32 dealers in high value goods such as precious stones and metals or works of art, auctioneers, transporters of funds and casinos (it previously applied to financial institutions only).33 The Directive aims at combating laundering of the “proceeds of all organized crime and fraud against the budget of the European Union (EU)”, whereas the previous version of the Directive imposed obligations only with respect to the proceeds of drug-related crime. The extension of its coverage to several non-financial activities and professions that are deemed vulnerable to misuse by money launderers constitutes another obvious improvement. For instance, the Directive requires banking secrecy to be suspended whenever necessary and that any suspicions of money laundering be reported to the authorities.34 It will be interesting to observe how the most controversial European financial centers, such as Luxembourg, implement this directive and whether the E.U. succeeds in having them amend their bank and financial secrecy laws in the near future.

30 Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, 91/308/EEC.
31 France and Belgium, for instance, have been at the forefront of the anti-money laundering effort since the early nineties and have adopted very stringent reporting obligations bearing on stock brokers, banks, public financial institutions and money changers. See for instance the French “Loi n° 90-614 du 12 juillet 1990 relative à la participation des organismes financiers à la lutte contre le blanchiment des capitaux provenant du trafic des stupéfiants.” France has also created TRACFIN, an administrative body whose role is to investigate and gather information relevant to money laundering activities in France. It is vested with extensive powers for that purpose.
32 The exact extent of lawyers’ obligations was undoubtedly one the most heatedly-debated issues in the negotiations surrounding the preparation of the new directive, as concerns about client confidentiality made it a rather delicate matter. While it had always been clear that lawyers representing their clients in contentious matters would not be subject to any reporting obligations, the conditions upon which they were to report suspicion of clients being engaged in money laundering (or attempted money laundering) while providing advisory services were extensively discussed. It was eventually decided that the Directive would only require lawyers to report money laundering activities of which they have “knowledge” and that member states would be free to adopt more stringent requirements in this regard.
The E.U. has very recently committed itself to the most demanding anti-money laundering international standards to date by adopting the so-called “Paris declaration”.35 The representatives of all the member countries of the European Union, minus Sweden and Finland, adopted the Paris declaration on February 8, 2002, which comprises a number of recommendations that each signatory must ratify and translate into domestic law. The Paris declaration provides for better harmonization of criminal laws regarding anti-money laundering, mandatory reporting on a unified registry of transactions involving offshore banking accounts and trusts of which real and beneficial ownership is unclear and prohibits E.U. financial institutions and banks to set up subsidiaries or a local presence in the OFCs designated as “non-cooperative” by the FATF.36 It also provides for improved cooperation among the signatories’ judicial authorities and law enforcement bodies and for seizure and allocation of laundered assets among the signatories.37 The promoters of the declaration have, however, failed to establish an anti-money laundering prosecution mechanism at the European level. Prosecutorial powers will therefore remain vested in member states’ judicial authorities. One of the most interesting aspects of the declaration is that it contemplates a shift of the burden of proof in litigation concerning money-laundering activities – which would result in defendants suspected of having engaged in such activities having to demonstrate otherwise.38 In addition, certain member countries have decided to take additional retaliation measures against “non-cooperative” OFCs. France, for instance, has announced that it would consider suspending public aid to those jurisdictions unless such aid is directly targeted at local populations.39

Signatories of the Paris declaration will gather periodically to follow-up on the implementation of these measures, which in some instances will not prove easy. Many of the biggest European banks indeed already have subsidiaries in “non-cooperative” jurisdictions such as Egypt, Russia or Israel.40 The declaration also provides reciprocally that these jurisdictions’ banks will be precluded from setting up subsidiaries and/or a local presence in the countries that are signatories to the declaration. These requirements will undoubtedly require further adjustments.

As noted in this article, we believe that the fight against money laundering should now revolve around enhancing transparency with respect to real and beneficial ownership of assets and capitals located in OFCs and traceability of transactions involving OFCs. The Paris declaration appears to be a most welcome development to

36 Id.
37 See, AGEFI, supra Note 35.
38 Id.
39 Id.
40 Id.
that end. However, the fact that it has been signed only by European nations will considerably limits its scope.

To a broader extent, it seems fair to assume that the most compelling issues that the European Union will face in the upcoming years are (i) whether or not intra-E.U. financial centers will comply with the E.U.'s stringent anti-money laundering and transparency enhancing requirements and what will happen otherwise, (ii) whether or not the support from certain E.U. members for their dependent and affiliated territories will fade and (iii) whether intra-E.U. tax competitions issues eventually will be distinguished from the broader problem of money laundering and financial crime.

The U.S. regulations with respect to money laundering\(^{41}\) have recently been enhanced by the adoption – following the attacks of September 11\(^{th}\) – of the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001 (the Patriot Act).\(^{42}\) Until the adoption of the Patriot Act, the U.S. anti-money laundering framework was mainly comprised\(^{43}\) of Title 18 of the U.S. Code Section 1956\(^{44}\), Title 18 of the U.S. Code Section 1957\(^{45}\) and the Bank Secrecy Act of 1970, as amended.\(^{46}\) This framework is extremely intricate and cannot possibly be summarized here, but it remains narrower in scope than the European anti-money laundering regulations, in that it imposes reporting and monitoring obligations mainly on financial institutions and provides for limited mandatory disclosure requirements. Significant attention has been devoted to the privacy implications of the Patriot Act as well as to its territorial scope, but its purely anti-money laundering provisions are in fact limited to financial institutions. It also makes “the act of smuggling cash itself a criminal offense”\(^{47}\), and allows “jurisdictions over launderers even where their conduct lacks a sufficient United States connection where there is proper service of process.”\(^{48}\) The “tracking” of potentially criminal assets will be improved as well, with the new inter-agency Foreign Terrorist Asset Tracking Center (FTAT) being able to use FinCEN data.

Meanwhile, the current U.S. administration has resolved to withdraw its support for a multilateral solution to the issue of problematic OFCs. It appears to


\(^{47}\) See supra, note 43.

\(^{48}\) Id.
disapprove of the extension of disclosure requirements contemplated by the FATF and finds that the FATF initiative serves as a tool to the OECD countries to deter international tax competition. This ambiguous duality was indeed obvious at the time of the creation of the FATF. The results that the FATF has achieved as far as coercing cooperation from certain problematic OFCs have consequently been shadowed by concerns over whether it is in fact a Trojan horse assembled by the developed world to fight OFCs’ favorable tax regimes rather than international money laundering and financial crime. The United States’ new approach is thus helpful in that it highlights that tax competition and money-laundering issues should not necessarily be confused. Further, the conditional availability of the U.S. support is another reason, of paramount importance, why the fight against money laundering will succeed only if it does not appear to be a disguised attempt by the OECD countries to hinder tax competition.

Many observers, however, have been wondering whether the U.S. was in fact entirely withdrawing its support for the FATF and whether the current U.S. administration intends to repudiate all multilateral anti-money laundering initiatives. In response, Treasury Secretary O’Neill indicated that the U.S. acknowledgment of OFCs’ tax sovereignty must not be confused with leniency toward tax evasion or money laundering. Since OFCs play a critical role in tax evasion (including U.S. tax evasion), money laundering and financial crime, this distinction may seem rather subtle. In addition, the anti-money laundering fight has been misportrayed by certain special-interest groups as a European attempt to hamper U.S. competitiveness, deny OFCs’ sovereignty, build “a global network of tax police”, infringe on taxpayers’ privacy rights and even prevent the Caribbean economies from developing.

The adoption of the Patriot Act in the aftermath of the September 11th attacks, however, has demonstrated that the fights against international terrorism, crime and money laundering are deeply entangled, and that financial opacity is beneficial first and foremost to individuals and organizations engaging in illegal activities – not to the populations of the Caribbean.

49 See, Harmful Tax Competition: An Emerging Global Issue, supra, note 16 (at 53-54).
50 So far the current U.S. administration seems to favor bilateral agreements on tax information exchange between the United States and certain OFCs, such as those signed with the Bahamas on January, 25, 2002, the Cayman Islands on November 27, 2001 and Antigua and Barbuda on December, 6, 2001. 51 Quote from House Republican leader Dick Armey; See on this issue INTERNATIONAL TAX SERVICE, Ernst & Young, CHANGES IN U.S. POSITION CAUSES OECD TO REFOCUS HARMFUL TAX COMPETITION PROJECT (July 2001), at http://www.ey.com/global/vault.nsf/Isle_of_Man/Isle_of_Man_OECD_ITS_Insights/$file/E&Y%20OECD%20ITS.pdf

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B. Acknowledging the benefits and shortcomings of the FATF approach.

In spite of the above-noted concerns over its ultimate purpose, the FATF has been able to coerce certain OFCs into being cooperative and amending their legal frameworks so as to deter money laundering and tax evasion. We think, however, that the FATF endeavor will ultimately prove insufficient and that forceful retaliation against certain problematic OFCs will be inevitable. Cooperation efforts should be pursued further before any retaliation measures are taken, though, as they help identify which OFCs are not sincerely dedicated to fighting money laundering.

The FATF succeeded in convincing certain OFCs to adopt anti-money laundering regimes and allocate more resources to their law enforcement bodies. Yet we believe that its method is bound to remain largely inefficient in terms of the fight against money laundering and that it in fact highlights the pitfalls inherent in relying on good will and self-improvement for the purpose of dealing with problematic OFCs. What the FATF does in substance is to (i) identify the jurisdictions that do not have anti-money laundering regulations and seem particularly vulnerable to it; (ii) issue recommendations and guidelines and try to persuade these jurisdictions to adopt them; (iii) draft a “black list” of the OFCs that fail to adopt these recommendations in a timely manner and remove from the list those that have made substantial progress toward full compliance with them; and (iv) take countermeasures against “non-cooperative” OFCs, mostly in the form of regulations to be adopted by its members requiring their financial institutions to pay extra attention or report any transactions conducted with these jurisdictions.

The FATF, however, lacks the capacity to take direct counter-measures against non-cooperative jurisdictions and therefore favors an incentives-based

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52 The FATF is further impaired by its lack of operational resources in light of its enormous task. It relies upon a five-persons team and an annual budget slightly in excess of U.S.$1 Million; Stern, Babette, Les Huit Recommendations Du GAFI pour Lutter Contre le Financement Du Terrorisme, LE MONDE, November 2, 2001 at 1.

53 “According to FATF:
Since the last progress report on NCCTs last October, the FATF confirms the countries have made impressive progress towards improving their counter-money laundering regimes, which is reflected in legislation that has been introduced into various parliamentary bodies as well as enacted legislation and regulations ... The organization’s president, José María Roldán, stated: “Our goal is for countries to deal constructively with the gaps in their anti-money laundering systems. We do not want to keep them on the list any longer than necessary. Close monitoring of the remaining legislative and implementation issues will be crucial in determining an appropriate time for a jurisdiction’s removal from the NCCT list.”


54 Those financial institutions must “pay special attention to any transaction having a link to a country or territory previously identified as non-cooperative” in order to make financial transactions more difficult between unidentified individuals and institutions from non-cooperative OFCs and FATF members. See, countermeasures against Nauru; at http://www1.oecd.org/fatf/pdf/PR-20011205_en.pdf (at 1).
approach.\textsuperscript{55} This means that the FATF can only encourage OFCs to adopt anti-money laundering regulations based upon its forty recommendations and must provide OFCs with reasonable prospects of being taken off its list.\textsuperscript{56} This has resulted in the Bahamas, the Cayman Islands, Liechtenstein and Panama no longer being deemed "non-cooperative" jurisdictions by the FATF after the FATF estimated that these jurisdictions had satisfactorily adopted its recommendations.\textsuperscript{57} In our view, these four jurisdictions remain quite problematic in terms of international money laundering. Indeed, these OFCs have adopted pieces of legislation and regulations consistent with the FATF forty recommendations. Yet this might not make much of a difference for purposes of the fight against money laundering. First, the FATF cannot monitor the implementation of these laws and therefore relies on the goodwill and good faith of local authorities, which is open to question. Second, the "black list" mechanism has an obvious perverse effect. Adopting the aforementioned recommendations equals avoiding sanctions for the concerned OFCs (or having sanctions lifted). Since the sanctions consist mostly of vigilance and reporting requirements imposed on the financial institutions of the FAFT member states, there is an obvious incentive for OFCs to adopt the FATF recommendations so that foreign institutions are no longer required to monitor transactions originating from or carried out with the OFCs. Third, the FATF 40 recommendations themselves do not contain sufficiently strong requirements regarding the critical issue of corporate devices and regulatory loopholes, which allow for investor anonymity and, as noted above, directly permit and favor money laundering.\textsuperscript{58}


FATF members could . . . develop . . . new type of countermeasures . . . should also consider whether it is desirable and feasible to condition, restrict, target or even prohibit financial transactions with such jurisdictions. Such measures could serve as an ultimate recourse should a country or a territory have decided to preserve law or practices that are particularly damaging for the fight against money laundering . . . also examine ways to prevent financial institutions located in identified non-cooperative countries or territories from using facilities (for instance, information technology facilities) located in the FATF members' territory. Id. at 54.

\textsuperscript{56} The FATF "encourage[s] constructive actions". "This dialogue should prompt them to adopt their laws and change their practices". See ideate 55.

\textsuperscript{57} "Panama has achieved substantial progress towards putting in place a supervisory and regulatory framework for the banking system that meets most international standards." It remains to be seen, however, how local authorities uphold these standards. See STAFF ASSESSMENTS, International Monetary Fund, PANAMA: OFFSHORE FINANCIAL ASSESSMENT, BANKING SECTOR ASSESSMENT (AUGUST 2001), at http://www.imf.org/External/NP/ofca/2001/eng/pan/083101.PDF

\textsuperscript{58} Like all multilateral endeavors, the FATF mechanism is also affected by political considerations. See also, Russia's Money Laundering Charges, BBC News Online (16 July, 2001), at http://www.bbcworldwide.com/.

In a G7 statement:
The issue is financial crime, and it is the Group of Seven (G7), the world's richest nations, who want Russia to dance to its tune . . . stakes are high, with Russia's potential entry into the World Trade Organization
The determination of whether OFCs are truly “cooperative” should thus be based upon whether or not they agree to set up truly efficient and transparent investor identification and record keeping tools. We have mentioned such problematic practices as loose restrictions on the disposing and trading of negotiable bearer instruments, but it might be opportune for cooperative OFCs to start by implementing basic transparency enhancement procedures. First, identification mechanisms must be unavoidable. Recent company law reforms have, for instance, enhanced corporate transparency in Panama. Foreign investors, however, may still set up local foundations through intermediaries and enjoy full anonymity. In addition, local records keeping requirements are lax enough that the identity of foundations’ beneficial owners may remain unknown. While there will always be loopholes available to sophisticated and well-advised criminals, it is possible to limit their scope significantly by requiring that no legal entity may be established without its founders, shareholders, direct, indirect and beneficial owners being identified in public records. Subsequent banking and financial transactions must also become more traceable (for instance through enhanced transparency of trading and clearing mechanisms). In addition, these records must be available not only to local authorities but also to anyone seeking access to them, even from abroad (as, for example, the German corporate registry is available to anyone domestically as well as outside German borders).

This attests to the shortcomings of the FATF approach, which is likely to prove insufficient once its “black list” is empty and that it appears that money laundering has not been significantly impeded. The FATF’s efforts should nonetheless be pursued further, as a preliminary step toward taking more forceful measures against problematic, non-cooperative OFCs. During this phase, the OECD countries – whether directly or through the FATF – should request from all OFCs that they adopt requirements such as those contemplated above with respect to investor identification, traceability of assets and transparent corporate practices in exchange for “no tax harassment” commitments on the part of the OECD countries. In order to make it very clear that the OECD countries’ focus is on deterring crime – as opposed to preventing international tax competition – the OECD countries must formally acknowledge OFCs’ tax sovereignty, which means pledging not to challenge the tax practices of those of the OFCs that complete the aforementioned anti-money laundering reforms. Such commitment may take the form of formal acknowledgements within the frame of the WTO, the FATF or of multilateral agreements, memoranda of understanding or “gentlemen’s agreements” (e.g. between the possibly at risk should it not put its house in order ... ‘We will implement coordinated countermeasures against [Russia] later this autumn if they have not enacted significant reforms by then, as recommended by FATF’. Still, US treasury secretary Paul O'Neill appears confident that Russia's response will be immediate: “Money laundering in Russia is a closed issue, the question has been removed from the agenda.” See id.
E.U. Commission and a given OFC). Not only will this help identify truly “cooperative”
jurisdictions (that is, OFCs aspiring to attract international capital and assets through
attractive taxation rather than encouraging fraudulent financial activities and sheltering
criminally tainted assets), it will also serve a very important strategic purpose. Indeed,
the next step that the OECD countries should consider in order to thwart problematic
OFcs is to criminalize doing business and engaging in commercial and financial
activities with these OFCs – which may then attempt to retaliate with legal action. Those
forceful, repressive measures should be the second step of a two-step process designed to
better fight money laundering. Indeed, once the OECD countries have (a) taken
aggressive steps against money laundering domestically, (b) sought to cooperate and
work alongside OFCs against money laundering and crime and (c) made it apparent that
their intent is not to deter international tax competition and keep OFCs from adopting
competitive tax regimes, they will have effectively shielded themselves against most
possible legal actions by the criminalized OFCs.

C. Going further: the case for a multilateral agreement on doing business
with problematic OFCs.

We believe that it would be opportune for the OECD countries to
eventually adopt a multilateral, binding agreement criminalizing doing business with the
OFCs that have failed to adopt transparency-enhancing measures and take appropriate
steps against crime, money laundering and doubtful business practice such as those
indicated above59 (third party countries should be able to subscribe to the convention as
well). Criminalizing doing business with a problematic OFC should mean prohibiting
engaging in any transaction, whether commercial, financial or otherwise, with any person
or entity of which it might reasonably be assumed that it is located or incorporated in that
OFC or that its assets are located in that OFC. This acknowledges that FATF-type
solutions based upon OFCs’ and financial organizations’ self-discipline and goodwill are
flawed and do not permit it to effectively address the issues raised by problematic OFCs
– whose negative impacts are such that they call for more vigorous measures.

What, however, makes a multilateral agreement a more suitable
instrument for purposes of criminalization of certain OFCs than alternative, domestic
measures? A multilateral agreement appears to be most appropriate because it would (a)
follow the precedent set by the groundbreaking 1997 OECD convention on Combating
Bribery of Foreign Public Officials60, whereby all parties committed to domestically

59 Desirable measures include, for instance, the setting up of transparent and publicly available corporate
registries, financial statements and records of corporate transactions, the adoption of devices allowing for
better traceability in connection with securities trading and clearing, strict rules governing negotiable bearer
instruments, better regulatory oversight of banking and financial activities and cooperation with other
nations in connection with the prosecution of money launderers and financial criminals.
criminalize acts of bribery of foreign public officials and prosecute companies and individuals suspected of having committed such acts, and (b) would permit to avoid the traditional pitfalls of domestic laws aiming to address international issues (as discussed below), such as the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act)\(^6\) or the Foreign Corrupt Practices Act of 1977 (FCPA)\(^2\) in the United States. Its binding nature would also logically make it a more effective tool than non-binding recommendations.

There are, in fact, only four ways available to a jurisdiction to attempt to tackle an international issue. The first is to adopt domestic laws of international reach, the second is to adopt so-called "extraterritorial" laws, the third is to enter into a series of bilateral agreements with foreign sovereigns and the fourth is to contribute to the emergence of international standards (for instance through the adoption of multilateral agreements). Considerable literature has been devoted to these issues, which go beyond the scope of this article. The insufficiencies of national laws and frameworks designed to address transnational issues are frequently noted, as well as the impracticalities of concluding numerous bilateral agreements on a given issue. Domestic laws of international reach include, for instance, the FCPA, which made it a federal crime for any U.S. person or entity to bribe or offer to bribe a foreign official in order to obtain an illegitimate business advantage. As for an example of a law that has been deemed "extraterritorial" (rightfully, in this case), we think of the Helms-Burton Act. The FCPA has been widely criticized by U.S. companies, which contended that it impaired their ability to conduct business abroad while their foreign competitors did not bear equivalent burdens\(^3\) (the above-mentioned Paris declaration might suffer from the same flaws as the FCPA did in this regard, as it will place European companies at a disadvantage relative to their U.S. competitors and lacks the participation of the E.U.'s biggest commercial partner). Laws of extraterritorial nature such as the Helms-Burton Act of 1996 have infuriated the U.S. commercial partners (and most noticeably the European Union), raised substantial concerns over their validity under international law and enforceability and frustrated U.S. companies.\(^4\) As a result, negotiations were eventually conducted with the

\(^{64}\) Especially the U.S. companies with foreign competitors in the areas relevant to the Helms-Burton Act, which felt that they would have to comply with the requirements of the law while their foreign counterparts would (a) disregard the law if they had no substantial business interests in the United States and/or (b) relentlessly challenge the law on the ground of its extraterritoriality if it were to apply to them — an argument that was not equally available to U.S. companies. "The law ... will have a negative impact for the U.S. position in the global economy in several areas, including (1) conflict with the principles underlying the WTO multilateral trading system; (2) possible violation of specific U.S. commitments in the WTO; (3) creation of a bad precedent for future actions by other countries; and (4) undermining of respect and
European Union and a settlement was reached so that E.U. companies be exempted from the most controversial requirements of the Helms-Burton Act, while the United States Congress responded to the claims of U.S. companies by significantly lowering their obligations under the FCPA.

In light of these or other examples, it appears that a binding, multilateral, widely agreed upon and enforceable agreement is preferable to any available domestic solutions. All multilateral attempts, however, raise challenging consensus building issues that constitute their most serious pitfalls. Countless draft multilateral agreements ended up as non-binding recommendations or guidelines because they lacked widespread support or understanding about their basic terms from the beginning. In addition, it must be noted that purely domestic attempts such as the adoption of the FCPA by the United States may be invaluable for international cooperation purposes. It is indeed the need for a fair and internationally level playing field that led the United States to pressure its fellow OECD members to adopt the above-noted 1997 convention on Combating Bribery of Foreign Public Officials.

Faced with the prospect of either abandoning the FCPA (or amending it enough to make it useless) or persuading its economic partners to subject themselves to similar obligations, the U.S. supported the second option and played a critical role in the adoption of the 1997 Convention. Had the original will to tackle international bribery not originated from the U.S. and not been translated into a law there,
it is fair to assume that an international agreement on bribery such as the 1997 Convention would still be a distant aspiration. A similar international agreement should be reached in order to address an issue of the importance of the fight against international crime and the harboring and laundering of its proceeds.\(^6\)

However, as opposed to mainly incentives-based FATF-type approaches, a binding multilateral agreement relying on aggressive sanctions may expose its signatories to legal retaliation by the concerned OFCs. Although the threat of sanctions is not \textit{per se} problematic from an international law standpoint, the actual use of such sanctions might well be.\(^7\)

Under international law, though not under all international law doctrines, sanctions are usually available to remedy a violation of a pre-defined international obligation. As earlier indicated, persistently non-cooperative OFCs may be deemed to be in violation of their obligation under international law to fight crime and the laundering of its proceeds. Should this mean, however, that states are consequently entitled to bring legal action and/or take counter-measures against these OFCs? The existence of an international obligation is not sufficient to give rise to a claim under international law. Rather, a cause of action will arise from the failure to perform, or the violation of, an international obligation that results in legally recoverable damages.\(^7\) The damage, whether real of assumed, and the causal link between such damage and the violation of the obligation are necessary elements to the existence of liability. Hence, the acts that, in the view of the OECD, “may potentially cause harm to the tax systems of other countries as they facilitate both corporate and individual income tax avoidance”\(^7\) cannot as such give rise to a claim under international law. Yet the international community arguably suffers from international crime and money laundering, and OFCs’ money laundering-friendly frameworks may be construed as directly contributing to the continuous occurrence of this damage. By adopting the OECD convention, the signatories would thus simply attempt to remedy the damage that they suffer from the OFCs’ leniency toward international crime and money laundering.

The issue, then, is whether these OFCs would be able to bring legal action against the signatories to the convention on grounds such as that it in fact discriminates against them, serves as a tool to unfairly exclude them from international trade, denies

\(^{6}\) In this regard, the aforementioned “Paris declaration” may constitute the first conclusive step toward international criminalization of problematic OFCs.

\(^{7}\) Creating a list of non-compliant countries and threatening economic sanctions amount to pressure, which does not constitute as such an illicit act under international law. It merely aims at creating the appropriate climate for cooperation. See OECD, TOWARDS GLOBAL TAX CO-OPERATION, PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES, 2000, at http://www1.oecd.org/daf/fa/harm_tax/Report_En.pdf (at 17).

\(^{7}\) Case concerning Barcelona Traction, Light and Power Company, Ltd. (Spain v. Country), 2000 I.C.J. (Feb. 5).

\(^{7}\) OECD, Harmful Tax Competition, \textit{supra} note 16, at 23.
their sovereign right to adopt the tax or legal regimes they see fit and/or is an inappropriate remedy.

While it is impossible to foresee the outcome of such a procedure, one may anticipate that they would not have a very strong case. Essentially, non-WTO OFCs will only be able to rely on litigation before the jurisdictions of the OECD countries or to bring actions before the ICJ, whereas WTO members will likely rely on the WTO dispute resolution mechanism. OFCs should be able to easily prove that the convention has caused a prejudice to them before the ICJ or the OECD countries’ domestic courts. But they may have a much harder time establishing that the OECD countries did wrong in making it illegal to conduct business with jurisdictions that have failed to adopt effective anti-money laundering frameworks and enhanced transparency standards. The OECD countries will likely make the case that theirs was a good faith effort, as evidenced by their acknowledgement of the tax practices of the OFCs that have chosen cooperation on the fight against laundering (which arguably was their obligation under customary international law, as noted above). Furthermore, the OECD countries will assert that the OFCs by failing to adopt transparency-enhancing measures and comply with strict anti-money laundering standards – have not clearly established their opposition to illegitimate business activities and that one’s right to conduct illegitimate activities must not be upheld.

Things might be less clear-cut as far as litigation within the frame of the WTO, but there are good reasons to think that the OFCs will end up on the losing side as well. Firstly, OFCs will claim that the convention’s signatories have violated their trade obligations. These obligations, however, are not absolute. Under the Security Exceptions of GATT and GATS, any WTO member is entitled to take any action “which it considers necessary for the protection of its essential security interests”. Taking the necessary means to protect oneself against international crime may be construed as essential to one’s security interests, whether economic and financial – or even military in light of terrorists’ reliance on financial crime to accumulate resources. In broader terms, commercial obligations yield to international public order. In addition, WTO members have known since the WTO Appellate Body decision “United States – Import Prohibition

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74 See discussion, supra, Part I.B.3.
75 Ability to conduct legitimate business/financial activities with OFCs is rightfully not “put in question” by the FATF. See Report on Non-Cooperative Countries and Territories, supra, note 55, at 55.
76 It is worth mentioning that Saint Kitts & Nevis is a WTO member.
77 Article XXI of the General Agreement on Tariffs and Trade (GATT) and Article XIV(b)(I)(s) of the General Agreement on Trade in Services (GATS).
of Certain Shrimp and Shrimp Products” (Shrimp/Turtle) that they have the right under WTO rules to “take unilateral trade action” against certain states, provided they have previously attempted to engage in multilateral negotiations and that they do so on the ground of exceptions to which they are legally entitled. The decision grants them such right in connection with the application of Article XX (General Exceptions) and considers that unilateral trade sanctions may be utilized under certain circumstances to achieve certain goals of environment protection and sustainable growth. There is no compelling reason why this rationale should not apply in connection with Article XXI, which provides for the aforementioned Security Exceptions. In essence, carefully designed unilateral trade measures are no longer invalid per se.

Secondly, OFCs might claim that a convention criminalizing doing business with them is an inappropriate remedy on the part of the OECD countries, the argument being that there is no immediate connection between the damage (the continuous occurrence of crime) and the remedy taken (the complete prohibition of any activity whatsoever carried out with a given jurisdiction). However, the OECD countries may argue that (i) no other effective remedy is available and that it is the concerned OFC’s failure to forcefully address the issue of money laundering that ineluctably led to such remedy after the OECD countries had “exhausted all options reasonably available” to it, and that (ii) this measure was “necessary”, as its anti-money laundering goal “could not be accomplished in a manner that was less trade restrictive”.

Criminalized OFCs might also argue that the convention’s adoption amounts to “discriminatory” sanctions. The WTO has constantly upheld the principle of non-discrimination in trade sanctions and the Shrimp/Turtle case confirmed it unambiguously. These OFCs may therefore be expected to make the point that by

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81 See Benjamin Simmons, supra, note 81, at 8540-436.
82 See Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT) providing that such exceptional measures are “subject to the requirement that [they] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Supra, note 77.
83 See Simmons, supra, note 81, at 8540-436.
criminalizing doing business with them while not acting alike toward territories such as Guernsey or Luxembourg, the OECD countries have both discriminated against them and promoted their affiliated territories at the OFCs' expense. This appears to be a valid argument. It is thus another reason why the OECD countries must have made their best efforts to address the issue of money laundering domestically by the time of the convention’s adoption. In any case, if the WTO were to rule against the OECD countries in this matter, it is rather unclear which means would be available to those OFCs to remedy the harm done by the convention’s adoption. This, however, relates to the more general, but critical, issue of whether small nations are able to effectively retaliate against the developed world within the current frame of the WTO.85

Conclusion

Money laundering and financial crime are issues of paramount importance to both the developed and developing worlds, which call for forceful measures and international cooperation. International approaches to this issue are thus justified, although past attempts have not been free of ambiguity and have been only partially effective. To ensure greater efficiency, organizations such as the OECD must provide guarantees that their focus is on thwarting international crime rather than impeding tax competition. The credibility of any action against money-laundering imposed by international law is greatly undermined by the inclusion of measures aimed at limiting international tax competition. Further, favorable tax regimes may co-exist with actions against money laundering and financial crime, and the OECD countries’ interest is to acknowledge the tax practices of the OFCs while effectively working toward deterring money laundering. This entails adopting comprehensive transparency-enhancing measures, as well as abandoning various regulatory and corporate devices allowing for investors’ anonymity and the non-traceability of assets.

In addition, problematic, persistently non-cooperative OFCs may and should be deemed to be violating their obligations under international law with respect to fighting crime. These OFCs contribute to the occurrence of a continuous damage that the OECD countries should consider remedying. This raises a number of challenging international trade issues relating to the means available to the OECD countries to strike these jurisdictions, and the possibility that they may retaliate with legal action either before the WTO or outside its frame.

Thwarting financial crime and its corollary, money laundering, is not easy but nonetheless feasible. It is essentially, and unsurprisingly, a matter of political will. Commitment to tackling this issue, along with sustained effort, will undoubtedly prove

85 See Pauwelyn, supra, note 73.

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fruitful. It is no less of a challenge than fighting international bribery, which led to the adoption of the 1997 OECD convention on Combating Bribery of Foreign Public Officials and similar agreements or legislative instruments throughout the world.

Apart from their criminal nature, bribery and money-laundering distort international trade and, as such, the existence of appropriate national legislation should become a criterion for admission and continuous membership to the WTO. Currently, countries must adjust their foreign trade legal regimes to the WTO standards in order to be granted admission, yet they do not have to meet even minimal standards with respect to money laundering and financial crime. This situation demands change. It also connects to the broader topic of whether adequate levels of human rights, labor standards and so forth should be achieved in order to gain admission to the WTO.