Title
From Anti-Money laundering to... what? The aftermath of “compliance” for offshore financial services

Permalink
https://escholarship.org/uc/item/1044b90z

ISBN
9780804770132

Author
Maurer, WM

Publication Date
2010-05-10

Peer reviewed
From Anti-Money Laundering to . . . What?

Formal Sovereignty and Feudalism
in Offshore Financial Services

Bill Maurer

There is no contradiction between the formal enhancement of state sovereignty and ungoverned space. Indeed, the former may bolster the latter, not just passively, by drawing boundaries and leaving the spaces between as no-man's lands, or epistemologically, by defining the sovereign space of governance negatively against spaces of sovereignty's exceptional absence. State sovereignty may more actively support ungoverned spaces. The two may also achieve a kind of coexistence within the same space: not necessarily in a causal relationship but simply coexistent and coterminous. This chapter argues that the latter kind of coexistence has been achieved in the space of flows of offshore finance (see Chapter 2). It examines the discursive and practical shift from anti-money laundering to “information sharing” in the global effort to regulate offshore finance and considers the implications of multilateral efforts to control offshore finance through soft law—norms, standards of practice, and peer review—rather than through the traditional tools of sovereign states such as direct sanction, treaty, and legislation (not to mention military force). It finds that in the aftermath of the 1996–2006 campaign of the Organization for Economic Co-operation and Development (OECD) against “harmful tax competition,” the formal sovereignty of offshore centers increased despite multilateral efforts to curtail it and that at the same time the ungoverned space of flows through offshore centers continued relatively unabated. The task of this chapter is to explain how and why this happened and what it might mean for understanding ungoverned spaces. It suggests that a
kind of neofeudalism exists at the heart of global finance and that an adequate response to it might require an equally neofeudal mindset.

Although this chapter is mainly limited to a consideration of the period from 1996 to 2006, the issues it takes up have received renewed attention since the U.S. presidential campaign of 2007, the subsequent election of President Barack Obama in 2008, and the global financial crisis that began around the same time. During the campaign, Obama and his running mate Joseph Biden of Delaware made ending tax haven abuses one plank of their platform. Biden especially railed against the revenues lost to offshore finance centers while his opponent, Sarah Palin, derided what she saw as his support for Americans paying more taxes. In the summer of 2007, the U.S. Senate Finance Committee held a hearing on the use and abuse of offshore tax havens, lending momentum to a regathering of forces against the offshore that had weakened under the administration of George W. Bush. And, after the election, President Obama attended his first G20 summit, where the release of a new OECD report on tax havens caused not a little diplomatic dispute among the delegates, notably smoothed over by President Obama himself. As New York Times columnist Gail Collins wryly noted: “Look,” the G20-ers must have been telling each other, “he can resolve the controversy over the use of the Organization for Economic Cooperation and Development’s list of tax havens, and he knows the difference between Australia and Austria. Surely, this is a new kind of American leader.”

The Obama administration’s new focus on offshore finance is connected to the global financial crisis and the revenue challenges facing the United States and other northern powers. At the time of this writing (summer 2009), the United States is actively pursuing the repatriation of funds held in Swiss bank accounts and a change in the tax deferral rules for corporations’ foreign-earned profits (which are often deemed “foreign” because they are recorded as the profits of offshore subsidiaries rather than the parent company); and the OECD is composing new “black,” “gray,” and “white” lists of jurisdictions based on their compliance with international norms of taxation, discussed further below. The motivation seems to be both to provide new revenue streams to fund social welfare programs—especially, in the United States, health-care reform—and to hold more bargaining chips for use in negotiation with pharmaceutical companies and business groups as the effect of the financial crisis on revenue becomes more pressing.

From the point of view of the offshore jurisdictions, however, this new attention smacks of neocolonialism. As British Virgin Islands Premier R. T. O’Neal, at the time of the G20 summit in April 2009, remarked to the Associated Press: “Why is it that we now in the colonies, because we are still a colony, can’t have a financial center? If you are doing something and you are saying I can’t do it, are you saying that I am inferior?” And the BVI Beacon newspaper, in a report on that territory’s conclusion of an eleventh Tax Information Exchange Agreement—conducted in order to comply with new OECD recommendations—implicitly mocked the color-coding scheme used since the mid-1990s by the OECD and multilateral agencies concerned with tax haven abuses. “Almost ‘white,’” the newspaper declared. The global politics of rank and race are painfully evident. They are the starting point for my consideration of neofeudalism in the debate over global revenue regimes, anti-money laundering, and tax information exchange.

This invocation of feudalism may be jarring. It is motivated by two related concerns. First, as discussed by Phil Williams (Chapter 2) and others in this volume, many contemporary ungoverned spaces seem to be organized along medieval lines, with politics of rank and bondage doing the work of social and economic organization rather than the bureaucracies, police, and markets of conventional territorial nation-states. International finance seen from the perspective of the offshore has some of the same characteristics: many offshore financial service centers are located in feudal and colonial microstates (principalities like Monaco and colonies like the British Virgin Islands), and much of the wealth being “protected” offshore is inherited and disguised through non–market oriented vehicles like charitable trusts. Second, the OECD’s effort to curtail harmful tax competition invoked the rhetoric of obligation but was thwarted by a rhetoric of “fairness.” This emphasis on fairness obscures our view of the other strong normative component to the harmful tax competition debate. This is the norm obviating payment as a solution to the tax haven problem.

“Payment” is used here in an anthropological sense and in contrast to the notion of exchange. Payments are monetary transactions such as fees, fines, penalties, and gifts for which nothing is directly received in return. Payments are morally and epistemologically problematic in societies in which money is supposed to index price and the value of goods marked to each other by free exchange in the market. Where money was not commensurate with all goods, payments were less awkward. Tribute, for example, often conveyed the sense of giving wealth to a higher cosmological order. One did not pay tribute to the
king in return for protection or grace, even if such was often the result, but simply because he was king. Payments to the state become morally ambiguous when rulers lose their cosmological or divine status: when a state is of the people rather than of the gods, then the rule of law must replace the whim of humans lest payments to the state come to appear to be a protection racket, bribery, or extortion.6

The thesis here is that this same sense of the moral ambiguity of payments both sustains offshore finance in the first place and prevents one practical solution to the problem of harmful tax practices. People seek to avoid taxes in part because of the whiff of feudal bondage about them, even if their own wealth evinces the politics of rank rather than the economics of market relationships. This same normative commitment against payments prevents an obvious solution to the problem of global tax competition: to buy off the tax havens and to insist on a redistribution of wealth from individuals of rank to the leveling of the market. In other words, our own commitment to not being medieval hinders our policy responses to the feudalism at the heart of finance.

The chapter proceeds as follows. First, it reviews the OECD’s effort to curtail harmful tax competition, along with the related efforts of the Financial Action Tax Force (FATF) and the Financial Stability Forum (FSF). Then, it explores how the OECD’s emphasis on consultation and peer review as governance mechanisms to achieve compliance led to a shift in rhetoric from harmful tax competition to tax cooperation and fairness. Next, it reviews the erosion of the onshore/offshore distinction in the wake of compliance. Finally, the chapter returns to the question of the relationship between sovereignty, neomediaevalism, and ungoverned spaces in the effort to achieve global tax regulation.

Governance through Blacklisting

“Harmful tax competition” became a hot issue in the late 1990s as a number of international actors began to worry about the consequences of neoliberal restructuring that characterized the period of the 1980s when Ronald Reagan was president of the United States and Margaret Thatcher was prime minister of the United Kingdom. A political philosophy that emphasized the free movement of money and the rolling back of the state sector raised the specter of a global race to the bottom, as governments scaled back revenue collection in order to attract foreign capital.7 Although part of an increasingly un-
Major powers took varied positions on the OECD's initiative. For the most part, European countries supported it (key exceptions being those countries such as Switzerland with histories of banking secrecy), but the United States' position fluctuated with the change of administration from Bill Clinton to George W. Bush in 2001, and again to Barack Obama in 2008. Despite the intensified awareness of the dangers of ungoverned financial flows in the wake of the terrorist attacks of September 11, 2001, the Bush administration argued that the OECD was engaged in precisely the kind of multilateral global governance project it had opposed in other domains, from the Kyoto protocols to the United Nations' effort to conduct weapons inspections in Iraq. The effort to "name and shame" tax havens, as it became known, was, to the Bush administration, an affront to the sovereignty of jurisdictions and a form of regulatory "overreach," with dire implications, it was claimed, for the principle of sovereignty itself. As former Treasury Secretary Paul O'Neill put it, the Bush administration was "troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system." Furthermore, the United States, O'Neill stated, "would not participate in any initiative to harmonize world tax systems."10

The main parties opposed to the OECD were the Society for Trust and Estate Practitioners, a professional association of tax planners; the Center for Freedom and Prosperity (CFP), a think tank in Washington, D.C.; and the International Tax and Investment Organization (later renamed the International Trade and Investment Organization, ITIO), a multilateral body of tax haven countries that was established with the assistance of the Commonwealth Secretariat, explicitly modeled on the OECD itself as a consultative body made up of representatives from its own member states as well as entities with observer status.11

The CFP was founded specifically to challenge the initiative. It argued that tax competition should in fact be encouraged as "an important check on excessive government."12 It claimed that the OECD initiative was an "attack" on taxpayers, free trade, sovereignty, and privacy. It charged the OECD with "empire-building,"13 and it spearheaded the formation of the Coalition for Tax Competition, which includes the Heritage Foundation, the Cato Institute, the American Enterprise Institute, and a number of other right-wing, libertarian, and Christian organizations (such as the Discovery Institute, which promotes creationism in U.S. public schools).

This multilateral effort brushed up against U.S. racial politics, as well. The generally left-leaning Congressional Black Caucus joined the Bush administration in opposing the OECD initiative. In a letter signed by notable progressive congressional representatives such as Maxine Waters, Barbara Lee, and Charles Rangel (archived by CFP), the Congressional Black Caucus expressed the concern that the OECD initiative would "impose economic harm on developing nations" and promoted the virtues of "the free flow of capital" in "improving economic conditions in poorer nations" by providing governments with "funds that are critically needed to provide education, health care, and social services."14 Statements from CFP, the Congressional Black Caucus, and the Bush administration resonated with similar rhetoric from Caribbean leaders that the initiative was "nothing less than a determined attempt to bend other countries to [the OECD's] will . . . a form of neo-colonialism in which the OECD is attempting to dictate the tax, economic systems and structures of other nations for the benefit of the OECD's member states" (according to Ronald Sanders, senior ambassador from Antigua to the United Kingdom).15 Caribbean leaders accused the OECD of "bullying" (Julian Francis, Bahamas Central Bank) and called its actions a threat to the islands' "economic sovereignty" (Ambrose George, Dominica Finance Minister).16

Yet partisans on the opposite side invoked sovereignty as well. NGOs like Oxfam and Christian Aid demonstrated how tax competition eroded the sovereignty of developing nations by hindering their efforts to provide for their citizens' welfare. Seiichi Kondo, OECD deputy-secretary, put it this way in a speech in 2002:

The OECD's project on countering harmful tax practices is part of a wider initiative to promote good governance in a globalised economy. Globalisation has enormous potential to improve living standards around the world. But it also brings risks, including the risk of abuses of the free market system. The activities of tax havens distort the free flow of capital and undermine the ability of governments to finance the legitimate expectations of their citizens for publicly provided goods and services. By providing a framework within which all countries—developed and developing—can work together to fight harmful tax practices, the OECD seeks to encourage transparent and fair tax competition.17

In its first report on the matter, "Harmful Tax Competition: An Emerging Global Issue," the OECD identified two types of harmful activity offshore:
and the latter toward financial crime and money laundering. The changing patterns of concern over time suggest that these lists are the product of the intersecting politics of north-south relations, colonial clientage, and geopolitics, as well as the OECD’s soft-law governance strategy and the ITIO’s effort to counter it.

"Participating Partners" and the Level Playing Field

Tax haven countries saw the OECD initiative as heavy-handed, imperial, and unfair. Being blacklisted evoked old colonial forms of domination, surveillance, and control. Countries so targeted felt sidelined and caught off guard. OECD members with histories of bank secrecy such as Switzerland and Luxembourg vociferously opposed the initiative. But the possible damage to the reputations of offshore jurisdictions by being blacklisted led them quickly to seek to minimize the damage. Most sought to get themselves off the blacklists by adopting best practices proposed by the OECD and FATF or by issuing press releases committing themselves to compliance. Jason Sharman, Gregory Rawlings, and others have amply documented this process. All the while, a discursive war raged over the OECD’s concepts and definitions.

The OECD’s modus operandi demanded that the ITIO be incorporated into its process of consultation as a participating partner. The result was the creation of the Global Forum on Taxation, which would meet every two years under the auspices of the OECD. The Global Forum consisted of OECD and non-OECD members, including the ITIO membership. The discourse of harmful tax competition very quickly shifted to “principles of transparency and effective exchange of information for tax purposes.” Furthermore, “The focus of the meeting was on how to achieve a global level playing field and how to improve further the process by which this initiative can be taken forward based on the widely accepted principles of equity and shared responsibility.”

The ITIO quickly issued its own press release, headlined, “It’s Official: OECD Tax Project Depends on Level Playing Field.” The chief outcome of the first Global Forum meeting was the creation of a “Level Playing Field Joint Working Group.” The “level playing field” slogan has by now made its way into the title of nearly every major report by the OECD and other parties to the tax competition debate, including the title of the OECD’s own report on the 2005 Global Forum meeting and a 2007 report by the Commonwealth Secretariat titled Assessing the Playing Field.
Onshore and Offshore: What's the Difference?

The deployment of the level playing field had another effect as well: it spotlighted OECD member states’ own tax practices, many of which would not have been deemed in compliance with the OECD and FATF’s norms. This fact underscored the “fairness” discourse that buttressed the opponents of the OECD initiative. And this rhetoric of fairness and the level playing field, in turn, drowned out all other competing approaches to tax competition. The larger issue of global tax regulation took a back seat to matters such as the procedures for facilitating information exchange among OECD and non-OECD countries—should they be automatic or on demand?—and timetables for the expiration of exemptions for information exchange regimes from four recalcitrant OECD members (Austria, Belgium, Luxembourg, and Switzerland, which are exempted until 2010).

Meanwhile, tax havens in compliance with OECD and FATF recommendations set up corporate registers, Know Your Customer, and due diligence procedures, which only served further to highlight the lack of such procedures in many onshore jurisdictions, again bolstering the “fairness” rhetoric. While the British Virgin Islands and almost all other tax havens have either outlawed or immobilized bearer shares, for example, Nevada and Wyoming still permit them. Current U.S. Vice President Biden’s home state of Delaware permits anonymous beneficial corporate ownership; most offshore centers in compliance with OECD and FATF recommendations do not.31 The International Monetary Fund even concluded in 2004, “Compliance levels for offshore financial centres are, on average, more favourable than those for other jurisdictions assessed by the Fund.”32 The U.S. Government Accountability Office reported much the same in its 2006 survey of corporate ownership information (“Most states do not require ownership information at the time a company is formed”).33

Ronen Palan argues that the result has been a shift from curbing tax haven abuses to ensuring that tax havens “play by the rules of the advanced industrial countries that by and large represent—let us have no illusions—business interests,”34 and that this is essentially a story of the triumph of those interests. Indeed, Palan notes, the liberalization of onshore regulatory regimes demonstrates more than ever the importance of the offshore to contemporary global political economy, because the offshore and onshore are always defined in relation to one another and because offshore has historically been central to the imagination and practical construction of onshore sovereign regimes.
Avoiding Payments All Around

In its effort to curtail offshore finance, the OECD used its signature method of epistemic governance—bringing parties together to discuss and to review each others’ standards and practices—in order to foster a new common sense and thereby to create and disseminate new financial norms. Despite compliance, however, most proponents and critics of the initiative concur by now that the exercise has been futile: small states initially targeted have issued letters of commitment, but nearly all make as a condition of that commitment the compliance of OECD member states. They demanded a level playing field, in other words. As discussed above, the ITIO introduced this concept into the OECD deliberations, and the concept quickly spread. The ITIO, not the OECD, appears to have been the more successful in creating a new episteme. While the idea of a level playing field echoes classically liberal concerns with fairness and equality of opportunity to compete, its effect has been to permit the continued use of offshore financial services by wealthy individuals and corporate persons seeking to minimize their exposure to risks, including national revenue collectors.

The outcome of the OECD initiative thus begs the question of which spaces are ungoverned: onshore or offshore? When considering the vast flows of money from the world’s wealthiest natural and corporate persons, who often use the tools of debt and charity to mask their relationships of exchange and evade their obligations to states, what are the dimensions and characteristics of the ungoverned space of the market? Indeed, given the nonmarket relationships through which high-net-worth individuals can shunt their funds, using entities like offshore charitable trusts, for example, is this ungoverned space even best characterized as a “market” at all? This chapter argues that policy initiatives seeking to curtail offshore finance and the dangerous space of flows they may represent paradoxically work to increase the ungovernability of the world’s superwealthy elites who rely on offshore finance to protect their assets. Wealthy nomads flourish in the current global political economy. Meanwhile, the consensus that the OECD initiative has failed misses the fact that failure took the form of “compliance”: all of the world’s tax havens agreed to comply with the new international norms against harmful tax competition when and if—crucially—the world’s most powerful states would do the same. In the meantime, they embarked on a number of information-sharing and double-taxation treaties, making use of the standard tool kit of international law and thereby making a claim to their formal status in international law as sovereign actors.

The discourse of fairness set in motion by the level playing field concept is a liberal discourse associated with market efficiencies. In a world to be governed by the rational self-interests of individual free men rather than the whim of kings, Hobbes’s “force and fraud” had to be banished lest markets become distorted and men’s interests thereby obscured. With the invention of modern accounting, furthermore, a fair price, arrived at without fraud or force, came to be taken as a “true” price, reflecting the real value of a thing, and fairness and truth were thereby conflated. There are also, of course, strong undertones in this set of understandings of notions of justice as equity, which cannot be treated fully in this short chapter. My point here is simply that the tax competition debate tapped into the rich associations among these concepts in Western jurisprudence, religion, and political economy.

Taxes, by contrast, have long been associated with tyranny and, especially in the United States, their avoidance with liberty and sovereignty. The CFP directly referenced these historical connections. Hence the double bind in which Treasury Secretary O’Neill was stuck: “troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country’s decision about how to structure its own tax system,” yet called upon by the OECD to address tax competition. Adam Smith himself argued that a just tax could be possible only in a policed system in which the courts of justice served a dual role as revenue collection agencies, in order to ensure the fairness and the certainty of taxation. At issue in modern, Western tax discourse is thus a set of understandings about just rule and sovereign government.

The focus on fairness in the harmful tax competition debate highlighted these associations about sovereignty and justice together with market-talk about competitive deregulation and the rules of the game in a globalized world, in which states emphasize the comparative advantage of a market in sovereignty. The market-talk, in turn, obviated other ways of thinking about taxes and their avoidance, and ways to address that avoidance: a discourse on payment without expectation of return, much like the language game of tribute in feudal societies. But because payment without return is morally suspect in market societies, the OECD, with its harmful tax competition initiative, cannot bring itself directly to target high-net-worth individuals and others seeking tax planning to “protect” their assets from state revenue collectors,
who are avoiding what they see as unfair payments. That same reticence is evident in the norm against buying off the tax havens. In other words, both a demand-side and a supply-side attack on tax havens would first have to resolve the ambivalence toward the logic of payment. And this is a much bigger problem than tax competition or information sharing.

Jason Sharman, an expert on efforts to achieve global tax regulation, argues that the best way to get rid of harmful tax competition, while avoiding charges of imperialism and respecting the sovereignty of small states yet also curbing tax evasion, is simply to buy the havens off. He writes that “there is no one who contests the fact that tax havens receive much less revenue... than higher taxing countries lose.” The countries listed on the OECD’s 2000 blacklist reported a combined government revenue of less than $13 billion. The U.S. Internal Revenue Service estimates that Caribbean tax havens alone cost the United States $70 billion per year in lost income tax revenue. Pay thirteen, save fifty-seven. Yet, Sharman writes, “despite the huge disparities in tax revenue lost to OECD countries versus the very meager revenue and employment benefits to tax havens... no such deal [of buying out the havens] looks likely in the near future.” Such a deal is not likely because buying the havens off would smash of extortion and would tap into the same normative commitment against payment that leads the wealthy offshore in the first place.

In invoking payments thus, this analysis offers a conceptual and political challenge. Where Williams (Chapter 2) sees a kind of creeping neomedievalism in many of the more exotic ungoverned spaces that historically have occupied military and intelligence analysts, run by resurgent tribal leaders or warlords demanding allegiance and exacting tribute, this chapter reveals a New Middle Ages at the heart of the global financial system. It also suggests an equally feudal solution to the problem of tax competition. If the rich insist on the global flow of wealth upward to themselves, then the corresponding part of the moral relationship linking lord and serf should be invoked: redistribute the tribute!

Notes

I thank Tom Boellstorff and Gregory Rawlings for their helpful comments on earlier drafts of this chapter. All errors remain my responsibility alone. Research on Caribbean offshore financial services and the OECD initiative has been supported by the National Science Foundation (SES-0516861). Any opinions, findings, and conclusions or recommendations expressed in this chapter are those of the author and do not necessarily reflect the views of the National Science Foundation.

7. Although not all of the jurisdictions targeted by these efforts are politically independent nation-states (many are dependent territories, like the British Virgin Islands), the term “state” or “country” is used throughout this chapter for convenience. And although the term “tax haven” is a highly charged one for those territories so labeled, it appears here in place of more convoluted locutions (such as “countries or territories deemed not in compliance with the FATF’s forty recommendations”), also for convenience. See J. C. Sharman, Havens in a Storm: The Struggle for Global Tax Regulation (Ithaca, NY: Cornell University Press, 2006), 165, n.1. To read this history in more detail, see Bill Maurer, “Due Diligence and ‘Reasonable Man,’ Offshore,” Cultural Anthropology 20:4 (2005): 474–505; and Maurer, “Re-regulating Offshore Finance?” Geography Compass 2:1 (2005): 155–75.
8. “About OECD,” Organization for Economic Co-operation and Development, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1_1,00.html.
11. The members of the ITIO are Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, the British Virgin Islands, the Cayman Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, the Turks and Caicos Islands, Panama, the Cook Islands, Samoa, and Vanuatu. The observers are the Commonwealth Secretariat, the CARICOM Secretariat, the Caribbean Development Bank, the Eastern Caribbean Central Bank, and the Pacific Islands Forum Secretariat.
14. Letter from the Congressional Black Caucus to The Honorable Paul O’Neill,

15. Ronald M. Sanders, "The OECD’s ‘Harmful Tax Competition’ Scheme: The Implications for Antigua and Barbuda,” speech to the Antigua and Barbuda Chamber of Commerce and Industry, St. John’s, Antigua, 27 March 2001.


18. Switzerland and Luxembourg, both OECD member states, appended lists of concerns about the report. Luxembourg challenged the report’s assumption that bank secrecy is necessarily a harmful tax competition; see OECD, "Harmful Tax Competition," 74. Switzerland defended the value of bank secrecy, noting that the report conflicted with Swiss secrecy laws. Alongside sovereignty as a state’s autonomous right to author law and a state’s obligation to the public weal, Switzerland and Luxembourg thus introduced a third kind of sovereignty: the sovereign proprietor of one’s own affairs and personal data.

19. See Maurer, "Re-regulating Offshore Finance,” for a review of the relationship between the OECD, FATF, and FSF blacklisting exercises; also, Sharman, Havens in a Storm.


23. Global Forum on Taxation, Closing Statement by the Co-Chairs, OECD, Ottawa, 14–15 October 2003; http://www.oecd.org/document/0,0,3343,en_2649_33745_16643264_l_1_1_1_1,00.html.

24. Ibid.


29. Sharman, Havens in a Storm, 161.

30. Ibid.


33. Ibid.


36. The term "nomad" is Palan’s.

37. Rawlings, "Taxes and Transnational Treaties."

38. See Webb, "Defining the Boundaries."

39. I have intentionally chosen the male pronoun here.


42. Palan, The Offshore World.

43. Sharman, Havens in a Storm, 154.

44. Ibid., 152–53.