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Vaughn E. James

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ARTICLE

TWENTY-FIRST CENTURY PIRATES OF THE CARIBBEAN: HOW THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ROBBED FOURTEEN CARICOM COUNTRIES OF THEIR TAX AND ECONOMIC POLICY SOVEREIGNTY

BY VAUGHN E. JAMES*

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* Associate Professor, Texas Tech University School of Law. The author expresses his thanks to the many people who made this article possible: Professors Timothy Floyd, William Casto and Jorge Ramirez, Texas Tech University School of Law; Professor Christian Day, Syracuse University College of Law; Professor David Brennen, Mercer University School of Law; Mr. Lebrecht Hesse, Solicitor General, Antigua and Barbuda, and Chairman, International Financial Sector Regulatory Authority, St. John's, Antigua; Mr. Clive Scott, Office of National Drug and Money Laundering Control Policy, Camp Blizzard, Antigua; June Laudat, St. John's, Antigua; Erol Meryl, Esq., and Gertrude LeCointe-Marius, Esq., St. Croix, United States Virgin Islands; Hon. Christine Parillon, former Consul General to the United Nations, Commonwealth of Dominica; Pascall Kentish, Antigua and Barbuda Law Library; Chancellor Jennifer Jackson and the Library Staff, University of the Virgin Islands, St. Croix, United States Virgin Islands; His Excellency George Williams, former Dominican High Commissioner to the United Kingdom; Edward Alexander, Information and Communications Advisor, CARICOM Representation in Haiti; and Fred White, Webmaster, Cakafete.com, Canefield, Dominica.
ABSTRACT: This article is concerned with a controversy that has been raging for over four years—the anti-harmful tax competition initiative launched by the Organization for Economic Cooperation and Development ("OECD") in April 1998, and that organization's subsequent blacklisting of several small defenseless jurisdictions who have dared to use tax competitive measures to secure for themselves a small piece of the global financial pie. On one side of the controversy sits the OECD: rich, powerful, domineering, and exhibiting many of the features of the colonial powers of the late fifteenth through twentieth centuries. On the other side sits the targeted jurisdictions: mostly island-nations of the Pacific and Caribbean, with their fragile economies and a constant struggle to survive in today's globalized economy. This article focuses on the OECD and on one group of targeted jurisdictions—the member states of CARICOM. The article demonstrates how the OECD, through its anti-harmful tax competition initiative, has robbed these Caribbean countries of their sovereign right to determine their tax and economic policies.

INTRODUCTION

In April 1998, the Paris-based OECD\(^1\) launched an attack on

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1. The OECD is a Paris-based organization with representatives from thirty of the world's richest countries. The current members of the organization are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See OECD, OECD Member Countries, available at http://www.oecd.org (last
what it deemed harmful tax competition. The attack came in the form of a report identifying various features of preferential tax regimes and tax havens.\(^2\) Two years later, on June 26, 2000, the OECD published another report, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices*,\(^3\) listing thirty-five jurisdictions as meeting the tax haven criteria of the 1998 report and, as such, as being "potentially harmful" tax regimes.\(^4\) The report called on the listed countries to provide the OECD with commitments to reform their laws and fiscal policies to eliminate those features which made the jurisdictions potentially harmful tax regimes and/or tax havens.\(^5\) Six jurisdictions signed advanced commitment letters prior to publication of the report, and thereby avoided being listed thereon.\(^6\)

Even before the OECD issued its 2000 Report, two of its ancillary entities issued their own reports regarding related tax and economic issues. In April 2000, the Financial Stability Forum ("FSF") issued their *Report of the Working Group on Offshore Centers*, a report that established three categories for offshore financial centers, and proceeded to categorize some of the world's financial centers, placing them into one of the FSF's categories.\(^7\)
Four days before the OECD issued its report, the Financial Action Task Force ("FATF") published a report naming fifteen jurisdictions that failed to take adequate measures to combat international money laundering. The FATF report deemed the fifteen jurisdictions to be the least cooperative with international money laundering investigators, and thereby offered the best protection for those interested in keeping their assets secret.

Most of the countries included on the OECD and FATF lists are small Caribbean and Pacific island nations. When one includes those jurisdictions that signed advanced commitments, and thus avoided inclusion on the OECD blacklist, the OECD and FATF blacklists targeted several members of the Caribbean Community and Common Market ("CARICOM"). Ten of the blacklisted countries are full-fledged CARICOM members; three are associate members; and four have observer status within CARICOM. Not surprisingly, the CARICOM countries loudly protested their inclusion in the OECD and FATF lists. Yet, two years later, when the OECD published its seven-member List of Uncooperative Tax Havens, none of the listed countries were in any way associated with the CARICOM community.

This article will examine the effects of the OECD (and to a lesser extent, the FATF) blacklisting of the CARICOM countries included on the 2000 list, particularly on their economies and on their ability to determine their own taxation and economic poli-

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8. FATF ON MONEY LAUNDERING, OECD, 1999-2000 ANNUAL REPORT ANNEX A (2000). FATF has subsequently released this report as an independent report under the same title. The 15 countries listed in the report as money laundering havens are: the Bahamas, Cayman Islands, Cook Islands, Commonwealth of Dominica, Israel, Lebanon, Principality of Liechtenstein, Republic of the Marshall Islands, Republic of Nauru, Niue, Panama, Philippines, Russia, Federation of St. Kitts and Nevis, and St. Vincent and the Grenadines.

9. Id.


11. Id. The full-fledged CARICOM members are: Antigua and Barbuda, the Bahamas, Barbados, Belize, Commonwealth of Dominica, Grenada, Montserrat, St. Lucia, Federation of St. Kitts and Nevis, and St. Vincent and the Grenadines.

12. Id. The associate members are: Anguilla, British Virgin Islands and Turks and Caicos Islands.

13. Id. The jurisdictions with CARICOM Observer Status are: Aruba, Bermuda, Cayman Islands, and Netherlands Antilles.

cies. The article will maintain that although the OECD's so-called anti-harmful tax competition initiative has not given the organization the absolute victory it had hoped for, the mere blacklisting of the CARICOM nations has had a tremendous negative effect on their economies and on their ability to maintain their sovereignty.

Section I will identify the parties to the controversy — the OECD on the one hand, and the CARICOM countries on the other. This section will discuss the historical background of each of these entities, and discuss their goals and aspirations. Section II will discuss the OECD tax initiative. This section will trace the history of the initiative, from its launching in April 1998 to the OECD’s publication of the *List of Uncooperative Tax Havens* in April 2002. Section III will discuss the CARICOM reaction to the blacklisting. This section will show that Caribbean nationals — from government officials to ordinary citizens — have widely criticized the blacklisting and the OECD tax initiative. Section IV will discuss the economic impact of the blacklisting on the CARICOM nations. This section will demonstrate that in most CARICOM nations — and particularly in Antigua and Barbuda, Dominica, and St. Vincent and the Grenadines — the OECD blacklisting has had significant detrimental effects on their economic outlook. Section V will chronicle the battle for sovereignty waged by CARICOM in response to the OECD initiative. This section will illustrate the OECD’s intransigence in the matter, and will demonstrate that but for the change of heart of the United States following the advent of the Bush Administration, the CARICOM nations would have been at the complete mercy of the OECD countries. The section will conclude, however, that notwithstanding the revised U.S. position, CARICOM nations have had to effectively surrender their sovereignty on tax and economic policy to the OECD. Finally, the article will conclude with a restatement of this article’s thesis — that the OECD, like the pirates who plied the waters of the Caribbean during the sixteenth through nineteenth centuries, has, through its ill- advised anti-harmful tax competition initiative, effectively robbed fourteen CARICOM nations of their sovereign right to determine their tax and economic policies.

I. **PARTIES TO THE CONTROVERSY**

Although the OECD's anti-harmful tax competition initiative targeted the island-nations of the Pacific Rim and the Caribbean, along with several small principalities and developing nations,
this article focuses on the OECD's interactions with one group of targeted jurisdictions — the member states of CARICOM. This section will give some background to the two parties.

A. The OECD\textsuperscript{15}

The OECD is the successor to the Organization for European Economic Cooperation ("OEEC"). The OEEC was formed under the Marshall Plan to administer North American aid for European reconstruction following World War II. The organization's members renamed it the OECD after the United States and Canada became members in September 1961. The OECD's stated mission is "to strengthen the economies of its member countries, improve the efficiency of market systems, and contribute to free trade expansion between both industrialized and developing nations."\textsuperscript{16}

Although the OECD initially focused on its member countries and their respective policies, the organization eventually turned its attention to advising emerging market economies and analyzing the impact of increasing interaction of various economic policies across the world.\textsuperscript{17} The OECD aims to increase its membership and to eventually create a world economy that is more prosperous and knowledge-based.\textsuperscript{18}

In light of the OECD's mission, it is not surprising that international tax policy is among the issues it addresses.\textsuperscript{19} In 1977, for example, the OECD made a major contribution in the area of international taxation with its \textit{Model Double Tax Convention}, which sought to alleviate the burdens of double taxation.\textsuperscript{20} Although not initially receiving widespread acceptance, the OECD \textit{Model Double Tax Convention} has by now served as a template for

\textsuperscript{15} Most of the material presented in this subsection is available on the OECD Website. See generally OECD Website., \textit{supra} note 1. Material obtained from other sources will be identified through the use of footnotes. Footnotes will also be used as necessary to clarify information available at OECD Website.


\textsuperscript{17} See OECD Website, \textit{supra} note 1.

\textsuperscript{18} See \textit{id.}

\textsuperscript{19} \textit{Id.} (confirming OECD's focus on international economic issues, including international taxation).

several tax treaties.\textsuperscript{21} In addition to its contribution to international taxation through the \textit{Model Double Tax Convention}, the OECD has also addressed a wide range of issues within that area, and continues to analyze a variety of global taxation issues.\textsuperscript{22} Each year, the OECD publishes statistics on tax revenues generated in OECD member countries.\textsuperscript{23} The OECD is also involved in proposing recommendations for fighting corruption, carrying out e-commerce and implementing transfer-pricing policies.\textsuperscript{24} Over the past few years, the OECD has shifted its focus to alleged harmful tax practices facilitated by globalization.\textsuperscript{25}

From the OECD's viewpoint, "globalization and new electronic technologies can enable a proliferation of tax regimes designed to attract geographically mobile activities."\textsuperscript{26} Accordingly, the organization maintains, governments need to take measures to protect their tax bases.\textsuperscript{27} In particular, says the OECD, governments "need to intensify their international cooperation to avoid the world-wide reduction in welfare caused by tax-induced distortions in capital and financial flows."\textsuperscript{28}

As regards a definition, the OECD believes that harmful tax practices may exist when certain jurisdictions tailor their tax regimes to erode the tax bases of other countries.\textsuperscript{29} "This [erosion] can occur when tax regimes attract investment or savings originating elsewhere and when they facilitate the avoidance of other countries' taxes."\textsuperscript{30} Apparently, the OECD — whose members boast free-market economies — does not believe in free enterprise and open-market competition in the area of taxation.

Because many CARICOM member states had, by 1998, begun

\begin{enumerate}
\item See Philip Baker, \textit{Double Taxation Conventions and Int'l Tax Law} 4 (2\textsuperscript{nd} ed. 1994) (OECD Model was basis for negotiating double taxation agreements); see also Robert Thornton Smith, \textit{Tax Treaty Interpretation by the Judiciary}, 49 TAX LAW. 845, 845 (1996) (OECD Model has served as principal basis for treaty negotiations among developed nations); Townsend, \textit{supra} note 16, at 227 (OECD Model Double Tax Convention of 1977 served as template for subsequent treaties).
\item See OECD Website, \textit{supra} note 1 (noting various fiscal areas addressed by OECD, including transfer pricing, corruption, and statistical analysis).
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{id.} (contending that globalization proliferates the spread of harmful tax competition that requires cooperative redress).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
to utilize tax competitive measures to attract much-needed foreign investment, the OECD’s shift in focus to the effects of globalization put it on a collision course with these Caribbean nations.

B. CARICOM

The Caribbean island chain lies in the aptly-named Caribbean Sea, the body of water separating North and South America. Belize, a Central American country, and Guyana, in South America, are typically considered part of the Caribbean. "Discovered" by Christopher Columbus on his journeys to the New World in the late fifteenth to early sixteenth centuries, the Caribbean nations were at various times colonies of Great Britain, France, the Netherlands, Denmark, Spain, and the United States.\(^3\) During the 1950s, the British colonies in the Caribbean began a move toward unifying the various islands under one government.\(^3\) This movement culminated in the formation of the British West Indies Federation in 1958. The Federation was a Federal Government drawn from ten member states of what was then known as the British West Indies.\(^3\) The Federation was short-lived, folding in 1962 after Trinidad and Tobago and Jamaica suddenly withdrew from the group.\(^3\)

Over the next eleven years, Caribbean leaders held several discussions aimed at reviving — in some way — the defunct British West Indies Federation. At the same time, many of the countries were obtaining political independence from Britain. The efforts of these leaders came to fruition on July 4, 1973, with the signing of the Treaty of Chaguaramas, which established the Caribbean Community and Common Market (CARICOM). The treaty was signed by Barbados, Jamaica, Guyana, and Trinidad and Tobago. Eight other Caribbean territories — Antigua, British Honduras (now Belize), Dominica, Grenada, St. Lucia,

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31. Most of the materials in this subsection are available at the CARICOM Website, http://www.caricom.org (last visited July 30, 2002) [hereinafter “CARICOM Website”]. Material obtained from other sources will be identified through the use of footnotes. Footnotes will also be used as necessary to clarify information available at CARICOM Website.


33. CARICOM Website, supra note 31 (discussing history of CARICOM).

34. Id. The ten members were: Antigua, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent, Trinidad and Tobago; e-mail from Edward A. Alexander, Information and Communications Advisor, CARICOM Representation in Haiti (Aug. 23, 2002, 09:13 CDT) (on file with author).

35. CARICOM Website, supra note 31.
Montserrat, St. Kitts/Nevis/Anguilla, and St. Vincent — became full members on May 1, 1974.\textsuperscript{36} Subsequently, the Bahamas, Haiti and Suriname also became members of CARICOM.\textsuperscript{37} Several other Latin American and Caribbean territories enjoy Observer Status in various institutions of the Community and CARICOM Ministerial bodies. These territories are: Aruba, Bermuda, Cayman Islands, Colombia, Dominican Republic, Mexico, Netherlands Antilles, Puerto Rico, and Venezuela. Three others, all British colonies — Anguilla, British Virgin Islands and Turks and Caicos Islands — are CARICOM associate members.\textsuperscript{38}

From its inception, CARICOM “has concentrated on the promotion of the integration of the economies of member states, coordinating the foreign policies of the independent member states, and in functional cooperation, especially in relation to various areas of social and human endeavor.”\textsuperscript{39} Some of the principal issues currently on CARICOM’s agenda include: restructuring of regional organs and institutions; analysis of the impact of NAFTA on existing arrangements, such as the Caribbean-Canada Trade Agreement (“CARIBCAN”) and the Caribbean Basin Initiative (“CBI”); resolution of the Haitian crisis; strengthening of relations with the wider Caribbean through the establishment of trade and economic agreements with Venezuela, Colombia, and the wider Caribbean; and deepening the integration process in the Caribbean Community through the formation of a single market and economy.

During the period that they were colonies of the European industrialized nations, CARICOM members produced various agricultural products — sugar, coffee, bananas and citrus, among others.\textsuperscript{40} After obtaining independence from their colonial masters, many Caribbean countries turned to tourism as a means of developing their economies.\textsuperscript{41} Many of the island nations also developed financial services industries, often to help diversify their economies and to mitigate the harmful effects of the annual

\textsuperscript{36} Id.

\textsuperscript{37} Id. (discussing CARICOM members and their status). The Bahamas is a member of the Caribbean Community, but not the Common Market. Haiti became a full-fledged member of CARICOM on July 4, 2002.

\textsuperscript{38} Id. Anguilla was once a part of the state of St. Kitts/Nevis/Anguilla. That state has been broken up into two entities, the Federation of St. Kitts and Nevis, an independent twin-island nation, and Anguilla, a British colony.

\textsuperscript{39} Id. (discussing history of CARICOM).

\textsuperscript{40} See generally LENNOX HONYCHURCH, THE DOMINICA STORY 53-59, 157-63 (1984) (discussing island plantation life both during and after slavery).

\textsuperscript{41} Id.
hurricanes that played "utter havoc" with their tourism plants. At the core of these financial services provided by the CARICOM member states lies the off-shore banking sector. Fostered by tax regimes with no or only nominal rates, and strict secrecy rules, the off-shore banking sector flourished in the Caribbean. For example, in terms of the size of its capital market, the Cayman Islands (a CARICOM Observer) is the fifth largest in the world, behind New York, London, Tokyo, and Hong Kong. Also, from 1985 to 1994, the value of investments put into the low tax jurisdictions of the Caribbean and South Pacific islands grew tenfold, to over $200 billion. Indeed, some commentators put the figure in the trillions. Still, commentators sympathetic to the Caribbean cause maintain that together with tourism, the off-shore banking sector helps to generate a measure of self-sufficiency for the islands, helping them put the necessary mechanisms in place to declare their full economic freedom.

Just as the CARICOM countries appeared to be on the verge of developing a truly prosperous financial services industry, the OECD struck, launching its anti-harmful tax competition initiative. The next section of this article will discuss the substance of the OECD tax initiative.

II. THE OECD TAX INITIATIVE

A. The 1998 Report

On April 9, 1998, the OECD approved a report entitled Harmful Tax Competition: An Emerging Global Issue (hereinafter "Harmful Tax Competition"). The report was the result of an OECD-initiated study to determine the extent of global tax competition. In preparing this report, the OECD's Committee on Fiscal

44. Id.
45. Id.
47. Hull, supra note 42.
48. See generally OECD, HARMFUL TAX COMPETITION, supra note 2.
49. Id. at 8 (stating that harmful tax competition dislocates financial and service activities, erodes national tax bases of other countries, distorts trade and investment patterns, and diminishes fairness and social acceptance of tax systems); see also
Affairs, turning its attention specifically to geographically mobile activities. In essence, *Harmful Tax Competition* created the Forum on Harmful Tax Practices, established guidelines for dealing with alleged harmful preferential tax regimes in OECD member countries, and adopted a series of recommendations to combat harmful tax practices of non-OECD countries.

In establishing its guidelines and recommendations, *Harmful Tax Competition* paid significant attention to the phenomenon of globalization. In that respect, the report first examined the benefits of globalization — facilitating tax system reform that focuses on base-broadening and rate reductions; encouraging reassessment of domestic tax systems to reduce governmental spending and induce investment; and improving global welfare and standards of living due to a more efficient allocation and utilization of resources.

Next, the report emphasized the negative impact of globalization and its impact on tax competition, including the increased ability of individuals to move capital from high tax jurisdictions to lower tax jurisdictions. The report listed the harms caused by this capital movement as: (1) distorting financial and, indirectly, real investment flows; (2) undermining the integrity and fairness of tax structures; (3) discouraging compliance by all taxpayers; (4) reshaping the desired level and mix of taxes and public spending; (5) causing undesired shifts in part of the tax burden to less mobile tax bases, such as labor, property and consumption; and (6) increasing the administrative costs and compliance burdens on tax authorities and taxpayers.

Of significance to the CARICOM countries, *Harmful Tax Competition* identified two types of harmful tax practices: harmful

Edmund W. Granski, Jr., *International Wealth Management Initiatives*, 225 N.Y.L.J. 9, (2001) (OECD seeks to develop measures to counter effects harmful tax competition has on national tax bases of its member countries).


51. *See id.* (*Harmful Tax Competition* examines general income tax provisions and specific taxes levied on certain types of income).

52. *Id.*

53. *See id.* at 13-14.

54. *See id.* at 16 (identifying effects of capital dislocation).

preferential tax regimes and tax havens.\textsuperscript{56} The report then went on to discuss "harmful tax practices." Essentially, according to the OECD, harmful tax practices exist when tax regimes are tailored to erode the tax bases of other countries.\textsuperscript{57} This can occur when tax regimes attract investment or savings originating elsewhere, and when they facilitate the avoidance of other countries' taxes.\textsuperscript{58} The report distinguished the two types of practices. Although some criteria for identifying both practices are similar, specific provisions vary enough to allow a jurisdiction to be classified as either a tax haven or a harmful preferential tax regime.\textsuperscript{59}

\textit{Harmful Tax Competition} identified the following as key factors in characterizing and assessing harmful preferential tax regimes: (1) the regime imposes low or no taxes on relevant income (from geographically mobile financial and other service activities); (2) the regime is ring-fenced from the domestic economy — i.e., the low tax rates offered by the regime are fully or partially insulated from the domestic economy and are applicable only to non-residents; (3) the regime lacks transparency — i.e., the details of the regime or its application are not apparent, or inadequate regulatory supervision or financial disclosure exists; and (4) no effective exchange of information with outside authorities or entities exists with respect to the regime.\textsuperscript{60} \textit{Harmful Tax Competition} listed additional criteria to be analyzed upon confirmation of the four previous criteria. These additional analytical factors included: (1) the regime has an artificial definition of the tax base; (2) the regime's failure to adhere to international transfer-pricing principles; (3) foreign source income is exempt from tax within the regime; (4) the regime offers a negotiable tax rate or tax base; (5) the existence of secrecy provisions within the regime; (6) the regime is promoted as a tax minimization vehicle; and (7) the regime encourages purely tax driven operations or arrangements.\textsuperscript{61} Notwithstanding the criteria it enumerated for harmful preferential tax regimes, the report failed to propose a specific tax rate that would indicate that a particular regime qualified as a

\textsuperscript{56} See OECD, \textit{HARMFUL TAX COMPETITION}, \textit{supra} note 2, at 8.
\textsuperscript{57} See generally Yu, \textit{supra} note 26.
\textsuperscript{58} Id.
\textsuperscript{59} See OECD, \textit{HARMFUL TAX COMPETITION}, \textit{supra} note 2, at 22-34 (noting that harmful preferential tax regimes can have provisions in tax legislation that give preferential treatment to specific classes of taxpayers, while tax havens primarily offer no, or very low, taxes to all types of income).
\textsuperscript{60} See generally Yu, \textit{supra} note 26.
\textsuperscript{61} OECD, \textit{HARMFUL TAX COMPETITION}, \textit{supra} note 2, at 30-34.
harmful preferential tax regime.  

According to the OECD, in general terms, tax havens are jurisdictions that fail to generate significant tax revenue due to nominal or no tax rates.  63  Harmful Tax Competition identified the following factors in characterizing a country as a tax haven: (1) the jurisdiction imposes no or nominal taxes on the relevant income from geographically mobile, financial and other service activities; (2) the jurisdiction lacks a policy of effective exchange of information regarding its financial service providers, thereby ensuring bank and banking secrecy; (3) the jurisdiction's financial service regimes lack transparency — i.e., the jurisdiction does not impose adequate regulatory supervision on the regimes or require adequate financial disclosure; and (4) the jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence, or prohibits those entities from having any commercial impact on the local economy.  64  According to the OECD Report, tax havens are essentially jurisdictions that allow non-resident taxpayers to hold passive investments, book-paper profits, and hide their affairs from discovery by their resident taxing authorities.  65  The report did not, however, state the tax rate that would be considered nominal and characteristic of a tax haven.  

Having identified the characteristics of the two so-called detrimental tax practices, Harmful Tax Competition boldly asserted that governments needed to proactively counter the impact and spread of these practices — that is, tax havens and harmful preferential tax regimes.  67  To that end, the report listed nineteen recommendations (“Recommendations”) countries could adopt to counteract the negative impacts of the tax systems of jurisdictions where these practices are found.  68  The Recommendations focused

62. See id. at 25-35. The report fails to enumerate a tax range indicative of harmful preferential tax regimes.

63. See id. at 21 (stating that tax havens do not generate significant revenue from tax systems and also have reduced regulatory and administrative constraints).

64. OECD, HARMFUL TAX COMPETITION, supra note 2, at 22-23.

65. See Townsend, supra note 16, at 239.

66. See OECD, HARMFUL TAX COMPETITION, supra note 2, at 22-25. As with its discussion of harmful preferential tax regimes, the report does not enumerate the tax rate or range of tax rates indicative of tax havens; see also George M. Melo, Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty?, 12 PACE INT'L L. REV. 183, 197 (2000) (commenting on failure of OECD to propose a tax rate considered to be harmful).

67. See OECD, HARMFUL TAX COMPETITION, supra note 2, at 37.

68. See id. at 67-71. The nineteen Recommendations were as follows:

I. Recommendations concerning domestic legislation and practices
1. Recommendation concerning Controlled Foreign Corporations (CFC) or equivalent rules: that countries that do not have such rules consider adopting them and that countries that have such rules ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices.

2. Recommendation concerning foreign investment fund or equivalent rules: that countries that do not have such rules consider adopting them and that countries that have such rules consider applying them to income and entities covered by practices considered to constitute harmful tax competition.

3. Recommendation concerning restrictions on participation exemption and other systems of exempting foreign income in the context of harmful tax competition: that countries that apply the exemption method to eliminate double taxation of foreign source income consider adopting rules that would ensure that foreign income that has benefited from tax practices deemed as constituting harmful tax competition do not qualify for the application of the exemption method.

4. Recommendation concerning foreign information reporting rules: that countries that do not have rules concerning reporting of international transactions and foreign operations of resident taxpayers consider adopting such rules and that countries exchange information obtained under these rules.

5. Recommendation concerning rulings: that countries, where administrative decisions concerning the particular position of a taxpayer may be obtained in advance of planned transactions, make public the conditions for granting, denying or revoking such decisions.

6. Recommendation concerning transfer pricing rules: that countries follow principles set out in the OECD's 1995 Guideline on Transfer Pricing and thereby refrain from applying or not applying their transfer pricing rules in a way that would constitute harmful tax competition.

7. Recommendation concerning access to banking information for tax purposes: in the context of counteracting harmful tax competition, countries should review their laws, regulations and practices which govern access to banking information with a view to removing impediments to the access to such information by tax authorities.

II. Recommendation concerning tax treaties

8. Recommendation concerning greater and more efficient use of exchanges of information: that countries should undertake programs to intensify exchange of relevant information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.

9. Recommendation concerning the entitlement to treaty benefits: that countries consider including in their tax conventions provisions aimed at restricting the entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices and consider how the existing provisions of their tax conventions can be applied for the same purpose; that the Model Tax Convention be modified to include such provisions or clarifications as are needed in that respect.

10. Recommendation concerning the clarification of domestic anti-abuse rules and doctrines in tax treaties: that the Commentary on the Model Tax Convention be clarified to remove any uncertainty or ambiguity regarding the compatibility of domestic anti-abuse measures with the Model Tax Convention.

11. Recommendation concerning a list of specific exclusion provisions found in treaties: that the Committee prepare and maintain a list of provisions used by countries to exclude from the benefits of tax conventions certain specific entities or types of income and that the list be used by Member countries as a reference point when negotiating tax conventions as a basis for discussions in the Forum.

12. Recommendation concerning tax treaties with tax havens: that countries consider terminating their tax conventions with tax havens and consider not entering into tax treaties with such countries in the future.
13. Recommendation concerning coordinated enforcement regimes (joint audits; coordinated training programs, etc.): that countries consider undertaking coordinated enforcement programs (such as simultaneous examinations, specific exchange of information projects or joint training activities) in relation to income or taxpayers benefiting from practices constituting harmful tax competition.

14. Recommendation concerning assistance in recovery of tax claims: that countries be encouraged to review the current rules applying to the enforcement of tax claims of other countries and that the Committee pursue its work in this area with a view to drafting provisions that could be included in tax conventions for that purpose.

III. Recommendations to intensify international co-operation in response to harmful tax competition.


Recommendation 15 Guidelines For Dealing With Harmful Preferential Tax Regimes in Member Countries:

i. To refrain from adopting new measures, or extending the scope of, or strengthening existing measures, in the form of legislative provisions or administrative practices related to taxation, that constitute harmful tax practices as defined in Section III of Chapter 2 of the Report.

ii. To review their existing measures for the purpose of identifying those measures, in the form of legislative provisions or administrative practices related to taxation, that constitute harmful tax practices as defined in Section III of Chapter 2 of the Report. These measures will be reported in the Forum on Harmful Tax Practices and will be included in a list within 2 years from the date on which these Guidelines are approved by the OECD Council.

iii. To remove, before the end of 5 years from the date on which the Guidelines are approved by the OECD Council, the harmful features of their preferential tax regimes identified in the list referred to in paragraph 2. However, in respect of taxpayers who are benefiting from such regimes on 31 December 2000, the benefits that they derive will be removed at the latest on the 31 December 2005. This will ensure that such particular tax benefits have been entirely removed after that date. The list referred to in paragraph 2 will be reviewed annually to delete those regimes that no longer constitute harmful preferential tax regimes.

iv. Each member country which believes that an existing measure not already included in the list referred to in paragraph 2, or a proposed or new measure of itself or of another country, constitutes a measure, in the form of legislative provision or administrative practice related to taxation, that might constitute a harmful tax practice in light of the factors identified in Section III of Chapter 2 of the Report, may request that the measure be examined by the Member countries, through the Forum on Harmful Tax Practices, for purposes of the application of paragraph 1 or for inclusion in the list referred to in paragraph 2. The Forum may issue a non-binding opinion on that question.

v. To coordinate, through the Forum, their national and treaty responses to harmful tax practices adopted by other countries.

vi. To use the Forum to encourage actively non-member countries to associate themselves with the Guidelines.

16. Recommendation to produce a list of tax havens: that the Forum be mandated to establish, within one year of the first meeting of the Forum, a list of tax havens on the basis of factors identified in section II of Chapter 2.

17. Recommendation concerning links with tax havens: that countries that have political, economic or other links with tax havens ensure that these links do not
on encouraging and providing guidance to so-called harmful tax jurisdictions to enact, or reform, their tax legislation and practices. The Recommendations also encouraged harmful jurisdictions to alter treaty arrangements with OECD members. Finally, the Recommendations encouraged OECD countries to terminate then-existing treaties with tax havens, or those countries with dependencies that were tax havens, and not to enter into treaties with such countries until the harmful features were removed.

*Harmful Tax Competition*’s final significant act was to establish a Forum on Harmful Tax Practices (“Forum”). The Forum was established to implement the Recommendations and to consult with jurisdictions with harmful preferential tax regimes seeking to reform their respective tax systems. The report mandated the Forum establish a list of tax havens and countries with harmful preferential tax regimes. The report also instructed the Forum to engage in a dialogue with cooperative non-member countries to promote the *Harmful Tax Competition Recommendations*. At the same time, the report established a deadline whereby jurisdictions identified as having harmful tax practices would comply with the Recommendations and thus eliminate

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69. See id. at 39.
70. See id. at 39, 46 (stating that some Recommendations were to ensure that tax treaties did not promote effects of harmful tax competition).
71. See id. at 50.
72. See id. at 54 (stating that the Forum is a subsidiary body, created to focus on remedial work against harmful tax competition).
73. See id. at 54 (stating that the Forum is responsible for overseeing implementation of *Recommendations of Harmful Tax Competition* and engaging in dialogue with non-member countries).
74. See id. at 54-55.
75. See id. (noting that the Forum is an avenue for discussing harmful preferential tax regimes, which will assist harmful tax competitive jurisdictions meet *Recommendations of Harmful Tax Competition*).
their harmful tax regimes. Accordingly, Harmful Tax Competition suggested that harmful preferential tax regimes remove their respective harmful features by April 2003. A special "grandfather provision" allowed for regimes with features benefiting taxpayers on December 31, 2000, to have these features removed by December 31, 2005. Additionally, a "standstill provision" precluded a country from adopting new features or broadening existing features.

B. The 2000 Report

Having received its mandate from the OECD, the Forum set to work. On June 26, 2000, the Forum presented the OECD Ministers with a progress report ("2000 Report") on the implementation of the Recommendations. As relevant here, the 2000 Report identified jurisdictions that met the criteria for being tax havens. The 2000 Report also listed various defensive measures that OECD member countries could adopt against uncooperative jurisdictions.

The report then stated that non-OECD-member countries had

76. Id.
77. Id.
78. Id.
79. Id.
81. See id. at 16-17.
82. Id. at 25. The proposed defensive measures listed in the 2000 Report are:

(a) To disallow deductions, exemptions, credits, or other allowances related to transactions with Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.

(b) To require comprehensive information reporting rules for transactions involving Uncooperative Tax Havens or taking advantage of their harmful tax practices, supported by substantial penalties for inaccurate reporting or non-reporting of such transactions.

(c) For countries that do not have Controlled Foreign Corporation (CFC) or equivalent rules, to consider adopting such rules, and for countries that have such rules, to ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices.

(d) To deny any exceptions (e.g. reasonable cause) that may otherwise apply to the application of regular penalties in the case of transactions involving entities organised in Uncooperative Tax Havens or taking advantage of their harmful tax practices.

(e) To deny the availability of the foreign tax credit or the participation exemption with regard to distributions that are
the key role in the efforts to eliminate harmful tax competition.\textsuperscript{83} The report — citing the global nature of harmful tax competition — encouraged non-OECD members to familiarize themselves with the contents of \textit{Harmful Tax Competition} (the 1998 Report) and to adopt its features.\textsuperscript{84} The new report also announced the OECD’s Committee on Fiscal Affairs’ plans to conduct regional seminars to assist with the removal of harmful features in the tax systems of non-member jurisdictions.\textsuperscript{85}

The 2000 Report stated that thirty-five jurisdictions had met the criteria for tax havens described in \textit{Harmful Tax Competition}, and should therefore be included on the \textit{List of Tax Havens}.\textsuperscript{86} The report requested that those jurisdictions make adjustments to their respective fiscal policies to conform to the \textit{Recommendations of Harmful Tax Competition}.\textsuperscript{87} The report warned that any tax haven jurisdiction that failed to comply would be deemed uncooperative and could be subject to defensive measures by the OECD member countries.\textsuperscript{88} Still, the OECD maintained that the list was sourced from Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.

(f) To impose withholding taxes on certain payments to residents of Uncooperative Tax Havens.

(g) To enhance audit and enforcement activities with respect to Uncooperative Tax Havens and transactions taking advantage of their harmful tax practices.

(h) To ensure that any existing and new domestic defensive measures against harmful tax practices are also applicable to transactions with Uncooperative Tax Havens and to transactions taking advantage of their harmful tax practices.

(i) Not to enter into any comprehensive income tax conventions with Uncooperative Tax Havens, and to consider terminating any such existing conventions unless certain conditions are met.

(j) To deny deductions and cost recovery, to the extent otherwise allowable, for fees and expenses incurred in establishing or acquiring entities incorporated in Uncooperative Tax Havens.

(k) To impose ‘transactional’ charges or levies on certain transactions involving Uncooperative Tax Havens.

\textsuperscript{83} See \textit{id.} at 22 (stating that non-member countries need to be included in effort against harmful tax competition because they are either affected by or have harmful tax practices).

\textsuperscript{84} See \textit{id.} (stating that OECD working with non-member economies would facilitate removal of harmful tax practices).

\textsuperscript{85} See \textit{id.}

\textsuperscript{86} See \textit{id.} at 17 (listing tax havens). Six jurisdictions signed advance commitment letters to the OECD prior to publication of the list, thereby avoided being included in the list.

\textsuperscript{87} See OECD, \textit{Harmful Tax Competition}, \textit{supra} note 2, at 67-71 (requesting, among other things, that tax havens adopt CFC rules, foreign investment fund rules, and exchange of information policies).

only "intended to reflect the technical conclusions of the [Committee on Fiscal Affairs] only and [was] not intended to be used as the basis of possible co-ordinated defensive measures."89

That claim notwithstanding, the 2000 Report held stern warnings for those jurisdictions included on the List of Tax Havens. Jurisdictions on the preliminary list could remove themselves therefrom only by agreeing to "co-operate" with the OECD initiative by signing either advance commitment letters (i.e., pre-June 2000) or making scheduled commitments (post June 2000) agreeing to institute policies reforming their tax policies in a manner satisfactory to the OECD.90 Those jurisdictions that failed to make such commitments would be included in the OECD List of Uncooperative Tax Havens, originally scheduled for completion by July 31, 2001.91 Jurisdictions that appeared on that list would be subject to the coordinated defensive measures of the OECD member countries.92

But even for those jurisdictions that submitted the required commitments to the OECD, the quest to stay off the blacklist would not automatically be over. The 2000 Report announced that the Forum would conduct annual reviews of those jurisdictions giving commitments to determine whether the established milestones and timetables were being met.93 If any jurisdiction failed to meet the milestones and timetables and any evidence existed that the jurisdiction's commitment to the effort to eliminate harmful tax competition was no longer in good faith, the OECD Committee on Fiscal Affairs would place the jurisdiction on the List of Uncooperative Tax Havens.94

C. Other OECD Lists of 2000

Even before the Committee on Fiscal Affairs issued the 2000 Report, two other OECD ancillaries issued their own lists. Although these lists are not the subject of this paper, their mere existence has caused significant reaction among the general population of the CARICOM countries. Accordingly, they merit some discussion here.

89. Id. at 17.
91. Id.
92. See OECD, 2000 Report, supra note 5, at 18.
93. See id.; see also OECD, Tax Haven Update, supra note 14.
94. Id.
1. The FSF List

The first of the OECD "other lists" was issued by the FSF. The FSF was itself established at the February 1999 G-7 summit. Its membership consists of both specific jurisdictions and various non-governmental organizations. Its main mandate is to promote financial stability through information exchange and international cooperation in financial supervision and surveillance.

At its inaugural meeting on April 14, 1999, the FSF established an ad hoc group, the Working Group on Offshore Financial Centers. The ad hoc group submitted its first and only report to the FSF on March 25-26, 2000. The FSF subsequently issued its own report on April 5, 2000. This report identified five key prudential and market integrity concerns in relation to Offshore Financial Centers ("OFCs"). The report also identified thirty-seven OFCs — labeled as "Financial Centres with Significant Offshore Activities" — to which the FSF sent a survey to be completed in order to begin a process of assessment that it wanted the IMF to eventually undertake.

95. REPORT OF THE WORKING GROUP ON OFFSHORE FIN. CENTRES, FIN. STABILITY FORUM, supra note 7.
96. See id. The FSF consists of forty members: three participants from each of the G-7 countries; two participants each, from the IMF, World Bank, International Organization of Securities Commissioners, the Basle Committee, and the International Association of Insurance Supervisors; and one participant each, from the Committee on Global Financial Systems, the Committee on Payment and Settlement Systems, the Bank for International Settlement, the OECD, Australia, Hong Kong, the Netherlands, and Singapore.
97. Id.
98. Id.
99. Id. at 2. The five concerns listed were:
   (a) Cross-border cooperation on information exchange, timely access to information and ability to verify.
   (b) Underlying supervision in an Offshore Financial Center.
   (c) Lack of due diligence in financial institutions.
   (d) Availability of information about beneficial ownership.
   (e) Lack of comprehensive and timely data on Offshore Financial Centers' financial activity.
100. Id. at Table I. Although the report claimed to identify thirty-seven jurisdictions as "Financial Sectors with Significant Offshore Activities," it lists only thirty-six such jurisdictions. The report lists the island of Nevis as a separate jurisdiction from the island of St. Kitts; however, Nevis and St. Kitts are actually united as one jurisdiction, the Federation of St. Kitts and Nevis. The thirty-seven jurisdictions listed are: Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Nauru, Cyprus, Gibraltar, Guernsey, Isle of Man, Jersey, Lebanon, Liechtenstein, Macao, Malta, Republic of the Marshall Islands, Monaco, Netherlands Antilles, Nevis, Niue, Panama, St. Kitts, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, Turks and Caicos Islands, Vanuatu and Costa Rica. Of these
Based on the survey results, the FSF issued a release that established three categories for OFCs and categorized the various jurisdictions accordingly.101 Category I consisted of territories whose "legal infrastructures and supervisory practices, and/or level of resources devoted to supervision and co-operation" as well as their "level of co-operation" were "largely of a good quality and better than in other OFCs."102 Category II consisted of territories whose characteristics (as described for Category I territories) were "largely of a higher quality than Group III, but lower than Group I."103 Category III consisted of territories whose characteristics were "largely of a lower quality than in Group II."104

In summary, the FSF report anticipated the IMF undergoing a thorough assessment that would ultimately lead to reform in the offshore financial services industry.105 However, unlike the OECD 2000 Report (and the FATF Report discussed infra), the FSF Report and press release did not threaten sanctions or put direct pressure on OFCs to engage in bilateral negotiations that would remove them from less desirable positions on the list.106 Of significance to the CARICOM countries, of the thirty-seven jurisdictions deemed to have "significant offshore activities," fourteen are either full or associate members of the organization, or had observer status therein.107 Of these, the FSF placed twelve in Cat-

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102. Id.
103. Id.
104. Id.
105. See Treyez and Woods, supra note 90, at 484.
106. See id.
107. See Press Release, Fin. Stability Forum, supra note 101. The jurisdictions with CARICOM member, associate member or observer status are: Anguilla, Antigua, Aruba, the Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Netherlands Antilles, Federation of St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Turks and Caicos Islands.
egory III,\textsuperscript{108} two in Category II,\textsuperscript{109} and none in Category I.

2. The FATF Report

The second OECD "other list" was contained in the FATF's 1999-2000 Annual Report, released in Paris, France, on June 22, 2000.\textsuperscript{110} The list identified jurisdictions that, in the FATF's opinion, did not have adequate safeguards against money laundering.

The FATF was formed as a result of the G-7 1989 summit. Members consist of representatives from twenty-nine countries and two regional bodies.\textsuperscript{111} In 1990, the FATF issued forty recommendations that currently serve as a guide to international financial regulation.\textsuperscript{112} In 1998, in an effort to arrest money laundering, the organization formed the Ad-hoc Group on Non-Cooperative Jurisdictions.\textsuperscript{113} Two years later, in February 2000, the group published a list of twenty-five criteria to determine whether a jurisdiction had adequate safeguards against money laundering.\textsuperscript{114} The FATF divided the criteria into four broad categories:

(1) Loopholes in financial regulations, including:

(i) Inadequate regulations and supervision of financial institutions;

(ii) Inadequate licensing rules, including background checks on financial managers;

(iii) Inadequate "Know Your Customer" rules;

(iv) Excessive secrecy provisions;

(v) Lack of SAR systems.

(2) Obstacles raised by other regulatory requirements, including:

\begin{itemize}
  \item \textsuperscript{108} See id. The Category III CARICOM-affiliated territories were: Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Belize, British Virgin Islands, Cayman Islands, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Turks and Caicos Islands.
  \item \textsuperscript{109} See id. The Category II CARICOM-affiliated territories were: Barbados and Bermuda.
  \item \textsuperscript{111} See id. The FATF member countries are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, Germany, Greece, Hong Kong/China, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. The two member regional bodies are the European Commission and the Gulf Co-operation Council.
  \item \textsuperscript{114} Id.
(i) Inadequate commercial law for registration of business legal entities;
(ii) Lack of identification of beneficial owners.
(3) Obstacles to international cooperation, including:
   (i) Obstacles by administrative authorities;
   (ii) Obstacles by judicial authorities.
(4) Inadequate resources for preventing and detecting money laundering activities.\textsuperscript{115}

Using these criteria, the FATF reviewed twenty-nine OFC jurisdictions and, on June 22, 2000, issued a report identifying fifteen of those jurisdictions as being non-cooperative in the fight against money laundering.\textsuperscript{116} Five of the jurisdictions listed were either full or associate members of CARICOM, or had observer status within the organization.\textsuperscript{117}

\textbf{D. Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices}

By November 2000, most of the blacklisted countries had not yet responded to the OECD's tax initiative. On November 24, the organization published a document entitled Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices ("MOU").\textsuperscript{118} The MOU provided jurisdictions identified by the OECD as tax havens with guidelines to demonstrate their commitment to transparency, non-discrimination and effective cooperation.\textsuperscript{119} The Committee on Fiscal Affairs expressed the hope that the MOU would provide the framework necessary "to continue its co-operative dialogue with each jurisdiction."\textsuperscript{120} The

\textsuperscript{115} FATF \textbf{ON MONEY LAUNDERING}, OECD, 1999-2000 \textbf{ANNUAL REPORT ANNEX A, supra} note 8.
\textsuperscript{116} \textit{Id.} The fifteen countries listed in the report as being uncooperative in the efforts to stamp out money laundering were: the Bahamas, Cayman Islands, Cook Islands, Commonwealth of Dominica, Israel, Lebanon, Principality of Liechtenstein, Republic of the Marshall Islands, Republic of Nauru, Niue, Panama, Philippines, Russia, Federation of St. Kitts and Nevis, and St. Vincent and the Grenadines.
\textsuperscript{117} \textit{Id.} The five CARICOM-affiliated territories listed on the non-cooperative list were: the Bahamas, Cayman Islands, Dominica, Federation of St. Kitts and Nevis, and St. Vincent and the Grenadines. CARICOM Website, \textit{supra} note 31.
\textsuperscript{118} OECD, \textbf{FRAMEWORK FOR A COLLECTIVE MEMORANDUM OF UNDERSTANDING ON ELIMINATING HARMFUL TAX PRACTICES} (2000).
\textsuperscript{119} \textit{Id.}
OECD explained to the tax haven jurisdictions that they could become parties to the MOU by simply issuing a press release announcing their commitment to join the OECD tax initiative, accompanied by a statement of the details of the commitment.\(^{121}\) While a jurisdiction could have sent an actual letter with a physical signature to the OECD, such was not absolutely necessary.\(^{122}\)

The MOU outlined the terms of the commitment the jurisdictions would be making. The duration of the commitment would be from July 31, 2001, to December 31, 2005.\(^{123}\) By December 31, 2001, each jurisdiction making the commitment would be required to adopt a plan to achieve transparency and effective exchange of information and to eliminate any tax regimes that attract business without substantial activity.\(^{124}\) By December 31, 2002, each jurisdiction had to “ensure that its regulatory or tax authorities ha[d] access to information regarding beneficial owners of companies, partnerships and other entities organised in its jurisdiction,” and to require that such entities adhere to generally accepted accounting standards in the preparation of their financial statements.\(^{125}\) The MOU further required that by December 31, 2003, each jurisdiction would establish the legal mechanisms for providing an effective exchange of information with OECD countries for criminal tax matters.\(^{126}\) These countries would also be invited to participate in the OECD’s Global Forum on Taxation, established to develop a framework for a legal mechanism for exchange of information.\(^{127}\) Additionally, each jurisdiction would remove any existing restrictions on the abilities of entities qualifying for preferential tax treatment to engage in business activity in the domestic market.\(^{128}\) Finally, the MOU required that, by December 31, 2005, each jurisdiction making the commitment would establish the means to provide OECD taxing authorities with information on all tax matters, to ensure access to bank information relevant

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122. Id.


124. Id.

125. Id.


127. Id.

128. Id. at 3.
for civil and/or criminal matters, and to "remove any restrictions that deny the benefits of preferential tax treatment to resident taxpayers, to entities owned by resident taxpayers, or to income derived from doing the same type of business in the domestic market."\textsuperscript{129}

The MOU also contained a "stand-still" provision.\textsuperscript{130} According to this provision, each party to the commitment would refrain from (1) introducing any new harmful tax practice — as that term is defined in the OECD 1998 Report on Harmful Tax Competition; (2) modifying any existing system into one constituting a harmful tax practice; and (3) strengthening or extending the scope of existing features that constitute a harmful tax practice under the 1998 Report.\textsuperscript{131} The MOU made clear that the mere entering into the MOU with the OECD would not be sufficient to prevent a jurisdiction from being included on the OECD List of Uncooperative Jurisdictions.\textsuperscript{132} Rather, only those jurisdictions that entered into the MOU and then adhered to its terms would not be included on the list.\textsuperscript{133} The document warned that those jurisdictions that did not adhere to the terms of the MOU could well have defensive measures applied against them.\textsuperscript{134}

\textbf{E. The 2002 List of Uncooperative Tax Havens}

On April 18, 2002, the OECD issued its most recent list — the \textit{List of Uncooperative Tax Havens}.\textsuperscript{135} In a statement issued on the day the list was issued, OECD Deputy Secretary-General, Seiichi Kondo, expressed his sorrow that the seven jurisdictions on the list had "decided that it is not in their interest to join OECD countries and other members of the international community in ending harmful tax practices that facilitate tax cheating and distort the market for financial services."\textsuperscript{136} Mr. Kondo boasted that over thirty other OFCs had already pledged to work with OECD coun-

\begin{itemize}
\item \textsuperscript{129} Id. at 3-4.
\item \textsuperscript{130} Id. at 4.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id. at 5.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id.
\item \textsuperscript{136} Seiichi Kondo, \textit{ENDING TAX HAVEN ABUSE} (2002).  
\end{itemize}
tries to counter so-called harmful tax practices. Mr. Kondo went on to state:

The OECD's project on counteracting harmful tax practices is part of a wider initiative to promote good governance in a globalized 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.

F. Reasons Underlying the OECD Initiative

Mr. Kondo's statement of April 18, 2002, gives some insight into the OECD's reasons for embarking on its initiative. The OECD is obviously concerned about the effects of globalization, and about the flow of capital from the industrialized countries to the so-called tax havens. As regards the former, Mr. Kondo is clear: "Globalization 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." As regards the free flow of capital, Mr. Kondo blamed the so-called tax havens for distorting this free flow of capital and thereby undermining "the ability of governments to finance the legitimate expectations of their citizens for publicly provided goods and services."

Certainly, in this computer and electronic age, the earth has been reduced to one big global village. This is particularly so in the realm of international finance. Transactions which once took weeks or days to complete can now be made with the simple click of a button on a computer mouse. Additionally, it is now very easy for an individual or business entity to move its headquarters or base of operations from a high-tax to a low-tax or no-tax jurisdiction. Consequently, ever-increasing amounts of capital are being transferred from industrialized countries into the so-called tax

137. Id.
138. Id.
139. Id.
140. Id.
havens. *Harmful Tax Competition* itself indicated that in 1994, residents of the G7 countries invested over $200 billion in various Caribbean and South Pacific islands, representing more than a 500% increase over the aggregate amount invested in 1985.\(^{141}\) Statistics also indicate that while traditional tax havens account for only 1.2% of the world’s population, and only 3% of the world’s GDP, they account for 25% of U.S. multinationals’ assets and 31% of their net profits.\(^{142}\)

In such a setting, with the tax base of the industrialized countries slowly being eroded, it is safe to say that globalization has indeed intensified international tax competition. The OECD, finding itself on the losing side of this battle, is doing its best to impede its progress.\(^{143}\) In fact, the very title of the OECD’s 1998 report — “Harmful Tax Competition: An Emerging Global Issue” — reveals the OECD’s stance on the issue of international tax competition. The contents of the report make it clear that the Recommendations and Guidelines contained therein, along with the OECD Tax Initiative, are nothing but the OECD’s attempt to eliminate the “harmful tax havens” and “preferential tax regimes” that are eating at the member countries’ tax bases.\(^{144}\)

Yet, the OECD, at least in its official statements, disavows any such motive. Upon the issuance of the 2002 *List of Uncooperative Tax Havens*, OECD Deputy Secretary-General Kondo stated:

The OECD does not seek to dictate to any country what its tax rate should be, or how its tax system should be structured. It does not seek to hinder enterprises in carrying out their normal business or to threaten the privacy of taxpayers. It aims to foster economic growth and development and ensure efficient and equitable flow of capital worldwide by promoting fair competition on tax rates. By getting commitments from more than thirty offshore financial centers to cooperate in fighting harmful tax practices, we are helping to protect the tax base not only of OECD countries but also of developing countries. By promoting transparency and cooperative agreements between all economies, our work will contribute to efforts to counter money laundering and the financing of terrorism (and strengthen

\(^{141}\) OECD, *HARMFUL TAX COMPETITION*, supra note 2, at 17.


\(^{144}\) OECD, *HARMFUL TAX COMPETITION*, supra note 2, at 37.
the international financial system).\footnote{145}

Notwithstanding the OECD's disclaimers, some commentators are convinced that, through its Tax Initiative, the organization has acted as a typical schoolyard bully, seeking to impose its will on the developing countries of the world.\footnote{146} Commentator Alexander Townsend, Jr., opines that "the OECD's 1998 and 2000 Reports addressing tax competition mark a coercive and intrusive solution that deviates from traditional fiscal remedies."\footnote{147} Townsend argues further that notwithstanding the substantive findings of \textit{Harmful Tax Competition} and the 2000 Report, the OECD's "efforts to curb tax competition marks a substantial deviation from the treaty network established to address international fiscal problems and usurps a basic tenet of fiscal legislation: national sovereignty."\footnote{148} Indeed, \textit{Harmful Tax Competition} requires tax competitive jurisdictions to make significant changes in their fiscal legislation and policies.\footnote{149} Although the OECD claims that non-OECD members have the option to voluntarily participate in the efforts against so-called harmful tax competition,\footnote{150} the mere threat of listed jurisdictions being subjected to the defensive measures outlined in the 2000 Report effectively coerces these jurisdictions into an involuntary compliance.\footnote{151}

\section*{III. CARICOM Reaction to the OECD Lists}

Throughout the CARICOM countries, people of all walks of life reacted strongly to the inclusion of their territories on the OECD, FATF and FSF lists issued in 2000. Among the "ordinary citizens," a significant minority had a blurred understanding of the different lists, and assumed that being on the OECD \textit{List of Tax Havens} meant that their countries had been included on a list of countries giving respite to money launderers.\footnote{152} Those citizens

\begin{footnotesize}
\footnote{145. Kondo, supra note 136.}
\footnote{146. Interview with Lebrecht Hesse, Solicitor General, Antigua and Barbuda, and Chairman, Intl Financial Sector Regulatory Authority, Antigua and Barbuda, in St. John's, Antigua (June 5, 2002); see also Townsend, supra note 16.}
\footnote{147. See Townsend, supra note 16, at 251.}
\footnote{148. Id. at 252.}
\footnote{149. See OECD, \textit{Harmful Tax Competition}, supra note 2, at 37, 67-71.}
\footnote{150. See Kondo, supra note 136 (stating that OECD does not seek to dictate to any country what its tax rate should be or how its tax system should be structured); see also OECD, \textit{2000 Report}, supra note 3, at 20-21 (noting OECD's intention to assist jurisdictions with compliance and to further obtain additional information).}
\footnote{151. Townsend, supra note 16, at 252.}
\footnote{152. Interview with Gertrude Lecointe-Marius, Esq., citizen, in St. Croix, Virgin Is. (May 30, 2002); Interview with Erol Meryl, Esq., citizen, in St. Croix Virgin Is. (June}
believed that their leaders erred, and that the OECD rightly included their countries on the *List of Tax Havens*. On the other hand, the majority of the CARICOM citizens were aghast that their countries were included on the *List of Tax Havens*. Many wondered just why their countries had been included on the list. In their minds, the listing was simply unfair. Moreover, they reasoned, the listing was not a reaction by the OECD to money laundering, but rather the organization's response to the flight of capital from the industrialized world to the developing countries of the Caribbean.

Among government officials, the CARICOM reaction was strongly condemnatory. Led by Barbados Prime Minister Owen Arthur, the CARICOM countries complained about the apparent double standards utilized by the OECD. The countries argued that while the OECD demanded compliance from the CARICOM members, some OECD members, specifically Switzerland and Luxembourg, refused to comply with the OECD's demands. Implying that the OECD countries were merely greedy powers attempting to hold on to their share of the world's wealth, CARICOM leaders argued that the OECD's aim was simply to cut small developing states out of offshore finance. This objective would be unfair, they maintained, for, as Antigua's Senior Ambassador with Ministerial Rank and High Commissioner to the United Kingdom, Ronald Sanders, stated, "many countries in the Caribbean were encouraged by the international community to go into the offshore financial services sector as a means of enhancing their earning power, and reducing their dependence on support from other countries." Now that the offshore sector was picking up steam, these same industrialized nations were trying to shut it down.

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1. 2002); Interview with an anonymous citizen, Ant. & Barb. (June 3-6, 2002); Interview with George Williams, supra note 208; Interview with an anonymous citizen, in London, Eng. (July 15-21, 2002).

153. Id.

154. Interview with Lebrecht Hesse, supra note 146.

155. Id.

156. Id.


158. Id.

159. Id.


161. See id.
Moreover, Ambassador Sanders has maintained a barrage of criticism on the OECD and its tax initiative. After the OECD published *Harmful Tax Competition*, Ambassador Sanders described the report as:

an attempt [by the OECD] to force all countries over which there is some measure of coercive influence and control to co-operate in the implementation and enforcement of a standardized system of taxation even though such a system may effectively place small countries at a severe disadvantage in building or creating financial services sectors.\(^\text{162}\)

Ambassador Sanders saw this “attack on the movement of money from OECD countries into countries such as those in the Caribbean” as “extremely troubling,” and called for “the most concerted action by the affected countries in resisting it.”\(^\text{163}\)

Two years later, after the OECD issued its *List of Tax Havens*, Ambassador Sanders warned that the CARICOM countries included on the list were “victims of the worst form of bullying by big, strong and powerful nations that the world has witnessed since the 19th Century.”\(^\text{164}\) Distinguishing the OECD and FATF lists, the Antiguan ambassador pointed out that the OECD tax initiative was “not about money laundering and financial crime” or “about offshore banks only.”\(^\text{165}\) According to Ambassador Sanders, “[t]he OECD ha[d] deliberately allowed an ill-informed international media to assume that the [tax initiative was] directed at curbing money laundering because this has won [the OECD] support.”\(^\text{166}\) In summary, Ambassador Sanders described the OECD tax initiative as “nothing less than a determined attempt [by the OECD] to bend other countries to its 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.”\(^\text{167}\)

Caribbean bankers also swiftly condemned the OECD initiative. Even before the OECD issued its *List of Tax Havens*, a group


\(^{163}\) Id.


\(^{165}\) Id.

\(^{166}\) Id.

\(^{167}\) Id.
of Caribbean bankers took a pre-emptive strike at the list, labeling it as an attempt to punish those regions that made their tax rates more attractive. Speaking for the group of bankers, Penny Ettinger, vice-president of Barbados-based Bayshore Bank, told a Miami Business Conference that the OECD was “trying to act as global tax police” in undertaking its tax initiatives. Moreover, Ms. Ettinger opined, the OECD confused the concepts of tax evasion and tax avoidance, perceiving tax avoidance “as ‘tax leakage’ from holes in the dike.”

Hot on the heels of Ms. Ettinger’s statement, Marion Williams, governor of the Central Bank of Barbados, and Julian Francis, governor of the Central Bank of the Bahamas, writing in The Financial Regulator, criticized the OECD’s initiative. Williams argued that the OECD’s proposals to blacklist “uncooperative” offshore financial centers were illegitimate and constituted an abuse of the organization’s power. For his part, Francis argued that the OECD initiative — aimed at “putting serious criminals out of business by attacking the financial jugular of small developing countries — [was] counterproductive.”

After the OECD issued the List of Tax Havens in June 2000, Caribbean bankers stepped up their criticism of the organization’s tax initiative. Referring to the blacklisting of the Caribbean countries, president of the Caribbean Development Bank (“CDB”), Neville Nicholls, accused the OECD members of using “shameless self-serving tactics” to blacklist small countries as tax havens so that these wealthy countries could protect their own financial sectors. According to Nicholls, the OECD’s effort to stop what it labeled “harmful tax practices” was only a “desire to recapture business lost to such jurisdictions.” Nicholls further accused the OECD of “using its fight against money laundering as an excuse to

169. Id.
170. Id.
172. Id.
173. Id.
175. Id.
alter Caribbean nations' competitive low-tax regimes to the benefit of banks in richer countries.\textsuperscript{176}

Other Caribbean bankers and business people joined the CDB president in criticizing the now-released \textit{List of Tax Havens}. Julian Francis, governor of the Bahamas Central Bank, opined that the list would leave "a bitter taste in the mouth of Bahamians, who realise [sic] that [they] are being bullied by some of [their] friends."\textsuperscript{177} In the same tone, Phillip Nicholls, president of the Canada Barbados Business Association, stated that the OECD blacklist sent conflicting signals to investors who regarded Barbados as being a "top-class jurisdiction for international tax planning."\textsuperscript{178} Meanwhile, Dominican Finance Minister, Ambrose George, expressed his "disappointment with the . . . unprecedented and largely unfounded attacks on the growth of the [Dominican] offshore sector."\textsuperscript{179} Mr. George also spoke of his inability "to comprehend the motivation for this latest threat to [the island nation's] economic sovereignty."\textsuperscript{180}

Even after the OECD issued its most recent list (the \textit{List of Uncooperative Tax Havens}) on April 18, 2002, CARICOM leaders and commentators were still seething over the inclusion of their territories on the 2000 \textit{List of Tax Havens} — even though the new list contained no CARICOM-affiliated countries. Antiguan Solicitor General, Lebrecht Hesse, bluntly stated that "[t]he OECD's mission is to destroy the emerging money markets of the newly developing countries because [such an emergence] reduces their capital."\textsuperscript{181} Hesse also accused the OECD of killing the economic diversification of the Caribbean island nations.\textsuperscript{182} Echoing that theme, Denzil Douglas, Prime Minister of the Federation of St. Kitts and Nevis, stated that the impact on the Caribbean countries of the blacklisting would be worse than the effects of the terrorist attacks on the United States on September 11, 2001.\textsuperscript{183}

\textsuperscript{176} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Interview with Lebrecht Hesse, \textit{supra} note 146.
\textsuperscript{182} Id.
\textsuperscript{183} \textit{St. Kitts PM Warns About the Destabilizing Effect of Caribbean Blacklisting},
Douglas went on to note that because of the blacklisting, the prospect for real investment flows to the Caribbean region grew increasingly bleak.\textsuperscript{184}

IV. Economic Impact of the OECD Listing on CARICOM Nations

Undoubtedly, the OECD \textit{List of Tax Havens} had a significant negative impact on the economies of the CARICOM nations included on that list. Indeed, this detrimental economic effect was apparently just what the OECD hoped for. In launching its tax initiative, the OECD stated its belief that the blacklisting would have an adverse impact on the economies of jurisdictions thus listed, essentially because some reputable companies, unwilling to do business in jurisdictions burdened with negative overtones, would relocate their activities to other jurisdictions.\textsuperscript{185} However, the OECD pointed out, should those blacklisted jurisdictions commit to adopting the new standards — and continue to comply — they could, in the long run, regain some of their lost business.\textsuperscript{186} In fact, to help these jurisdictions get through that rough period of economic downturn, the OECD asked its Development Assistance Committee to aid them, and prepared to conduct conferences and meetings with international organizations to discuss development plans for those jurisdictions.\textsuperscript{187}

The CARICOM countries were well aware of the potential economic impact of being blacklisted by the OECD. Even Barbados, undoubtedly the most economically stable CARICOM country, stood to be affected by the OECD blacklisting. After all, Barbados boasts “an efficient infrastructure and a Government that encourages foreign investment . . . by offering tax breaks.”\textsuperscript{188} Additionally, the Barbadian offshore finance and information services sectors are important foreign exchange earners.\textsuperscript{189} The financial services industry employs approximately two thousand people,
directly affects other industries, and provides about one-third of government revenues. Because the Barbadian industries are highly interrelated, a collapse of the financial services industry would have “dire social and economic consequences,” leading to other serious social ills like corruption and crime. Hence, from the onset, Barbados’s Prime Minister, Owen Arthur, was concerned about his country’s inclusion on the OECD’s List of Tax Havens.

Of all the CARICOM countries, the twin-island nation of Antigua and Barbuda appears to be the hardest hit by the OECD’s blacklisting. In April 1999, even before the OECD included the islands on its List of Tax Havens, the United States and Britain issued an “advisory” to their financial institutions, recommending “enhanced scrutiny” for transactions in Antigua and Barbuda.

In an effort to have the advisories lifted, the government of Antigua and Barbuda took several measures to bring its offshore financial sector in line with the requirements of the Americans and British. With the help of the British government, the twin-island nation made significant changes to its laws governing the offshore financial services sector. The government also established a fully independent International Financial Sector Regulatory Authority (“IFSRA”), and took the extra precaution of clearing the names of the members of its board of directors with the governments of both the United States and the United Kingdom.

To the detriment of the nation’s economy, between the end of 1999 and August 2000, the government reduced the number of offshore banks operating in the territory from seventy-two to eighteen, and the number of international business corporations from 12,378 to 10,797. Of the offshore insurance companies registered in Antigua and Barbuda, the government placed all on inac-

191. Id.
192. Interview with Clive Scott, Office of National Drug and Money Laundering Control Policy, Antigua and Barbuda, in Camp Blizzard, Antigua (June 3, 2002); see also Sanders, The OECD Report on “Harmful Taxation” and Its Implications for Small States, supra note 162.
194. Id.
195. Id.
tive status, and subsequently struck them from the country's corporate registry. With the government taking such drastic measures, by the time the OECD published its *List of Tax Havens*, the twin-island nation was already undergoing a financial drought. The inclusion of Antigua and Barbuda on the OECD *List of Tax Havens* only made matters worse.

As an initial matter, some foreign companies, wary of doing business in a blacklisted jurisdiction, relocated their activities out of Antigua and Barbuda. Then, in an effort to avoid having the islands listed on the upcoming *List of Uncooperative Tax Havens*, the government undertook various efforts to comply with the OECD's demands, such as further amending legislation which it had already amended to satisfy the demands of the American and British governments. These changes in legislation had two effects: (1) some of the offshore institutions operating on the islands were found to be falling short of the required standards, and (2) some offshore institutions, fearing they would not be able to meet the new standards, moved their operations out of Antigua and Barbuda. Thus, whereas the islands were once home to seventy-two offshore banks, by the summer of 2002, only eighteen remained. Not only were the islands affected by loss of fees and other revenue resulting from the exodus of the offshore banks, but their departure also resulted in loss of employment for the Antiguans they once employed, with the resultant decrease in the nation's GDP.

Along with Antigua and Barbuda, Dominica and St. Vincent and the Grenadines, two CARICOM member countries against whom the United States also issued financial advisories, suffered greatly from the OECD blacklisting. The former, having had its economy devastated first by Hurricane David in 1979 and then

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196. Id.
197. See *All Havens in a Storm*, THE ECONOMIST, July 1, 2000, at 114.
198. Interview with Lebrecht Hesse, supra note 146.
200. Interview with Lebrecht Hesse, supra note 146.
201. Id.
202. Id.
203. Honychurch, supra note 40, at 209-12 (describing the effects of Hurricane David).
by Hurricane Luis in 1995, turned to the financial services sector to diversify its economy. In 1996, the Dominican government established a re-engineered Economic Citizenship Program aimed at attracting quality investors to the island "while attempting to keep out the snake of international crime." By December 1998, 173 investors had successfully applied for economic citizenship in Dominica. It was also during 1998 that the government of then-Prime Minister Edison James announced its plans to "make Dominica a principal provider of offshore financial services not only in the Caribbean, but the world."

Sadly for Dominica, it was also in 1998 that the OECD launched its tax initiative. At that time, the Dominican offshore financial sector was still in its embryonic stage. Satisfied that it was establishing a "clean regime," the Dominican government did not believe that the OECD Recommendations and Guidelines were applicable to the island's fledgling offshore sector. To the government's shock and consternation, in 2000, Dominica appeared on both the FATF list of jurisdictions deemed non-cooperative in the fight against money laundering and the OECD List of Tax Havens.

During the months following the publication of the blacklists, the situation worsened for the Dominican offshore financial sector. On February 5, 2001, Senator Carl Levin (D-Mich.), the Ranking Democrat on the U.S. Senate Permanent Subcommittee on Investigations, released the results of a year-long investigation by his subcommittee staff on how U.S. banks were being used by foreign banks to launder the proceeds of criminal activity. The

205. Christopher E. J. Main, Dominica: Encouraging Investment . . . But Not At Any Price, available at http://www.escapeartist.com/efam11/Dominica_Investments.html (last visited July 6, 2002). The Economic Citizenship Program is administered by the Dominica International Business Unit ("IBU"). An investor pays U.S.$50,000 to receive economic citizenship for the investor, his or her spouse, and up to two children under the age of 18. Another option is to purchase U.S.$75,000 in 15-year bonds and to pay certain additional application fees. Each applicant must provide evidence of a successful business background or technical expertise. All applicants are screened for criminal backgrounds. Id.
206. Id.
208. Interview with George Williams, former Dominican High Commissioner to the United Kingdom, in London, Eng. (July 17, 2002).
209. Id.
210. Press Release, Senator Carl Levin, Levin Shows How U.S. Banks Are Used to Launder Drug Money and Fraud Proceeds; Findings of Year-Long Staff Investigation
report labeled Dominica "a small bank secrecy jurisdiction in the Caribbean," and asserted that one of the island’s offshore banks had moved more than $85 million through U.S. banks, "including millions of dollars associated with money laundering, financial frauds and illegal gambling operations on the Internet."211 The subject bank protested the negative assertion, arguing that certain "bureaucrats ha[d] used the far-reaching powers of the United States government to obtain incomplete information, [and] use[d] it in an intrusive and sensational fashion to draw conclusions that [were] neither warranted nor accurate."212

The bank’s protestations notwithstanding, the government, in an effort to comply with OECD demands, ordered the bank’s license revoked and directed the accounting firm, Price-waterhouseCoopers, to oversee the liquidation of the bank’s assets.213 Meanwhile, the government also established a Financial Intelligence Unit and an advisory council to supervise the offshore financial services sector.214

In the final analysis, the blacklisting seriously affected the Dominican economy. Not only did the government revoke the license of one bank, but several others fled the island. This flight resulted in further decline of the island’s economy. By June 2002, with unemployment high and the economy in near-shambles, the government of Prime Minister Pierre Charles presented the island nation with a “tax-filled” national budget featuring significant increases in fuel, sales, and telecommunications and cable services taxes, along with cuts in the size of the government’s cabinet.215

The multi-island nation of St. Vincent and the Grenadines

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211. Id.
suffered a similar economic decline in the face of the OECD and FATF blacklisting.\textsuperscript{216} Like Dominica, St. Vincent and the Grenadines had, in the mid-1990s, "launched an economic diversification program and strengthened measures to deal with the decline in the banana industry."\textsuperscript{217} In 1996, the government revised the laws governing the offshore financial sector.\textsuperscript{218} As a result, the sector experienced rapid growth. At one point, the sector boasted 11,400 registered entities, of which 28 were banks, 608 trusts, and the rest international business companies.\textsuperscript{219} The IMF estimated that the offshore financial sector contributed EC$30 million (3.5 percent of GDP) in 1999 in fees, employment, rentals, and use of utilities.\textsuperscript{220}

Unfortunately for St. Vincent and the Grenadines, 1999 was the last year of prosperity for the offshore financial sector. In 2000, both the OECD and the FATF included the multi-island nation on their blacklists. Concerned, the government enacted measures intended to strengthen the supervisory and regulatory framework for offshore activities — including the increase in staff and amendments to existing laws.\textsuperscript{221} The measures also included the closure of several banks and insurance companies operating on the islands.\textsuperscript{222} With an unemployment rate of 25-40%,\textsuperscript{223} St. Vincent and the Grenadines has been devastated by the economic losses brought on by the closures and revocations.

Indeed, the story is the same throughout the Caribbean. All the blacklisted countries have been severely affected by their inclusion on the OECD List of Tax Havens. Those countries unfortunate enough to be included on both the OECD and FATF lists have suffered the greatest economic hardship.

However, it is not only in the economic realm that the OECD

\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
has had an impact on CARICOM, but the impact has also been felt in the area of sovereignty. In their efforts to be removed from the blacklists, CARICOM countries have capitulated to the OECD, and in so doing, have surrendered their sovereign rights to be masters of their respective tax and economic policies. The next section of this article addresses this important issue.

V. A Matter of Sovereignty: How the OECD Pirated CARICOM Independence

As noted previously, CARICOM countries reacted strongly to their inclusion on the OECD blacklist. Their reaction was even stronger when, in response to the FATF’s issuance of its list of uncooperative countries and territories in the fight against money laundering, the United States Treasury Department issued advisories against five CARICOM member nations, asking American financial institutions to give “extra scrutiny” to transactions with those countries. Barbados’s Prime Minister, Owen Arthur, CARICOM’s leading spokesperson on the OECD initiative, referred to the issuing of the advisories as a “snow job” on the part of the United States and other OECD governments. According to Mr. Arthur, the OECD’s “reference to so much dirty money in the Caribbean is strange, since more dirty money passes through places like New York and London every day than in all the countries of the Caribbean.”

Mr. Arthur’s comments were in keeping with the sentiments expressed by CARICOM leaders meeting in St. Vincent and the Grenadines in early July 2000, who criticized the OECD initiative as being “inconsistent with international practice.”

Notwithstanding their annoyance at the OECD, the CARICOM nations found themselves unable to halt the OECD tax initiative. However, taking Mr. Arthur’s advice that the countries act as a united force in the matter, CARICOM countries stood together to negotiate with the OECD. Throughout the year 2001, CARICOM participated in extensive discussions with the OECD, to no avail. The OECD was adamant: capitulate or face economic

224. See supra Part III.
226. Id.
227. Id.
228. Id.
229. Id.
death and international ostracism. It was not until the new Republican administration in the United States withdrew its support for the OECD initiative that the organization adopted a less aggressive approach.

A. The Barbados Consultation, January 8-9, 2001

The first negotiation session between the OECD and CARICOM was held in Barbados from January 8-9, 2001.\textsuperscript{230} OECD officials met with representatives from the CARICOM member states, the IMF, the World Bank, the United Nations, the World Trade Organization, relevant regional organizations, and the OECD’s Development Assistance Committee, ostensibly to improve the dialogue between the OECD and the targeted jurisdictions.\textsuperscript{231} According to the OECD, the meeting's objective was to establish early confidence building measures, develop a common perspective in the effort to eliminate harmful tax practices, and to examine ways to improve the administrative and regulatory capabilities of the blacklisted jurisdictions and provide assistance in restructuring their economies if necessary.\textsuperscript{232} An important outcome of the meeting was the parties’ agreement to set up a task force to replace the OECD’s process noted in the MOU.\textsuperscript{233}

Speaking as host of the conference but also expressing the views of the CARICOM countries, Barbados Prime Minister Owen Arthur explained to participants that the service sector was the fastest growing area of the global economy and that everyone should be allowed to share in that market.\textsuperscript{234} He opined that the integrity of the international financial system and the prevention of tax crimes could be achieved only through cooperation and an agreement to establish an international standard of regulation, operation and practices.\textsuperscript{235} Prime Minister Arthur expressed his belief that a process of meaningful dialogue among the parties,

\begin{itemize}
\item \textsuperscript{230} Bruce Zagaris, Consultations in Barbados on OECD Harmful Tax Competition Initiative Yield Progress, 17 INT’L ENFORCEMENT L. REP. 50, 1 (2001).
\item \textsuperscript{231} Id.
\item \textsuperscript{233} Zagaris, supra note 230, at 1. The task force included the following countries: Antigua and Barbuda, Australia, Barbados, British Virgin Islands, Cook Islands, France, Ireland, Japan, Malaysia, Malta, the Netherlands, United Kingdom, and Vanuatu. Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id.
\end{itemize}
without coercion or the threat of arbitrary deadlines, could achieve an understanding to move towards a mutually beneficial resolution of the dispute.\textsuperscript{236} Prime Minister Arthur discouraged the use of unilateral actions by any one country or a group of countries — such as the OECD — as a means of resolving the perceived global problem of harmful tax practices.\textsuperscript{237}

Speaking on behalf of its members, the CARICOM Secretariat stated that its "members [would] continue to cooperate with any attempt to build a sounder international financial architecture and to develop international best practices."\textsuperscript{238} The Secretariat noted that most CARICOM member states had already made several changes to their tax regimes to adhere with international standards.\textsuperscript{239} Further, the Secretariat stated, in 1999, CARICOM members created a Policy Advisory Committee to review the legislative and administrative framework of various member jurisdictions, and in 2000, created the Caribbean Association of Regulators of International Business ("CARIB") to advance the reform process.\textsuperscript{240} However, the Secretariat noted that some of its members, especially the Bahamas and the member-states of the OECS,\textsuperscript{241} had become dependent on the offshore sector and had therefore expressed concern that the process should take into account the special situation of the small and developing countries.\textsuperscript{242} The Secretariat went on record as "strongly" supporting the dialogue and negotiation process.\textsuperscript{243}

In addressing the conference, Neville Nicholls, president of the Caribbean Development Bank, warned that the Caribbean countries should not be required to behave like the OECD members.\textsuperscript{244} Mr. Nicholls saw "[d]ifferences in resource endowments, resource accessibility, patterns of utilization, and, critically important, culture and outlook" between the OECD member states and

\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} See The Organization of Eastern Caribbean States, at http://www.caribisles.org/caribbean/count-09.htm (last visited July 7, 2002). The OECS is a CARICOM subregional grouping consisting of the islands of Antigua and Barbuda, Dominica, Federation of St. Kitts and Nevis, Grenada, Montserrat, St. Lucia, and St. Vincent and the Grenadines. Id.
\textsuperscript{242} Zagaris, \textit{supra} note 230, at 1.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
their counterparts in the Caribbean.\textsuperscript{245} The CDB president also stated that international cooperation and the principles of self-determination required that countries not impose their own cultures on others.\textsuperscript{246}

Inasmuch as several of the blacklisted countries were members of the Commonwealth, the conference was also addressed by Commonwealth Secretary-General, Don McKinnon. Mr. McKinnon opined that given its agenda, the conference would not produce a mutually acceptable definition of a harmful tax practice or the level of investigative assistance to be provided by one country to another.\textsuperscript{247} He therefore suggested that the goal of the meeting should be to adopt common principles which would evolve over time into mutually accepted definitions and agreed-upon levels of inter-state involvement.\textsuperscript{248} Mr. McKinnon noted the opposition of Commonwealth member states to the OECD’s actions, actions that challenged those states’ sovereignty over their domestic tax affairs and threatened them with sanctions for not yielding to the OECD.\textsuperscript{249} He also recommended that the “MOU... be reworked into a ‘convention by agreement between equal partners.’”\textsuperscript{250}

Responding to the statements of the various delegations, OECD Deputy Secretary General, Seiichi Kondo, stated that the OECD did not want to establish minimum tax rates or to interfere with the privacy of individual citizens.\textsuperscript{251} Rather, Mr. Kondo stated, the OECD encouraged competition between different tax regimes in a globalized economy, and supported competition that promotes diversity in tax systems while allowing countries to decide their own tax rates and structure.\textsuperscript{252} Mr. Kondo acknowledged that the OECD initiative had created uncertainty, an uncertainty that needed to be resolved quickly through dialogue with interested parties to eliminate harmful tax practices.\textsuperscript{253}

Overall, observers hailed the Barbados conference as a success.\textsuperscript{254} Essentially, the OECD implicitly withdrew the deadlines set forth in the MOU.\textsuperscript{255} If the task force were successful, it would

\begin{footnotes}
\footnotetext[245]{Id.}
\footnotetext[246]{Id.}
\footnotetext[247]{Id.}
\footnotetext[248]{Id.}
\footnotetext[249]{Id.}
\footnotetext[250]{Id.}
\footnotetext[251]{Id.}
\footnotetext[252]{Id.}
\footnotetext[253]{Id.}
\footnotetext[254]{See Hishikawa, supra note 190, at 406.}
\footnotetext[255]{Zagaris, supra note 230, at 1.}
\end{footnotes}
replace the deadlines contained in the MOU. Twenty-first Century Pirates yet, the OECD did not agree to remove the MOU, the deadlines, or the sanctions, and maintained its right to “impose unilateral sanctions after July 31, 2001.”


Soon after the Barbados conference, the newly-created task force met in London for a summit to prepare guidelines to develop a mutually acceptable process by which the principles of transparency, non-discrimination, and effective exchange of information could evolve into firm commitments. Ministers and senior officials from the member countries of the task force attended the summit, along with representatives of the OECD, CARICOM, and the Pacific Islands Forum. The OECD’s objective for this summit was to obtain public political commitments from as many jurisdictions as possible in order that those jurisdictions would not be included on the List of Non-Cooperative Tax Havens, originally due for publication in July 2001.

The London summit was grossly unsuccessful. The two sponsors, the OECD and the Commonwealth Secretariat, engaged in a war of words, with the Commonwealth accusing the OECD of “dictatorial behavior,” and the OECD, in turn, accusing the Commonwealth of acting like an “irritant to the process.” Diane Stafford, Commonwealth Director of Legal and Constitutional Affairs, argued that the OECD tax initiative was unfairly concerned with mobile capital, in the process disregarding the tax-related investment practices of OECD members. For their part, OECD officials denied such charges of partiality, pointing out that the list of harmful tax regimes included OECD members.

257. Zagaris, supra note 230, at 5.
261. OECD Tax Haven Summit Opens with Accusations of Bad Faith, supra note 258.
262. Id.
263. Id.
the Commonwealth Secretariat spokesperson, described the two sides as being far from agreement in determining the strategy to develop on the issues of transparency, non-discrimination, and effective exchange of information.\textsuperscript{264}

Essentially, the task force failed to create an agreement on how to combat tax evasion and money laundering.\textsuperscript{265} In a joint statement issued after the meeting, the sponsors stated that they would continue their dialogue in an effort to come to a mutual agreement.\textsuperscript{266} Yet, the OECD did not relax its July 2001 deadline for receipt of commitments from non-OECD member countries.\textsuperscript{267}

\textbf{C. OECD-Commonwealth Task Force Meeting, Paris, March 1-2, 2001}

The third meeting between the OECD and CARICOM representatives took place in Paris on March 1-2, 2001.\textsuperscript{268} The meeting was attended by ministers and senior finance and tax officials from the thirteen countries represented on the task force, along with Prime Minister Arthur of Barbados, Tony Hilton, Australia's ambassador to the OECD, representatives of the Commonwealth Secretariat, the OECD Secretariat, and the CARIB Secretariat.\textsuperscript{269}

The Commonwealth countries introduced several new proposals, including (1) full membership in the OECD for non-members involved in the anti-harmful tax competition initiative, (2) the ability to stop the initiative if the OECD members failed to comply, and (3) the "continuation of a collective rather than bilateral approach to negotiation."\textsuperscript{270} The Commonwealth countries expressed their willingness to work with the OECD, but emphasized that the terms had to be suitable to them.\textsuperscript{271}

The Commonwealth countries also argued that the OECD's threat of sanctions was "high-handed and undemocratic."\textsuperscript{272} They

\begin{itemize}
\item \textsuperscript{264} Agreement Elusive Between OECD and Offshore Centers, supra note 259.
\item \textsuperscript{265} Commonwealth and OECD Fail to Agree on Anti-Tax Evasion Campaign, \textit{Agence Fr. Presse}, Jan. 28, 2001, available at 2001 WL 2331102.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Agreement Elusive Between OECD and Offshore Centers, supra note 259.
\item \textsuperscript{270} OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains, supra note 268.
\item \textsuperscript{271} OECD, Commonwealth Fail to Agree on Tax Havens, \textit{AFX News}, March 4, 2001, available at 2001 WL 14640759.
\item \textsuperscript{272} Mark Atkinson, \textit{OECD Accused of Tyranny: Caribbean Leader Alleges Double
asked the OECD to postpone the July 2001 deadline, but once again, the OECD refused.\textsuperscript{273} Annoyed at the OECD’s seeming intransigence, Prime Minister Arthur of Barbados accused the organization of “‘technocratic tyranny’ by ‘nameless, faceless people’ with no common sense.”\textsuperscript{274} He also accused the OECD of employing double standards by holding the Commonwealth countries to the July 2001 deadline, while allowing OECD members until 2003 to eliminate their harmful tax practices.\textsuperscript{275} As a final matter, the targeted Commonwealth countries asserted that they were legitimate financial centers, and argued that the United Nations would be the appropriate framework to achieve the elimination of harmful tax practices, rather than direct pressure being applied by the OECD.\textsuperscript{276}

The Paris meeting ended in deadlock, with the parties failing to reach an agreement.\textsuperscript{277} The meeting mandated Barbados’s Prime Minister Arthur and Australia’s ambassador to the OECD, Tony Hilton, to continue negotiations.\textsuperscript{278} By then, though, it was doubtful that the parties would ever arrive at an amicable solution.

\section*{D. Change of Course in the United States}

The impasse was broken by a relatively unexpected occurrence. In the United States, the Clinton Administration had given strong support to the OECD initiative.\textsuperscript{279} When George W. Bush took office as President in January 2001, CARICOM leaders were expecting a different approach from the new administration.\textsuperscript{280} Accordingly, CARICOM leaders exerted considerable efforts in making their case to the new Secretary of the Treasury, Paul O’Neill, Congressional Republicans, and the Congressional Black Standards at Tax Havens Talks, THE GUARDIAN (London), March 3, 2001, available at 2001 WL 14955197.

\textsuperscript{273} OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains, supra note 268.

\textsuperscript{274} Atkinson, supra note 272.

\textsuperscript{275} Id.

\textsuperscript{276} Godoy, supra note 269.

\textsuperscript{277} OECD, Commonwealth Fail to Agree on Tax Havens, supra note 271.

\textsuperscript{278} Id.


\textsuperscript{280} See Sanders, supra note 164.
Caucus.\textsuperscript{281} Prime Minister of Antigua, Lester Bird, even discussed the matter directly with President Bush.\textsuperscript{282}

In May 2001, Secretary O'Neill announced that the United States was withdrawing its support for the OECD initiative.\textsuperscript{283} According to Secretary O'Neill, he 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."\textsuperscript{284} Secretary O'Neill also voiced his concern about the potential unfair treatment of some non-OECD countries under the provisions of the tax initiative.\textsuperscript{285} The Treasury Secretary forcefully reiterated that the United States "d[id] not support efforts to dictate to any country what its own tax rates or tax system should be, and w[ould] not participate in any initiative to harmonize world tax systems."\textsuperscript{286} According to Secretary O'Neill, the United States "simply has no interest in stifling the competition that forces governments — like businesses — to create efficiencies."\textsuperscript{287} Although he acknowledged the accomplishments of the OECD, Secretary O'Neill stated that the OECD initiative — in its then-existing form — was too broad and should be refocused towards the need for the exchange of specific information in the detection and prevention of illegal tax evasion.\textsuperscript{288}

Initially, the OECD announced that it would defy the Bush Administration and press on with the tax initiative.\textsuperscript{289} Reason eventually prevailed, however, and the organization decided to seek some form of U.S. cooperation instead. Consequently, the OECD scheduled a meeting for tax officials from the United States and other industrialized countries for Paris in June 2001.\textsuperscript{290} At

\begin{itemize}
  \item \textsuperscript{281} Id.
  \item \textsuperscript{282} Id.
  \item \textsuperscript{284} Id.
  \item \textsuperscript{285} Id.
  \item \textsuperscript{286} Id.
  \item \textsuperscript{287} Id.
  \item \textsuperscript{288} Id.
  \item \textsuperscript{289} Charlotte Deny, OECD to Defy Bush Over Tax Havens, GUARDIAN UNLIMITED, May 12, 2001, available at http://www.guardian.co.uk/business/story/0%2C3604%2C489710%2C00.html (last visited May 30, 2002) (stating that OECD was insisting that the initiative was still on track, despite U.S. government's decision to withdraw support for central parts of plan).
  \item \textsuperscript{290} See Michael Peel, OECD May Have to Deal to Fight Tax Evasion, FIN. TIMES, June 28, 2001, available at 2001 WL 24309558.
\end{itemize}
that meeting, the OECD essentially gave in to U.S. demands and agreed to a less aggressive approach to its tax initiative.\textsuperscript{291} The OECD made a major concession, agreeing that it would not impose sanctions on tax havens that simply offered favorable tax breaks to foreign companies and investors (also called "ring fencing").\textsuperscript{292} In return, the United States agreed to continue its campaign to have targeted jurisdictions disclose various account information of those suspected of tax evasion to the Internal Revenue Service and the OECD tax authorities.\textsuperscript{293} To the delight of the CARICOM countries, the negotiations led to several modifications to the OECD's original plan.\textsuperscript{294}

These modifications are set out in The OECD's Project on Harmful Tax Practices: The 2001 Progress Report.\textsuperscript{295} First, the modifications provided that the OECD would not apply any sanctions to so-called uncooperative jurisdictions any sooner than the April 2003 deadline imposed by the organization on its own members to abolish their harmful tax regimes.\textsuperscript{296} Moreover, member states would retain the right to determine whether or not to apply any appropriate and/or proportionate sanctions on uncooperative jurisdictions.\textsuperscript{297} Second, the modifications provided that the OECD would in the future seek commitments regarding transparency and effective exchange of information only, and would not focus on the application of the no substantial activity criteria to determine whether or not a tax haven was uncooperative.\textsuperscript{298} Third, because of ongoing discussions with the various jurisdictions, and in keeping with the OECD's objective of obtaining as many commitments to the initiative as possible, the OECD extended the deadline for making commitments to cooperate with the new guidelines to February 28, 2002.\textsuperscript{299} Finally, in an effort to ensure that the committed jurisdictions had sufficient time to develop and implement their plans, the OECD extended the time for developing the compliance plan from six to twelve months after

\begin{itemize}
\item 291. See id.
\item 293. See Peel, supra note 290.
\item 295. Id. ¶¶ 23-35.
\item 296. Id. ¶ 32.
\item 297. Id. ¶¶ 32, 48.
\item 298. Id. ¶¶ 27-30.
\item 299. Id. ¶ 33.
\end{itemize}
each jurisdiction made the commitment.  

In light of the OECD's modifications to its demands, CARICOM countries began to consider issuing commitments to the tax initiative. Even before the Caribbean countries issued their rash of commitments, the OECD announced that Barbados was no longer included on the List of Tax Havens. Barbados' removal from the list brought an end to a very public battle between the OECD and one of its most vocal opponents.

Thereafter, as the new February 28, 2002 deadline approached, the CARICOM nations issued the long-awaited commitments to join the anti-harmful tax competition initiative. Some jurisdictions, like Antigua and Barbuda, St. Vincent and the Grenadines, British Virgin Islands, Belize, the Bahamas, Grenada, Montserrat, Turks and Caicos Islands, and the United States Virgin Islands, wrote letters to OECD General Secretary, Donald Johnston, pledging their commitment "to the principles of effective exchange of information in tax matters and transparency." These letters contained attachments outlining the measures the respective jurisdictions would take to fully implement their commitments by December 31, 2005. Other jurisdictions — like Dominica and St. Lucia — issued press releases announcing their commitment to the OECD principles of transparency and effective exchange of information. These press releases also outlined just how those jurisdictions would fulfill their commitments by December 31, 2005.

Having received these commitments from all the CARICOM member countries, when the OECD issued its List of Uncooperative Tax Havens on April 18, 2002, no CARICOM country was included on the list.

The removal of the fifteen CARICOM nations from the OECD blacklist came at quite a price for the Caribbean island-nations.
Not only did fourteen of those islands have to issue commitments to the OECD, but they also had to enact legislation satisfactory to the OECD member countries signaling their commitment to arresting harmful tax competition and money laundering. Hence, from the time the OECD launched its anti-harmful tax competition initiative in 1998, almost all CARICOM countries enacted some form of related legislation. The list of CARICOM countries enacting new legislation or amending already existing legislation includes:308


   (a) Central Bank of the Bahamas Act, 2000;
   (b) Bank and Trust Companies Regulation Act, 2000;
   (c) Financial Intelligence Unit Act, 2000;
   (d) Financial and Corporate Service Providers Act, 2000;
   (e) Criminal Justice (international cooperation) Act, 2000;
   (f) International Business Companies Act, 2000;
   (g) Dangerous Drug Act, 2000;
   (h) Financial Transaction Reporting Act, 2000; and

3. Cayman Islands — Enacted Amendments to the Monetary Authority Law, Proceeds of Criminal Conduct Law, Banks and Trust Companies Law and Companies Management Law. The Cayman Islands also issued new regulations and enacted new laws that addressed customer identification and record keeping for a wide range of activities.


5. Federation of St. Kitts and Nevis — Enacted the following four laws:
   (a) The Financial Intelligence Unit Act, No. 15 of 2000;
   (b) The Proceeds of Crime Act, No. 16 of 2000;

308. The following material is taken from Treyez & Woods, supra note 90, at 459-61.
(c) The Financial Services Commission Act, No. 17 of 2000; and
(d) The Nevis Offshore Banking (Amendment) Ordinance, No. 3 of 2000.


VI. CONCLUSION

Four years after the OECD launched its anti-harmful tax competition initiative, it was able to claim victory. Although the organization did not achieve all that it had originally set out to accomplish and had to tone down its rhetoric, it certainly achieved much with regard to its relations with CARICOM. After all, the OECD did receive commitments from fourteen of the fifteen CARICOM countries included on the original List of Tax Havens, pledging that they would join the effort to fight so-called harmful tax competition. The other CARICOM country included on the original list, Barbados, was deemed by the organization to already be in compliance, and therefore not deserving of being thus listed. In essence, then, what the OECD received was total capitulation by CARICOM.

But this capitulation does not mean that the leaders of the CARICOM countries lack principle. Rather, the Caribbean islands are, in the words of Lebrecht Hesse, “small and perceived as weak, without the power to take on the might of the industrialized countries which make up the OECD.”309 Thus, although they were understandably annoyed at the OECD and its bullying tactics, they could hardly do much to stop the initiative. To survive in this globalized economy, they really had no choice but to “fall in line.” Meanwhile, the OECD countries, like Blackbeard, Bluebeard and the other pirates who plied the waters of the Caribbean during the sixteenth through nineteenth centuries, can smile at their success in once again robbing the Caribbean of its gold — its sovereign right to determine its tax and economic policies, and the rights of its people to shape their destiny.

309. Interview with Lebrecht Hesse, supra note 146.