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This paper identifies legislative changes in tax havens resulting from pressure from rich countries exercised through the OECD. It focuses on the specific situation of the Netherlands Antilles. The paper analyzes the response given by the Netherlands Antilles to the international community through the modification of its tax agreement with the mother country in Europe and considers whether that is a solution for adoption by other tax havens. The paper then argues that this model is not appropriate for use in a small economy that cannot rely on a supportive mother country or on tourism as an alternative resource. The paper concludes that the legal status of small island states could be reconsidered in public international law and proposes that rich countries adopt a balanced approach when considering harmful tax competition.

I. Introduction

Any attempt to comment on tax haven legislation exposes the writer to two dangers:

- The first is the risk of offending those who defend the status quo of tax havens, on the basis that tax competition is good because low tax rates attract corporations and are a source of income for small economies.
- The second is the risk of offending those who criticize the status quo on the basis that it is not tax competition, but rather tax harmonization that is desirable, because competitive practices in taxation can distort the location of capital and services in a manner detrimental to the international community as a whole.[1]

This paper, therefore, advocates a balanced approach to the question of tax havens. It concludes that one must simply rethink the legal status of tax havens within the international community. The example of recent changes that occurred in the Netherlands Antilles is the basis for reflection. Along with tourism, taxation is the mainstay of that small economy.[2] The Netherlands Antilles is often seen as a leading financial center offering an attractive regime with low tax rates. Many international financial firms have a presence in the Netherlands Antilles because, until recently, tax rates ranged between 2.4 percent and 9.66 percent depending on the type of income a company generated.[3] Those tax rates made the Netherlands Antilles seem a veritable tax "heaven."[4]

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[1]Amos C. Peters, "Exploring Caribbean Tax Structure and Harmonization Strategies," *Bull. Int'l Bur. Fisc. Doc.*, May 2002, p. 178, at 186.

[2]Followed by petroleum refining and shipping. Almost all consumer and capital goods are imported principally from Venezuela, the United States, and Mexico, because poor soils and inadequate water supply (except for Aruba) hamper the development of agriculture.

[3]When deriving their net income out of interest, royalty, dividend, trading, management and consultancy, offshore

(Footnote continued on next page.)

This paper aims to show the advantages of a balanced approach to tax havens, even if that approach satisfies neither of the opposed positions indicated at the outset. Indeed, the recent changes in the tax laws of the Netherlands Antilles are a good example of how a legislature can both satisfy the international community and preserve a local economy largely based on offshore financial and tax services.

Should investing in a tax haven be viewed as tax evasion or tax avoidance?

Is the traditional tax evasion/tax avoidance distinction still relevant for our subject?[5] In other words, should investing in a tax haven be viewed as tax evasion or tax avoidance? Authors usually distinguish tax evasion, which is illegal, from tax avoidance, which is legal.[6] When an individual's earnings reach the minimum level for income tax and social security contributions, he or she can decide to stop working for the rest of the tax year (perfectly legal) or continue to work for unreported cash payment (not legal). But nowadays tax avoidance itself sometimes becomes illegal, because most high-tax countries have antiavoidance laws, which prevent both companies and individuals from using tax havens to escape their national tax obligations. That was the case, for instance, for the French "exit tax" on unrealized capital gains on stock in companies in which an individual has substantial holdings as soon as they had left France.[7] The aim of that domestic legislation is to prevent people from benefiting from tax competition seen as harmful to the community as a whole.[8]

In addition to those internal measures taken by high-tax countries, multilateral organizations, like the European Union or the OECD, use political pressure and threats of economic reprisals to eliminate harmful tax competition. Even the World Trade Organization has an interest in promoting better trade-related tax legislation. That is exemplified by the recent challenge before the WTO Appellate Body of the U.S. foreign sales corporation tax regime.[9]

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banking, insurance, shipping, and aircraft activities: *see* Netherlands Antilles Profits Tax Ordinance. *See also* Xander R. M. Arts, "The Netherlands Antilles New Fiscal Regime and Amended Tax Arrangement for the Kingdom of the Netherlands Enter into Force," *Intertax* 2002, vol. 30, no. 4, p. 153. And when entering into tax rulings with the tax inspector, one could often effectively reduce those already low percentages. Also, under Dutch law, Dutch corporations were able to transfer their statutory seats to the Netherlands Antilles in some emergency situations, like the wartime German occupation. "Thus the Netherlands Antilles became a pioneer for asset protection facilities" (Caroline Doggart, *Tax Havens and Their Uses*, The Economist Intelligence Unit, United Kingdom, 2002, p. 157).

[4]Rather than using the term "heaven," this paper could have used the term "fiscal paradise," as the French, Spanish, or Portuguese do, or the German "tax oasis," terms with much the same flavor, but it will use instead the English expression "tax haven," which is much more appealing than "offshore centre" or "low-tax jurisdiction." This paper uses the term "tax haven" in an entirely neutral sense, without implying any judgment whatsoever about the probity of any particular tax regime. The term simply denotes a fiscally attractive location, a refuge from taxation, a haven in the basic sense of the word. *See generally* Thierry Francq and Alain Damais, "Comment fonctionnent les centres offshore?" *Problèmes économiques*, no. 2.674, July 19, 2000, p. 1; Mykola Orlov, "The Concept of Tax Haven: A Legal Analysis," *Intertax* 2004, vol. 32, no. 2, p. 95; *see also* art. 209 B, French General Tax Code, as amended by art. 104 of Finance Act for 2005.

[5]*See generally* Rémi Gouyet, *L'illicite et le droit fiscal*, Presses Universitaires du Septentrion, 2000; Charles Robbez Masson, *La notion d'évasion fiscale en droit interne français,* Paris, L.G.D.J. 1990.

[6]Doggart, *Tax Havens and Their Uses*, p. 6. But for a more subtle distinction between tax avoidance and tax saving, *see* Uckmar, "General Report," in *Tax avoidance/Tax evasion*, Cahiers de droit fiscal international, Kluwer, 1983, vol. LXVIIIa, p. 15 (para. 35).

[7]Former art. 167 *bis* of the French General Tax Code, repealed by art. 19 of Finance Act for 2005 (Dr. fiscal 2005, no. 1-2, comm. 72); *see also* Conseil d'Etat, Dec. 14, 2001, *Hughes de Lasteyrie du Saillant*, no. 211341, RJF 2/02 no. 160, concl. G. Goulard, p. 112; ECJ, Mar. 11, 2004, *de Lasteyrie du Saillant*, *aff.* C-9/02, RJF 5/04 no. 558, chron. L. Olléon, p. 347, Dr. fiscal 2004 no. 20, comm. 483, B. Boutemy and E. Meier; Rép. Morel-A-L'Huissier, *Journal Officiel, Assemblée Nationale (JOAN)*, Sept. 21, 2004, p. 7298; CE, Nov. 10, 2004, no. 211341, RJF 2/05 no. 135. *See generally* Raphaël Coin, "Les règles anti-évasion fiscale françaises ont-elles un avenir dans un contexte international?," *Les Petites Affiches* 2003, no. 196, p. 3; B. Gouthière, "L'exit tax déclarée contraire au droit communautaire," *Feuillet Rapide*, 21-04, p. 15; J. Le Calvez, "Brèves remarques sur l' 'exit tax' et le droit communautaire," *Dalloz*, 2004, no. 13, p. 933.

[8]For an overview of the situation in the Netherlands, *see* Johan Barnard, Jacques Overgaauw, and Stef van Weeghel, "Netherlands," in *Limits on the Use of Low-Tax Regimes by Multinational Businesses: Current Measures and Emerging Trends*, International Fiscal Association, 2001, vol. LXXXVIb, p. 693.

[9]The foreign sales corporation regime has been held contrary to the GATT Agreement on Subsidies and Countervailing Measures. *See generally* Stanley I. Langbein, "United States — Tax Treatment for 'Foreign Sales Corporations': WTO Doc. WT/DS108/AB/R. WTO Appellate Body, Feb. 24, 2000," *Am. J. Intl. L.*, 2000, vol. 94, p. 546; "FSC ruling will force major tax reform," *Offshore Red*, March 2002, p. 3; Paul R. McDaniel, "The Impact of Trade Agreements on Tax Systems," *Intertax* 2002, vol. 30, no. 5, p. 166 (published earlier in *Festschrift für Klaus Vogel zum 70*, Geburtstag, Heildelberg, C.F. Müller Verlag, 2000, p. 1105); Carol Doran Klein and Jason Slatter, "WTO Releases Arbitration Panel Report Granting EU Authority To Impose Import Sanctions," *Intertax* 2003, vol. 31, no. 1, p. 54. For a similar debate in

(Footnote continued on next page.)

Why, then, does the Netherlands Antilles offer a good example of a coherent response to international community pressure directed to eliminating harmful tax competition? The Netherlands Antilles' response took the form of a move from their favorable international tax regime toward a more internationally accepted tax scheme for foreign investors.[10] But it also preserved the interests of the local economy by including a transitional period of approximately 20 years. However, it is uncertain that this example can be followed everywhere; after all, it is not easy for a small country economy, with few resources other than offshore financial services, to switch to other sources of income just to please other (richer) countries. More fundamentally, the sovereign legal status of small independent states within the international community may have to be reconsidered.[11]

This paper first identifies the pressures for tax changes exercised by rich countries, focusing on the specific situation the Netherlands Antilles was facing in the world community. Then it analyzes whether the response given by the Netherlands Antilles through, for instance, the modification of its tax agreement with the mother country in Europe is a solution for adoption by all other tax havens.

II. The Netherlands Antilles and the World Community

The Kingdom of the Netherlands encompasses the Netherlands, the Netherlands Antilles, and Aruba.[12] The Netherlands (also known as Holland, after two of its larger provinces) is the part of the kingdom situated in Europe. The Netherlands Antilles comprises two island groups in the Caribbean Sea. One group, including Curacao and Bonaire, lies north of Venezuela, while the other group, comprising St. Maarten, Saba, and St. Eustatius, lies east of the Virgin Islands and north of Martinique. Of those five islands, Curacao is the largest, containing 75 percent of the islands' approximately 200,000 inhabitants. Aruba originally formed part of the Netherlands Antilles, but acquired a separate status in 1986.[13]

For the relationship between the motherland and its dependent territories, the situation is as follows. In theory, the Netherlands Antilles and Aruba are autonomous in the management of their affairs, because the mother country in Europe is responsible only for foreign affairs, defense, and external economic relations.[14] In practice, however, the Netherlands Antilles, more than Aruba, is very dependent on the European part of the kingdom.[15]

Interest in tax havens is not new, but it is increasing.[16] The international community is now accusing tax havens of financing terrorism. And September 11 is only one of the factors behind that increase.[17] Two interconnected factors are as important as the financing of international terrorism — money laundering and harmful tax competition. Harmful tax competition has been the subject of in-depth investigation by various international bodies. In all those investigations the Netherlands Antilles have been included.

In practice, the Netherlands Antilles is very dependent on the European part of the kingdom.

That is because tax regimes like that of the Netherlands Antilles have led to dramatic capital inflows to offshore centers.[18] However, there has

Europe, *see* Otmar Thömmes, "CFC Legislation and EC Law," *Intertax* 2003, vol. 31, no. 5, p. 188.

[10]Recently those tax rates have been raised to a standard 34.5 percent, so it may be asked whether the Netherlands Antilles is still the tax "heaven" it once was.

[11]*Supra* note 8.

[12]*Statuut voor het Koninkrijk der Nederlanden*, 1954 Staatsblad 503, as amended.

[13]Another reason for leaving Aruba aside in this paper is that its offshore industry is much less important than that of Curacao.

[14]*See* C. Kortmann and P. Bovend'Eert, *Dutch Constitutional Law*, Kluwer Law International, 2000, p. 37: the autonomy and equivalent status of those overseas territories vis-à-vis the state in Europe is guaranteed by a charter, which is the basis for that federation *sui generis*.

[15]*Id.*, p. 40.

[16]*See* Anthony Sanfield Ginsberg, *International Tax Havens*, Durban, Butterworths, 1997; Mark Hampton, *The Offshore Interface: Tax Havens in the Global Economy*, New York, St. Martin's Press, 1996; Timothy Lyons, Huub Bierlaagh, and Joanna Wheeler, *The International Guide to the Taxation of Trusts*, Amsterdam, IBFD Publications, 1998; International Bureau of Fiscal Documentation, *Taxation & Investment in the Caribbean*, Amsterdam, IBFD Publications, 2000. More recently, *see* Jacques Malherbe, "Harmful Tax Competition and the Future of Financial Centres in the European Union," *Intertax* 2002, vol. 30, no. 6-7, p. 219 (published earlier in *Festschrift für Klaus Vogel zum 70*, p. 1125).

[17]Akiko Hishikawa, "The Death of Tax Havens?" *Boston College International and Comparative Law Review*, available at http://www.bc.edu/bc_org/avp/law/lwsch/journals/ 2002, vol. 25, no. 2, p. 389, at 415.

[18]That rate of increase is well in excess of the growth of total outbound foreign direct investment. Foreign direct investment in those regions increased more than five-fold over the period 1985-1994, to more than US $200 billion: *see* OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998, p. 80. In fact, for every percentage point increase in the

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recently been a slowdown, at least within the Caribbean jurisdictions. The offshore sector's contribution, which was 20 percent of the gross domestic product in 1985, fell to 8 percent in 2000.[19] Financial services in most Caribbean jurisdictions have lost significant business in their sector. As a result, the Netherlands Antilles has also experienced a sharp decline in growth since the middle of the last decade.[20] The characterization of the Netherlands Antilles as a tax haven, which makes the taxpayer fall from "heaven" (2.4 percent tax rate) to what will be shown to be "hell" (34.5 percent tax rate), results from the OECD's conquest of paradise through economic reprisals.

A. From Heaven to Hell: The Netherlands Antilles Characterization as a 'Tax Haven'

Although the following organizations are not the only international bodies pressuring for changes in taxation,[21] the main reason for that economic recession is the "blacklisting" of those jurisdictions by the OECD, the European Union, and the Financial Stability Forum (FSF).[22] Therefore, three bodies, the FSF, the European Union, and the OECD, were exerting pressure for changes. Let us look at the FSF findings first.

1. The Financial Stability Forum

The FSF,[23] which brings together senior representatives of national financial authorities and international financial institutions, issued a report in April 2000.[24] It characterized the Netherlands Antilles as being among the most dubious of tax havens, along with, for instance, Aruba, the British Virgin Islands, the Cayman Islands, Liechtenstein, Mauritius, Nauru, Seychelles, and Vanuatu.[25] In September 2003 in Paris, the 10th meeting of the FSF suggested that the monitoring of the offshore financial centers should be an integral part of the IMF's financial sector surveillance work,[26] a suggestion repeated a few days later in Dubai.[27] The IMF has already published an assessment in 2002 of the offshore financial situation in Aruba.[28] The assessment in the Netherlands Antilles was published in February 2004.[29]

2. The EU 'Code of Conduct'

In much the same way, the European Union is tackling harmful tax competition among its member states. In 1997, the European Council agreed on a common political approach, with a package of tax measures that included a code of conduct designed

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top corporate tax rates in industrialized countries, capital inflows to offshore centers in the Caribbean rose by 19 percent. Moreover, an IMF study indicates that offshore financial center banks' cross-border assets and liabilities grew by over 6 percent annually during 1992-1997 to around US $5 trillion (FSF, Report of the Working Group on Offshore Centres dated April 5, 2000, available at http://www.fsforum.org).

[19]Doggart, *Tax Havens and Their Uses*, p. 157.

[20]Contrasting with Aruba, which is among the highest per capita income economy in the region, the Netherlands Antilles has a growth rate, for 2002, of 0.8 percent (IMF, Country Report no. 03/160 entitled "Kingdom of the Netherlands — Netherlands Antilles: 2003 Article IV Consultation — Staff Report"; *Public Information Notice on the Executive Board Discussion*, p. 35, and IMF, Country Report no. 03/159 entitled "Kingdom of the Netherlands — Netherlands Antilles: Selected Issues and Statistical Appendix," 2003, no. 1, no. 6, p. 45).

[21]*See* the Financial Action Task Force on Money Laundering (FATF).

[22]Bruce Zagaris, "Caribbean Jurisdictions Must 'Get Up, Stand Up' Against U.S. Discriminatory Sanctions," *Tax Notes Int'l*, Aug. 19, 2002, p. 923.

[23]The FSF is an initiative of Hans Tietmeyer, the president of the Bundesbank, to create a financial stability forum. The treasury departments of the G7 countries approved it. (*See* "Les pays riches promettent de tirer ensemble la croissance mondiale," *La Nouvelle République*, no. 1042, Feb. 25, 1999, available at http://www.africaonline.co.ci/AfricaOnline/infos/nourep/1042int1.html.) *See also* FSF, *Who We Are*, 2003, available at http://www.fsforum.org/about/who_we_are.html. But the FSF consists only of G7 governments, the IMF, the Bank for International Settlements, the OECD, and related international bodies. (*See* Doggart, *Tax Havens and Their Uses*, p. 152.)

[24]FSF, "Report of the Working Group on Offshore Centres," April 5, 2000, available at http://www.fsforum.org, p. 68.

[25]FSF, *Grouping of Offshore Financial Centres (OFCs) to Assist in Setting Priorities for Assessment,* ref. no.: 15/2000E, released May 26, 2000, available at http://www.fsforum.org/publications/PR_OFC00.pdf; *see also* "Le Forum de stabilité financière publie la liste des centre off-shore à problèmes," *Les Echos*, May 26, 2000.

[26]FSF, 10th Meeting of the FSF (Paris, Sept. 10, 2003), 2003, available at http://www.fsforum.org.

[27]FSF, Statement by Roger W. Ferguson Jr., chair of the Financial Stability Forum, International Monetary and Financial Committee Meeting (Dubai, Sept. 21, 2003), available at http://www.fsforum.org.

[28]IMF, Monetary and Exchange Affairs Department, Jan Willem van der Vossen, Ross Delston, Gabriella Ferencz, and Steve Butterworth, *Aruba — Offshore Financial Center Assessment*, 2002, vols. I and II. In 1995, a consulting firm attempted to estimate the economic importance of the offshore sector for Aruba, but due to lack of data, it did not come to an authoritative estimate. The economic importance of the approximately 5,000 offshore entities cannot be established reliably, as they do not prepare or publish financial statements or information on ownership and activities.

[29]IMF, *Assessment of the Supervision and Regulation of the Financial Sector, Kingdom of the Netherlands*, Feb. 2004, vol. 2.

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to eliminate harmful tax competition in the business taxation area.[30] According to the proposed timetable, phasing out harmful tax measures will be completed by December 31, 2005.[31]

Apart from setting a date for the termination of the schemes, the code of conduct requests member states with dependent and associated territories, such as the Kingdom of the Netherlands, to ensure that harmful business taxation measures are suppressed in those territories.[32] Indeed, a working group on harmful tax competition, known as the Primarolo group, identified the Kingdom of the Netherlands as a leader in Europe, with 10 harmful tax measures.[33]

The tax package was finally agreed on in Luxembourg by the EU Council of Economic and Finance Ministers on June 3, 2003. As it stands, that consists of three measures: the code of conduct, a directive on the taxation of savings income, and a directive on the taxation of interest and royalty payments between associated companies.[34] As "soft law," the code of conduct is only a political commitment agreed on by the member states.[35]

Despite the nonbinding nature of the code of conduct, some tax regimes could be challenged separately under the EC competition law rules and, more particularly, state aid rules.[36] State aid measures would have far more impact than the nonbinding

[30]Conclusions of the ECOFIN Council Meeting on Dec. 1, 1997, concerning taxation policy (98/C 2/01), JOCE C 2/1 dated Jan. 6, 1997, CELEX no. 31998Y01106(01). The ECOFIN Council consists of the ministers of economy and finance of the member states. *See most recently* Philippe Cattoir and Matthias Mors, "Une chronique du paquet fiscal — les fondements et les enjeux de la démarche communautaire," *Dr. fisc.* 2005, p. 240; Otmar Thoemmes and Hans van den Hurk, "Tax Package Finally Adopted; Substantial Modification of Interest and Royalty Directive," *Intertax* 2003, vol. 31, no. 11, p. 474.

[31]Heleen Nijkamp, "Landmark Agreement on EU Tax Package: New Guidelines Stretch Scope of EU Code of Conduct," *EC Tax Review*, 2001, no. 3, p. 147; the directive on savings taxation is due to take effect from Jan. 1, 2005, and that on interest and royalties from Jan. 1, 2004 (European Commission, *Taxation: Commission Welcomes Adoption of Package to Curb Harmful Tax Competition, IP/03/787,* Brussels, June 3, 2003, available at http://europa.eu.int).

[32]Conclusions of the ECOFIN Council Meeting on Dec. 1, 1997, concerning taxation policy.

[33]*See* Dawn Primarolo, *Report of the Code of Conduct Group on Business Taxation (Primarolo Report*), available at http://www.uv.es/cde/TEXTOS/primaloro_en.pdf, 1999, and Gerard Meussen, "The EU Fight Against Harmful Tax Competition; Developments in Light of the Enlargement of the EU with 10 Candidate Member States," in *Tax Policy in EU Candidate Countries on the Eve of Enlargement*, Symposium of Sept. 12-14, 2003, Riga, Latvia, available at http://www.eurofaculty.lv/taxconference. The Netherlands has already taken measures to suppress some regimes (in decree of Nov. 20, 2000, no. IFZ2000/1292M, entitled ruling policy regarding BV1/BV2-structures, BNB 2001/14), the Dutch state secretary of finance declared that in so-called BV1/BV2-structures (structures used by U.S. corporations for their foreign acquisitions and reorganizations aimed at gaining particular tax advantages by using differences in qualifications of the BVs (transparent versus nontransparent) in the relations of the Netherlands versus the United States), rulings no longer would be issued and, furthermore, through a change in legislation, the Dutch fiscal unity regime would no longer apply to those structures. The policy behind that decree was the principle of good faith toward treaty partners and the ongoing international discussion on harmful tax competition. More recently, on March 30, 2001, the Dutch state secretary of finance issued eight decrees in which a new policy on advance pricing agreements and advance tax rulings was laid down: *see* Carlo Romano, "Advance Tax Rulings and Principles of Law — Towards a European Tax Rulings System?" Amsterdam, *International Bureau of Fiscal Documentation*, 2002; Gerard Meussen and Erik Velthuizen, "APAs and ATRs: The New Dutch Regime in a European Perspective," *EC Tax Review* 2002, no. 1, p. 4, and Marja de Best, "Rulings: nouvelle politique néerlandaise," *Bulletin européen et international* 2001, no. 4, p. 3.

[34]European Commission, *Taxation: Commission Welcomes Adoption of Package to Curb Harmful Tax Competition*.

[35]*See generally* Gérard Farjat, "Réflexions sur les codes de conduite privés," in *Droit des relations économiques internationales: études offertes à Berthold Goldman,* Paris, Litec, 1982, p. 47; Pieter Sanders, "Codes of Conduct and Sources of Law," in *Droit des relations économiques internationales: études offertes à Berthold Goldman*, Paris, Litec, 1982, p. 283; and, recently, Edwin van der Bruggen, "The Power of Persuasion: Notes on the Sources of International Law and the OECD Commentary," *Intertax* 2003, vol. 31, no. 8-9, p. 259.

[36]State aid is any financial assistance provided by the state or municipal institutions directly or indirectly, the purpose or result of which is to increase the competitiveness of an enterprise, a group of enterprises, or a sector of the economy. *See* Commission notice on the application of the state aid rules to measures relating to direct business taxation (98/C, JOCE dated Dec. 10, 1998, no. 384/03). The commission authorization granted in 1987 and extended in 1994 for the arrangements for international financial services centers in Dublin expires in 2005 (Conclusions of the ECOFIN Council Meeting on Dec. 1, 1997 (no. 3)). The council has recently agreed to extensions beyond the end of 2005 of benefits of the following measures would be granted:

- Belgium: Coordination centers, extension to Dec. 31, 2010;
- Ireland: Foreign income, extension to Dec. 31, 2010;
- Luxembourg: 1929 holding companies, extension to Dec. 31, 2010;
- Netherlands: International financing, extension to Dec. 31, 2010;
- Portugal: Madeira's free economic zone, extension to Dec. 31, 2011.

See Results of Council of Economics and Finance Ministers, Brussels, Jan. 21, 2003 — MEMO/03/13, 2003, available at http://europa.eu.int.

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code of conduct, because they are enforceable by the European Court of Justice.[37] However, EC competition rules do not apply to the Netherlands Antilles.[38] Therefore, the OECD threat of economic reprisals is of much greater concern to small economies like the Netherlands Antilles because those are the only real and effective measures that could be taken against them.

B. The OECD Conquest of Paradise: The Threat of Economic Reprisals

Every tax lawyer is aware of OECD work in the field of tax treaties. The OECD now also provides a framework in which countries can work to eliminate not tax competition as such, but only "harmful" tax competition. Tax competition is not necessarily bad. That is the view of the United States, a major player. For instance, former U.S. Treasury Secretary Paul O'Neill stated in May 2001 that "the U.S. does not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems."[39] But the question now is — to what extent is that competition permissible? It seems that the OECD members are open to competition as long as it is transparent and nondiscriminatory.[40] The OECD position expressed in a report issued in 1998 is presented below, before dealing with the Netherlands Antilles response to that OECD appraisal.

1. The 1998 Report

In 1998, the OECD established an international framework to counter the spread of harmful tax competition by adopting a report (the 1998 report).[41] It defines the factors to be used in identifying harmful tax practices. The key features of harmful preferential tax regimes are: (1) no or low effective tax rates; (2) lack of transparency; (3) lack of effective exchange of information; and (4) "ring-fencing" of regimes.[42] Ring-fencing refers to when preferential tax regimes are insulated from the domestic markets of the country providing the regime, for example, by excluding resident taxpayers from taking advantage of its benefits, or prohibiting enterprises that benefit from the preferential regime from operating in the domestic market. The very fact that a country feels the need to protect its own economy from the regime by ring-fencing is a strong indication that the regime has the potential to create harmful effects.[43]

The Ministerial Council of the OECD instructed its Committee on Fiscal Affairs to produce, from the number of jurisdictions meeting the tax haven criteria, a list of those that were uncooperative, to be completed by July 31, 2001. In 2000, the OECD published a preliminary list of the jurisdictions that were found to meet the tax haven criteria of the 1998 report.[44] Cited among those jurisdictions are Aruba and the Netherlands Antilles.[45] What risks did the Netherlands Antilles face if it had maintained its existing old tax regime?

If it had, the OECD would allow its members to take defensive measures either under domestic legislation or under tax treaties, such as, for instance, disallowing tax deductions, tax exemptions, tax

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[37]For an interesting argument using art. 96 of the EC Treaty as a legal basis to attack tax measures that have been identified as harmful under the code of conduct, *see* Francesco Nanetti and Giovanni Mameli, "The Creeping Normative Role of the EC Commission in the Twin-Track Struggle Against State Aids and Harmful Tax Competition," *EC Tax Review* 2002, no. 4, p. 185, at 189; Jan de Goede, "European Integration and Tax Law," *European Taxation* 2003, vol. 43, no. 6, p. 206; and Meussen, *The EU Fight Against Harmful Tax Competition: Developments in Light of the Enlargement of the EU With 10 Candidate Member States*, p. 5.

[38]On the relationship between the Netherlands Antilles and the community, *see* art. 182 et seq. of the EC Treaty and, recently, Peter Oliver, "Judgments of 22 Nov. 2001," *CML Rev.* 2002, vol. 39, p. 337.

[39]Doggart, *Tax Havens and Their Uses*, p. 153, and Hishikawa, "The Death of Tax Havens?" p. 412. It was the Clinton administration that really pushed for the OECD to "handle" tax havens. That is not any more the case with the Bush administration, although that changed after September 11 in the sense that tax havens need to disclose as much information as possible to determine whether funds are used to finance terrorism.

[40]R. Hammer and J. Owens, *Promoting Tax Competition,* OECD publication available at http://www.oecd.org/dataoecd/63/11/1915964.pdf, 2002.

[41]OECD, *Harmful Tax Competition: An Emerging Global Issue*, p. 80.

[42]*Id*. at 26. However, the ring-fencing criteria has been dropped, because what is most important for the OECD is transparency and the exchange of information.

[43]*Id*. at 27. In the Netherlands Antilles, the tax revenue for 2002 on income and profits is 11.1 percent of the GDP, of which 2.5 percent is offshore. (*See* IMF, Country Report no. 03/160, p. 29.)

[44]OECD, *2000 Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, available at http://www.oecd.org/dataoecd/9/61/2090192.pdf (no. 17); *see also* Francis Lefebvre, "Liste des paradis fiscaux de l'OCDE," *Bulletin européen et international* 2000, no. 4, p. 23.

[45]The critical remarks that were made to the Netherlands Antilles tax laws can be summarized as follows: there were no legal mechanisms that allow tax information to be exchanged with other tax authorities upon request; beneficial ownership information was not available to the public; and there were restrictions on the ability of the Netherlands Antilles entities to do business on the preferential tax terms in the Netherlands Antilles. *See* OECD, *2000 Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices,* p. 17.

credits, or making other allowances related to transactions with uncooperative tax havens. The economic reprisals could also have taken the form of a "transactional" charge. Those levies would have been imposed on particular transactions involving uncooperative tax havens.[46] Of course, the legality of those defensive measures, which fall within the scope of the General Agreement on Trade in Services, has been questioned in light of public international economic law.[47] And the OECD timetable has also been recently undermined by the European Union by permitting some of its own members (who are also OECD members) to avoid tax information exchange until 2010 at the earliest.[48] But the Netherlands Antilles took that threat seriously.

2. The Netherlands Antilles' Response

Indeed, it is true that if the Netherlands Antilles did not make a commitment to eliminate harmful tax practices by July 31, 2001, it would have been automatically included in the list of uncooperative tax havens, subject to possible economic reprisals and suffering a major loss of confidence on the part of its international clients. The Netherlands Antilles minister of finance wrote a letter to the OECD secretary general on behalf of the government of the Netherlands Antilles, committing his country to eliminating tax practices determined to be harmful by changing its tax framework.[49] To achieve that, it also needed to amend its relationship with the mother country in Europe.

III. The Netherlands Antilles and the Kingdom

Under its commitment to the OECD, the Netherlands Antilles has taken several measures. This paper describes only the major tax measures, bearing in mind how the Netherlands Antilles fits into the international tax system.

In the postwar years, the advantages of important tax treaties between the Netherlands and the United States and the United Kingdom were extended to include the Netherlands Antilles.[50] Currently, however, the Netherlands Antilles has a tax treaty only with the Netherlands, known as the tax arrangement for the Kingdom (TAK),[51] and with Norway. It terminated all the other tax treaties, because some third-country residents had abused them to reduce withholding taxes on investments in OECD countries.[52] By contrast, the mother country

[46]*Id*., p. 25.

[47]In favor of the legality: Jakob B. Gross, "OECD Defensive Measures Against Harmful Tax Competition Legality Under WTO," *Intertax* 2003, vol. 31, no. 11, p. 390, at 395; for a preliminary analysis of possible claims: Stephen J. Orava, *Potential WTO Claims in Response to Countermeasures Under the OECD's Recommendations Applicable to Alleged Tax Havens,* available at http://www.ito.org, 2001, p. 17. *See also* Romain Grynberg and Bridget Chilala, *WTO Compatibility of the OECD "Defensive Measures" Against "Harmful Tax Competition,"* available at http://www.thecommonwealth.org; *The Journal of World Investment,* 2001; and OECD, *Project on Harmful Tax Practices: The 2001 Progress Report,* available at http://www.oecd.org, p. 9.

[48]Richard J. Haye, "A Level Playing Field for Tax Information Exchange?" *Tax Planning International Review* 2003, p. 1 (5); International Trade and Investment Organisation, *EU Concessions Threaten OECD Tax Timetable,* available at http://www.itio.org, 2003; Andrew Parker, "OECD Tax Plan Faces Collapse," *Financial Times* (European edition), Oct. 10, 2003, front page, also available at http://www.itio.org.

[49]*See* letter dated Nov. 30, 2000, from W.R. Vogos, minister of finance, for and on behalf of the government of the Netherlands Antilles to Donald Johnson, secretary general of the OECD, available at http://www.oecd.org.

[50]Doggart, *Tax Havens and Their Uses*, p. 157; *see generally* Marshall J. Langer, "The Outrageous History of Caribbean Tax Treaties With OECD Member States," *Tax Notes Int'l,* June 10, 2002, p. 1205.

[51]*See generally Rijkswet van 28 Oktober 1964*, *houdende Belastingregeling voor het Koninkrijk* — history: Staatsblad Oct. 28, 1964, no. 425, Staatsblad 1996, no. 664, and Staatsblad 2001, no. 647 (an unofficial English translation is available at http://oneline.ibfd.org); S.R. Pancham, *Op weg naar een Nieuw Fiscaal Raamwerk,* International Belasting Bulletin 1999, no. 3, p. 15; Lowtax.net, *Netherlands Antilles Double Tax Agreement,* 2003, available at http://www.lowtax.net. Also, on Aug. 3, 2001, the National Ordinance on the Supervision of Fiduciary Business was passed in the Netherlands Antilles: *see* Alma M. Heide, *Netherlands Antilles,* The OFC Report 2002, p. 132. The Dutch parliament, on its part, adopted the amendment to the TAK on Dec. 2001 (PricewaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles and Aruba,* Feb. 7, 2002, p. 15-16). *See generally* "New Fiscal Framework for Netherlands Antilles," *Offshore Red*, 2000, p. 228; "Netherlands Antilles," *Offshore Red*, 2001, p. 187. Although the TAK follows the lines of a treaty, from a public international law perspective, it is domestic legislation.

[52]*See generally* Langer, "The Outrageous History of Caribbean Tax Treaties With OECD Member States," p. 1210. The tax treaty with Norway has been revised. In June 1987, the U.S. government abruptly withdrew the extension of the Netherlands-U.S. treaty to the Netherlands Antilles (Doggart, *Tax Havens and Their Use*s, p. 161). But art. 8 of the treaty with the U.S. remains in effect (it governs the treatment of withholding tax on interest on specific loans by Netherlands Antilles corporations to U.S.-resident corporations, and it applies only to interest on some Eurobonds), *see* IBFD, "General," in *Taxation & Investment in the Caribbean,* IBFD, 2003, binder 1, para. 7.2.1. But the Netherlands Antilles fully terminated its treaties with Denmark and the United Kingdom. The Central Bank of the Netherlands Antilles announced that negotiations on tax treaties with Venezuela, Mexico, Spain, Italy, and the United States (the

(Footnote continued on next page.)

in Europe has, of course, concluded many tax treaties, but the Netherlands Antilles is excluded from their scope, for instance, in the France-Netherlands and the Netherlands-U.S. tax treaties.[53] However, the United States has recently entered into an exchange of information agreement with the Netherlands for the Netherlands Antilles, which shows that new treaties with important trading partners are now under consideration.[54] The Netherlands Antilles is negotiating tax treaties with the United States, Venezuela, Spain, and a few other countries.[55]

A. The New Fiscal Framework

Given the New Fiscal Framework (NFF) adopted by the Netherlands Antilles, it might well appear to the observer that paradise is lost. However, the "exception clause" creating a transitional period until 2019 seems to have given paradise a reprieve.

1. The OECD Friendly Measures: Paradise Lost?

At the end of 2001, the Netherlands Antilles' parliament adopted two important pieces of legislation — the New Fiscal Framework[56] and the law ratifying the amendments to the TAK. The NFF and the TAK both entered into force on January 1, 2002.[57] It ended the period of uncertainty for clients resulting from international pressure, bearing in mind that clients are indeed ready to pay a little bit more for any gain in certainty and predictability.

The NFF comprises three laws. The most important is the law on corporate income tax. The highlights of the NFF are the introduction of a uniform corporate tax regime with a standard profits tax rate of 34.5 percent and a broad participation exemption regime,[58] which looks very much like the French participation exemption regime.[59] The meaning of "uniform" corporate tax regime is that the NFF abolishes the previous distinction between offshore and onshore tax regimes, so that it could no longer be characterized as a ring-fencing regime.[60]

> ***The mother country in Europe has concluded many tax treaties, but the Netherlands Antilles is excluded from its scope.***

To understand fully the amendments to the TAK and their impact, the previous situation must be explained. Before the amendments, withholding tax on dividends paid to corporate shareholders established in the Netherlands Antilles and holding at least 25 percent of the shares in the Dutch subsidiary paying the dividend could be reduced from 15 percent to 7.5 percent, or to 5 percent if the dividend recipient was subject to a profit tax rate of at least 5.5 percent.[61] As the old profit tax rate in the Netherlands Antilles ranged between 2.4 percent

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1986 treaty with the United States has never been ratified by that country) have started or will begin soon (*see* Central Bank of the Netherlands Antilles, *Annual Report*, 2003, available at http://www.centralbank.an; IBFD, "General," in *Taxation & Investment in the Caribbean*, para. 7.2.1).

[53]France-Netherlands tax treaty dated March 16, 1973, *Journal Officiel de la République Française (JORF)*, dated Dec. 27, 1973 (art. 3.1.b); *see also* Netherlands-U.S. tax treaty, dated Dec. 19, 1992 (art. 3.1.b).

[54]Agreement Between the Government of the United States of America and the Government of the Kingdom of the Netherlands in Respect of the Netherlands Antilles for the Exchange of Information With Respect to Taxes, dated Apr. 17, 2002, available at http://usinfo.state/gov; *see also* Michael Molenaars, "Exchange of Information Under the Netherlands-U.S. Income Tax Treaty," *Tax Notes Int'l*, Apr. 26, 1999, p. 1713; Maarten van der Wijden, "The New Protocol to the Netherlands-United States Tax Treaty," *Bull. Int'l Bur. Fisc. Doc.* 2004, p. 304, and IBFD, *Annual Report*, 2002-2003, p. 52.

[55]Personal conversation with Hans Klaver, on Nov. 17, 2003, Amsterdam.

[56]*Landsverordening van de 29 ste december 1999 tot wijziging van de Landsverrordening op de Winstbelasting 1940* (P.B. 1965, no. 58). The law was first adopted on Dec. 29, 1999. But because it became clear that the negotiations with the Dutch government on the amendments to the TAK (*see infra*) would take longer than expected, the law was finally dated Dec. 19, 2001. *See generally* PricewaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles and Aruba*; A.H. Schaapman, "Het Nieuw Fiscaal Raamwerk van de Nederlandse Antillen," *Tijdschrift voor Antilliaans Recht* 2002, and IBFD, "General," *in Taxation & Investment in the Caribbean*, para. 6.

[57]"Netherlands Antilles," *Offshore Red*, 2002, p. 238.

[58]Under the participation exemption regime, gains or profits made from foreign participations are exempted for 95 percent. The remaining 5 percent is taxed according to the uniform charge of 34.5 percent (the effective charge therefore amounts to about 1.7 percent). The exemption is applicable if the taxpayer is a shareholder accounting for at least 5 percent of the paid-in capital or of the voting rights and if the possession of shares is less than 5 percent, then it may be regarded as a qualifying participation providing the cost price of the shares amount to more than ANG 1,000,000 (approximately €650,000): *see* PricewaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles and Aruba*, p. 6.

[59]*See* art. 145 and 216 of the French General Tax Code, *as modified by* law no. 99-1172 dated Dec. 30, 1999, *JORF*, Dec. 31, 1999, and by law no. 2002-1575 dated Dec. 30, 2002, *JORF*, Dec. 31, 2002.

[60]*See* Willem G. Kuiper, *New Fiscal Regime for the Netherlands Antilles — The Return of a Tax Haven,* Shoreliner.com 2002, no. 9.

[61]*See* art. 11(3) of the TAK.

and 3 percent, that meant that the Dutch withholding tax on dividends was, in practice, reduced to 7.5 percent. Therefore, the total tax burden on those intercorporate dividends ranged between 9.7 percent and 10.3 percent, approximately.

The amendments of the dividend withholding tax article have the effect that dividends paid by a Dutch company to a Netherlands Antilles company are subject to Dutch dividend withholding tax at a rate of 8.3 percent, provided that at least 25 percent of the paid-in share capital (or voting rights) in the Dutch company are held by the Netherlands Antilles company. For conduit dividends flowing through the Dutch B.V., a further tax credit of approximately 3 percent may be available.[62] If the 25 percent condition is not fulfilled, the Dutch dividend withholding tax rate increases to 15 percent.[63]

To summarize, that amendment to the TAK, which applies only to dividends paid from the Netherlands to the Netherlands Antilles, provides that, in most cases, the effective tax burden will be lower than it was under the old arrangement. Tax is first levied in the Netherlands at source and the subsequent dividend is entirely exempted in the Netherlands Antilles.[64] The entire amount withheld in the Netherlands is then paid back by the Dutch government to the Netherlands Antilles.[65] However, the NFF does not entirely abolish the old tax provisions; the NFF succeeded in preserving its very competitive tax rate of 2.4 percent to 3 percent for existing companies, but only until 2019. This is known as the "exception clause" or the "transitional arrangement."

2. A Transitional Period up to 2019: Paradise Gets a Reprieve

The transitional arrangement for offshore companies is of great practical interest. In the transitional period up to and including the year 2019, existing offshore companies will be granted the benefits of the old offshore regime, provided some requirements are met.[66] That implies that the previous 2.4 percent to 3 percent tax rates, for those companies, are guaranteed up to and including the year 2019.[67] Similarly, the new rules, which alone are designed to comply with international standards on transparency and ring-fencing, are inapplicable to taxpayers that have elected to remain subject to the old offshore regime under the transitional rules.[68] The NFF has also created attractive new vehicles with the aim of securing financial business after the transitional period has expired.[69] There has been no official reaction from the OECD. However, informal discussions with OECD senior representatives reveal that the OECD is happy with the changes that occurred in the Netherlands Antilles.

B. The Impact on the Local Economy

Because it is not expected that those tax changes will have an adverse impact on the local economy, one must ask whether that apparently successful change could be adopted elsewhere.

1. A Limited Impact

The OECD has not been totally indifferent to the impact of the changes it requests on the local economy.[70] Although it is very clear that precise and reliable data on the economic impact are difficult to collect,[71] it seems that offshore financial centers contribute some 8 percent to 10 percent of the GDP of tax havens.[72] In the Netherlands Antilles, approximately 8,000 people work, directly or indirectly, in the offshore services industry. Because the population is less than 200,000 people, that accounts for around 10 percent of the active population.[73] Surprisingly, the Netherlands Antilles parliamentary debates before the vote on the NFF do not reveal any in-depth discussion on the impact of tax measures

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[62]*Wet op de dividendbelasting 1965* (Dutch Dividend Withholding Tax Act), art. 11.

[63]PricewaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles and Aruba,* p. 15.

[64]*Id*. at 16.

[65]*Id*.

[66]The Guarantee Ordinance of 1993 provides a guarantee that the reduced taxation regime for the offshore sector will be applicable until the year 2019: IBFD, "General," in *Taxation & Investment in the Caribbean*, para. 6.

[67]Willem G. Kuiper, *New Fiscal Regime for the Netherlands Antilles — The Return of a Tax Haven,* Shoreliner.com 2002, no. 9.

[68]*See generally* Rob. F. Havenga, "New Ruling Policy in the Netherlands Antilles," *Intertax* 2003, vol. 31, no. 2, p. 87.

[69]The exempted private limited companies (NA B.V.) can opt for a zero percent tax charge.

[70]Doggart, *Tax Havens and Their Uses*, p. 151. The OECD has held various meetings with various countries to achieve global cooperation. (For a description of those meetings, *see* Hishikawa, "The Death of Tax Havens?" p. 389.)

[71]IMF, Country Report no. 03/160.

[72]Hishikawa, "The Death of Tax Havens?" p. 402.

[73]*Politieke besluiteloosheid ondermijnt offshore-industrie* ("Political Indecisiveness Undermines the Offshore Industry"), summary of a press conference in Willemstad, Curacao, available in the library of the IBFD, Amsterdam, and on file with author. In 1988, the percentage of the economically active population was 38.4 percent of the total population, that is, 72,906 persons.

on the local economy.[74] On the contrary, it expresses the confidence of the Netherlands Antilles government that the adoption of internationally accepted standards will create more income to the economy.[75] And that prediction happens to be sound; it seems that the offshore sector has already begun to recover following the implementation of the NFF.[76]

2. The Specificity of the Netherlands Antilles Case

One should not forget that the Netherlands Antilles is in a special and privileged situation; if economic problems arose because of the NFF regime, it would be in a position to call for help from its mother country in Europe. That is probably one of the reasons why, after a referendum held in November 1993, the people of the Netherlands Antilles voted to continue their union with their mother country.[77]

Informal discussions reveal that the OECD is happy with the changes in the Netherlands Antilles.

But what about the Republic of Nauru, the Pacific island nation that Australia is using as a holding station for unwanted asylum seekers? It could surely be said that Nauru's one and only onshore bank — the Bank of Nauru, which has effectively been insolvent for years — is not too concerned about the U.S. Treasury threats.[78] Indeed, for a long time international banks have ceased to deal with it![79] Could we also say that OECD pressures over those small economies reflect "neo-colonial attitudes" by rich countries?[80] One reason for that belief is that, because those countries are in economic decline, they will be unable to survive without the income generated from their offshore banking fees.[81] As tourism is not a viable or sufficient option, the only alternative source of income is to develop another kind of service industry, such as the financial services industry.[82]

It is true also that Nauru settled its famous 1989 case over phosphates with the Commonwealth of Australia and obtained a few dollars in damages.[83] However, declining phosphate reserves are having an adverse effect on the local economy of Nauru. It is far from certain that Australia will be willing to help Nauru financially, if Nauru was moving toward more internationally accepted standards. Yet Nauru did recently decide to adopt those standards on December 3, 2003, hoping in the meantime that "OECD Member countries and other international organizations [will] take these adverse revenue effects [over the small economy of Nauru] into account in determining the development assistance they provide."[84] One American author has written extensively about harmful tax competition, focusing on the Caribbean jurisdictions and the U.S. sanctions.[85] It is not obvious that one should condemn those exhortations to Caribbean jurisdictions to "get up and stand up" against possible discriminatory sanctions.[86] The view of this paper is that a fundamental reconsideration of the legal status of those tiny sovereign island states cannot be avoided.[87]

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[74]Statenstukken 1999-2000 no. 2313, *memorie van toelichting* (explanatory memorandum), para. 1, section 1.2.

[75]*Id*.

[76]IMF, Country Report no. 03/160 (nos. 2 and 7).

[77]Doggart, *Tax Havens and Their Uses*, p. 156.

[78]To seal Nauru off from the American financial system.

[79]Sean Dorney, "Nauru debts," *The World Today,* dated May 5, 2003, available at http://www.abc.net.au.

[80]As stated by Vanuatu's finance minister. (*See* Hishikawa, "The Death of Tax Havens?" p. 415.)

[81]*Id*.

[82]E-commerce and high-tech industry are another option. The Netherlands Antilles, for instance, has approved a National Ordinance on Electronic Agreements to provide a legal framework for electronic transactions (*see* "Netherlands Antilles," *Offshore Red*, 2001, p. 187).

[83]ICJ, Sept. 13, 1993, "Certain Phosphate Lands in Nauru (*Nauru v. Australia*)," *ICJ Rep.*, p. 322.

[84]Letter dated Dec. 3, 2003, from Nauru minister of finance to the OECD secretary-general. *See also* Charles E. McLure Jr., "Will the OECD Initiative on Harmful Tax Competition Help Developing and Transition Countries," *Bull. Int'l Bur. Fisc. Doc.*, March 2005, p. 90.

[85]*See generally* Bruce Zagaris, "OECD Harmful Tax Competition Report and Related initiatives Leaves the Caribbean Offshore 'in Irons,' " *Tax Notes Int'l*, Aug. 21, 2000, p. 879; Bruce Zagaris, "What Lies Ahead for the Caribbean: The End of Kubla Khan?" *Tax Notes Int'l*, July 10, 2000, p. 145; Bruce Zagaris, "Offshore Jurisdictions Tack as Gusting Winds Buffet Their Boats and Shores," *Tax Notes Int'l,* Feb. 21, 2000, p. 823; and Bruce Zagaris, "OECD Report on Harmful Tax Competition: Strategic Implications for Caribbean Offshore Jurisdictions," *Tax Notes Int'l*, Nov. 19, 1998, p. 1507.

[86]Zagaris, "Caribbean Jurisdictions Must 'Get Up, Stand Up' Against U.S. Discriminatory Sanctions," p. 923.

[87]Nauru, which became an independent state in 1968, has a population of 8,042 (1983 census) and a territory of 5,263 acres (Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed., Longman, 1996, vol. I/Introduction and Part 1, p. 121). On microstates, *see also* Nguyen Quoc Dinh,

(Footnote continued on next page.)

IV. Conclusion

After this short review of taxation in the Netherlands Antilles, one might ask whether the days of tax havens are numbered.[88] But given the economic impact of suppressing tax havens in some poor economies like Nauru, can one not sympathize a little with those wishing for a long life to tax havens? A moderate solution must be proposed — it is only after balancing the costs and benefits of suppressing a particular attractive tax regime that a jurisdiction will be willing to adopt OECD-friendly measures. The Netherlands Antilles is one example of a country that has shown itself willing. Malta could be another. While a candidate for entry into the European Union, Malta probably recognized that it might be more profitable, in the long run, to belong to the European Union than to preserve tax and financial regimes objected to by the international financial community.[89]

The long-term solution to the problem posed by those tiny countries for which tax regime change is unpalatable is to rethink their legal status. Is full sovereignty meaningful when economic independence is unavailable? The economies of those island states are so dependent on one or two larger nations that one can wonder whether those states should not be simply "annexed"; for instance, with Curacao becoming an integral part of either the Netherlands or Venezuela, with a special legal status maintaining its identity like the French overseas territories. Of course, the word "annex" is not used in its historical meaning in public international law; it just means that large nations have particular responsibilities to those states and that they should reconsider their relationship with them.

In any case, a balanced approach is necessary to ensure both an effective fight against harmful tax competition and respect for legitimate tax policies of sovereign nations and international legal obligations alike.[90] That is one aspect of the passionate debate over the Netherlands Antilles in particular, and tax havens in general. Hopefully, this paper has revealed the storm initiated by the OECD over those "deserted" economies, through the example of the Netherlands Antilles. But, as is said by people in the Principality of Liechtenstein, isn't it only where there are economic deserts that tax oases can exist at all?[91] ◆

Patrick Daillier, and Alain Pellet, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, para. 278.

[88]Hishikawa, "The Death of Tax Havens?" p. 389.

[89]"Malta," *Offshore Red*, 1999, p. 7. Malta is now a member of the European Union.

[90]United Nations Charter, June 26, 1945, art. 2.1.

[91]"*Steueroasen können nur existieren, wo es Steuerwüsten gibt*," ("tax oasis can only exist where there are deserts") cited by Gross, "OECD Defensive Measures Against Harmful Tax Competition Legality Under WTO," p. 400.