

UC Irvine

UC Irvine Previously Published Works

Title

From the Revenue Rule to Soft Law and Back Again: The Consequences for 'Society' of the Social Governance of International Tax Competition

Permalink

<https://escholarship.org/uc/item/7x72h4fq>

Author

Maurer, B

Publication Date

2016

DOI

10.4324/9781315607139-10

Copyright Information

This work is made available under the terms of a Creative Commons Attribution License, available at

<https://creativecommons.org/licenses/by/4.0/>

Peer reviewed

Chapter 10

From the Revenue Rule to Soft Law and Back Again: The Consequences for ‘Society’ of the Social Governance of International Tax Competition

Bill Maurer

In the late 1990s, international standard-setting bodies, multilateral institutions and non-governmental organizations began to worry that, in a world of the free movement of money, governments would lose tax revenue to states that competitively lowered their rates to attract foreign investment.¹ ‘Tax competition’, it was feared, would erode the ability of states to provide needed social services to their citizens. Although market promoters around the world had been extolling the virtues of liberalization, even those institutions most associated with the promulgation of neoliberal reforms like the World Bank expressed alarm about the effect of those reforms on revenue collection as well as on the control and interdiction of financial crime and money laundering.

After a flurry of activity aimed at curbing tax competition worldwide, however, including the issuance of a series of ‘blacklists’ of countries deemed not to be in compliance with an emerging set of international fiscal norms, the effort was deemed a failure. Citing the hypocrisy of the large, wealthy nations behind the effort to curb tax competition, who would not subject themselves to the same level of scrutiny demanded of the tax havens, many small countries accused of tax competition demanded a ‘level playing field’; that is, they made the centrepiece of their counter-campaign the call for universal rules of the tax game, so that large states would be subject to exactly the same forms and level of scrutiny as small states. Meanwhile, many of these same small countries struck individual deals in the form of Double Taxation Treaties with the big players like the United States.

¹ Although not all of the jurisdictions targeted by these efforts are politically independent nation-states (many are dependent territories, like the British Virgin Islands), I will use the term ‘state’ or ‘country’ throughout this chapter for convenience. And although the term ‘tax haven’ is a highly charged one for those countries so labelled, I will employ it here in place of more convoluted locutions (such as ‘countries or territories deemed not in compliance with the FATF’s 40 recommendations’ or some such), also for convenience. See Sharman (2006, 165, n. 1).

This, in effect, killed the multilateral effort for global tax regulation. What had begun as an effort at international governance through ‘soft law’ – non-binding guidelines, peer review, peer pressure and shaming – ended up reaffirming the sovereignty of individual jurisdictions, free to make treaties with each other and free to pursue their own fiscal policies (Sharman 2006; Rawlings 2007).

Viewed one way, the international effort against ‘harmful tax competition’ at the turn of the century can be seen as a story of the limits of social governance or multilateral regulation of the financial sphere. Spearheaded by the Organization for Economic Co-operation and Development (OECD), the effort to curb tax competition relied on consultation and peer review, which allowed other actors such as estate planning practitioners and representatives from tax haven countries to shape the normative deliberations of the OECD and ultimately to shift the discourse on tax competition itself. In striving to achieve a kind of epistemic governance (Marcussen 2004) based on persuasion rather than force, the OECD of necessity had to invite ‘society’ – here, in the form of NGOs and international organizations formed specifically to counter the OECD’s initiatives – to the table. Once they became a part of the consultative process, they were able to use the power of words to transform it. The tax havens and their advocates were able to turn the language of the OECD against it, calling into question its ‘reputation for impartial expertise’ (Sharman 2006, 161). Relatively weak, small states like the British Virgin Islands and the Cayman Islands were able to trump the concerted efforts of the powerful OECD countries by using the very tools of organizations like the OECD: peer pressure, and the deployment of rhetoric about reputation and fairness in the context of new social networks that were created through the consultative process. Jason Sharman ends his compelling account of the global effort to co-ordinate tax regulation by noting the unpredictability of regulation through rhetoric. Given the double-edged nature of the tax havens’ relative victory in this affair – small states won, but tax havens continued to operate – Sharman concludes that ‘there is no reason to think that a more social view of politics and economics entails a world of greater harmony or justice’ (Sharman 2006, 161).

There is a fascinating ambiguity in his statement, however. Sharman intends by a ‘social view of politics and economics’ to refer to analytical strategies for scholars, such as his own constructivist political economy. Yet the phrase could also be taken to refer to policy or regulatory strategies for political actors, like the OECD, which seek to lead policy discussions and governance programmes through social relations and social pressure. Indeed, there is an epistemological and pragmatic isomorphism between social science itself, and efforts to govern through or with ‘the social’. That convergence can be traced back to nineteenth-century social thinkers like Comte, who sought a social science that would facilitate rule. But the rise of ‘social’ forms of governance through participation and consultation lends it a new cast. This chapter reflects on the implications for the anthropology of law. As anthropologists increasingly grapple with new forms of governance and new assemblages of politics, economics and ethics (Collier and Ong 2005), and as anthropologists turn to transnational and international legal processes (Merry

1992; 2006), the question of the 'social' takes on a particular salience and has the potential to create productive theoretical muddles. One of the lessons of those muddles is that every analytical, ethical or political position can be co-opted for other ends: the world, after all, is a pragmatic puzzle, not a grand theory. Discourses 'may contain elements of theory but they are not theoretical,' Nigel Thrift reminds us; rather, 'They are practically oriented orders bent to the task of constructing more or less durable social networks and they are constantly redefined in order to cope with the vagaries of that task' (Thrift 1996, 22). This chapter serves as a demonstration of Thrift's statement, and points toward a less linear, less causal account of the role of the 'social' in transnational, multilateral governance today. It proceeds by reviewing the notion of soft law and its incorporation/creation of a category of the social. It then analyses the OECD's effort to curb harmful tax practices as an initiative designed to incorporate 'society' into governance. It concludes by reflecting on the observation among legal anthropologists and law and society scholars that international legal processes resemble and contingently re-assemble something called 'society' in the process of trying to take society into account.

'Society' and allied terms like 'civil society' are used by many participants in the debates this chapter will outline. Among people on the ground, who are not experts in the offshore financial services sector and have little knowledge of the details of the regulatory process of the issues at stake, 'country' or 'territory' are more often invoked, especially together with words like 'voice' or 'say', as in wanting to make sure my country has a say in matters that affect it. From a social scientific perspective, one might easily dismiss such words as mere rhetoric, concealing other powerful interests which hide behind the cloak of legitimacy conferred by 'social' words. My argument in this chapter, however, like that of Thrift, Strathern and others who have examined the bureaucratic constitution of 'society' itself, is that the instrumentalization of 'the social' or 'society' is no longer as distinct from either the general social scientific concept of the social – indeed, they have the same origin point in modernist reconfigurations of human organizations of all types – or the nebulous entity popularly understood as 'society'. This means, too, that words are rarely 'just' words, and that rhetoric is a form of world-making.

Social Governance and Soft Law

Numerous scholars from a range of disciplines have drawn attention to the increasing role of so-called soft law in solving problems of international governance and regulation that cannot be addressed through the hard laws of individual sovereign states or by enforceable international treaties. As with all dichotomies, the boundary between soft law and hard law is indistinct, both analytically and in practice. Here, I use the term 'soft law' to refer to governance through peer review, consultation, peer pressure, shaming, and the creation of non-binding guidelines and recommendations. Soft law includes 'a variety of processes ... which have normative content [but] are

not formally binding' (Trubek, Cottrell and Nance 2006, 65). The sources of soft law are varied. They include multilateral international organizations like the OECD, as well as non-governmental organizations, private actors and civil society groups. In Europe, soft law has become the hallmark of the Open Method of Co-ordination (OMC) in the creation and maintenance of European integration (Trubek and Trubek 2005). Soft law is also a key component of the so-called 'new governance', based on participation, networked decision-making, diversity, consultation rather than the formal mechanisms or the centralized 'command and control' regime association with law and constitutionalism (see de Búrca and Scott 2006, 2–3). Mörth provides a convenient ideal-typical sketch contrasting hard law 'government' with soft law 'governance', the former based on public actors and state-centrism, the latter based on private actors and 'deliberative and societally based' processes and models (Mörth 2006: 121).

There is a good deal of ambiguity in the definitions of soft law offered by scholars and practitioners, and many have questioned the dichotomy between hard and soft law, positing processes through which the latter becomes legalized or formalized, or querying various hybrid or intermediate forms (Kirton and Trebilcock 2004). I do not intend to delve into the various debates about the concept of soft law in the academic literature (for a good starting point on these debates, see Mörth 2004). I am more interested in an early and recurrent question about soft law, which has to do with the degree and valence of 'social' forces operating through or within it (Abbott and Snidal 2000; Finnemore and Toope 2001). Thus, Finnemore and Toope state: 'Law is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies' (Finnemore and Toope 2001, 743). This is a point of connection between scholarship on soft law and legal anthropology and socio-legal studies more broadly, for which law has always been a social phenomenon, and shot through with social interests, processes, forms and forces. Seen through the lens of law and society scholarship, perhaps all law is always 'soft'. The level of degree, however, may very well depend on the impact of law and society scholarship itself on a specific legal domain or practice: one is reminded that Alternative Dispute Resolution, using mechanisms 'outside' formal law, has its genesis in anthropological accounts of dispute-settlement processes outside the West and in socio-legal efforts to bring the voices of the powerless to the legal table.² Therefore, any discussion of the relationship between society and law of necessity begs the question of which domain is inside or outside the other; indeed, it calls into question the very notion of there being such domains in the first place. As we will see, a good deal of the work involved in the debate over harmful tax competition was a kind of domain-work: the creation of groups and interests

2 Strathern (2004) discusses the analogous situation in science, where ethical review boards and the attempt to anticipate the unexpected led science to be imagined as 'inside' society, rather than society as something that could be rationally re-ordered in accordance with science.

as ‘social’ in themselves, and therefore owed by the OECD, due to its inclusive doctrine, a seat at the table.

Tax Competition and the Revenue Rule

The historical association between sovereignty and taxation precluded any direct interference in the tax policies of countries deemed to be participating in ‘harmful’ tax practices. Both by exacting revenue and by spending it, states stitch together taxation, sovereignty and citizenship, as the American Revolutionary War and the founding of the United States republic remind us (Einhorn 2006). The connection to sovereignty is also evident in the so-called ‘Revenue Rule’, Lord Mansfield’s eighteenth-century dictum that ‘no country ever takes notice of the revenue laws of another’. Cameron (2006, 236) traces the origins of the publicly financed, tax-based fiscal state to the rise of statistics and audit that developed in tandem with modern European money and trading systems. He notes that the ‘overwhelming majority of modern fiscal states have only been in existence since 1945’, and emphasizes the spatial dimension of taxation, since, in its redistributive capacity, it ‘involves the transmission of money, goods, services and so on through space from one group to another’ and also helps to suture together the ‘social, political and economic citizen’ with the ‘norms and institutions of the state’ (Cameron 2006, 237). The fiscal state of the twentieth century is thus the social welfare state, a state to serve ‘society’, in accordance with ideals of social democratic citizenship. This is also the vision of the state that has come under attack since the Thatcher/Reagan era and market-oriented neoliberal reform. The very idea of tax competition is in line with such neoliberal visions, and it conjures threats to the ‘social’ norms and institutions and the bounded fiscal territories of contemporary states. Indeed, Oxfam, the hunger relief NGO, joined the debate on tax competition by emphasizing the harm done to ‘society’ by tax haven jurisdictions:

Tax is widely regarded as an essential component of a fair and efficient society. An essential principle underlying tax collection has been the liberal social obligation on companies and individuals to pay tax proportionately to their income in order to finance public goods and social welfare. (Oxfam 2000, 6)

If state sovereignty precludes one state’s interference in the tax policy of another, however, then how could international organizations hope to counter tax competition? The answer came from a set of soft law initiatives put forward by the OECD (1998), which were followed closely by similar projects, sparked by slightly different concerns, by the Financial Action Task Force of the G7 (for example, FATF 2001), the Financial Stability Forum (FSF) and NGOs like Oxfam. Seeking to ‘name and shame’ countries into compliance with international financial norms, these initiatives, in the process, created those norms, but not exactly as they might have pleased. The impetus behind the actions of each was slightly

different. For the OECD, the focus was on tax competition. For the FATF, the issue was money laundering. For the FSF, the emphasis was on international financial stability in the wake of the Asian financial crisis. Countries on the receiving end of these efforts experienced them as of a piece, however. Nearly all countries initially named on so-called ‘blacklists’ of non-compliant or non-co-operating jurisdictions – including almost all of the world’s tax havens – complied, often rather quickly. In some cases, compliance came even before the blacklists were issued, pre-empting international ‘shaming’ through what were called ‘advance commitments’.

Tax competition itself, meanwhile, is a product of an imagined future inspired by economic theory (Webb 2004, 795), and thus a fine example of the way economic theory performs, rather than describes or predicts, the economy (after Callon’s ‘performance’ of the economy by economic theory; Callon 1998, 22). Rather than describing an actually existing condition whereby the lowering of tax rates in one jurisdiction in fact spurs a race to the bottom in revenue regimes elsewhere, tax competition is the logical but not empirically observable outcome of a particular economic theory.³ In calling for an end to tax competition, Oxfam argued that tax competition saps revenue from poor countries when their wealthy elites squirrel their money offshore. That phenomenon, however, is not necessarily linked to tax *competition* so much as the mere presence of lower-tax jurisdictions, not a process of competitive lowering of rates internationally. It would occur regardless of whether the race to the bottom predicted by economic theory took place. That ‘tax competition’ names a phenomenon of dubious ontological status makes the debate about it an interesting object for anthropological investigation – like Evans-Pritchard’s (1937) ensorcelled granaries, or the divine.

In another publication, I have discussed some of the debates in tax haven countries sparked by the OECD initiative, as well as the procedures that offshore financial centres put into place in its wake (Maurer 2005; see also Sharman 2006). Chief among these are due diligence and ‘Know Your Customer’ (KYC) policies to collect and maintain information on clients. I argued that due diligence is a specific kind of ethical regulation based on qualitative assessments of virtue. I also argued that due diligence and its critique fold into one another and obviate certain conventional forms of academic analysis (Maurer 2005). This chapter fills in another piece of the ethical puzzle of offshore financial services by focusing not on the procedures, but on specific form of governance attempted by the OECD, a kind of social governance effected through peer review and pressure, moral suasion, and the creation of new epistemic communities. This form of governance

3 Webb (2004) makes the most sustained argument that the OECD’s harmful tax competition initiative was based on and shaped by norms rather than actual revenue crises or rational policy decisions independent of the predictions of liberal economic theory. On the question of whether competition among states to attract investment leads to a taxation race to the bottom, the evidence is contradictory at best. As Webb (2004, 788) puts it, ‘governments certainly behave as if tax competition has increased’, but the empirical evidence does not always support the contention.

can be seen as a scaling-up of due diligence, for it proceeds in much the same fashion and through many of the same forms of review and pressure. Rather than taking the form of a dictate from powerful states interfering with the revenue laws of other states, and thereby challenging sovereignty and violating the revenue rule, the OECD would proceed through its signature method of consultation and multilateral co-ordination. Here was a case where the social nature of OECD soft law governance seemed perfectly suited to address the threat to 'society' posed by tax competition.

Creating 'Participating Partners'

The OECD campaign against harmful tax competition generated intense debate. Tax haven countries saw it as heavy-handed, imperial and unfair. Being blacklisted evoked old colonial forms of domination, surveillance and control. Countries so targeted felt sidelined and caught off guard. OECD members with histories of bank secrecy like Switzerland and Luxembourg vociferously opposed the OECD initiative. But the possible damage to offshore jurisdictions' reputations by being blacklisted quickly led them to seek to minimize the damage. Most sought to get themselves off the blacklists by adopting best practices proposed by the OECD and FATF or by issuing press releases committing themselves to compliance. Jason Sharman, Gregory Rawlings and others have all amply documented this process (Webb 2004; Maurer 2005; Rawlings 2005; Woodward 2005; Sharman 2006). All the while, a discursive war raged over the OECD's concepts and definitions. The main parties opposed to the OECD were the Society for Trust and Estate Practitioners (STEP), a professional association of tax planners; the Center for Freedom and Prosperity (CFP), a Washington, DC think tank, and the International Tax and Investment Organization (later renamed the International Trade and Investment Organization, ITIO), a multilateral body of tax haven countries that was established with the assistance of the Commonwealth Secretariat, explicitly modelled on the OECD itself as a consultative body made up of representatives from its own member states as well as entities with observer status.⁴

The logic of the OECD demanded that the ITIO be incorporated into its own process of consultation as a participating partner. The result was the creation of the Global Forum on Taxation, which would meet every two years under the auspices of the OECD. The Global Forum consisted of OECD and non-OECD members, including the ITIO membership. The discourse of harmful tax competition very

4 The members of the ITIO are: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Turks and Caicos Islands, Panama, Cook Islands, Samoa, and Vanuatu. The observers are the Commonwealth Secretariat, CARICOM Secretariat, Caribbean Development Bank, Eastern Caribbean Central Bank, and the Pacific Islands Forum Secretariat.

quickly shifted to ‘principles of transparency and effective exchange of information for tax purposes’ (OECD 2003). Furthermore:

The focus of the meeting was on how to achieve a global level playing field and how to improve further the process by which this initiative can be taken forward based on the widely accepted principles of equity and shared responsibility. (OECD 2003)

The ITIO quickly issued its own press release, headlined, ‘It’s Official: OECD Tax Project Depends on Level Playing Field’ (ITIO 2003). The chief outcome of the first Global Forum meeting was the creation of a ‘Level Playing Field Joint Working Group’. The ‘level playing field’ slogan has by now made its way into the title of nearly every major report by the OECD and other parties in the tax competition debate, including the title of the OECD’s own report on the 2005 Global Forum meeting and a 2007 report by the Commonwealth Secretariat titled *Assessing the Playing Field* (Stoll-Davey 2007).

The effect of the inclusion of the ITIO into the Global Forum has been a kind of politics by press release (after Rawlings’ phrase, ‘compliance by press release’; Rawlings 2007, 59). At the close of the 2007 Global Forum meeting and the release of the Commonwealth Secretariat report, the ITIO issued a press release headed:

LITTLE DIFFERENCE BETWEEN ONSHORE AND OFFSHORE, NEW ANALYSIS OF OECD DATA REVEALS

‘End stigmatization and let us into treaty network’, say small countries

Commonwealth calls for fair play

The release concludes:

Big countries operate through clubs and use organizations that they control (OECD, FATF, IMF, FSF, and so on) to establish and promulgate rules, standards of practice and intended norms. They call these ‘international standards’ and impose them on weaker states. Small and developing states feel unfairly pressured to apply standards not uniformly applied by those countries which are applying the pressure or by other more powerful competitor countries.

In his introduction to the ITIO report, Ransford Smith, Deputy Secretary-General of the Commonwealth Secretariat, states: ‘*In the global arena the lack of representation and effective participation of small vulnerable economies in international standard setting bodies and processes is one of the major drawbacks. The small states have limited opportunities to make inputs into the development of measures that are critical for the efficient functioning of the*

sector, as well as for their development. Yet their compliance is expected within given timeframes.' (ITIO 2007, 6; italics in original)

The press release echoes the discourse of much of the tax competition debate, framing the issue in terms of weak versus strong states and calling into question the universality of rules and practices devised by the few and the powerful. This is a profoundly post-colonial rhetoric as well, drawing on legacies of imperial rule and touting the principles of liberty, equality and fairness. It also draws on the post-colonial network of expertise embodied in the Commonwealth Secretariat (which had earlier issued another volume in support of small states' 'fiscal sovereignty'; Biswas 2002). What was the effect of the incorporation of new participating partners and their discourse of the level playing field?

Soft Law or Hard Imperial Power in the HTC Debate?

Allow me to present a series of quotations from various observers of and parties to the debate over harmful tax competition:

In the end, the OECD juggernaut was brought to a halt by the resistance of some of its other members – Switzerland, Luxembourg and Liechtenstein in particular – who refused to go along with the demands of their more strident sister states in the OECD for fear of the harmful effect on their vital financial services sector.⁵

The failure to note widespread US derelictions in permitting anonymously owned companies is a significant shortcoming in the [OECD's 2006] Report. If illicit companies with secret ownership merely migrate out of the tax havens and into the United States, what is the point of the OECD project? (Hay 2006, 5)

[The] OECD initiative has really run out of steam ... the initiatives have really got diverted from their main goals (Guernsey interviewees of Gregory Rawlings, quoted in Rawlings 2005, 299)

[T]he jury is still out on whether the OECD's attempt to define and neutralize harmful tax practices by 'naming and shaming' tax havens as renegade states in the international tax regime will be successful. (Eden and Kudrle 2005, 124)

Without US support or the creation of a level playing field the OECD project is stalled. (Woodward 2005, 212)

5 Roland M. Sanders, 'Europe Eyeing Tax Havens Again', *Caribbean News*, 11 September 2006.

OECD officials engaged in serious efforts to consult and pacify business opponents, and made concessions to those business criticisms that resonated most strongly with liberal economic ideology. ... [T]his is the equivalent to consulting with the fox about policies to protect the henhouse. (Webb 2004, 812)

[T]he OECD-sponsored campaign against 'harmful' tax competition has been unsuccessful because regulative norms have severely constrained the means legitimately able to be employed. (Sharman 2006, 143)

OECD countries embarked on a difficult challenge when we commenced our work on countering harmful tax practices and this report reflects the success we have had in bringing about change. In 2000, we identified 47 potentially harmful preferential tax regimes in OECD countries. Of those regimes, 19 regimes have been abolished, 14 have been amended to remove their potentially harmful features, 13 were found not to be harmful and only one has been found to be harmful. This Report, along with the report recently issued by the OECD Global Forum on Taxation on the transparency and exchange of information practices in 82 economies, shows that we are making real progress in addressing harmful tax practices. (Ciocca 2006)

35 jurisdictions have made commitments to transparency and effective exchange of information and are considered co-operative jurisdictions by the OECD's Committee on Fiscal Affairs. (OECD 2006)

These assessments of the OECD initiative come from a number of academic political scientists, as well as a former ambassador of the Caribbean commonwealth of Antigua and Barbuda (Sanders), a professional consultant for the firm Stikemann Elliott, one of Canada's top seven corporate law firms (Hay), the Chair of the Organization for Economic Co-operation and Development's Committee on Fiscal Affairs (Ciocca) and the interviewees of an anthropological colleague (Rawlings). The diligent reader will detect the rhetorical shift, presaged in the quotations above, from competition to co-operation, as well as the use of the prepositional phrase 'toward a level playing field'. The point of contention between the first seven and the last two quotations above is whether the OECD initiative has been a success or a failure (and, in case the point is unclear somehow, only the OECD itself judged its effort a success!).

Different actors caught up by the OECD's initiative had different views on it. To many of the small states targeted by the effort, it was a neo-colonial imposition by an undemocratic alliance of powerful, rich countries on the smallest and weakest players in the international political arena. Caribbean leaders complained that the OECD campaign was 'nothing less than a determined attempt to bend other countries to [the OECD's] will', 'a form of neo-colonialism in which the OECD is attempting to dictate the tax economic systems and structures of other nations for

the benefit of the OECD's member states'.⁶ They accused the OECD of 'bullying' (Julian Francis, Bahamas Central Bank) and called its actions a threat to the islands' 'economic sovereignty' (Ambrose George, Dominica Finance Minister).⁷ In the United States, both the Bush administration and the Congressional Black Caucus came out against the initiative, in the name of defending the sovereignty of small nations against powerful and non-democratic global entities. To conservative Washington, DC think-tanks, meanwhile, the OECD initiative was an effort by global institutions with world government aspirations to quash the free market and trample on American sovereignty. Others argued that the OECD held double standards, as several of its member states would not be deemed in compliance with its own recommendations on tax competition. The Bush administration, for its part, advocated for an information-sharing regime rather than the reduction of tax competition itself, in line with security concerns born of the post-9/11 climate, but just as importantly, based on its ideological commitments to both low taxes and surveillance.

As already noted, the OECD effort also sparked the consolidation of existing professional networks of estate and tax planners (mainly through the Society for Trust and Estate Practitioners, or STEP) as well as the formation of new multilateral organizations (for example, the ITIO).⁸ These new networks and organizations significantly reshaped the OECD's discursive and regulatory regime. The emphasis on tax competition shifted to tax co-operation and the establishment of a 'level playing field' – that is, a commitment to securing compliance of OECD member states before forcing non-members to do the same. And the emphasis on ending tax haven abuses and thereby reallocating revenue wealth back to countries in which it is owed shifted to information-sharing. These discursive and practical shifts led to charges that the effort was ultimately a failure.

Indeed, by now, most proponents and critics of the initiative concur that the exercise has been meaningless: small states initially targeted have issued letters of commitment, but nearly all make a condition of that commitment OECD member states' own compliance. In other words, they demand a 'level playing field' before bringing their own practices into compliance. The result, commentators claim, is a stalemate. Or, as Ronen Palan argues, the result has been a shift from curbing tax haven abuses to ensuring that tax havens 'play by the rules of the advanced

6 Ronald M. Sanders, 'The OECD's "Harmful Tax Competition" Scheme: The Implications for Antigua and Barbuda', address to the Luncheon Meeting of the Antigua and Barbuda Chamber Commerce, 27 March 2001.

7 Catherine Kelly, 'Don't Count on Friends in the New Global Economy', *The Punch*, 17 July 2000; Government of Dominica, Budget Speech 2000/2001, 'Stabilization, Consolidation and Diversified Growth – Foundations for a Sustainable Recovery'. See James (2002) for a further discussion of these comments.

8 The FATF's distinct initiative also encouraged the formation of new regional multilateral organizations concerned with combating money laundering, such as the Asia/Pacific Group (APG).

industrial countries that by and large represent – let us have no illusions – business interests’ (Palan 2003, xvi). Indeed, Palan notes, the liberalization of onshore regulatory regimes demonstrates more than ever the importance of the offshore to contemporary global political economy (Palan 2003, xix). And, because of the initiative – not despite it – offshore activity and onshore activity that takes the same form as offshore arrangements is growing at a fine clip: there are now ‘huge incentive[s] for companies and individuals to open multiple businesses in various havens in the hope that if an investigation occurs, it will drag on endlessly’ (Palan 2003, xvii).

The problem with the consensus that the OECD initiative has failed is that so much activity has taken place in the mean time, and so much work, paper, and argument continues to be generated by it and that so many new social networks have been created and sustained by it (not least networks of scholars!). If we consider the actual effects of the initiative separate from its stated goals, then what comes into view is, first of all, the massive generation of documents and discourse, especially press releases, commitment letters and a discursive regime organized in terms of the ‘level playing field’, information sharing, and ‘tax co-operation’. Second, we see the consolidation and enlargement of professional societies – STEP being the primary example, but also the creation of scholarly networks of those studying the phenomenon as well as, and sometimes at the same time, consulting on or contributing to it. We also see the expansion – regardless of how we ultimately evaluate it – of what scholars of the OECD have called ‘normative deliberations’ or ‘epistemic governance’: the use of peer consultation and review among participating countries and territories to generate, redefine and promulgate knowledge and norms about tax competition. We see new parties to those consultations, like the ITIO and new regulatory bodies in the countries targeted, like the Financial Services Commission of the British Virgin Islands. Whether or not it represents a co-optation of the initiative, the imagination and deployment of the ‘level playing field’ is, after all, a measurable effect of it and, specifically, of its incorporation of ‘society’ into the deliberative process.

And that incorporation felled a powerful beast – or at least radically transformed it. The OECD, a large, rich organization, found its effort redirected by a collection of small states whose interests were represented by tiny organizations with minuscule budgets. This was not a case of a multilateral organization being bought off by rich lobbyists, as Jason Sharman has demonstrated. While the outcome might ultimately serve business interests, those interests did not bankroll the attack on the OECD’s campaign. Instead, true ideologies from the Centre for Freedom and Prosperity – three individuals, one full-time staff member, a budget for this purpose of only \$600,000 (Sharman 2006, 67) – lent the power of persuasive ideas and rhetoric to the counter-campaign. And the ITIO, with a budget of around \$200,000 and an ‘intermittent’ (Sharman 2006, 67) existence (it seems to come to life just before every biannual Global Forum conference), could hardly be said to be a ‘front organization’ (Sharman 2006, 67) for other interests.

It would be a mistake to see the CFP and ITIO as not true social actors because of their smallness, however. It would be the same category error as claiming that an individual English speaker could not provide insight into the grammar of the language, or assuming that individuals are datapoints and societies are aggregates. The whole is not only greater than the sum of the parts; the parts themselves contain wholes. And, within the logic of the OECD, as soon as such a social whole is conjured into existence, it must be invited into the consultative process. The 'currency' of the OECD's influence is precisely its identity as a consultative body; to act otherwise in the face of people with whom to consult would have debased that currency (Sharman 2006, 69).

The discursive convergence around the effort's 'failure', however, turned on a number of other questions. Was the initiative scuttled by the reluctance of the United States government under President George W. Bush, which withdrew its support for the effort? Or was it hijacked, or at least watered down, by new professional bodies, new transnational actor networks of consultants, tax planners, lobbyists, and government officials? Was it a pointless endeavour from the beginning, given the refusal of some OECD members to abide by the same rules as the non-OECD countries it targeted, and given the fact that several US states permit practices deemed harmful, like anonymous corporate ownership? Does it demonstrate the effectiveness of so-called soft law, non-binding directives, principles and commitments? Or does it rather show how easily soft law can be co-opted – and, if so, by whom, and how?

Again, these questions are shared by both analysts of and participants in the tax competition debate. This is a significant part of the social field within which the initiative has taken place. As such, these questions are 'data' rather than second-order commentary on another, prior phenomenon, for these kinds of questions are exactly the stuff of the OECD's consultative process. Furthermore, the individuals and groups involved constitute overlapping constituencies and co-constitutive knowledge practices. Scholars have been enlisted into the policy and regulatory debate and activity (see, for example, Sharman and Rawlings 2005), and terms from the policy debate have wended their way into the scholarly argument, in a continuous loop (see Elyachar 2006, 416). This is a part of the representational or narrative dilemma at issue in Sharman's statement, quoted at the beginning of this chapter, that 'social' approaches to politics and economics may not have the ends anyone intends.

This convergence was possible because there is no place to stand, politically, ethically or epistemologically, in the debate over harmful tax competition *as it was constituted here* without having the rug ripped out from underneath one's starting premises. For example, there are two widely held criticisms of the OECD effort in the literature and among the parties to the debate itself: (1) that international institutions like the OECD, in promulgating best practices, are engaged in a neocolonial project, and (2) that the OECD has double standards and unfairly targets small, powerless states while it allows its big, rich member countries to continue to engage in practices it otherwise condemns (like anonymous corporate ownership,

permitted in several US states). However, arguments like these against the OECD fail to address that here, at least, it was trying to curtail unfettered capital mobility, restrain tax evasion by the ultra-rich and prevent corrupt regimes from using tax havens to hide revenues skimmed for the profit of elites or rulers. Alternatively, if analysis or critique begins from a position critical of capital mobility, tax haven abuses or money laundering, then the argument quickly becomes a colonialist one: it denies tax haven countries their sovereignty and supports soft law imperialism; it refuses small countries the options for attracting investment afforded big countries, and it cannot account for the fact that, in this case at least, multilateral, neoliberal organizations that supposedly serve business interests were here acting against them. How much simpler, then, to worry over success or failure.

Conclusion: Reassessing the Social

What interests me about soft law is that its practitioners, proponents and critics alike all presume something called the ‘social’. This holds true for proponents and critics of soft law in the world, as well as proponents and critics of the *analytical concept* or the *analytical utility of the concept* of soft law. For proponents of soft law in the world – true believers, or more cautious advocates who see a role for it in certain places or for certain issues – the incorporation of the social into governance has the potential profoundly to democratize and to allow other, diverse voices into the domain of policy-making and implementation. Critics of the analytical concept of soft law, like Finnemore and Toope (2001), seem to agree that law is more ‘social’ than those who endorse soft law as an analytical concept might allow. It is a truism in law and society scholarship that law is always-already a ‘social’ phenomenon, full of custom, norms, so the concept of soft law has little analytical utility. But why this rush to the ‘social’ for analytical purposes or the embrace of the ‘social’ for policy objectives?

The nature of the ‘social’ enlisted in soft law social governance projects went relatively unquestioned in the OECD’s harmful tax competition initiative. Regardless of whether one deems the OECD effort a success or failure, it proceeded through the type of consultative bringing together of a number of actors for which the OECD is well known. The use of audit, standards and peer review, which are simultaneously ‘autonomizing and responsabilizing’ (Rose, O’Malley and Valverde 2006, 91), have been understood as hallmarks of neoliberal governmentality. Yet the very idea of curbing harmful tax competition depended on a vision of the maintenance of the fiscal state’s integrity, not its evaporation; the initiative was trying to promote a non-market-based system of payments in the form of revenue collection that was detached from the market; indeed, it was trying to preclude or close off the formation of a market in sovereignty (see Palan 2003). It did so in terms of the logical extension of a theory about that market in sovereignty. One analytical lesson, then, is that evidence of the infiltration of market logic does not always guarantee ‘marketization’ as an outcome. There are other things going on

besides markets, calculation, equivalence and so on, even when – indeed, I would argue, especially when – we see markets, calculation, equivalence going on.

In the case of the harmful tax competition initiative, a ‘social governance’ entity, the OECD, which was originally trying to curb ‘neoliberal’ competitive deregulation, was opposed by a collection of unlikely partners which joined market freedom with political freedom. These partners used the OECD’s own practice of partnership to bring ‘society’ into the discussion, not to reduce, but to protect tax competition. The effects were complicated: small states ‘won’, but meanwhile, onshore jurisdictions, not subject to the same level of ‘peer review’, have become more competitive (such as the US states of Delaware and Wyoming, which permit anonymous corporate ownership). Some small states used their enhanced sovereignty to engage in Double Taxation Treaties with the United States, thereby even further enhancing their sovereignty (Rawlings 2007).

At least three meanings of ‘society’ cohere in the debate over offshore finance charted here. First is the social as an object of social policy, and particularly as an organism fed by the fiscal state. This is the social of the welfare state, and it was constructed as being under threat by tax competition. Second is the social of ‘participatory’ forms of governance that involve the bringing together of various stakeholders and interest groups to discuss regulatory matters of mutual concern. Who gets invited to the table and who does not is a highly politically charged affair. The tale narrated here, however, is one of ever-increasing inclusion: as more parties and potential partners were identified, they were invited into the process.

I am hoping to withhold the cynical scholarly rejection of such invitations as a cover for brute interests only so that we may better see the shape of this kind of process. Like Sharman, I note that in the case of offshore finance, brute interests did not so straightforwardly ‘win’ or carry the day. We can only sustain that cynical critical posture towards offshore finance if we think that ongoing colonial relationships – actual, not metaphorical, colonial relationships – are just fine, and that the livelihoods of people living in tax havens do not matter. This is why some scholars (like Sharman) argue that the best solution to the problem of tax competition is to buy the tax havens off, and others (like myself, Maurer 2007) point out that this could take the form of reparations for slavery and colonialism.

This brings us to the issue of ‘soft law’ itself, and whether it is worth sustaining as a concept. Soft law relies on social as opposed to formal legal mechanisms. Yet the anthropology of law and socio-legal studies have long acknowledged that the law is far more than formal. It is the particular manner in which soft law ‘makes’ society that is of interest here. If the statistics of the nineteenth century constituted a particular kind of society that could then be intervened in, contained or channelled, the soft law of the late twentieth and early twenty-first century creates a society not to be tinkered with like the elements in a scientific experiment, but rather to be ‘invited to participate’ in its own self-construction. As an analytical concept, soft law may not carry much water. But it is an important ethnographic object in many of the worlds anthropologists of law are currently moving in.

In this chapter, I have been more interested in the process than the outcome, however. In *The Law of Primitive Man*, E. Adamson Hoebel wrote: 'International law, so-called, is but primitive law on the world level' (Hoebel 1954, 331). Michael Barkun (1968) extends the argument. Sally Merry writes, in a review essay on the anthropology of international law:

Some intriguing parallels can be found between the way international law works and the law of villages without centralized rulemaking bodies and formal courts Both rely on custom, social pressure, collaboration, and negotiations among parties to develop rules and resolve conflicts. In both, law is plural and intersects with other legal orders Each order constitutes a semiautonomous social field within a matrix of legal pluralism. Both depend heavily on reciprocity and the threat of ostracism, as did the Trobrianders in Malinowski's account. Gossip and scandal are important in fostering compliance internationally as they are in small communities. Social pressure to appear civilized encourages countries to ratify international legal treaties much as social pressure fosters conformity in small communities. Countries urge others to follow the multilateral treaties they ratify, but treaty monitoring depends largely on shame and social pressure. Clearly there are many differences between social ordering in villages and in the world, but there are some similarities. (Merry 2006, 101)

While the anthropology of law and socio-legal studies have been saying for some time that law is a profoundly social affair, the rise of governance explicitly articulated in terms of peer pressure and peer review, such as that promoted by the OECD, brings to the fore the conceptualization and the pragmatic unfolding of the 'social' as a social artifact itself. That pragmatic unfolding poses analytical challenges to social scientific accounts of legal process, not least because it is an explicit and self-conscious effort to acknowledge and then harness the 'social' basis of law. While messy for theory, it is exemplary of the kind of 'practically oriented orders' involved in the continual redefinition and rearticulation of 'society' itself (Thrft 1996, 22).

Acknowledgements

I would like to thank the editors of this volume and participants in the 'Law and Governance' conference for their criticisms of earlier versions of this chapter. I would also like to thank Franz and Keebet von Benda-Beckmann for pushing me to think more about the implications of my argument for 'society'. Special thanks are due Tom Boellstorff, Stefan Helmreich and Gregory Rawlings for their detailed commentary. I would also like to thank Jeff Katcherian and Andrea Ballesterio for helping me to think about soft law.

The material presented in this chapter is based on research supported by the National Science Foundation, Law and Social Sciences programme under grant no.

0516861. Any opinions, findings and conclusions or recommendations expressed in this material are those of the author, and do not necessarily reflect the views of the National Science Foundation.

References

- Abbott, K. and Snidal, D. (2000), 'Hard and Soft Law in International Governance', *International Organization* 54(3): 401–19.
- Barkun, M. (1968), *Law without Sanctions: Order in Primitive Societies and the World Community*, New Haven, CT: Yale University Press.
- Biswas, R. (ed.) (2002), *International Tax Competition: Globalization and Fiscal Sovereignty*, London: Commonwealth Secretariat.
- Búrca, G. de and Scott, J. (2006), 'Introduction: New Governance, Law and Constitutionalism', in G. de Búrca and J. Scott (eds), *Law and the New Governance in the EU and the US*, Oxford: Hart Publishing, pp. 1–12.
- Callon, M. (1998), 'The Embeddedness of Economics Markets in Economics', in M. Callon (ed.), *The Laws of the Markets*, Oxford: Blackwell, pp. 1–57.
- Cameron, A. (2006), 'Turning Point? The Volatile Geographies of Taxation', *Antipode* 38: 236–58.
- Ciocca, P. (2006), 'Committee on Fiscal Affairs Releases Outcome of Review of Preferential Tax Regimes in OECD Countries', press release, Centre for Tax Policy and Administration, Organization for Economic Co-operation and Development, <www.oecd.org/document/31/0,3343,en_2649_34897_37446047_1_1_1_1,00.html>, accessed 30 January 2009.
- Collier, S. and Ong, A. (2005), 'Global Assemblages, Anthropological Problems', in A. Ong and S. Collier (eds), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems*, Oxford: Blackwell, pp. 3–21.
- Eden, L. and Kudrle, R.T. (2005), 'Tax Havens: Renegade States in the International Tax Regime?', *Law and Policy* 27(1): 100–127.
- Einhorn, R.L. (2006), *American Taxation, American Slavery*, Chicago, IL: University of Chicago Press.
- Elyachar, J. (2006), 'Best Practices: Research, Finance and NGOs in Cairo', *American Ethnologist* 33(3): 413–26.
- Evans-Pritchard, E.E. (1937), *Witchcraft, Oracles and Magic among the Azande*, Oxford: Oxford University Press.
- Financial Action Task Force (2001), *Financial Action Task Force Annual Report on Money Laundering, 2000–2001*, Paris: FATF Secretariat.
- Finnemore, M. and Toope, S.J. (2001), 'Alternatives to 'Legalization': Richer Views of Law and Politics', *International Organization* 55(3): 743–58.
- Hay, R.J. (2006), 'OECD Level Playing Field Report Released: Consensus or Conflict?', *Tax Planning International Review* (June): 1–8.
- Hoebel, E.A. (1954), *The Law of Primitive Man*, Cambridge, MA: Harvard University Press.

- International Trade and Investment Organization (ITIO) (2003), 'It's Official: OECD Tax Project Depends on Level Playing Field', press release, <www.itio.org/NewPressReleases/PR23-10-03.htm>, accessed 30 January 2009.
- (2007), 'Little Difference between Onshore and Offshore, New Analysis of OECD Data Reveals', press release, <www.itio.org/pdf/ITIO_press_release_1_May2007.pdf>, accessed 30 January 2009.
- James, V.E. (2002), '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', *University of Miami Inter-American Law Review* 34(1): 1–62.
- Kirton, J.J. and Trebilcock, M.J. (2004), 'Introduction: Hard Choices and Soft Law in Sustainable Global Governance', in J.J. Kirton and M.J. Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Aldershot: Ashgate, pp. 3–28.
- Marcussen, M. (2004), 'OECD Governance through Soft Law', in U. Mörtz (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, Cheltenham: Edward Elgar, pp. 103–27.
- Maurer, B. (2005), 'Due Diligence and "Reasonable Man" Offshore', *Cultural Anthropology* 20(4): 474–505.
- (2007), 'Incalculable Payments: Money, Scale and the South African Offshore Grey Money Amnesty', *African Studies Review* 50(2): 125–38.
- Merry, S. (1992), 'Anthropology, Law and Transnational Processes', *Annual Review of Anthropology* 21: 357–77.
- (2006), 'Anthropology and International Law', *Annual Review of Anthropology* 35: 99–116.
- Mörth, U. (2004), 'Introduction', in U. Mörtz (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, Cheltenham: Edward Elgar, pp. 1–9.
- (2006), 'Soft Regulation and Global Democracy', in M.-L. Djelic and K. Sahlin-Andersson (eds), *Transnational Governance: Institutional Dynamics of Regulation*, Cambridge: Cambridge University Press, pp. 119–35.
- OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, Paris: OECD.
- (2003), *OECD Global Forum on Taxation, Ottawa, 14–15 October; Closing Statement by the Co-Chairs*, <www.oecd.org/document/0/0,2340,en_2649_201185_16643264_1_1_1_1,00.html>, accessed 30 January 2009.
- (2006), 'List of Unco-operative Tax Havens', <www.oecd.org/document/57/0,3343,en_2649_33745_30578809_1_1_1_1,00.html>, accessed 30 January 2009.
- Oxfam (2000), *Tax Havens: Releasing the Hidden Billions for Poverty Eradication*, London: Oxfam.
- Palan, R. (2003), *The Offshore World: Sovereign Markets, Virtual Places, and Nomad Millionaires*, Ithaca, NY: Cornell University Press.

- Rawlings, G. (2005), 'Mobile People, Mobile Capital and Tax Neutrality: Sustaining a Market for Offshore Finance Centers', *Accounting Forum* 29: 289–310.
- (2007), 'Taxes and Transnational Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty', *Law and Policy* 29(1): 51–66.
- Rose, N., O'Malley, P. and Valverde, M. (2006), 'Governmentality', *Annual Review of Law and Social Science* 2: 83–104.
- Sharman, J.C. (2006), *Havens in a Storm: The Struggle for Global Tax Regulation*, Ithaca, NY: Cornell University Press.
- and Rawlings, G. (2005), *Deconstructing National Tax Blacklists: Removing Obstacles to Cross-border Trade in Financial Services. A Report for the Society of Trust and Estate Practitioners*, Sydney and Canberra: University of Sydney and the Australian National University.
- Stoll-Davey, C. (2007), *Assessing the Playing Field: International Cooperation in Tax Information Exchange*, London: Commonwealth Secretariat.
- Strathern, M. (2004), *Commons and Borderlands: Working Papers on Interdisciplinarity, Accountability, and the Flow of Knowledge*, Wantage: Sean Kingston Publishing.
- Thrift, N. (1996), 'Shut up and Dance, or, is the World Economy Knowable?', in P.W. Daniels and W.F. Lever (eds), *The Global Economy in Transition*, Harlow: Longman, pp. 11–23.
- Trubek, D. and Trubek, L. (2005), 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination', *European Law Journal* 11(3): 343–64.
- , Cottrell, P. and Nance, M. (2006), "'Soft Law" "Hard Law," and EU Integration', in G. de Búrca and J. Scott (eds), *Law and the New Governance in the EU and the US*, Oxford: Hart Publishing, pp. 65–94.
- Webb, M.C. (2004), 'Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition', *Review of International Political Economy* 11(4): 787–827.
- Woodward, R. (2005), 'Offshore or "Shorn off"? The OECD's Harmful Tax Competition Initiative and Development in Small Island Economies', in G. Harrison (ed.), *Global Encounters: International Political Economy, Development, and Global Governance*, London: Palgrave Macmillan, pp. 195–212.