

THE FUTURE OF THE CARIBBEAN

The Caribbean Offshore Financial Services Revolution – A Bold, Futuristic Initiative Requiring Brave Leadership

By Professor Rose-Marie Belle Antoine

Offshore Centres indicative of a broader issue

My topic, while focusing on Offshore Financial Centres (OFCs), highlights an area where law intersects with economic and social policy. Moreover, it is representative of a much wider issue that confronts the Caribbean's socio-economic landscape, having deep implications for our future. On the one hand, the development of OFCs in the Caribbean is a remarkable example of Caribbean talent, dedication, creativity and brilliance. On the other, the OFC phenomenon is a tragic reminder of a region handicapped by a world view that has defined our political and economic policy; and even the way in which we define ourselves, or rather, fail to define ourselves and our place in the world.

This is an opportune time to be considering such policy issues – at a time when the very existence of the sector, particularly in developing countries such as ours, is being threatened by an aggressive onslaught by onshore nations under the umbrella of regulation and respectability – much of it orchestrated by the Organisation of Economic Cooperation and Development (OECD) and Financial Action Task Force (FATF).

I will demonstrate that while legitimate concerns may be raised about the sector, as with *any* financial sector, many of the allegations, though posed as valid legal objections, are coloured by political and economic overtones and are without legal justification. In fact, from a legal and economic policy perspective, offshore structures and policies are inherently legitimate.

We need to mount an appropriate defence for this mode of industry – chosen by so many Caribbean nations as a legitimate path to development. In fact, this is a billion-dollar sector, responsible for the high GDP and standards of living for several of our neighbours such as the BVI, Cayman, Nevis, the Bahamas and Bermuda.

However, to do so, we must first understand the legal issues involved, since it is through legal policy that such financial centres have been attacked. In fact, offshore finance is an area where law has been used as an important tool for economic policy, to usher in a new era of development. Law was also the weapon used against the

region by onshore developed countries afraid of losing revenue to offshore developing countries. I believe that we must analyse this socio-legal construct if we are to chart a suitable course for the future.

A rare and genuine example of indigenous thought and action

Few people recognize that in terms of economic and legal policy, the creation and development of the OFC is a rare and genuine example of indigenous thought and action – a shining example in fact, that has been emulated the world over, on every continent. Did we know, for example, that the international business company was created right here in the Caribbean, in the BVI, by our own professionals? This is the model IBC that has been exported across the world. Similarly, unique and innovative legal norms and products such as the offshore trust, which I have described as a ‘hybrid financial product,’ have been born on our shores in various transmutations: i.e. the purpose trust; the anti-Bartlett trust, which challenges archaic, unresponsive, common law rules and orthodox principles, for example, about the liability of trustees considered to be unfair and onerous. We have been the prime movers and initiators - not mimic men – guided by the needs of the market. [See e.g. Antoine, Rose-Marie, *Trusts and Related Tax Issues in Offshore Financial Law*, Oxford University Press, 2nd edn, 2012, chs 1 & 2].

We don’t know these facts because our vision is obstructed by the far more pervasive ‘bad press’ on the offshore sector. Very few have taken the time to examine carefully the reality behind the sector, and what it represents. The offshore/international sector has been, especially in recent years, repeatedly held up as a negative phenomenon, involving shady deals and criminal activity – the bogeyman. Nothing is said though about the wholesale export of these more modern legal commercial principles involving, banking, trust, company, commercial law in the offshore environment, to the shores of these very same nations that criticize offshore financial centres and the laws that support them. So, while some of us may realize that Jersey, Isle of Man and Guernsey – Cayman, BVI; important offshore financial centres are in fact all British territories. Few of us understand and appreciate that several states in the USA, perhaps the most strident critic of Caribbean offshore financial centres, have copied our offshore laws and policy lock, stock and barrel. I am referring her to Delaware, Atlanta, Colorado, and Alaska and the like. [See Antoine, above, ch 4, for a detailed description on these, what I have termed ‘Onshore Offshore Financial Centres.]

I have examined this in detail and the picture is telling. Few industries, however, have attracted the kind of hypocrisy allowed to permeate and distort the legal and economic framework of this sector, even well-established principles in economics, trade, domestic law and international law.

My conclusion has been that once again, it is a tale of one set of standards for them, and another, far less advantageous for us. Indeed, so successful has been the anti-offshore lobby, we have even persuaded ourselves that the term 'offshore' is tainted somehow. Some of us have tried to change the name to 'international'. Since we are being 'disruptive', let us acknowledge that this is the name Trinidad and Tobago preferred, for example, based on the so called 'Kuwait model' which ironically, has borrowed from the region's offshore laws. I have refused to do this and make no apology. I do not think that we should allow ourselves to be defined and redefined. There is nothing inherently wrong about the term 'offshore' and in any event, whether we call ourselves international or anything else, everyone knows what we are speaking about.

I concede that it is undeniable that there are credible regulatory and even ethical issues in the OFC, as in any financial sector. There are rules and products that though not abusive in or of themselves can be susceptible to abuse. However, the approach to international regulation of the sector has been self-serving and cynical, to say the least. When we examine the case law, it is clear that where these issues are concerned, the outcome for onshore developed countries has been different, that is, more advantageous than where offshore jurisdictions are concerned. Attempts by onshore countries to bully offshore nations to abandon or compromise such developmental policies are without foundation. Today, the OFC is in retreat mode. Time will tell...

But what does this have to do with forging a future for the Caribbean? The 'how we got here' is instructive.

The perception that the aggression aimed at OFCs was as a result of errors, or wrong directions in terms of the management of the sector, or its laws is misplaced. On the contrary, the economic and legal policy that sustained OFCs can be seen to have legitimacy in terms of legal principle, as I will demonstrate. Rather, the crisis facing the sector is as a result of the Caribbean being unwilling or unable to stand up to assert our sovereignty and our right to a slice of the pie, even in the face of the kinds of double standards the industry is continually being faced with.

There is a kind of *déjà vu* in this and in practically every sector and the lesson here is wide-ranging. It strikes me, as I have just assumed the Chair of the Regional Commission on Decriminalizing Marijuana, that we have been here before. For years, some persons, such as Rastafarians, were pressing, even before the Courts, for the decriminalization of marijuana. This was met with harsh criticism, derision and a heavy-handed criminalization policy, which, if anything fuelled crime. Yet, almost

overnight, when certain US states announced legalization of marijuana, it was as if a magic wand had been waved and it suddenly became okay for us!

In the OFC as in other sectors, often, we do not need more work, nor more talent or even more research – what we really need is courageous leadership to stand our ground.

Where are we now? – TIEAs, FATCA and Aggressive Disclosure

Since 2009 we have seen renewed aggression against OFCs (the election of President Obama was not coincidental), which resulted in two main international initiatives: (1) the emergence of TIEAs and the institution of FATCA, where local banks (foreign to the US) are compelled to automatically disclose information about banks. These initiatives were grounded in an onslaught on the principle of financial confidentiality, demonizing it where offshore activities were involved, outrageous assertions of extraterritorial jurisdiction by certain onshore countries like the US and very damaging propaganda about money laundering. [See Antoine, Rose-Marie, *Confidentiality in Offshore Financial Law*, Oxford University Press, 2013, 2nd ed.].

This may seem innocuous and even good and sensible policy. Why should transnational companies and wealthy persons be able to bypass the good old USA and put their monies offshore? In fact, these are radical and controversial (even outrageous) international law and international tax law principles, completely violative of comity and sovereignty. What is worse, the well-established and well respected orthodox principles of international law, conflicts of laws and tax law remain entrenched for every other area of endeavour. We are therefore in a kind of schizoid arena since these new aggressive principles of law are only being applied to the offshore financial construct.

So for example, in extradition matters, if the US wished to extradite someone from the UK, even the most heinous criminal, the established rule of international law that no country enforces the foreign fiscal and penal laws of another, and the principles against dual criminality still obtain. This is the reason why a country does not extradite if it has abolished the death penalty but the other has not, as is the case here.

This is what I mean by double standards: A niche, narrow exceptions to what are accepted principles of law based on fairness, based on sovereignty and comity, have been carved out only for offshore matters. Why? The answer is for reasons of the economic interest of powerful onshore nations like the US and Germany. This is why I have always maintained that the debates surrounding the OFC have little or nothing to do with high moral or legal principle and everything to do with dollars and cents.

The Myth about Money Laundering

Money laundering was the first line of attack, perpetuating the myth that OFCs are havens for crime. Money laundering was seen as a soft target, but who are the money launderers? Was Madoff involved in the offshore sector? No. Was BCCI? No. Not even Stanford from Antigua was an offshore investor, though he was used to label the OFCs. He became a citizen of Antigua and therefore, he could not invest in the offshore sector which caters exclusively for non-residents. His dealings were very much onshore finance – a much sidestepped fact.

The Banker notes that “no financial institutions are immune [to] money launderers.” This is the reason for the onerous banking restrictions now in traditional international banks. In fact, they all (Barclays, Royal Bank Scotia, etc.) have offshore branches today, since offshore financial business has entered the mainstream of finance.

Indeed, typically, offshore jurisdictions have had much tougher anti-money laundering laws than onshore ones. Note that T&T is one of the last to amend these laws. The real issue has always been the loss of revenue to offshore countries as investors chose alternative methods of genuinely transnational business. Money Laundering has been the Achilles heel in a propaganda war

Signing away our birthright with TIEAS (Tax Information Exchange Agreements)

Yet, intriguingly, in both examples that I have given, the TIEA and the FATCA (Foreign Account Tax Compliance Act), it is we ourselves who have signed away our birthright. A treaty, ironically, is a legal instrument based on consensus, an agreement between two or more sovereign nations. We signed it, and in so doing, agreed to ignore correct legal principle. Similarly, we signed the FATCA Agreements, though with a big stick behind us. This is compelled consent, somewhat like the forced amnesty in the (July 1990) attempted coup.

Am I being naïve? Yes, to some extent since we were in a corner. Some, like Prime Minister Barrow, complained. However, my point is that we did not see the kind of fighting back, the courageous leadership that requires solidarity, etc. to demand that our voices be heard. (The ship-rider agreement and the initiative by Prime Minister Kenny Anthony to defy extortion from American Airlines in the OECS are some of the few examples of solidarity.)

In 2001, we started to see a counter-initiative to the OECD aggression and threats at blacklisting in the *High Level* Consultations, held in Barbados. There was in fact a pull back from the OECD nations. However, the onslaught was relaunched after the world recession in 2009. Indeed, OFCs were scapegoated in the recession – (lamenting that tax profits were being siphoned offshore), when in reality the financial crisis had nothing to do with tax liabilities. It was about the greed and mismanagement of Wall Street.

Tax Policy and the Legitimacy of the Offshore Sector

Let us examine the issue of tax.

First, it has always been the case that any country remains at liberty to create and define a tax policy which provides tax incentives to foreigners. Nonetheless, small, developing countries like ourselves are being told that we cannot get into the act. Yet, the USA, Canada and practically every country in the world offers incentives to foreigners, so much so that our own wealthy persons do not bank locally. Rather, they go to Miami and the like. Our best brains and most enterprising are poached by Canada and offered 5-year tax holidays. No one speaks of unfair tax competition, which was what the OECD first labelled Caribbean OFCs for daring to do this also for foreign investors. Providing tax incentives is a legitimate exercise in sovereignty.

Moreover, both domestic and international law in all countries had recognized the difference between tax evasion and tax avoidance or tax planning. The landmark cases come from the UK and the US, not the Caribbean [*Westminster Case* – “every man is entitled to, if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be.”]. Due mainly to the success of OFCs however, we have witnessed the undermining of this principle, with the result that it is difficult to predict when one is simply trying to arrange one’s financial affairs in a fiscally prudent manner or commit a crime. Much of tax planning has now been criminalized – itself a hugely controversial move. In addition, more financial products and situations are being taxed.

Notably, the US and similar countries have claimed taxation from citizens even if living abroad and even when citizens decide to give up their US citizenship, as occurred famously a couple of years ago with Internet (Microsoft) millionaires who decided to migrate elsewhere because of high taxes. Currently, one is taxed at the point of departure. We have witnessed the unilateral expansion of the accepted parameters for taxation.

Secondly, international law has always upheld the principle that no country should uphold the foreign fiscal law of another. Tax law is expected to stop at the border.

There is nothing unlawful, or even unethical about OFCs not cooperating in foreign tax matters. In fact, it is the opposite, but OFCs were vilified for this well established, appropriate and legally correct approach. Yet, the TIEAs that we have signed make it compulsory for the host country (us) to disclose information on all activities, accounts, etc. where it is ‘foreseeably relevant’ to a tax proceeding in the requesting country – a very low threshold.

OFC Laws Predated Free Trade

Remarkably, the onslaught at the liberalization of tax policy in the Caribbean and offshore allies, comes at a time when free trade is touted as the order of the day – not, it seems, for poor countries that actually do have a competitive edge!

Concept of Greater Interest in Taxation lays it bare

Consequently, because of these entrenched legal principles, there had been a clash of national economic interests surrounding the principle of financial confidentiality and tax profits. As I predicted, when the erroneous legal rationales of aggressive onshore nations were laid bare, the next frontier was pure, undisguised economic, political aggression in the form of TIEAs and FATCA.

In the first set of cases, involving several Caribbean banks, Nova Scotia, and Royal Bank, the US courts had used direct, extraterritorial means to force information. They subpoenaed bank managers and even foreign bank managers, in one case a Canadian national, and even lured one manager into a Miami airport to get information on accounts. There was success but it was highly controversial. The principle of comity was assessed – the respect that each nation is supposed to give to the laws of another country when there is a conflict of laws.

Here, these conflicts were caused by the opposing economic interests coming together. Bank personnel from offshore countries were statutorily bound by financial confidentiality laws while the US courts sought disclosure of the information and threatened contempt if not. What the courts were supposed to do was to assess which country had the greater interest in upholding its laws. In other words – balance the competing interests and then determine whose law to apply.

Tellingly, in every one of the several cases, the US courts ruled that their interests in upholding the laws were greater than the laws of the offshore countries, despite the fact that these offshore laws supported financial and industrial sectors that practically upheld the entire country’s economic infrastructure. There is little or no evidence of equity here and tax profits were paramount.

To quote from one case, *Garpeg*:
“*Taxes are the life blood of this country.*”

US courts clearly saw and supported their own country’s economic and political interest with no regard for that of the offshore country. So much so, that one could see dissonance when examining how those same courts treated with the principle of financial confidentiality, much valued in patent conflicts, e.g. Similarly, US courts were contradicting accepted boundaries of territorial jurisdiction to compel offshore banks that had links onshore to surrender information.

Yet, these aggressive rulings came at a price. Other onshore nations, in particular, the UK and Canada, were not amused. Canadians, for example, accused the US in the *Field* case, of “judicial imperialism.” Several UK cases, such as *McKinnon*, criticized the approach of unilaterally expanding jurisdiction, saying:

“If every country where a bank happened to carry on business asserted a RIGHT to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.”

The trouble for onshore jurisdictions was that they still could not get past the entrenched traditional principles of law, such as the non-enforcement of foreign tax law, the dual criminality rule, etc. Courts, even their own courts, were refusing to abolish these centuries-old principles which gave legitimacy to the offshore sector. Clearly therefore, onshore countries were not able to win the war fairly. Valid legal principles did not support disclosure and the dismantling of the offshore regime.

Moreover, there was antagonism by countries like the Bahamas, Cayman, etc. where there is no direct taxation liabilities for *anyone*, having to play ‘fiscal policemen’ for foreign onshore countries to enforce their own tax laws. This also offended a principle called dual criminality, that is, if it is not a crime in my country, I cannot assist in enforcing your law on grounds of comity – the respect that nations are supposed to have for each other’s law.

Even beyond the question of tax, OFCs were on good legally principled ground. For example, the offshore trust that was developed, a special kind of trust created by statute, was buffered by the Hague Convention on the Law of Trust, which intentionally or not, endorsed some of the then seemingly more radical provisions that offshore jurisdictions were creating, e.g. giving flexibility to choose which

country's law would govern the trust and abolishing ancient rules of trust which were viewed as inhibiting commerce.

It was not, therefore so easy to win the jurisprudential war, especially with scholars like myself who began to interrogate these issues seriously and question the motives of counter law initiatives.

The solution was to get OFCs to agree to play the game of the onshore countries, on their terms, regardless of the damage to be done to OFC jurisdictions, leading to the signing of TIEAs, and FATCA. Clearly, before we went ahead and agreed to sign TIEAs and FATCA, the courts and authorities could not legally provide onshore countries with information on persons investing here, thereby triggering tax liabilities and breaching financial confidentiality. It was simply not justifiable on legal grounds, even in their own courts!

Whereas they could not succeed in law, they succeeded in legal diplomacy. I see that this Conference has a section on diplomacy, including labour diplomacy. We should add legal diplomacy to the list, since this has had a huge impact on our economic and political fortunes.

So here we are. Can the pie be shared? All of the attention in this new era is focused on inflows – monies being invested from onshore nations to our shores. Perhaps, as a start, we can start using these TIEAs to begin accounting for the millions flowing from our collective shores from our wealthy investors, the hoteliers, the manufacturers. Perhaps if we fought back, as Martin Luther King did by not buying from that store, we can make a dent.

Whatever we do, we must recognize that we have succeeded in creating a bold, dynamic and legally justifiable economic and legal infrastructure, but we have not had the courage nor the vision to defend and sustain it. Do we now roll over and die or can we restore balance, inject some measure of fairness in this paradigm? If we are to achieve the desirable outcome to sustain this sector for the good of the region, we do need to disrupt and upset the status quo even a little. This requires bold action and brave leadership on all fronts.

This is the presentation, "The Caribbean Offshore Financial Services Revolution – A Bold, Futuristic Initiative Requiring Brave Leadership," made by Professor Rose-Marie Belle Antoine, Dean of the Faculty of Law, The UWI St. Augustine on the first day of the Forum on the Future of the Caribbean, May 5-7, 2015.