"Tax Havens and Public International Law: The Case of The Netherlands Antilles[*]"

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Abstract

This paper identifies changes to tax havens' legislation as a result of 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 this is a solution for adoption by other tax havens. The paper then argues that such a model is not appropriate for use in a small economy which cannot rely on a supportive mother country nor 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.

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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 advocate the *status quo* with respect to tax havens, with the argument that tax competition is good because low tax rates have the advantage of attracting corporations and are a source of income for small economies.
- The second is the risk of offending their opponents, those who criticize the *status quo* with respect to tax havens, with the view that it is not tax competition, but rather tax harmonization which 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*, which are sometimes perceived as true *heavens*! 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 will be the basis for reflection. Along with tourism, taxation is indeed the mainstay of this small economy.[2] So leaving tourism aside (while bearing in mind that a tax haven crisis can affect tourism as well[3]), the Netherlands Antilles is often presented as a leading financial centre offering an attractive regime with low tax rates. Many international financial firms have a presence in the Netherlands Antilles, and to a lesser extent in Aruba.[4]

The reason why is because until recently tax rates ranged between 2.4 % to 9.66 %, depending on the type of income a company generated.[5] These tax rates would make the

[1] Amos C. Peters, *Exploring Caribbean Tax Structure and Harmonization Strategies*, Bulletin of the International Bureau of Fiscal Documentation 2002, May 2002, p. 178 (186).

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

[3] The choice of haven is also, in practice, influenced by considerations of location, even if another tax haven situated further from the client offered greater tax advantages (see Rotterdam institute for Fiscal Studies, *Regional aspects of tax havens, in* International Tax Avoidance, Boston/Antwerpen/London/Frankfurt, Kluwer, 1979, p. 107).

[4] There were 33 offshore banks operating in 2000, originating mainly from the Netherlands and Venezuela.

[5] When deriving their net income out of interest, royalty, dividend, trading, management and consultancy, offshore 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 these already low percentages. Also, under Dutch law, Dutch corporations were able to transfer their statutory seats to the Netherlands Antilles in certain 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).

Netherlands Antilles seem a veritable tax "*heaven.*" This used to be true, but recently these tax rates have been raised to a standard 34.5 %, so it may be asked whether it is still true.

This paper aims to show why a balanced approach should be advocated when dealing with tax havens, even if it 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 legislator can both satisfy the international community and preserve a local economy largely based on offshore financial and tax services.

The Kingdom of the Netherlands encompasses the Netherlands, the Netherlands Antilles, and Aruba[6]. The Netherlands (also known as Holland, two of its larger provinces) is the part of the Kingdom situated in Europe. The Netherlands Antilles, then, 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 these five islands, Curacao is the largest, containing 75% of the approximately 200,000 inhabitants of the islands. Aruba originally formed part of the Netherlands Antilles but acquired a separate status in 1986. Another reason for leaving Aruba aside in this paper is that its offshore industry is much less important than that of Curacao, so this paper focuses on the Netherlands Antilles, and deals with Aruba only occasionally.

With respect to the relationship between the motherland and its dependent territories, the situation is as follows. In theory, the Netherlands Antilles and Aruba are autonomous as regards the management of their affairs, since the mother country in Europe is responsible only for foreign affairs, defence, and external economic relations.[7] In practice however, the Netherlands Antilles, more than Aruba, are very dependent on the European part of the Kingdom.[8]

The introduction proposes a few distinctions with respect to the terms used therein, to prepare the reader to the background and substance of these changes in the tax laws of the Netherlands Antilles. At the outset this paper refers to the "Netherlands Antilles" as a tax "*heaven.*" It could have used the term "*fiscal paradise*," as the French, Spanish or Portuguese do, or the German "*tax oasis*," terms with much the same flavour, but it will use the English expression "*tax haven*," much more appealing than "*offshore centre*" or "*low tax*

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

[7] See C. Kortmann, P. Bovend'Eert, *Dutch Constitutional Law*, The Hague/London/Boston, Kluwer Law International, 2000 (37): the autonomy and equivalent status of these overseas territories *vis-à-vis* the State in Europe is guaranteed by a Charter which is the basis for this federation *sui generis*.

[8] Idem (40).

jurisdiction."[9] This paper is using the term "*tax haven*" in an entirely neutral sense, without implying any judgement whatever about the probity of any particular tax regime.[10] The term simply denotes a fiscally attractive location, a refuge from taxation, a haven in the basic sense of the word.

Is the traditional tax evasion/tax avoidance distinction still relevant for our subject?[11] 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[12]. 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 anti-avoidance laws, which prevent both companies and individuals from using tax havens in order to escape their national tax obligations. This was the case, for instance, of 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.[13] The aim of such domestic legislation is to prevent people from benefiting from tax competition seen as harmful to the community as a whole.[14]

In addition to these internal measures taken by high-tax countries, multilateral organizations like the European Union (EU) or the Organisation for Economic Co-operation and Development (OECD) use political pressure and threats of economic reprisals in order to eliminate harmful tax competition. Even the World Trade Organization has an interest in promoting better trade-related tax legislation. This is exemplified by the recent challenge

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[9] See generally, Thierry Francq, Alain Damais, *Comment fonctionnent les centres offshore?*, Problèmes économiques 2000, no. 2.674 dated July 19, 2000, p. 1; Mykola Orlov, *The Concept of Tax Haven: A Legal Analysis*, Intertax, vol. 32, no 2, 2004, p. 95; see also art. 209 B, French General Tax Code, as amended by art. 104 of Finance Act for 2005.

[10] Caroline Doggart, *Tax havens and their uses*, *The Economist Intelligence Unit*, *United Kingdom*, 2002, p. 1.

[11] 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.

[12] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom,* 2002, 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, Boston/Antwerpen/London/Frankfurt, Kluwer, 1983, vol. LXVIIIa, p. 15 (para. 35).

[13] 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, 14 December, 2001, *Hughes de Lasteyrie du Saillant*, no 211341, RJF 2/02 no 160, concl. G. Goulard, p. 112); ECJ, 11 March 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, JOAN 21 Sept. 2004, p. 7298; CE, 10 Nov. 2004, no 211341. 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*, FR 21-04, p. 15; J. Le Calvez, *Brèves remarques sur l' "exit tax" et le droit communautaire*, D. 2004, n° 13, p. 933.

[14] For an overview of the situation in the Netherlands, see Johan Barnard, Jacques Overgaauw, 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.

before the Appellate Body of the United States of America (U.S.) foreign sales corporation tax regime[15].

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 reason is that the Netherlands Antilles response took the form of a move from their favourable international tax regime towards a more internationally accepted tax scheme for foreign investors. 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.[16]

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, and then tries to analyze 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.

[15] 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 Corporation." WTO Doc. WT/DS108/AB/R. WTO Appellate Body, February 24, 2000,* Am. J. Comp. 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 Paul R. McDaniel, *The Impact of Trade Agreements on Tax Systems, in* Festschrift für Klaus Vogel zum 70. Geburtstag, Heildelberg, C. F. Müller Verlag, 2000, p. 1105), Carol Doran Klein, 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 Europe, see Otmar Thömmes, *CFC Legislation and EC Law*, Intertax 2003, vol. 31, no. 5, p. 188.

[16] Johan Barnard, Jacques Overgaauw, 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.

II THE NETHERLANDS ANTILLES AND THE WORLD COMMUNITY

Interest in tax havens is not new, but it is increasing.[17] And September 11 is only one of the factors behind this increase.[18] 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, and in all these investigations the Netherlands Antilles have been included.

This is because tax regimes like that of the Netherlands Antilles have led to dramatic capital inflows to offshore centres.[19] However, there has recently been a slowdown, at least within the Caribbean jurisdictions. The offshore sector's contribution, which was 20% of the gross domestic product in 1985, fell to 8% in 2000.[20] 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.[21]

A. <u>From Heaven to Hell: The Netherlands Antilles Characterization as a "*Tax Haven*"</u>

Although the following organizations are not the only international bodies pressuring for changes,[22] the main reason for this economic recession is the "blacklisting" of these

[17] 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, 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; Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, IBFD, *Taxation & Investment in the Caribbean*, Amsterdam, IBFD, 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 Jacques Malherbe, *Harmful Tax Competition and the Future of Financial Centres in the European Union*, *in* Festschrift für Klaus Vogel zum 70. Geburtstag, Heildelberg, C. F. Müller Verlag, 2000, p. 1125).

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

[19] This rate of increase is well in excess of the growth of total outbound foreign direct investment. Foreign direct investment in these regions increased more than five-fold over the period 1985-1994, to more than USD 200 billion: see OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998, 80 p. (no. 35). In fact, for every percentage point increase in the top corporate tax rates in industrialised countries, capital inflows to offshore centres in the Caribbean rose by 19%. Moreover, a IMF study indicates that offshore financial centres banks' cross-border assets and liabilities grew by over 6% annually during 1992-1997 to around USD 5 trillion (FSF, *Report of the Working Group on Offshore Centres dated April 5, 2000, available on <http://www.fsforum.org>*, 2000, 68 p. (no. 17)).

[20] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 157.

[21] Contrasting with Aruba which is among the highest *per capita* income economy in the region, the Netherlands Antilles have a growth rate, for 2002, of 0.8% (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, 35 p.*, 2003, and IMF, *Country Report no. 03/159 entitled "Kingdom of the Netherlands - Netherlands Antilles: Selected Issues and Statistical Appendix"*, 45 p., 2003, no. 1, no. 6).

[22] See the Financial Action Task Force on Money Laundering ("FATF").

jurisdictions by the OECD, by the EU, and by the Financial Stability Forum (FSF).[23] So two bodies, the OECD and the FSF were exerting pressure for changes. Let us look at the FSF findings first.

1. The Financial Stability Forum

The FSF,[24] which brings together senior representatives of national financial authorities and international financial institutions, issued a report on April 2000.[25] It characterized the Netherlands Antilles as among the most dubious of tax havens, along with, for instance, Aruba, the British Virgin Islands, the Cayman Islands, Liechtenstein, Mauritius, Nauru, Seychelles, or Vanuatu.[26] In September 2003 in Paris, the tenth meeting of the FSF suggested that the monitoring of the offshore financial centres should be an integral part of the International Monetary Fund's (IMF) financial sector surveillance work,[27] a suggestion repeated a few days later in Dubai.[28] The IMF has already published an assessment in 2002 of the offshore financial situation in Aruba.[29] The assessment in the Netherlands Antilles was published in February 2004.[30]

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[23] Bruce Zagaris, *Caribbean Jurisdictions Must "Get Up, Stand Up" Against U.S. Discriminatory Sanctions*, Tax Notes International 2002, dated August 19, 2002, p. 923.

[24] The FSF is an initiative of the President of the Bundesbank, Hans Tietmeyer, 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 1999, no. 1042, newspaper dated Feb. 25, 1999, available on <http://www.africaonline.co.ci/AfricaOnline/infos/nourep/1042int1.html>). See also: FSF, *Who we are?*, 2003, available on <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 Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 152).

[25] FSF, *Report of the Working Group on Offshore Centres dated April 5, 2000, available on <http://www.fsforum.org>*, 2000, 68 p.

[26] FTF, *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 2000, newspaper dated May 26, 2000, available on <http://perso.wanadoo.fr/ceric/colloques/pageprogramme/rencontres/documentations/partie...>.

[27] FSF, *Tenth Meeting of the FSF (Paris, 10 September 2003)*, 2003, available on <http://www.fsforum.org>.

[28] FSF, *Statement by Roger W. Ferguson, Jr., Chairman of the Financial Stability Forum, International Monetary and Financial Committee Meeting (Dubai, 21 September 2003)*, 2003, available on <http://www.fsforum.org>.

[29] IMF, Monetary and Exchange Affairs Department, Jan Willem van der Vossen, Ross Delston, Gabriella Ferencz, Steve Butterworth, *Aruba - Offshore Financial Center Assessment*, 2002, vol. I & 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, nor information on ownership and activities (IMF, Monetary and Exchange Affairs Department, Jan Willem van der Vossen, Ross Delston, Gabriella Ferencz, Steve Butterworth, *Aruba - Offshore Financial Center Assessment*, 2002, vol. I (8)).

[30] IMF, Assessment of the Supervision and Regulation of the Financial Sector, Kingdom of the Netherlands, February 2004, 2 vol.

2. The European Union "Code of Conduct"

In much the same way, the European Union is tackling harmful tax competition amongst 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 (the "Code of Conduct")[31] designed to eliminate harmful tax competition in the business taxation area.[32] According to the proposed timetable, the phasing out of harmful tax measures will be completed by 31 December 2005.[33]

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 such territories.[34] 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.[35]

[31] Within the EU, the Primarolo Group (from the name of Dawn Primarolo, then UK paymaster general) identified harmful tax practices within the EU.

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

[33] 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 January 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 on <http://europa.eu.int/>*, 2003).

[34] Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy (98/C 2/01), JOCE C 2/1 dated January 6, 1997, CELEX no. 31998Y01106(01).

[35] See Mrs. Primarolo report: 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 12-14 September 2003, Riga, Latvia, available on <http://www.eurofaculty.lv/taxconference/>, Dawn Primarolo, *Report of the Code of Conduct group on business taxation (Primarolo Report), available on <http://www.uv.es/cde/TEXTOS/primaloro_en.pdf>*, 1999, . The Netherlands has already taken measures to suppress some regimes (In his decree of November 20, 2000 (Decree of November 20, 2000, no. IFZ2000/1292M, 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 American corporations for their foreign acquisitions and reorganizations aimed at gaining certain tax advantages by using differences in qualifications of the BV's (transparent versus non-transparent) in the relation the Netherlands versus the United States), rulings no longer would be issued and that furthermore, through a change in legislation, the Dutch fiscal unity regime would no longer apply to these structures. The policy behind this decree was the principle of good faith towards treaty partners and the ongoing international discussion on harmful tax competition (see 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 12-14 September 2003, Riga, Latvia, available on <http://www.eurofaculty.lv/taxconference/> (3)). 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, Erik Velthuizen, *APAs and ATRs: The new Dutch regime in a European perspective*, EC Tax Review 2002, no. 1, p.

The tax package was finally agreed in Luxembourg by ECOFIN[36] on June 3, 2003. As it stands, this consists of three measures: the Code of Conduct, a directive concerning the taxation of savings income, and a directive on the taxation of interest and royalty payments between associated companies.[37] As "*soft law*," the Code of Conduct is only a political commitment agreed upon by the Member States.[38]

Despite the non-binding nature of the Code of Conduct, certain tax regimes could be challenged separately under the EC competition law rules, and more particularly state aid rules.[39] State aid measures would have far more impact than the non-binding Code of Conduct, since they are enforceable by the European Court of Justice.[40] However, EC competition rules do not apply to the Netherlands Antilles.[41] For this reason, the OECD threat of economic reprisals is of much greater concern to small economies like the Netherlands Antilles because these are the only real and effective measures that could be taken against them.

4, and Marja de Best, *Rulings : nouvelle politique néerlandaise,* Bulletin européen et international 2001, no. 4, p. 3).

36 The Ecofin Council consists of the ministers of economy and finance of the member states.

37 European Commission, *Taxation: Commission Welcomes Adoption of Package to Curb Harmful Tax Competition, IP/03/787, Brussels, June 3, 2003, available on <http://europa.eu.int/>*, 2003.

38 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.

39 See Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C, JOCE dated December 10, 1998, no. 384/03). The Commission authorization granted in 1987 and extended in 1994 for the arrangements for international financial services centres in Dublin expires in 2005 (Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy (98/C 2/01), JOCE C 2/1 dated January 6, 1997, CELEX no. 31998Y01106(01) (no. 3)). The Council has recently agreed extensions beyond the end of 2005 of benefits of the following measures would be granted:
- Belgium: Co-ordination Centres, extension to December 31, 2010;
- Ireland: Foreign Income, extension to December 31, 2010;
- Luxembourg: 1929 Holding Companies, extension to December 31, 2010;
- Netherlands: International Financing, extension to December 31, 2010;
- Portugal: Madeira's Fee Economic Zone, extension to December 31, 2011. See *Results of Council of Economics and Finance Ministers, Brussels, 21 January 2003 - MEMO/03/13*, 2003, available on <http://europa.eu.int>.

40 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, 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 (189); Jan de Goede, *European Integration and Tax Law,* European Taxation 2003, vol. 43, no. 6, p. 206, 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 12-14 September 2003, Riga, Latvia, available on <http://www.eurofaculty.lv/taxconference/> (5).

41 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.

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

Every tax lawyer is aware of the 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. And this is the view of the U.S., which is a major player. For instance, Paul O'Neil, U.S. Treasury Secretary, stated in May 2001 that "*the US 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*."[42] But the question now is: to what extent is this competition permissible? It seems that the OECD Members are open to competition as long as it is transparent and non-discriminatory.[43] The OECD position expressed in a report issued in 1998 will be presented before dealing with the Netherlands Antilles response to such 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).[44] It defines the factors to be used in identifying harmful tax practices. The key features of harmful preferential tax regimes are (i) no or low effective tax rates, (ii) lack of transparency, (iii) lack of effective exchange of information, and (iv) "ring-fencing" of regimes.[45] "Ring-fencing" refers to the situation where 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, which 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.[46]

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[42] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 153, and Akiko Hishikawa, *The Death of Tax Havens?,* Boston College International and Comparative Law Review, available on <http://www.bc.edu/bc_org/avp/law/lwsch/journals/> 2002, vol. 25, no. 2, p. 389 (412). It is the Clinton administration that really pushed for the OECD to "handle" tax havens. This is not any more the case with the Bush/O'Neil administration, although this changed after September, 11 in the sense that tax havens need to disclose as much information as possible in order to determine whether funds are used to finance terrorism.

[43] R. Hammer, J. Owens, *Promoting Tax Competition*, OECD publication available on <http://www.oecd.org/dataoecd/63/11/1915964.pdf> 2002.

[44] OECD, *Harmful Tax Competition: An Emerging Global Issue*, 1998, 80 p.

[45] Idem (26). However, the "ring-fencing" criteria has been dropped, because what is most important for the OECD is the transparency and the exchange of information.

[46] Idem (27). In the Netherlands Antilles, the tax revenue for 2002 on income and profits is 11.1 % of the GDP, of which 2.5% is offshore (see IMF, *Country Report no. 03/160 entitled "Kingdom of the Netherlands -*

The Ministerial Council of OECD instructed its Committee on Fiscal Affairs to produce, from the number of jurisdictions meeting the tax haven criteria, a list of those which were uncooperative ("*List of Uncooperative Tax Havens*"), to be completed by 31 July 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.[47] Cited among these jurisdictions are Aruba and the Netherlands Antilles.[48] What risks did the Netherlands Antilles face if it had maintained its existing old tax regime?

In this case, the OECD allowed its members to take defensive measures either under domestic legislation or under tax treaties, such as, for instance, (i) disallowing tax deductions, (ii) disallowing tax exemptions, (iii) disallowing tax credits, or other allowances related to transactions with Uncooperative Tax Havens. The economic reprisals could also have taken the form of a "transactional" charge. These levies would have been imposed on certain transactions involving Uncooperative Tax Havens.[49] Of course, the legality of these 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.[50] And the OECD timetable has also been recently undermined by the EU by permitting some of its own members (who are also OECD members) to avoid tax information exchange until 2010 at the earliest.[51] But the Netherlands Antilles took seriously this threat.

Netherlands Antilles: 2003 Article IV Consultation - Staff Report; Public Information Notice on the Executive Board Discussion, 35 p., 2003, p. 29).

[47] OECD, *2000 Report: Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices, available on<http://www.oecd.org/dataoecd/9/61/2090192.pdf>*, 2000, 30 p. (no. 17); see also Francis Lefebvre, *Liste des paradis fiscaux de l'OCDE,* Bulletin européen et international 2000, no. 4, p. 23.

[48] The critical remarks which were made to the Netherlands Antilles tax laws can be summarized as follows: (i) there were no legal mechanisms that allow tax information to be exchanged with other tax authorities upon request, (ii) beneficial ownership information was not available to the public, and (iii) 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, available on<http://www.oecd.org/dataoecd/9/61/2090192.pdf>*, 2000, 30 p (17).

[49] Idem (no. 35).

[50] In favour of the legality: Jakob B. Gross, *OECD Defensive Measures against Harmful Tax Competition Legality under WTO,* Intertax 2003, vol. 31, no. 11, p. 390 (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 on <www.ito.org>*, 2001, 17 p. See also, Romain Grynberg, Bridget Chilala, *WTO Compatibility of the OECD "Defensive Measures" against "Harmful Tax Competition" available on <http://www.thecommonwealth.org>, The Journal of World Investment*, 2001, and OECD, *Project on Harmful Tax Pracices: The 2001 Progress Report, available on <http://www.oecd.org>*, 2001, p. 9.

[51] 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 on <http://www.itio.org>*, 2003; Andrew Parker, *OECD Tax Plan Faces Collapse,* Financial Times (European edition) dated October 10, 2003, front page, also available on <http://www.itio.org>.

2. The Netherlands Antilles Response

Indeed, it remains true that if the Netherlands Antilles did not make a commitment to eliminate harmful tax practices by 31 July 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 therefore 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.[52] The Netherlands Antilles responded by deciding to change its tax framework. To achieve that, it also needed to amend its relationship with the mother country in Europe.

III THE NETHERLANDS ANTILLES AND THE KINGDOM

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

In the post-war years, the advantages of important tax treaties between the Netherlands and the U.S. and the United Kingdom were extended to include the Netherlands Antilles.[53] At present, however, the Netherlands Antilles has a "tax treaty" with the Netherlands, known as the Tax Arrangement for the Kingdom (TAK)[54]. The Netherlands Antilles also has a tax treaty with Norway, but that is all; all the other tax treaties were terminated, because some third-country residents had abused the treaties to reduce withholding taxes on investments in

[52] See letter dated November 30, 2000, from Mr. W.R. Vogos, Minister of Finance, for and on behalf of the Government of the Netherlands Antilles to Mr. Donald Johnson, Secretary General of the OECD, available at <www.oecd.org>.

[53] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 157; see generally, Marshall J. Langer, *The Outrageous History of Caribbean Tax Treaties With OECD Member States*, Tax Notes International 2002, p. 1205.

[54] See generally Rijkswet van 28 Oktober 1964, houdende Belastingregeling voor het Koninkrijk - history: Staatsblad 28 Oktober 1964, no. 425, Staatsblad 1996, no. 664, and Staatsblad 2001, no. 647 (an unofficial English translation is available on <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 on <www.lowtax.net>). Also, on August 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 December 2001 (PriceWaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles And Aruba, 40 p., February 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. For the implementation of the NFF in Aruba, see J. P. Ruiter, A. T. Snijders, *Beschrijving van het Nieuw Fiscaal Raamwerk in Aruba*, Weekblad Fiscaal Recht 6532, dated June 4 2003, p. 923. Although the TAK follows the lines of a treaty, from a public international law perspective, it is domestic legislation.

OECD countries.[55] By contrast, the mother country in Europe has of course concluded many tax treaties, but the Netherlands Antilles are excluded from their scope. This is the case, for instance, of the France-Netherlands and the U.S.-Netherlands tax treaties.[56] However, the U.S. has recently entered into an exchange of information agreement with the Netherlands in respect of the Netherlands Antilles, which shows that new treaties with important trading partners are now under consideration.[57] The Netherlands Antilles are currently negotiating tax treaties with the U.S., Venezuela, Spain and a few other countries.[58]

A. The New Fiscal Framework

1. The OECD Friendly Measures: Paradise Lost?

At the end of 2001, the Netherlands Antilles' Parliament adopted two important pieces of legislation: (i) the New Fiscal Framework[59] ("NFF"), and (ii) the law ratifying the amendments to the TAK. The NFF and the TAK both entered into force on 1st January 2002.[60] 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.

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[55] See generally, Marshall J. Langer, *The Outrageous History of Caribbean Tax Treaties With OECD Member States*, Tax Notes International 2002, p. 1205 (1210). The tax treaty with Norway has been revised. In June 1987 the U.S. Government abruptly withdrawed the extension of the U.S.-Netherlands treaty to the Netherlands Antilles (Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, 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 certain specific loans by Netherlands Antilles corporations to U.S.-resident corporations, and it applies only to interest on certain Eurobonds), see IBFD, *General*, *in* Taxation & Investment in the Caribbean, IBFD, 2003, binder 1, para. 7.2.1. But Netherlands Antilles fully terminated its treaties with Denmark and the United Kingdom. The Central Bank of the Netherlands Antilles announces that negotiations on tax treaties with Venezuela, Mexico, Spain, Italy, and the United States (the 1986 new treaty with the U.S. has never been ratified by that country) have started or will begin soon (see Central Bank of the Netherlands Antilles, *Annual Report*, 2003, available on <http://www.centralbank.an>; IBFD, *General*, *in* Taxation & Investment in the Caribbean, IBFD, 2003, binder 1, para. 7.2.1).

[56] France-Netherlands Tax Treaty dated March 16, 1973, JORF dated Dec. 27, 1973 (art. 3.1.b)); see also U.S./Netherlands Tax Treaty, dated Dec. 19, 1992 (art. 3.1.b)), and Maarten van der Wijden, *The New Protocol to the Netherlands-United States Tax Treaty*, Bull. Int'l Bur. Fisc. Doc. 2004, p. 304.

[57] 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 April 17, 2002, available on <http://usinfo.state/gov>; see also, Michael Molenaars, *Exchange of information under the Netherlands-US Income Tax Treaty*, Tax Notes International 1999, vol. 18, no. 17, p. 1713, and IBFD, *Annual Report*, 2002-2003, 134 p. (52).

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

[59] 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 December 29, 1999. But because it became clear that the negotiations with the Dutch government regarding the amendments to the TAK (see infra) would take longer than expected, the law was finally dated December 19, 2001. See generally, PriceWaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles And Aruba, 40 p., February 7*, 2002; 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, IBFD, 2003, binder 1, para. 6.

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

The NFF comprises three laws, the most important being the law on corporate income tax. The highlights of the NFF are first, the introduction of a uniform corporate tax regime with a standard profits tax rate of 34.5 %, and secondly, a broad participation exemption regime,[61] which looks very much like the French participation exemption regime.[62] 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.[63]

To understand fully the amendments to the TAK and their impact, the prior situation must be understood. Before the amendments, withholding tax on dividends paid to corporate shareholders established in the Netherlands Antilles and holding at least 25% of the shares in the Dutch subsidiary paying the dividend could be reduced from 15% to 7.5%, or to 5% if the dividend recipient was subject to a profit tax rate of at least 5.5%.[64] As the old profit tax rate in the Netherlands Antilles ranged between 2.4% and 3%, this meant that the Dutch withholding tax on dividends was, in practice, reduced to 7.5%. Therefore, the total tax burden on such inter-corporate dividends ranged between 9.7% and 10.3% 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%, provided that at least 25% of the paid-in share capital (or voting rights) in the Dutch company are held by the Netherlands Antilles company. With respect to conduit dividends flowing through the Dutch B.V., a further tax credit of approximately 3% may be available.[65] In the event that the 25% condition is not fulfilled, the Dutch dividend withholding tax rate increases to 15%.[66]

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[61] Under the participation exemption regime, gains or profits made from foreign participations are exempted for 95 %. The remaining 5 % is taxed according to the uniform charge of 34.5 % (the effective charge therefore amounts to about 1.7 %). The exemption is applicable if the taxpayer is a shareholder accounting for at least 5 % of the paid in capital or of the voting rights, and If the possession of shares is less than 5 %, 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 euros): see PriceWaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles And Aruba, 40 p., February 7*, 2002, (6).

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

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

[64] See Art. 11(3) of the Rijkswet van 28 Oktober 1964, houdende Belastingregeling voor het Koninkrijk - history: Staatsblad 28 Oktober 1964, no. 425, Staatsblad 1996, no. 664, and Staatsblad 2001, no. 647 (an unofficial English translation is available on <http://oneline.ibfd.org>. See generally PriceWaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles And Aruba, 40 p., February 7,* 2002, (15-16).

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

[66] PriceWaterhouseCoopers, *Update on Fiscal Developments and Possibilities in the Netherlands Antilles And Aruba,* 40 p., *Feb. 7*, 2002, (15-16).

To summarize, this 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.[67] The entire amount withheld in the Netherlands is then paid back by the Dutch government to the Netherlands Antilles.[68] However, the NFF does not entirely abolish the old tax provisions: the NFF succeeded in preserving its very competitive tax rate of 2.4-3% for existing companies, but only until 2019. This is known as the "*exception clause*," or as the "*transitional arrangement*."

2. A Transitional Period up to 2019: Paradise Postponed

The transitional arrangement for offshore companies has to be discussed because it is of great practical interest. In the transitional period up to and including the year 2019,[69] existing offshore companies will be granted the benefits of the old offshore regime, provided certain requirements are met. This implies that the previous 2.4-3% tax rates, for these companies, are guaranteed up to and including the year 2019.[70] Similarly, the new rules, which alone are designed to comply with international standards regarding transparency and ring-fencing, are inapplicable to taxpayers that have elected to remain subject to the old offshore regime under the transitional rules.[71] In addition to the transitional period, the NFF has created attractive new vehicles with the aim of securing financial business after the transitional period has expired.[72] There has been no official reaction from the OECD as of today. 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

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

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[67] Idem (16).
[68] Idem.
[69] 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, IBFD, 2003, binder 1, para. 6.
[70] Willem G. Kuiper, *New Fiscal Regime for the Netherlands Antilles - The Return of a Tax Haven,* Shoreliner.com 2002, no. 9.
[71] See generally, Rob. F. Havenga, *New Ruling Policy in the Netherlands Antilles,* Intertax 2003, vol. 31, no. 2, p. 87.
[72] The exempted Private Limited Companies ("NA B.V.") can opt for a 0% tax charge.

1. A Limited Impact

The OECD has not been totally indifferent to the impact of the changes it requests on the local economy.[73] Although it is very clear that precise and reliable data on the economic impact are difficult to collect,[74] it seems that offshore financial centres contribute some 8% to 10% of the GDP of tax havens.[75] In the Netherlands Antilles, approximately 8,000 persons work, directly or indirectly, in the offshore services industry. Since the population is less than 200,000 people, that accounts for around 10% of the active population.[76] Surprisingly, the Netherlands Antilles Parliamentary debates prior to the vote on the NFF do not reveal any in depth discussion on the impact of tax measures on the local economy.[77] 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.[78] And that prediction happens to be sound; it seems that the offshore sector has already begun to recover following the implementation of the NFF.[79]

2. The Specificity of the Netherlands Antilles Case

One should not forget that the Netherlands Antilles are in a special and privileged situation: if economic problems arose because of the NFF regime, they would be in a position to call for help from their mother country in Europe. This 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.[80]

But what about the Republic of Nauru, the Pacific island nation which Australia is using as a holding station for unwanted asylum seekers? Sure, it could be said that Nauru's

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[73] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 151. The OECD has held various meetings with various countries to achieve global cooperation (For a description of these meetings, see Akiko Hishikawa, *The Death of Tax Havens?*, Boston College International and Comparative Law Review, available on <http://www.bc.edu/bc_org/avp/law/lwsch/journals/> 2002, vol. 25, no. 2, p. 389).

[74] 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, 35 p.*, 2003, (33, "*Appendix II - Kingdom of the Netherlands – Netherlands Antilles: Statistical Issues*").

[75] Akiko Hishikawa, *The Death of Tax Havens?*, Boston College International and Comparative Law Review, available on <http://www.bc.edu/bc_org/avp/law/lwsch/journals/> 2002, vol. 25, no. 2, p. 389 (402).

[76] *Politieke besluiteloosheid ondermijnt offshore-industrie ("Political Indecisiveness Undermines the Offshore Industry"), summary of a Press Conference in Willemstad, Curacaom 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% of total population, that is 72,906 persons (Atlapedia online, *Countries AtoZ,* available on <http://www.atlapedia.com/online/countries/nethanti.htm> 2003, Netherlands Antilles).

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

[78] Idem.

[79] 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, 35 p.*, 2003, (no. 2, no. 7).

[80] Caroline Doggart, *Tax havens and their uses, The Economist Intelligence Unit, United Kingdom*, 2002, p. 156.

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.[81] Indeed, for a long time international banks have ceased to deal with it![82] Could we also say that OECD pressures over these small economies reflect "neo-colonial attitudes" by rich countries?[83] One reason for such belief is that since these countries are in economic decline, they will be unable to survive without the income generated from their offshore banking fees,[84] and 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.[85]

It is true also that Nauru settled its 1989 famous case with the Commonwealth of Australia and obtained a few dollars in damages,[86] but we are all aware of the adverse effect of declining phosphate reserves on the local economy of Nauru, and it is far from certain that Australia will be willing to help Nauru financially, if Nauru was moving towards more internationally accepted standards. Nevertheless, Nauru has moved that direction on December 3, 2003, hoping in the meantime that "*OECD Member countries and other international organisations [will] take these adverse revenue effects [over the small economy of Nauru] into account in determining the development assistance they provide.*"[87] One American author has written extensively about harmful tax competition, focusing on the Caribbean jurisdictions and the U.S. sanctions.[88] It is not obvious that one should condemn such exhortations to Caribbean jurisdictions to "Get up and stand up" against possible discriminatory sanctions.[89] The view here is that a fundamental reconsideration of the legal status of these sovereign tiny Island States can not be avoided.[90]

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

[82] Sean Dorney, *Nauru debts*, Newspaper The World Today, dated May 5, 2003, available on <http://www.abc.net.au>.

[83] As stated by Vanuatu's Finance Minister (see Akiko Hishikawa, *The Death of Tax Havens?*, Boston College International and Comparative Law Review, available on <http://www.bc.edu/bc_org/avp/law/lwsch/journals/> 2002, vol. 25, no. 2, p. 389 (415)).

[84] Idem (415).

[85] 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).

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

[87] Letter dated Dec. 3, 2003 from Nauru Minister of finance to the OECD Secretay-General.

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

[89] Bruce Zagaris, *Caribbean Jurisdictions Must "Get Up, Stand Up" Against U.S. Discriminatory Sanctions*, Tax Notes International 2002, dated August 19, 2002, p. 923.

[90] 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, Arthur Watts, *Oppenheim's International Law*, 9th ed., London/New York,

IV CONCLUSION

After this short review of "*Taxation in the Netherlands Antilles*", one might ask whether the days of tax havens are numbered[91]. But given the economic impact of suppressing tax havens in some poor economies like Nauru or Vanuatu, can one not sympathise a little with those wishing "*Long life to tax havens!*"? A moderate solution has to be proposed: it is only after balancing the costs and profits of suppressing a particular attractive tax regime that a jurisdiction will be willing to adopt OECD-friendly measures. The Netherlands Antilles example is one example. Malta could be another. While a candidate for entry into the EU, Malta had probably recognised that it may be more profitable, in the long run, to belong to the EU than to preserve tax and financial regimes objected to by the international financial community.[92]

The long-term solution is to completely rethink the legal status of these small Island States.[93] Is full sovereignty meaningful when economic independence is unavailable? The economy of these Island States is so dependent on one or two larger nations, that one can wonder whether these states should not be simply "annexed," 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 towards these 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[94]. This 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 these "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 deserts that tax oasis can exist at all?[95]

Longman, 1996, Vol. I/Introduction and Part 1, 554 p. (121)). On micro-states, see also Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit international public*, 6th ed., Paris, L.G.D.J., 1999, 1455 p. (no. 278).

91 Akiko Hishikawa, *The Death of Tax Havens?*, Boston College International and Comparative Law Review, available on <http://www.bc.edu/bc_org/avp/law/lwsch/journals/> 2002, vol. 25, no. 2, p. 389.

92 *Malta*, Offshore Red 1999, p. 7. Malta is now a member of the EU.

93 Personal conversation with A. (Teun) V. M. Struycken, on Nov. 13, 2003, Nimegue.

94 United Nations Charter, June 26, 1945, art. 2.1.

95 "*Steueroasen können nur existieren, wo es Steuerwüsten gibt*," ("*tax oasis can only exist where there are deserts*") cited by Jakob B. Gross, *OECD Defensive Measures against Harmful Tax Competition Legality under WTO*, Intertax 2003, vol. 31, no. 11, p. 390 (400).