# TAX JUSTICE FOCUS

The quarterly newsletter of the tax justice network

THE FRENCH EDITION

2007 VOLUME 3, NUMBER 3

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Published by the Tax Justice Network International Secretariat Limited
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For free circulation, ISSN 1746-7691

# EUROPE LEADS THE FIGHT AGAINST TAX HAVENS

*Europe contains a number of tax havens, but is becoming less tolerant of them: in fact, the European Union has increasingly taken the lead in the global fight against tax havens and offshore financial centres. Christian Chavagneux and Ronen Palan outline how the EU is leading the way.*

The European Community's Court of Justice (the highest court in the EC) has signalled how attitudes are shifting in Europe. As recently as 2005, the Court tended to side with individuals and corporations and not with states seeking to protect their revenues. But then, in a landmark judgement in April 2005 (the Halifax case), the Court ruled that European law forbids transactions having the sole purpose of creating a tax advantage. This interpretation was reaffirmed in a case involving Cadbury Schweppes in May 2006, when the court condemned what it called "wholly artificial" subsidiaries in tax havens. In another important judgement delivered on 13 March 2007 (the so-called 'thin-cap' affair), the Court ruled that states could restrict freedom of establishment of wholly artificial structures devoid of economic reality and having tax avoidance as their principal objective.

Three swallows do not, of course, make a summer: we must carefully monitor future rulings. But the change in attitude signals that something important is happening.

European states, for their part, have been making progress on three fronts.

First, on the **taxation of the savings of non-residents**. Since July 2005, an EU directive applying to all member states requires information to be exchanged on non-resident deposits with the relevant national authorities. Austria, Belgium and Luxembourg secured the right to retain their banking secrecy, but are required to impose a withholding tax on earnings from deposits starting at a rate of 15 per cent from 2005 to 2007, rising to 20 per cent from 2008 to 2010, and to 35 per cent thereafter. This depended on applying equivalent measures to the principal non-EU member state competitors (Andorra, Liechtenstein, Monaco, Saint Moreno, Switzerland) plus all the dependencies and associated territories

of member states (the Channel Islands, Isle of Man, and Caribbean islands). And, despite pessimism about being able to do this, this was achieved. European financial diplomacy has continued: in early 2006, the Cayman Islands and Montserrat agreed to information exchange in principle, and the British Virgin Islands and Turks and Caicos opted for the principle of a withholding tax.

The European Commission admits that some of Europe's offshore capital has simply fled to Asia as a result. But this has prompted the EU to widen the geographical scope of its initiative, and now it is seeking to open negotiations with Hong Kong, Singapore, Macau and Japan, as well as with Canada, Bahrain, Dubai and the Bahamas. Since last March, there are clear indications that the Commission has targeted several loopholes in the directive, and is working with financial intermediaries to try and identify how best to close them. After that, the EU will have to convince the tax havens to follow suit, as it has already done with the original directive. According to tax expert Richard Murphy "if that happens, most of the existing loopholes in the directive will disappear".

Second, the EU is also pushing for the **harmonisation of company taxation** across the community. Multinational companies with subsidiaries in more than one European country pay taxes in the countries they operate in, but they tend to shift profits to the lowest-tax country through complex systems of transfer pricing. A European-wide tax base would reduce the incentives for doing so: applying a "formulary apportionment" process would mean that group profits are taxed just once in the EU, and the resulting revenues are then distributed between the different countries according to agreed criteria (e.g. amount of capital invested, sales turnover) as is already done between states in the U.S., and in Canada. There is a long way to go before a consensus is reached, but Germany and France support the proposal. The United Kingdom and Ireland, predictably, oppose it, because they fear that harmonisation of the tax base will be followed by harmonisation of tax rates. The proposal is also opposed by the Baltic states and Slovakia, which fear that a harmonised tax base will be narrower, and will allow more exemptions, than their existing regimes. The Commission has given itself until 2008 to come up with a directive for company taxation.

*"The code of conduct introduced an important innovation that overturns a traditional objection of tax havens: that under the principle of sovereign equality large and powerful states cannot dictate to smaller states what laws or rules they can or cannot impose in their own territories. "*

Finally, for several years a **code of good conduct on business taxation** has been applied within the European Union. The code does not have the status of a legal instrument, but provides an informal approach to regulation which has nonetheless proved effective. In adopting this code, member states have been working towards eliminating a number of harmful tax competition practices and avoiding new ones. The code sets out explicit criteria for identifying harmful tax practices in the EU, including: lack of transparency; tax rates significantly lower than in other countries; tax advantages specifically targeted at non-residents (i.e. ring fenced from the local economy) or targeted at economic or financial activities not connected to real domestic economic activity; or ways of taxing profits that fall outside international norms.

The code of conduct introduced an important innovation that overturns a traditional objection of tax havens: that under the principle of sovereign equality large and powerful states cannot dictate to smaller states what laws or rules they can or cannot impose in their own territories. To avoid the charge of 'imperialism', the code does not try to elaborate a principle of "just taxation" and then impose this on recalcitrant states. Instead, taking a line of reasoning adopted by the OECD, the code accepts the principle of tax competition, allowing states freedom of choice in this matter. But then, crucially, it insists that the tax regime's rules are applied equally on all businesses in the jurisdiction. This confronts and challenges jurisdictions that have created a niche in the global economy precisely by making a distinction in their tax treatment between resident and non-resident companies. Citing the code, for example, in 2006 the Commission forced Luxembourg to abandon its tax regime for holding companies. Similarly, the adoption of new tax regimes by Jersey, Guernsey and the Isle of Man from 2008 onwards (notably the 0% tax rate on business profits) may be taken to task for not respecting the Code.

The struggle against tax havens has a long and difficult road ahead. But we should recognise that the European Union has already taken several positive steps, and seems to want to go still further.

*Christian Chavagneux and Ronen Palan co-authored* Les paradis fiscaux *published by La Découverte, Paris, new edition 2007*

## UPDATE

Europe is playing hardball on this: Reuters reported on October 2 that Singapore's refusal to soften its strict bank secrecy laws could scupper talks with Europe about a trade agreement. "Clearly people engaged in money laundering are looking for places like Singapore with low levels of transparency to actually engage in money laundering," said Glyn Ford, a Member of the European Parliament. "Is this a dealbreaker? Potentially yes."

# OBJECTIVE DOHA: TACKLING THE HAVENS

editorial

*Jean Merckaert*

In December 2008, six years after the Monterrey Conference in Mexico, Doha will be hosting the United Nations' follow up conference on Financing for Development. This choice of location calls for a moment's reflection, since the name of the capital of Qatar – an emirate bordered by the offshore financial centres of Bahrain and Dubai – is often associated with the resounding stalemate of the WTO's so-called 'development round' of trade negotiations.

*"the G-8 countries, which have the means but not the will to stamp out this phenomenon, tolerate this secrecy because of pressures from the principal beneficiaries of tax evasion: banks, multinational companies and super-rich people."*

But the chips are down. Sixty years after the universal declaration of human rights (December 1948) and seven years before the day of reckoning for achievement of the Millennium Development Goals (MDGs), Doha provides an opportunity for the international community to tackle the number one obstacle to the financing for development agenda: tax and legal havens. Secret repositories for the proceeds of crime, corruption and tax evasion, and generators of financial instability, these havens cost the poorer countries of the South between $500-800 billion annually – five times the UN's estimated cost of financing the MDGs.

International attempts to tackle the havens have patently failed. Since 2006 not a single country remains on the blacklist created by the Financial Action Task Force (FATF) set up by G-8 to combat money laundering. And yet organised crime continues to prosper. The Financial Stability Forum (FSF) has also dropped its own list of offshore financial centres not cooperating with the rules for financial surveillance. The rapid growth of poorly regulated financial instruments, including offshore hedge funds, remains a cause for concern. According to the OECD, which is tasked with tackling tax evasion, only three jurisdictions remain on its non-cooperating list (Andorra, Liechtenstein, and Monaco). Which begs the question: why do tax authorities still feel so powerless in the face of this phenomenon? The steps taken by the IMF and the United Nations to tackle money laundering and promote tax cooperation respectively, are equally unconvincing.

Crucially, these initiatives are organised in compartmentalised ways, making them almost totally ineffective. Trying to tackle dirty money flows without also tackling tax evasion, as the IMF has attempted, is pure delusion, because the secrecy space provided by the havens protects tax evaders as much as it enables illicit capital flight. As well as this, the G-8 countries, which have the means but not the will to stamp out this phenomenon, tolerate this secrecy because of pressures from beneficiaries of tax evasion: banks, multinational companies, super-rich people and even political parties with secret finances. By doing so, even when they don't operate as havens in the way that London and the American state of Delaware do, they become complicit in economic and financial crime and the looting of the countries of the South. Furthermore, it is a mistake to treat tax evasion as a lesser evil than handling the proceeds of other crimes: evasion undermines the legitimacy of states and deprives them of the means to take vital actions.

It will take a multiplicity of actors to put this subject at the heart of the Doha agenda. Fortunately, civil society organisations are not alone in taking on this issue. Under a Norwegian initiative, a task force is now being formed to tackle capital flight and tax havens, with Chile, France and Spain also participating, in the context of the work of the Leading Group on Solidarity Levies to Finance Development. The World Bank has also announced that it is preparing to launch a study of illicit financial flows from South to North, whilst also engaging with the United Nations in strengthening procedures for repatriating ill-gotten loot. The revision of the IMF's mandate could also provide an opportunity to clarify that institution's role in tackling the tax and legal havens. As David Spencer's article suggests, the United Nations Tax Committee could see its role reinforced as an outcome of Doha. The European Union, which has made some progress in tackling the havens, as Christian Chavagneux outlines in his article, could and should play a leading role at Doha.

This is another occasion for France, which holds the presidency of the EU during the second half of 2008, to act with credibility. But while Monaco and Andorra, which are closely linked to France, fight it out to see which will be the last to stay on the OECD's blacklist, it is hard to see this happening.

*Jean Merckaert heads the Financing for Development programme of the Comité Catholique Contre la Faim et Pour le Développement (CCFD)*

feature

# AFRICA: THE SHADOW WORLD OF OIL

Xavier Harel

*The oil industry provides unbridled scope for corruption, writes Xavier Harel. In Congo-Brazzaville, the regime of Denis Sassou Nguesso embezzles hundreds of millions of dollars annually from oil revenues, with the help of BNP Paribas, the French oil company Total, and the opaque legal systems of various tax havens.*

The shenanigans and opulent lifestyles of the offspring of some African presidents make regular headlines. Leader of the pack is the oldest son of Teodoro Obiang Nguema, Equatorial Guinea's dictator, who was given a $35 million villa in Malibu, California, complete with swimming pool and tennis court. Another is Gabonese president Omar Bongo's son, Ali, likewise the happy owner of a sumptuous pad in Malibu, this one valued at $25 million.

Until very recently the affairs of Denis Christel Sassou Nguesso, son of the president of oil-rich Congo Republic (not to be confused with the larger Democratic Republic of Congo-Kinshasa), were handled more discreetly. But publication of bank statements dating from 2004 and 2006 by British NGO Global Witness shows that he enjoys the same taste for high living as his peers: palaces, smart restaurants, top brand clothes and shoes, fine leather goods… Denis has spent up to $48,000 monthly on luxury goods, revealing a particular fancy for Louis Vuitton. Nothing prevents Denis from enjoying the high life: the young playboy directs Cotrade, a subsidiary of the Congolese national oil company – Société Nationale des Pétroles du Congo (SNPC), which is responsible for marketing the country's oil.

While 70 per cent of the Congolese population lives below the poverty line, the hundreds of millions of dollars he has squandered between Paris and Marbella didn't come from hard work on the part of Denis Christel. In fact they consisted of commissions on oil shipments paid into accounts held at the Bank of East Asia on behalf of Long Beach Limited, a company domiciled in Anguilla, with Denis Christel Sassou as sole beneficiary. For example, on 19 March 2005, Long Beach Limited's account was credited with $320,000: a commission arising from a shipment on the tanker Tanabe. The company's account was also topped up with commissions paid by Sphynx Bermuda and African Oil and Gas, shell companies used by President Sassou to embezzle oil rents for his own benefit.

These embezzlements would never have been revealed had it not been for an American vulture fund. Without the efforts of lawyers acting for Kensington – an American fund holding debt instruments valued at over $100 million – to track Congolese assets, we would still know nothing about who was hiding behind Long Beach Limited. The company was managed by nominees to avoid disclosure of the owner's identity: a handy way to keep dodgy commissions out of sight from prying eyes. Kensington seized $12 million from the accounts of Long Beach Limited and Elenga Investment Limited, another Anguilla registered company established for the benefit of Blaise Elenga, number two at Cotrade.

Oil companies are particularly attracted to the discreet ways of tax havens. SNPC – a public company responsible for marketing Congolese oil on behalf of the national treasury – made a habit of selling oil shipments at way below market price to Bermuda-registered Sphynx Bermuda, a company belonging to… Denis Gokana, president of SNPC. He resold the shipments at market price and pocketed hundreds of millions of dollars, at the expense of the Congolese people. Dozens of tanker cargoes were sold this way, via shell companies, for the sole purpose of embezzling oil rents. Both BNP Paribas, a major French bank, and commodity trader Trafigura, helped along the way.

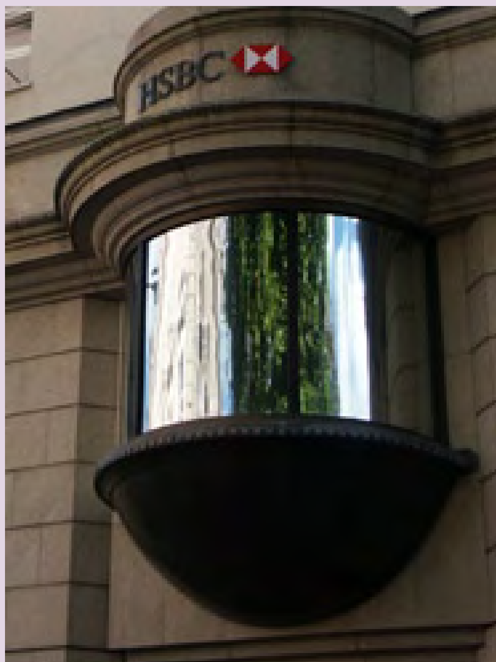
The British Virgin Islands and Jersey lie at the heart of a scandalous structure apparently created for the sole purpose of disguising ownership of Congolese oil reserves.

But first, we must backtrack slightly. When Denis Sassou Nguesso seized power in 1997 after a bloody coup d'état, he discovered that his predecessor, Pascal Lissouba, had handed control of a number of Congolese oil assets at way below their real value to the oil major

*"The British Virgin Islands and Jersey lie at the heart of a scandalous structure apparently created solely for the purpose of disguising ownership of Congolese oil reserves"*

## JERSEY IMPLICATED IN OTHER AFRICAN SCANDALS

The UK's Serious Fraud Office has begun a new investigation into British links with one of the biggest corruption inquiries in Africa. UK firms won huge contracts from the Kenyan governments of presidents Daniel arap Moi and Mwai Kibaki, but anti-corruption investigators have discovered that many were fictitious and amounted to state-sponsored looting. The SFO inquiry is concentrating on the movement of millions of pounds into accounts in Guernsey and Jersey controlled by Andrew MacGill, a 64-year-old arms dealer from Fife. Documents seen by the *Guardian* show that financing for some of the 18 suspicious security equipment contracts at the heart of the investigation was administered through a company called Investec Trust, which handled LBA's business from 2001 through accounts with the banks HSBC in Guernsey and Standard Chartered in Jersey.




*HSBC's office in the Channel Islands*

Internal audits showed that no questions were asked by Investec managers about LBA's receipt of funds from Kenya or Mr MacGill's arms dealing. It was only after the publication in March 2004 of a report by the former anti-corruption chief, John Githongo, that the company's lawyers recommended the firm make a suspicious activity report to Guernsey's financial intelligence service.

*The Guardian* (UK), Oct 1, 2007

Elf, which was omnipotent in Congo. The incoming ruler asked for compensation. In 2003, following a long period of negotiations, Elf, which was taken over by Total in 2000, ceded to the Congo – for a token payment – an old oil field (Likouala) which still held reserves of tens of millions of barrels. But instead of handing management of the field to SNPC, the government immediately sold it to a Congolese company with no experience in the oil industry, Likouala S.A. The IMF quickly suspected this was a device to fill the coffers of Sassou or one of his cronies. The Congolese argued that the transaction only involved Total, Congo and SNPC. Be that as it may, the proceeds from Likouala cannot be traced. And for good reason: Likouala S.A. is controlled by a trust created in the British Virgin Islands, which in turn is owned by a foundation based in Jersey. This is an obvious way to hide the real owners of the oilfield. As a result, several hundreds of millions of dollars have disappeared into thin air, to the benefit of a mysterious foundation in Jersey.

The oil industry feeds unbridled corruption. The Elf Affair revealed how a cut from each barrel of that company's output was paid into the Swiss bank accounts of the rulers of Congo-Brazzaville, Congo and Cameroon. Elf's former chairman, Loïk Le Floch-Prigent was well aware that on top of official payments made for oil licences, unofficial payments were also paid to those leaders' Swiss bank accounts.

The secrecy of tax havens provides perfect opportunities for the oil industry to corrupt dishonest leaders with relative ease.

*Xavier Harel is a journalist with* Le Tribune *and author of* Afrique: Pillage à huis clos

# TAX HAVENS AND ILL-GOTTEN WEALTH

*feature*

*Antoine Dulin & Jean Merckaert*

*A study published in March 2007 estimated the value of wealth embezzled by prominent dictators at $100–180 billion. Antoine Dulin and Jean Merckaert, who authored the study, take western governments to task for complicity in this looting.*

THE DIRECTORS DREDGE & RIGG

*With thanks to Private Eye*

Repatriation of dictators' loot has become a major issue on the international agenda. This is demonstrated by the powerful pressures that built up around the repatriation of Duvalier's funds held in Switzerland, and the likely repatriation to the Democratic Republic of Congo of around US$7 million accumulated by former dictator Mobutu Sese Seko which have been frozen in various Swiss bank accounts since 1997. However, the amount of funds repatriated to date is a drop in the ocean compared to the wealth that has been looted from countries in the South. This much is clear from the evidence produced in the report *Biens mal acquis . . profitent trop souvent: la fortune des dictateurs et les complaisances occidentales* (*Looted Wealth… is Profitable Too Often*) published in March 2007 by the Paris-based CCFD (Comité Catholique contre le Faim et pour le Développement, www.ccfd.asso.fr)

In this study, which details the different procedures for repatriating funds and the barriers put up to impede repatriation, CCFD estimates that the value of wealth embezzled just by the most prominent dictators over recent decades amounts to $100–180 billion: between one to two times the annual value of governmental development aid. In some countries, the value of looted wealth is equivalent to their annual Gross Domestic Product. And these estimates do not even include wealth embezzled by the dictators' relatives or cronies. In practice, the looting of assets has undermined the democratic aspirations of Southern countries, destroyed their economies, and drained the reserves of their central banks.

*"How credible is the preaching on good governance from Tony Blair and Gordon Brown's Commission for Africa, when so many major tax havens, not least the City of London, fly the British flag?"*

Despite the virtuous rhetoric of the agencies leading the global fight against corruption, it is less often remarked upon that this plundering of wealth happens with the connivance of western governments. During the Cold War, the governments of the United States, the United Kingdom and France actively supported despotic regimes or encouraged corruption to further their economic and geo-political interests. Even today, France continues to gives financial and diplomatic support to the regimes in Congo-Brazzaville and Gabon, notwithstanding the massive pilfering going on in both countries. The Elf Affair revealed the extent of this complicity and its connections into the heart of the French Establishment. In the United Kingdom, it has recently been revealed that weapons manufacturer BAE Systems has been paying enormous kickbacks to Prince Bandar of Saudi Arabia: the fact that these payments were routed via the Bank of England makes it clear that they were authorised at the highest levels within the government.

These examples help explain why western governments have been less than eager to seize and subsequently restore the wealth embezzled by these dictators. Of the huge sums involved, a mere $4 billion has actually been repatriated, and $2.7 billion has been frozen. Switzerland, anxious to restore its tarnished image, has led the way in making repatriations: Marcos ($658 million), Abacha ($594 millions), Montesinos ($80.7 millions). Jersey – a British tax haven – has repatriated some of the Abacha loot; the United States has returned some of Pinochet's ill gotten wealth to Chile. France, for her part, has returned nothing.

Nonetheless, for several years the international community has been working on procedures for facilitating the repatriation of stolen wealth. The Organisation of American States, the Council of Europe, the African Union and the European Union have promoted conventions and protocols relating to the fight against corruption. The United Nations' Convention Against Corruption (UNCAC), signed at Mérida in December 2003, which came into force in December 2005, addresses repatriation of stolen assets in its Chapter V, making it a fundamental principle of international law. To date 95 countries have ratified UNCAC, but there are no measures to monitor its effective application.

Since the end of the 1980s several procedures have been put into place to secure the cross border restitution of stolen wealth, but in practice these have proved to be minefields. Haitian NGOs have been battling for more than 20 years to secure the repatriation of the assets looted by "Baby Doc" Duvalier. At the start of June this year, the Swiss federal council was on the verge of returning $5 million frozen on account for several years to Duvalier's family, but delayed its decision on the grounds of legal technicalities. Thanks to NGO activism, supported by representations to the Swiss courts by two victims of Duvalier's regime, the freeze on the accounts has been prolonged for a few more months. But there is no certainty of victory in this case.

The international measures taken against tax and legal havens have not stopped them from thriving, nor from continuing to be amongst the principal barriers to repatriation of assets. They make it very difficult to accurately trace stolen funds because banking secrecy and the use of webs of legal entities (offshore companies, trusts, foundations, etc) makes it so easy to hide or disguise the real ownership of assets. They also enable the laundering of dirty money into the mainstream financial markets and allow illicit funds to be shifted very rapidly through the money markets to avoid detection.

In practice the freezing and repatriation of stolen wealth runs up against weaknesses in the system for international legal cooperation. France has refused support to Nigeria because it submitted its request in English; Britain has refused to cooperate with requests for assistance unless there is proof that the funds are actually being held within its territory; Switzerland does not investigate the real beneficiaries of accounts held under false names; Liechtenstein has around fifteen administrative and legal bases for delaying investigations and repatriation for as long as possible; countries such as Israel don't bother to reply to requests for legal mutual assistance. The pace of international justice simply can't keep up with the speed of international finance. As a result, former Malian dictator Moussa Traoré took advantage of procedural delays

*"And what about the hypocrisy of Nicolas Sarkozy, speaking on 26 July, when he invited Africans to invest their wealth rather than divert it – and then gave red carpet treatment the very next day to Omar Bongo, the kingpin of kleptocracy in Gabon for the past 40 years and a central actor in the Elf Affair?"*

in bilateral exchanges between his country and Switzerland to withdraw most of the funds in his accounts in 1991. In the case of Mobutu, Swiss authorities were only able to freeze $7 million of the $5 to $6 billion dollars embezzled.

Until northern countries take a lead in cracking down on the looting of countries in the South by tackling the predatory regimes and the tax and legal havens which support them, the looters will continue to benefit from this legal impunity. How credible is the preaching on good governance from Tony Blair and Gordon Brown's Commission for Africa, when so many major tax havens, not least the City of London, fly the British flag? And what about the hypocrisy of Nicolas Sarkozy, speaking on 26 July, when he invited Africans to invest their wealth rather than divert it – then gave red carpet treatment the very next day to Omar Bongo, the kingpin of kleptocracy in Gabon for the past 40 years and a central actor in the Elf Affair?

Meantime, the World Bank and United Nations have jointly launched their StAR initiative to assist countries from the South with tracking and repatriating looted wealth, and we can hope that civil society's growing interest in these issues will increase pressure for action. On 18th June 2007, the public prosecutor's office in Paris opened a preliminary investigation into the real estate holdings in France of a number of African dictators. This procedure follows on from a complaint about diversion of state funds raised by French NGOs Survie, Sherpa, and the Federation of Congolese Diaspora (FDC), originating from the report by CCFD. If other NGOs around the world get inspired by this initiative, perhaps one day the countries of the North will be forced to stop handling wealth stolen from the countries of the South.

*Antoine Dulin is the main author of* Biens mal acquis *under the direction of Jean Merckaert.*

### Table : Dictators and their loot

| Country / DICTATOR / period | Estimated looted assets ($) | Amount repatriated from abroad ($) |
|---|---|---|
| Philippines / MARCOS / 1965-86 | 5 to 10 billion (bn) | 658 millions (mn) (Switzerland-2003) |
| Mali / TRAORE / 1968-91 | 1 to 2 bn | 2.4 mn (Switzerland / 1997) |
| Nigeria / ABACHA / 1993-98 | 2 to 6 bn | 160 mn (Jersey / 2004)<br>594 mn (Switzerland / 2002-05) |
| Angola / DOS SANTOS / 1979- | several bn | 21 mn (Switzerland / 2005) |
| Peru / FUJIMORI / 1990-2000 | 0.6 to 1.5 bn | 80.7 mn (Switzerland / 2002-04)<br>20 mn (USA / 2006) |
| Haiti / DUVALIER / 1971-86 | 0.5 to 2 bn | |
| RDC - Zaire / MOBUTU / 1965-1997 | 5 to 6 bn | |
| Kazakhstan / NAZARBAEV / 1991- | 1 bn | |
| Kenya / MOI / 1978-2002 | 3 bn | |
| Indonesia / SUHARTO / 1967-98 | 15 to 35 bn | |
| Iran / M.PAHLAVI / 1941-79 | 35 bn | |

Source : CCFD, *Biens mal acquis… profitent trop souvent. La Fortune des dictateurs et les complaisances occidentales*, April 2007.

# ECONOMIC AND FINANICAL CRIME NEEDS A COORDINATED RESPONSE

feature

Chantal Cutajar

*Despite an increasingly sophisticated arsenal of national and international legal measures, economic and financial crime continues to flourish. Chantal Cutajar makes the case for harmonising countermeasures and strengthening cross-border enforcement. (A longer version of this paper (French only) is available for download from: http://www.taxjustice.net/cms/front_content.php?idcat=6)*

The cross-border nature of many economic and financial crimes requires international cooperation between governments. But principles of national sovereignty require that states retain responsibility for actions at national level. This sets up barriers to legal cooperation.

The international dimension of economic and financial crime is a structural issue: differences between national legal and fiscal regimes frequently create opportunities for arbitrage. Obstacles to international juridical cooperation include barriers to communication caused by differences between national systems, and technical problems because of the way international cooperation is actually organised. When economic and financial crime happens, these difficulties become amplified: there are also political obstacles, such as when investigations involve high ranking people, not to mention technical difficulties such as inadequate disclosure and legal blockages. Even so, progress is being made: the networks of mutual assistance are expanding, although there are questions about how effective they are.

Measures to harmonise procedural issues and legal definitions used by different legal systems would improve the effectiveness of cross-border criminal investigation and enforcement. Such harmonisation will be arduous, since it needs comparative law to be studied in depth.

Take money laundering for example. Money laundering is a secondary crime, involving people disguising or hiding the origins of proceeds from a primary (predicate) crime (e.g. theft, fraud, tax evasion, misusing public funds, etc.) But this raises problems in French jurisprudence: for a long time French courts disagreed over whether a suspect can be simultaneously investigated for money laundering as well as for the predicate crime. Two cases heard at the Cour de Cassation in June 2003 and January 2004 decided that this cumulation of charges is possible, where there is no overlap in the material elements of the primary crime and the subsequent money laundering.

Although it is not standard practice in all jurisdictions, combining investigation of both the money laundering offence and the predicate crime would strengthen crime enforcement, particularly with respect to confiscating the proceeds of crime. This cumulative approach should become the international norm.

In addition, different countries have different standards of evidence concerning the origins of illicit funds passed from one person to another. French law requires proof of a primary crime, which can be especially hard to provide when the crime takes place abroad. Belgian courts, on the other hand, are satisfied with proof that the money launderer was aware of the predicate crime or of the assets' illicit origins.

The need for legal harmonisation at EU level is becoming increasingly indispensable. Lack of harmonisation creates competitive distortions within the EU, allowing money launderers to choose whichever jurisdiction provides the lowest level of regulation.

*"Lack of harmonisation creates competitive distortions within the EU, allowing money launderers to choose whichever jurisdiction provides the lowest level of regulation."*

Despite frictions arising from different legal traditions, a common approach is gradually emerging. Italy, Netherlands, Portugal, the UK, Germany and Spain have put in place special arrangements for fighting economic and financial crime, showing several clear trends, such as:

- limited specialisation during the investigation stage, with the police playing the predominant role;
- the special arrangements are restricted to a limited range of economic and financial crimes, applying rules based on the legal qualification of the crime, and the importance of the case;
- resistance to over-riding the authority and prerogatives of judges handling the cases:

Fighting cross-border financial and economic crime requires a unified trans-national approach involving specialists capable of working in multidisciplinary environments. But the potential for taking this further is restricted by financial constraints. At this stage, the scope for cooperating along multidisciplinary lines remains fairly embryonic.

# HARMFUL TAX PRACTICES: NEXT STEPS FOR EUROPE

*feature*

Vincent Drezet

*International cooperation provides the most effective way to tackle tax competition and tax evasion. Vincent Drezet makes the case for harmonization of European Union rules, including company law, and for strengthening procedures for mutual assistance and information exchange.*

By now it's well established that tax competition and tax havens are systemic issues, providing the basis for numerous financial, legal and tax dodges. Even the term "tax haven" is too narrow, since the facilities provided by these territories are legal as well as fiscal. But it is far easier to talk about measures to prevent fiscal erosion and tackle the havens than it is to put these measures into practice: which is why we propose a common European approach, since the introduction of common rules throughout the European Union (EU) would improve our opportunities for tackling these problems effectively.

What we need are measures to limit variations in tax regimes across the different EU member states. We need to work towards further harmonisation, making substantial modifications to the European budget, overturning banking secrecy, creating a framework for better disclosure of legal information, putting an end to a wide range of tax loopholes, and strengthening anti-avoidance mechanisms. The outlines of such a general framework for promoting tax justice would be based on an analysis of tax competition and a variety of ground-breaking proposals.

It has become clear that tax competition is damaging in a number of ways. It lowers the tax burden on mobile factors while increasing the tax burden on fixed factors; it impoverishes public budgets, it promotes a race to the bottom, and it generally weakens tax systems. The only way to reverse these tendencies is to institute common rules across the EU. But this won't happen with a single wave of a magic wand.

For starters, the most important ingredient – political will – is noticeably lacking. But it should be possible for the European Council, the Parliament and the Commission to take steps towards harmonisation or towards enhanced cooperation. Modifying tax regimes on a concerted basis would take time: so one solution might involve the creation of a mechanism to gradually bring the different regimes into a broadly based framework which could be progressively harmonised over time. The thinking behind the European exchange rate mechanism (nicknamed "the snake"), which was used to restrict fluctuations within a progressively narrowing band, could equally be applied to the creation of a European 'tax snake'.

> *"The thinking behind the European exchange rate mechanism (nicknamed "the snake"), which was used to restrict fluctuations within a progressively narrowing band, could equally be applied to the creation of a European 'tax snake'"*

Such an instrument could be based on a number of measures:

- An upper rate limit on value added tax
- A minimum lower tax rate on corporate profits
- A European corporate tax
- Common rules for determining the tax base (for both VAT and corporate taxation) and for taxing companies operating through subsidiaries in different European countries
- A minimum effective tax rate on the earnings of individuals
- Harmonisation of rules and procedures for combating tax evasion and avoidance
- Taxation of companies and individuals on all corporate and private investments and shareholdings located in another EU member state but according to the tax regime of the investors' country of residence.
- Commitment to automatic exchange of tax information on all capital placed offshore – which would extend to individuals, companies, trusts, etc.
- Re-evaluation of the EU budget to finance a European solidarity fund

It will be essential to tackle tax evasion and avoidance in order to make such an instrument viable. This will require a legal system that allows fast access to information,

with appropriate checks and balances. Such a framework would, of course, need to be backed by sanctions and could be supported by a Europe-wide data bank modelled on Europe's VAT information exchange system V.I.E.S. which, though far from perfect, demonstrates that this project is technically feasible.

Information sharing, mutual assistance, and other forms of cooperation need to be extended to monitor and collect all types of taxes, both direct and indirect. For this, it will be necessary to revise the scope of the Council of Europe / OECD Convention on Mutual Administrative Assistance in Tax Matters to ensure that all taxes are included without exemption or derogation. The revisions should apply to all EU and OECD member states that have signed the Convention. At the same time the EU should strengthen its commitment to international cooperation on tax administration. The figures speak for themselves: one and a half million companies operate in more than one EU country, but the number of multilateral controls enabling a coordinated system for operating the community-wide VAT regime fell from 15 in 2000 to 3 in 2003.

On the other hand, the system for mutual administrative assistance only involved 2 per cent of these businesses in 2003. A 'right to proceed' could be established to allow investigators to pursue enquiries in another EU Member State where the company operates or has established a subsidiary. Considerable political will would be required to turn this into concrete legal measures backed by appropriate technical and human resources. Interestingly, the Commission noted back in 2004, that with only 30,000 inspectors covering the different Member States, it would take 40 years to inspect each and every of the 24 million entities registered under the VAT regime.

*"It should be made a requirement that the names of the ultimate beneficiaries (i.e. individual persons) who own a company or benefit from a trust should be disclosed, at the time of their inception, to the public authorities, without exception. This information would then be available for exchange with the public authorities of other Member States."*

One of the key characteristics of tax havens is the way they allow rapid and very low cost creation of shell companies which enable cross border financial flows and financial management to occur under a veil of anonymity. Typically tax havens provide a regime of opacity relating to company law; so it is possible to set up shell companies which hide or disguise the real identity of owners and beneficiaries. These types of entities (including trusts and foundations) are tailor-made for illicit financial transactions and money laundering. There is obviously a need to tackle this opacity and increase the transparency of all such structures.

The ultimate goal should be that the public authorities of all Member States collect and make available information relating to beneficial ownership of legal entities registered in their territories. This requires a sufficient level of supervision to ensure the strict integrity of a system for obtaining, managing and transmitting this information. It should also be possible for public authorities involved in the monitoring and implementation of the laws – during the course of their investigations – to exchange information about beneficial ownership of companies registered in other Member States of the EU. It should therefore be made a requirement that the names of the ultimate beneficiaries (i.e. individual persons) who own a company or benefit from a trust should be disclosed, at the time of their inception, to the public authorities, without exception. This information would then be available for exchange with the public authorities of other Member States, and sanctions could apply if it is not made available. Such a measure would make it possible to tax a resident of a Member State, even when that resident has transferred part of his or her wealth to an offshore trust, for example.

In the longer term it will be necessary to consider the case for harmonising company law throughout the EU. Within this context, the concept of territoriality as well as the group taxation of companies should urgently be reviewed. European legal standards relating to the location of registered offices, suppression of fictional or shell companies, common requirements throughout the EU relating to the creation or modification of companies, cooperation on information exchange, it is clear that company law cannot be disregarded in the struggle against tax havens and harmful tax practices.

Here, in short, is a proposal for how to inject a bit more social justice into the European economy.

*Vincent Drezet is a member of the Syndicat National Unifiés des Impôts (SNUI)*

# news and research

## Expert Meeting in Rome Considers Tax Agenda for Doha 2008

*by David Spencer*

The UN's Financing For Development Office sponsored a meeting in Rome on September 4-5, entitled "Tax Aspects of Domestic Resource Mobilization—A Discussion of Enduring and Emerging Issues". The Meeting was attended by fifteen experts worldwide, including David Spencer, a Senior Adviser to the Tax Justice Network (TJN).

The Rome Meeting focused on tax as a means of development, especially in developing countries and transition economies, and was intended to provide suggestions to the UN Tax Committee about helping developing countries and countries with economies in transition to mobilise domestic resources, as emphasized by the 2002 Monterrey Consensus and the 2005 United Nations World Summit. The World Summit had stated explicitly that the UN resolved "to support efforts to reduce capital flight and [to support] measures to curb the illicit transfer of funds." At the meeting TJN presented 18 recommendations for the UN Tax Committee, primarily related to capital flight and the resulting tax evasion and loss of government revenue.

Papers were also presented on common tax issues confronted by developing countries, and the need for greater South-South cooperation and coordination on tax issues: the sharing by developing countries of experience in the taxation of resources (including mining, petroleum, forestry, fishing and land); environmental taxes; tax aspects of trade (including the loss of tax revenue as a result of trade liberalization) and of investment (including the issue of the possibly harmful impact of tax incentives); transfer pricing issues (and the capacity of developing countries to confront transfer mispricing); the impact of capital flight; and technical cooperation in tax matters. (Issues of South –South cooperaton are also within the jurisdiction of the Special Unit for South-South Cooperation of the United Nations Development Programme.)

At the Rome meeting, Dr. Noureddine Bensouda of Morocco, the Chairman of the UN Tax Committee, made three recommendations.

First, the juridical statute [of the UN Tax Committee] should be reconsidered to give it more powers and permanence in the international tax scene; this could be achieved through making a permanent intergovernmental structure within the UN, composed of permanent technical experts who would work for the Committee and represent it at international events. Second, the UN Model Convention should be more than a simple guide. Instead, it should be endorsed by the UN as UN official document bearing all the positions, observations and reservations of the UN members. Third, funding is crucial. Member countries should raise the necessary funds, either by directly contributing to the trust fund, or by financing particular Committee's activities (such as by funding training workshops.)

*(Cont'd)*

### TIMELINE

**March 2002** – The International Conference on Financing for Development (FFD) called on developing countries to mobilize domestic resources for development (Monterrey, Mexico)

**December 2003** – UN General Assembly elevates Ad hoc group of experts on international cooperation in tax matters to Committee status, accountable to ECOSOC

**December 2004** – UN Tax Committee holds first session in Geneva. TJN represents civil society.

**April 2005** – High level meeting of UN ECOSOC, Bretton Woods Institutions, and UNCTAD confirms commitment to FFD and tackling capital flight and tax evasion

**September 2005** – UN World Summit resolved to support efforts to reduce capital flight (New York)

**June 2006** – TJN proposes Code of Good Conduct on Information Exchange to ECOSOC Substantive Session (Geneva)

**September 2007** – TJN proposes 18 recommendations for tackling capital flight and tax evasion UN expert meeting (Rome)

**September 2007** – Norwegian government announces creation of a Leading Group task force on tax havens and capital flight, including Chile, France and Spain (Oslo)

**December 2008** – Second Global Conference on Financing for Development (Doha, Qatar)

# news and research

## Expert Meeting in Rome

*(cont'd from p12)*

The UN's Financing for Development Office confirmed that the recommendations from the Rome Meeting will be reported to the 3rd session of the UN Tax Committee in Geneva, on October 29—November 2 (2007), and will also serve as an input for preparations for the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, to be held in Doha, Qatar in the second half of 2008.

The Rome meeting was attended by 15 experts worldwide: tax policy makers, administrators, and other experts (including six members and observers of the UN Tax Committee); the Chairman of the OECD's Committee on Fiscal Affairs (Paolo Ciocca of Italy); and three senior Italian tax officials.

TJN's 18 recommendations can be downloaded from the homepage of the TJN website.

*David Spencer is senior adviser to the Tax Justice Network. He is based in New York.*

## Letter from Africa

*by Alvin Mosioma*

*Do you feel poor and fleeced* was the title of an article in Kenya's Daily Nation about TJN 4 Africa's first Tax Forum, organised with the support of the Heinrich Boell Foundation. The title referred to Christian Aid's report 'The Shirts Off Their Backs' which was distributed at the event.

Billed under the theme Kenya Tax Revenue Growth – Who is paying? the event attracted over 150 participants, including tax experts, lawyers, academics, officers from the Kenya Revenue Authority (KRA), business people, journalists and representatives from local and international NGOs.

Guest speakers Jack Ranguma (former commissioner of domestic tax at the KRA) and Kwame Owino (programme coordinator at Kenya's Instititute of Economic Affairs) were asked to address three questions:

- Who is carrying the tax burden resulting from increased revenue collection?
- How has the Increase impacted on poorer households?
- How adequately does the tax system address issues of equity and distribution?

In summary the speakers made the following points:

First, despite having been successful in raising more revenues, a large percentage of expenditure (mainly relating to the development component of the budget) continues to be financed from external sources and Kenya remains reliant on external aid.

Second, only 7 per cent of the population actually pays direct taxes.

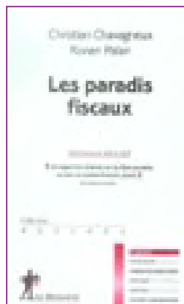
Third, government efforts to increase revenue collection are targeting mainly the so called informal sector.

Finally, tax evasion by rich people and large businesses has not received as much attention from government as tax evasion by "the little people".

During discussion it was suggested that tax collection in Kenya is arbitrary and provides tax officers with opportunities for corruption. In conclusion, it was agreed that tax payers need to know more about the importance of tax and the Tax Forum should continue with its work.

*Alvin Mosioma coordinates the Secretariat of TJN 4 Africa*

# reviews




**Les Paradis fiscaux (Tax Havens)**

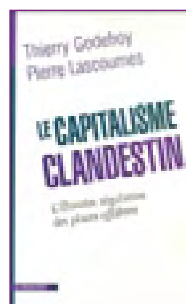
Ed. La Découverte

Collection Repères

Paris 2006, 122 pages

This wide ranging book examines tax havens from an historic, economic and political perspective. French journalist Christian Chavagneux and British academic Ronen Palan use simple and rigorous language to analyse the phenomenon. Notably they explain how tax havens, which emerged as a result of several converging factors in the mid 20th century, have become an unavoidable feature of global trade, finance and investment flows. A sense of powerlessness can overwhelm readers confronted with the multiplicity of powerful actors involved in offshore finance. But despite their clear analysis of the weakness of political reactions to this problem, the authors conclude on an optimistic note by drawing attention to the increased mobilization of civil society.

An updated and larger edition, this time in English and involving TJN's Richard Murphy, is in the pipeline.




**Clandestine Capitalism: The Illusion of Offshore Regulation**

Thierry Godefroy and Pierre Lascoumes

Ed. La Découverte, Paris, 2004, 262 p.

The globalisation of financial markets has turned offshore financial (OFCs) centres into indispensable features of the onshore capital markets. Trying to stigmatise them by concentrating on media friendly issues like mafia and terrorist money, misses the point and is ineffective, because the main users of these offshore centres are – either directly or through intermediaries – high level players in the industrial and financial markets and even nation states themselves.

What are the attractions of OFCs? There are several, first and foremost being their low or non-existent tax rates. There is also the secrecy space arising from how tax havens can use their sovereignty (which may be total or partial) to provide account holders with guaranteed anonymity, backed by a refusal to cooperate in information exchange with foreign authorities. Lastly, the huge laxity which applies to the formation and operation of companies and other legal entities created for non-residents seeking shelter from investigation -- or simply greater flexibility.

This book starts with a rigorous analysis of the advantages "offshore" provides, illustrated by concrete examples and factual case studies (both legal and fraudulent). The second part outlines the comprehensive history of efforts by the international community to counter the main abuses, notably unfair tax competition or refusal to cooperate. On the issue of tax competition, since George Bush's election the United States has joined the side of the tax havens by blocking dialogue. On the issues of administrative and legal cooperation, the authors show how the major offshore centres (Cayman, Barbados) have effectively blocked progress through the simple ruse of placing wonderful new laws onto their statute books without really changing the way they operate in practice.

The strengths of this book lie in the way it provides a methodical analysis of the subject, backed by factual information, while also pointing out themes around which political strategies could realistically be organised (subject to there being political will in the first place.) Although it was published in 2004, the book remains a useful tool because of the way it structures the many issues arising from the "offshore" problem.

*Jacques Terray*

# reviews

**Africa: looting behind closed doors. How a handful of players siphon African oil**

Xavier Harel

Ed. Fayard

Paris 2006, 288 pages

In Africa, oil stands for misery, war and dictatorship. But Le Tribune journalist Xavier Harel doesn't stop at this shocking conclusion. In this thoroughly researched work, he exposes the hypocrisy behind western concerns about poverty and corruption. Black gold would not be such a curse for continental Africa were it not for the complicity of France, the United States, the United Kingdom and China.

In Congo-Brazzaville, Sassou Nguesso knows he can count on unconditional support from the Elysée palace, from Total, and from BNP Paribas to assist with his wholesale embezzlement of oil revenues. Even as it attacks the 'enemies of democracy', the White House greets the tyrant Teodoro Obiang Nguema with open arms: oil from Equatorial Guinea is flogged off to American oil majors at bargain prices.

This book uncovers the links between oil, corruption and tax havens, highlighting the pernicious role of the City of London, whose notorious secrecy provides cover for criminals from around the world.

And Harel's conclusion: only through mass civil society mobilization will the voices of citizens prevail over those of a "handful of players".

## CALENDAR

**Oct 22–25**
Tax justice lecture tour of French universities: Rennes, Nantes, St. Malo, and Laval. John Christensen will be talking about the political economy of tax havens

**Oct 29**
Tax justice briefing to South Centre members in advance of the Third Session of the UN Tax Committee. Bruno Gurtner and John Christensen will be representing TJN.

**Oct 29**
UNCTAD meeting on Financial Reporting and Transparency in the Extractive Industries, Geneva. Richard Murphy will be representing TJN in discussions on the impact of International Financial Reporting Standards on both the Extractive Industries and developing countries.

**Oct 29–Nov 2**
Third Session of the Committee of Experts in International Cooperation in Tax Matters, Geneva. Bruno Gurtner and John Christensen to attend.

**Nov 7–9**
Annual meeting of TJN European Steering Committee in Paris (contact Michel Roy: michel-roy@secours-catholique.asso.fr )

**Nov 29**
John Christensen to speak in Rome at meeting of CIDSE (Coopération Internationale pour le Développement et la Solidarité)

**Sept 18–21 2008**
European Social Forum, Malmö, Sweden

**December 2008**
Second Global Conference on Financing for Development (the follow up to Monterrey (2002), Doha, Qatar