


Bibliography


commenting on the inclusive approach taken by every regional anti-money laundering group in contrast to FATF blacklisting, officials at the Asia-Pacific Group on Money Laundering have also said that they have ‘philosophical difficulties’ with the practice of blacklisting (Author’s interview 2002). In sum, the evidence presented above suggests that blacklisting by international organisations can be an effective means by which to pressure tax havens into reform. What remains in doubt, however, is whether this tactic is regarded as an appropriate means for building new global regulations in the area of tax and financial services.
character’. The penalty for straying too far beyond these expectations is damaging institutional legitimacy which, as covered above, also entails a decline in institutional effectiveness. OECD models are followed because of what the OECD is seen to be; if the organisation is seen to deviate from these ideals much of the reason to follow their recommendations is diminished. To the extent that the OECD compromises its expertise, impartiality, inclusiveness and/or pro-market credentials it discredits and devalues the pedigree of its outputs and has little else to fall back on. This threat is all the more immediate coming at a time when member states are keen to get as much as possible from their contributions (Marcussen 2001), and when the rise of such bodies as the FATF, FSF, IMF offshore audit and joint OECD-IMF-World Bank International Taxation Dialogue as well as the UN-sponsored International Tax Organisation threaten to displace the OECD from its position of the pre-eminent international organisation dealing with tax matters.

7. Conclusion: Blacklisting in Decline

The Financial Stability Forum has not repeated its three part classification of the perceived quality of regulation in offshore centres. In a November 2002 agreement with the IMF, the FATF agreed to discontinue its NCCT list, though jurisdictions on the list at that point remained until they had enacted specified reforms. Both the FSF and the FATF ceded some of their functions to the IMF’s audit of offshore jurisdictions. This initiative is notable for its very different conduct and tone, being much more inclusive and consensual in contrast to the earlier blacklisting exercises. The IMF reports are only published with the consent of the jurisdiction, the jurisdiction is invited to make written responses in the report, and there is no effort to make a dichotomous compliant/non-compliant distinction. The OECD has gone from referring to ‘tax havens’ to ‘committed jurisdictions’ to ‘participating partners’. In a partial exception, the OECD still maintains a list of ‘unco-operative tax havens’ (comprised of Andorra, Liechtenstein, Monaco, Liberia and the Marshall Islands), though this list seems to be declining in saliency, with the secretariat backing away from blacklisting jurisdictions like Antigua and Barbuda that have reneged on earlier commitments to exchange tax information. Given evidence of its effectiveness, why has blacklisting fallen out of favour?

The answer must remain speculative subject to interviewing those in the IMF and FATF itself later in 2004. However, two factors might be important, derived from both the theoretical discussion immediately preceding and from the views of those interviewed. The first is the tension between the identity and epistemic authority of international organisations, explored with reference to the OECD, and the confrontational cast of blacklisting. Those interviewed in tax haven jurisdictions were almost unanimous in arguing that the IMF’s insistence that the FATF discontinue blacklisting was because the IMF saw this practice as inappropriate and in danger of being discredited as arbitrary and discriminatory. It may well be said that officials in tax haven jurisdictions could be expected to malign the NCCT process along these lines. However in
review is the bread and butter of the OECD’s institutional life: ‘There has been no other international organisation in which the practice of peer review has been so extensively developed as the OECD’ (Pagani 2002: 7). These mechanisms are described as follows:

Peer review relies on the influence and persuasion exercised by the peers during the process. This effect is sometimes known as “peer pressure”. The peer review process can give rise to peer pressure through, for example: (i) a mix of formal recommendations and informal dialogue by the peer countries, (ii) public scrutiny, comparisons, and in some cases, even ranking among countries; and (iii) the impact of all the above on domestic public opinion, national administration and policy makers. The impact will be greatest when the outcome of the peer review is made available to the public, as is usually the case at the OECD. When the press is actively engaged with the story, peer pressure is most effective (Pagani 2002: 5-6).

This paper observes that peer review is not necessarily limited to member states, and has been regularly used in promoting policy change in non-members. The report also emphasises, however, several important preconditions. It stresses that peer pressure is not designed as a conflict resolution mechanism, and can never be used in a coercive or adversarial fashion, with ‘naming and shaming’ risking ‘shifting the exercise from an open debate to a diplomatic quarrel’ (6). The process and standards must be ‘credible’ (legitimate) in that they are endorsed by all parties before the particular studies get underway. Lastly, the parties being reviewed must trust the reviewer and the process and regard them both as impartial. Needless to say, each of these prerequisites has been missing in the tax haven campaign, and much of the tax haven case has been built on these discrepancies. In turn, these discrepancies have been important in the decline of blacklisting.

These findings illustrate the link between the effectiveness of particular pronouncements in effecting policy change and the reputation of the process and the institution in the specific case of the OECD. They also lend weight to more general findings about international organisations’ reliance on an extra-linguistic authority and meeting expectations of even-handedness and inclusiveness (Hurd 1999, 2002; Porter 2001). They also are a close fit with more general work on legitimacy (Franck 1990; Franck 1995). Thus former Canadian Finance Minister Paul Martin said of the FSF standards: ‘They will work only if the developing countries and emerging markets help to shape them, because inclusiveness lies at the heart of legitimacy and effectiveness’ (quoted in Germain 2001). Sounding like a rather platitudinous hope, the experience of the OECD tax competition campaign tends to bear this verdict out.

For the OECD, just as its identity underlies and validates its practices and conduct, its practices and conduct reproduce its identity. This reciprocal constitution has meant that expectations about appropriate conduct for the OECD have generated strong pressures to stay ‘in
Others observers with a sociological bent have also written on the Weberian rational-legal authority of international organisations across a range of policy areas (Finnemore 1996; Meyer et al. 1997; Barnett and Finnemore 1999; Braithwaite and Drahos 2000). Although this tendency is become particularly pronounced among international organisations in the last few of decades it represents a long term trend:

Historians of intergovernmental organisation and international integration note that for the last two centuries at least, the ideology most often used to justify new, powerful, and autonomous international institutions has been a kind of “scientism”, the argument that there are socially beneficial, technical tasks that should be handed over to “experts” to be done for us (Murphy 2000: 799).

It also has close analogues at the domestic level and has been analysed as far back as Weber and Michels. But given the OECD has this particular identity as a paragon of scientific virtue and impartiality, a body of technocrats producing and disseminating knowledge, how does this translate into achieving institutional goals?

The tools by which the OECD achieves its aims are listed in the statement of purpose contained in its homepage as ‘dialogue, consensus, peer review and pressure’ which are all said to be ‘at the very heart of the OECD’. Its outputs consist of dozens of models, manuals, reviews, guides to best practice, surveys, forecasts and statistics. Each of these relies for its impact not just on the factual content but also on the link with the reputation of its institutional progenitor as being, in a revealing phrase, ‘the authority’ among international organisations devoted to the study and measurement of economic policy in the world’s most advanced and prosperous nations. Positive verdicts or high rankings on the various international ‘league tables’ are loudly trumpeted by governments while more critical attention is often seized on and amplified by opposition parties and pressure groups. However the Paris headquarters staff also interact with national policy makers and seek to inculcate its policy more directly by hosting upwards of 40,000 officials from national governments at ‘the Chateau’, and holding around 60 regional seminars each year (Pagani 2002; Marcussen 2001). In acting as forum in this manner, where informal interaction in the corridors and elsewhere complements more formal meetings and discussions, the OECD is among the most active international organisations practicing what Adler has described with reference to the Organisation for Security and Co-operation in Europe as ‘seminar diplomacy’ (Adler 1998).

It is instructive to look at the OECD’s own analysis of its techniques for spreading its values, particularly peer review and peer pressure, both to gain insight into the standard operating procedures but also to note how poorly the blacklisting strategy to push tax havens into compliance fits with the established procedures. In contrast to just providing a venue for national policy makers to meet and talk, peer review and peer pressure, involve regular, institutionalised interaction, and a great deal of support work by the secretariat and a level of shared values. Peer
over member and non-member governments alike, argumentative persuasion, socialisation, model building and more recently blacklisting, extend directly from and redound on this same identity. Above all, the OECD epitomises the impartial, technocratic international organisation devoted to the production and dissemination of scientific knowledge. As such, the OECD has a much more specific and narrowly functional identity than states, even the tiny states it has clashed with over tax competition, and in turn this is closely linked with the knowledge-based or epistemic authority that it wields in identifying and being identified with the mantle of scientific truth. To the extent that the OECD is seen to violate expectations of appropriate behaviour or deviate from its role, however, it risks damaging its standing and authority, in turn reducing its influence over policy, imperiling its budget and continued institutional survival.

Writing on the founding principles of the OECD, Martin Marcussen relates that the institution was designed as a text-book example of an epistemic community, with the objective being to ‘develop a common value system at the level of civil servants in the OECD countries that should form the basis for consensually shared definitions of problems and solutions in economic policy-making’ (Marcussen 2001: 1). Thus as far as its typical internal conduct it corresponds closely with various work on transnational epistemic communities (Haas 1990; Haas and Adler 1992; Goldstein and Keohane 1993). Braithwaite and Drahos judge that ‘The OECD is the single most important builder of business regulatory epistemic communities’ (2000: 29). The founding document which reconstituted the Organisation for European Economic Co-operation, the OECD Convention adopted in December 1960, lists three major goals of ensuring economic growth within its membership, contributing to ‘sound economic expansion’ in members and non-members alike, and to promote world trade on a multilateral, nondiscriminatory basis. To this extent the OECD has stayed true to the intentions of its founder in the early 1960s:

As a financially and politically independent body, the OECD would be able to distance itself from national controversies and dedicate itself completely to science. According to this point of view, the OECD exists in a vacuum which allows it to formulate, refine, and diffuse new policy ideas. This it can do most effectively if it possesses a high degree of scientific authority and a reputation of political neutrality (Marcussen 2001: 4-5)

More broadly, the OECD is an exemplar of the belief in the power of scientific knowledge and impartial experts at the international level:

IO officials are able to couple their expertise to claims of “neutrality” and an “apolitical” technocratic decision-making style that denies them the possession of power or a political motive. In short, IOs have authority in global politics and the ability to shape international public policy because of their “expertise”, and our acceptance of their presentation of “self” as apolitical and technocratic (Barnett 2002: 113).
As such this section has shown that blacklisting by international organisations is not just cheap talk or mere rhetoric, but is a stick that can be used to beat tax havens into regulatory reform. The bark is the bite. Having gone this far, it remains to discuss two further points. In the earlier discussion of verdictives or assertive declarations Austin and Searle hold that not just any old speaker can produce utterances with this illocutionary force, but instead the speaker must be invested with some extra-linguistic authority. The section below examines why international organisations have this authority, and thus can issue effective blacklists. The conclusion speculates as to why blacklisting by international organisations against tax havens seems to be in decline precisely when there is more and more evidence that this method is effective. Both points are connected, because the very features that imbue international organisations with their authority also tend to limit confrontational tactics like blacklisting while promoting more inclusive, consensual solutions.

6. The OECD and Epistemic Authority as a Double-Edged Sword

A common question in connection with norms, rhetorical action and argument is to what extent these methods level out differences in material resources and power between various parties. Risse concludes: ‘It makes a difference in the UN Security Council whether the United States or Cameroon pushes a certain argument’ (2000: 16), but provides little explanation as to why. Critics of the constructivist program have faulted its practitioners for failing to address this issue in similar terms: ‘Norms backed by the United States are likely to become more widespread and effectual than otherwise similar norms originating in Luxembourg’ (Kowert and Legro 1996: 491). The FATF, FSF and OECD’s ability to influence politicians, transnational policy communities, corporations, journalists in the specialist and general press, and ultimately investors, has been closely linked to their authority conceived of as a facet of identity rather than material resources. In this way international organisations have been able to apply pressure through blacklisting in a way that individual states cannot, because of their particular identity as impartial, ‘apolitical’ technocratic institutions able to achieve policy influence as a product of their epistemic or knowledge-based authority. The following section sketches the main features of the OECD’s identity, an exemplar of a much broader set of international organisations, and traces how particular aspects of this identity have influenced the conduct and outcomes of the campaign.

In general constructivist scholars have relied on the idea, implicitly or explicitly, that the norms which shape actors’ decisions and behaviour are ultimately bound up in the tenets of their identity, and vice versa (March and Olsen 1989; Onuf 1989; Onuf 1998; Hopf 1998). Certainly with respect to the OECD it is apparent that the particular expectations held by those inside and outside the secretariat as to appropriate conduct for the organisation at once reflect and reproduce its institutional identity. Similarly, the means by which the OECD achieves political influence
support the contention that being listed as an ‘unco-operative tax haven’ damaged Vanuatu’s reputation, and that this reputational damage was then reflected in material costs. As a preliminary, it is worth noting the haste with which legislation was passed by the government under the threat of FATF blacklisting in September 2000. More generally, a comprehensive IMF report on Vanuatu’s offshore financial sector in 2003 notes that:

A modern “international financial centre” that wishes to attain recognition as part of the wider system can no longer work to standards of regulation that fall below accepted international practices. By doing so a very clear reputational risk is created for the jurisdiction, which has economic implications far wider than just the offshore sector itself (IMF 2003:18-19).

Elsewhere the report notes how the jurisdiction’s reputation has already been considerably compromised in the eyes of foreign governments and investors (9, 19). Lest this be dismissed as one international organisation sticking up for another, it is worth noting that one of the most prominent financial service providers in the country has removed the word ‘Vanuatu’ from its trust holding company because of reputational concerns. Clients have increasingly asked that correspondence and transactions are re-routed via third countries to avoid association with the country. The government effected a U-turn in 2002, when after years of vocal opposition a commitment was made to the OECD process. Local industry sources (who are scathing in their opinion of this decision) attribute the reversal to politicians’ and bureaucrats’ worries about being ostracised in international fora. But this belated removal from the OECD list has not prevented the material costs of reputational damage.

From early 2002 banks such as Barclays, HSBC and Chase Manhattan refused to process transactions from Vanuatu, and most major American banks only accept transactions from Vanuatu intermittently. The accounting firm KPMG has withdrawn from the country and publicly denied having ties with the jurisdiction (though it maintains a correspondent relationship with a local firm). The National Bank of Vanuatu was cut off from international foreign exchange markets, and had to buy US dollars via local subsidiaries of Australian banks, imposing increased transaction fees and delays. The Reserve Bank believes that ‘Vanuatu’ has been included as a key word in suspicious transaction reporting software, and every single transaction between Vanuatu and Australia is now scrutinised by the Australian Tax Office. The government is now in the throes of reforming the financial sector, imposing much stricter requirements on offshore banks (which as a result have declined from a peak of 160 to 9) and relaxing financial secrecy provisions. In sum, despite its early defiance, Vanuatu fits the general pattern whereby blacklisting damages reputation, which in turn depresses business and creates pressure for regulatory reform.

The cases above have thus demonstrated how blacklisting as a form of speech act, and as mediated through damage to listed jurisdictions’ reputations, has caused material economic pain.
Act identifies jurisdictions ‘of primary money laundering concern’ based on ‘the extent to which that jurisdiction is characterised as a tax haven or offshore banking or secrecy haven by credible international organisations or multilateral expert groups’. Tax havens complain about being blacklisted by jurisdictions that know nothing about them, yet many of the tax havens themselves do exactly the same, for the same reasons: the need to protect their reputations, and the lack of resources to conduct independent research.

Aside from governments, blacklists also damage a jurisdiction’s reputation with service providers and clients. For Liechtenstein, service providers in Zurich, Geneva and Lugarno began to steer clients towards other investment destinations. Finally, negative media coverage creates uneasiness among clients and potential clients. In Liechtenstein’s own version of the Cayman Islands’ ‘Grisham effect’, officials are peeved that criminals in German soap operas are always stashing their ill-gotten gains in the Principality. As noted earlier, Liechtenstein authorities have been unyielding in their rejection of OECD demands, even as these have been progressively watered-down, and thus has stayed on the OECD blacklist, in sharp contrast to its energetic response to the FATF. The difference seems to be a matter of principle and pragmatism. Principle because the government and the private sector are strongly convinced that financial secrecy and low taxes are legitimate, and that tax evasion is not a criminal matter. On the other hand, no one argues that money laundering is legitimate or anything other than a criminal matter. Pragmatism because public and private sector officials regarded the FATF NCCT list as more damaging, although they also acknowledge that the OECD listing is ‘unhelpful’, and does impose definite costs.

Vanuatu is in some ways the exception that proves the rule. Almost uniquely, the country is not shy in advertising itself as a tax haven (the Pacific’s premier tax haven, according to the promotional material), with no income, corporate, withholding or inheritance taxes. Vanuatu was established as a tax haven in 1970-71 at the instruction of its then British colonial rulers. Vanuatu was listed by the OECD as a tax haven in 2000, and as an unco-operative tax haven in 2002, was placed in FSF Category 3, but successfully stayed off the FATF blacklist thanks to some rapid legislative reform in mid-2000. Again distinguishing itself from the other five cases examined in this paper, and indeed almost all of the other 41 jurisdictions included in the OECD initiative, the Vanuatuan cabinet and finance minister foreshadowed long in advance that the country would not co-operate with the OECD, and was quite happy to be blacklisted as a result. Rather than being worried about the prospect of being blacklisted, many in Vanuatu positively seemed to relish the prospect, seeing it as free advertising (Economist 27 January 2000; author’s interview Port Vila, Vanuatu March 2004 and Pacific Islands Forum 2002). How can this contrary evidence be accommodated within the bounds of the argument about the centrality of reputation?

Despite this nonchalance with regards to the OECD blacklist, there is strong evidence to
for two reasons. Firstly that because Jersey is considered (or at least considers itself) a cut above other listed jurisdictions, it simply has more reputational capital to lose than recent entrants like Antigua and Barbuda or Pacific islands. Secondly, and echoing the comments of those in the Caymans, Jersey depends much more heavily on institutional business with a substantive (and thus public) presence, rather than private banking or brass plate activities. Institutions are thus vulnerable to ‘guilt by association’ through their visible and public presence in a jurisdiction in a way that individuals with an International Business Company or asset protection trust are not.

In line with other jurisdictions (in particular Liechtenstein, see below), Jersey officials are more worried by the prospect of being blacklisted on money laundering grounds than by the OECD as part of the Harmful Tax Competition initiative. Although Jersey strenuously denies that it is a tax haven, officials recognise that it is routinely referred to as such in the media, and are pessimistic about this ever changing. These same officials indicate that Jersey would do ‘whatever it takes’ to stay off a money laundering list such as the NCCT, such would be the implications for compromising the Crown Dependency’s reputation.

Liechtenstein epitomises this distinction between being blacklisted by the FATF and OECD. In mid-2000 the Principality was blacklisted by both organisations, as well as being placed in Category 3 by the FSF. The government worked strenuously to effect the reforms demanded by the FATF but has steadfastly refused any compromise with the OECD, to the point of being listed as an ‘unco-operative tax haven’ after missing the April 2002 deadline for committing to information exchange. What evidence is there of economic loss because of blacklisting? Liechtenstein had received a good deal of negative press coverage after a German government report had identified it as being a haven for money launderers and organised crime in 1999, but the double blacklisting in 2000 compounded this unfavourable attention. In a manner reminiscent of Nevis, the effect of blacklisting only cut in the following year, as the number of new trusts (Anstalt) being formed dropped off sharply. Indeed, as of early 2004, the level of Anstalt formation had not yet re-attained its 2000 level (author’s interviews Liechtenstein, January 2004). Once again, these business losses created by blacklisting were compounded by the expense of the regulatory solution. A new six person Financial Intelligence Unit and a new Due Diligence Unit were set up, and a new independent Financial Market Services Authority is to be established by 2005.

Authorities believe that the blacklists diffused across audiences on three levels: governments, service providers, and clients. Just as the first blacklisting of Antigua and Barbuda generated secondary blacklistings, so too the OECD and FATF decisions have been incorporated into national blacklists. For example, Singapore, a member of neither organisation, has forbidden Liechtenstein banks from opening branches or subsidiaries because the Principality is on its national blacklist. Most countries do not conduct their own research in compiling national blacklists, but simply use the lists compiled by international organisations. Even the US Patriot
a substantial number of banking, legal and accounting firms, and according to an oft-quoted statistic had become the world’s fifth-largest banking centre (Palan 2003). It is currently the world’s third-largest buyer of US government bonds. Nevertheless, the much greater size, depth and diversity of the Caymans financial sector did not mean that it was invulnerable to blacklisting. Like St Kitts and Nevis, the Caymans Islands was placed on the NCCT for money laundering, and was put in Category 3 by the FSF (officials and those in the private sector regard the FATF verdict as at least partially warranted, but the FSF classification as completely arbitrary). Unlike the 35 jurisdictions listed as tax havens by the OECD in June 2000, however, the Caymanian government agreed to pre-commit to a slate of reforms. Sources in Cayman confirm that this decision was motivated by concerns that, were the jurisdiction to appear on a third blacklist in addition to the FATF and FSF, the financial sector could be seriously damaged. Worries centred on the possibility that banks in New York might terminate their correspondence relationships with the Islands. Although once again it is difficult to draw clear lines of cause and effect, new business suffered a decline, though in contrast to Antigua and Barbuda there was no evidence of existing business fleeing because of the blacklisting. Much more certain, however, is the increased cost of regulation due to increased due diligence, including that carried out retroactively, and information gathering and exchange requirements. The Cayman Islands Monetary Authority has expanded from 48 people in 1998 to 90 in 2004 (CIMA 1998: 15; Author’s interview March 2004). Because of fierce price competition, the government and financial intermediaries have had to take on the extra cost, rather than being able to pass it on to customers. Once again, the reputational effects of blacklisting by international organisations live on after de-listing, with the Cayman Islands blacklisted by European and Latin American countries from 2000 to the present on the strength of the FSF and FATF listings.

Turning from the Caribbean to Europe, further evidence for the effect of blacklisting is taken from Jersey and Liechtenstein. Marketing itself as ‘the premium offshore centre’, Jersey considers itself in a different league from the other jurisdictions examined in this paper, with the possible exception of the Cayman Islands (this section is based on author’s interviews in Jersey January 2004). Jersey has also fared better than the jurisdictions surveyed, falling afoul only of the initial OECD listing in 2000 but making a conditional commitment in time to avoid being labelled an ‘unco-operative tax haven’ in 2002. Jersey officials have adopted a deliberate preemptive strategy in dealing with blacklists, looking to make sure that they are ahead of the game in terms of financial regulation and supervision, particularly as applied to anti-money laundering. To this end, as with the other jurisdictions, the cost of regulation has risen, with the Financial Services Commission expanding from a staff of around 30 in the late 1990s to almost 80 currently. Senior officials not only acknowledge that blacklists are effective, making the same observation as those in other havens that reputation and image are crucial, and that perceptions are as important as reality, but even hold that Jersey is particularly vulnerable. This sensitivity is
jurisdictions, while those investors that persevered tended to drive a harder bargain with Antiguan authorities. The Anglo-American advisories acted as a trigger for other countries to issue similar cautions (including other havens like Jersey). After making more than 30 changes to relevant legislation, the advisories against Antigua and Barbuda were dropped in August 2001.

In mid-2000 the Federation of St Kitts and Nevis was listed as a tax haven by the OECD and as being vulnerable money laundering by the FATF, as well as being placed in Category 3 by the FSF (the following section is based on the author’s interviews, St Kitts, January 2004). Although one country, the islands of St Kitts and Nevis each set their own financial laws and regulations, with Nevis setting up its offshore sector in 1984, while St Kitts has been one of the last Caribbean jurisdictions to enter the market (St Lucia excepted), passing offshore banking and incorporation legislation only in 1997. For some time after these listings, the two components of the federation could not agree on a proper response. Nevis was initially inclined to ignore the blacklisting and carry on business as usual, and both halves of the federation bridled as what they saw as completely illegitimate interference in their sovereign prerogatives. Yet soon the effects began to bite. After about eight months, new incorporations in Nevis fell off by approximately half, as institutional customers (as opposed to private individuals) complained about the taint to their reputation as a result of dealing with a blacklisted jurisdiction. Some US banks refused to recognise entities incorporated in Nevis. Even sooner it became apparent to those in St Kitts from attending international expos that they could not market their services while on the blacklist, and thus that the offshore sector would not get off the ground until delisting. Thus from 2001 both islands began passing new regulation and expanding their supervisory staff in order to be judged compliant with the international organisation-sponsored new standards. Staff in Nevis went from 2-3 to 11, in St Kitts from 2-3 to 5, while a new joint 10 person Financial Intelligence Unit was set up and 2-3 more positions were created for a joint Financial Services Commission. This represents a very substantial commitment to the public purse for a developing country of 43,000 people, and as a result it is highly likely that the offshore sector now costs significantly more to administer than it brings in in revenue. Less quantifiably, time and attention that would have been devoted to bringing in new business had to be devoted to overhauling regulations, preparing those in the private sector, and holding dress rehearsals for the FATF visit which resulted in St Kitts and Nevis being de-listed by the FATF, and later the OECD in 2002. Several members of the EU as well as Latin American countries have kept St Kitts and Nevis on national blacklists on the strength of the OECD and FATF listings, even though the organisations themselves have given the country a clean bill of health.

Although a UK Overseas Territory rather than a sovereign state, the Cayman Islands is a much larger and more established tax haven than either Antigua and Barbuda or St Kitts and Nevis (this section is based on author’s interviews in the Cayman Islands January and March 2004). With initial legislation passed in 1965, by the end of the 1990s the Caymans had attracted
5. From Blacklisting, to Reputational Damage, to Economic Damage: Six Cases

This section contains evidence to support the argument that blacklisting has indeed been effective in causing material damage to tax havens adjudged to be non-compliant with various multilateral regulatory initiatives. To re-iterate, blacklisting by international organisations is an action that damages tax havens’ reputations. Moving from the sphere of language and ideas to material consequences, this section illustrates how blacklisting, mediated by reputational damage, translates into economic costs. In each case it is difficult to definitively show that blacklisting has caused economic decline and avoid the post hoc ergo propter hoc fallacy, particularly when blacklisting has coincided with the general economic downturn from late 2000. Even those interviewed in affected jurisdictions note that it is difficult to determine what proportion of a fall off in business is due to blacklisting versus changes in the world economy, the activities of competitors, unrelated firm restructuring and a host of other factors. I have sought to mitigate the risk to causal inference by taking the judgements of those in affected jurisdictions on how much damage has been caused by blacklisting. The logic behind this decision is that as long as blacklisting is perceived to be effective by those on the receiving end it will be consequential, but if real economic damage caused by blacklisting is misattributed to other factors it will not be an effective spur to reform.

An early instance of blacklisting against Antigua and Barbuda in December 1999 is instructive in illuminating the damaging consequences of such a reputational attack (evidence from this section is taken from an Antiguan government report, Ferrance 2000). Rather than the action of an international organisation, this first example involved informally co-ordinated action by individual states. The United States and Britain decided to take action after a high-profile scandal in Antigua and Barbuda involving the Russian-administered ‘European Union Bank’ (UNDCCP 1998) indicated both that criminals were targeting the financial system and that local authorities were not conducting adequate supervision and regulation. Again, these advisories made no mention of economic sanctions. Speaking at a conference in Trinidad and Tobago in December 2000, a spokesman for Antigua and Barbuda outlined the impact of these advisories, beginning his presentation ‘God forbid that you share this experience’ (Ferrance 2000: 1). Shortly after the advisories were issued, the Bank of New York, Bank of America, Chase Manhattan and HSBC Banks all terminated their correspondent banking relations with Antiguan institutions. Those banks that continued to provide correspondent banking services raised their fees by 25 per cent, on the grounds that they had to take extra precautions against illegal money. Thanks to a sudden drop off in interest in the country by foreign investors, the number of offshore banks declined from 72 at the end of 1998 to 18 in December 2000, causing a decline in government revenue and job losses. Investment professionals and bankers in the US and Britain were obliged to warn clients about the advisories, many of whom instead chose other Caribbean
pleased not to be on the list’ (*Miami Herald*, 19 April 2002). These concerns extend well beyond
the Caribbean, and again the emphasis is on how third parties view a particular jurisdiction: ‘the
Isle of Man’s position in the offshore financial centre sector depends on being perceived as
meeting the “international norm”. If some practices are widely seen as unhealthy and harmful,
then the island will have to fall into line’ (*Financial Times*, 15 July 1999). Investors tend to
avoid or leave jurisdictions with bad reputations not only out of concern that their money will be
misappropriated, but also because firms risk harming their own reputations, as reflected in their
share prices (Zagaris 2001).

Given the adverse financial consequences associated with scandals, bad publicity and
appearing on blacklists (as discussed in the next section) why are international organisations’
reputational attacks anything more than an instance of rational strategies and responses? If states
adapt their policies so as to avoid losses to the financial sector, the economy in general and
government revenue, what role do intersubjective factors play? In this case it is important not to
reduce the (material) symptoms of the problem with its (reputational) cause. Thus the Catholic
Church in the United States has suffered important financial losses through lower contributions
since the eruption of scandals concerning priests sexually abusing children and subsequent
cover-ups. But to say the Church has a financial problem, while ignoring the massive damage
that has been done to the institution’s reputation, which has produced these financial problems, is
to mistake effect for cause.

Reputation as used by rationalist scholars has often been linked to a record of an actor’s
past behaviour, or more formally their past decisions in an iterated game (Axelrod 1984). The
conventional view holds that ‘Observers are like accountants who carefully tabulate the target’s
behaviour and collectively give the target one reputation’ (Mercer 1996: 34). However the notion
of reputation in connection with tax havens is meant in much the same way as Wendt describes
states developing identities through interaction with other states (Wendt 1992, 1999). Mercer’s
book *Reputation and International Relations* concisely identifies the basic mistake mainstream
international relations makes in talking about reputation. Rationalist work in particular takes
reputation to be a ‘property concept’, something that you can own, whereas in fact reputation is a
‘relational concept’, what others think of you (Mercer 1996: 6-26). The sociological literature on
stigma supports Mercer’s basic point. Defined as ‘labelling, stereotyping, separation, status loss,
and discrimination’, analysis of stigmatisation has covered an improbably wide range of topics,
from exotic dancing to urinary incontinence to leprosy (Link and Phelan, 2001). One does not
study the stigma attached to being unemployed or an ex-convict by looking at the objective
properties of these conditions or affected individuals, instead it is necessary to examine the social
processes by which categories are constructed and links formed to stereotyped beliefs (Link and
Phelan 2001: 34). In this sense ‘reputation’ is closer to racial and gender stereotypes than the
conventional game-theoretic rendering.
Jurisdictions with more established financial centres assiduously cultivate their image as secure, stable and well-run investment destinations, and as a consequence are able to attract a greater volume of more lucrative business. Despite the prevalence of ‘race to the bottom thinking’, in part promoted by the OECD, it is commonsensical that no amount of secrecy and protection from tax authorities will attract investors to jurisdictions in which deposits are known to vanish into thin air. A 1998 UN report on money laundering and havens succinctly presents this balancing act:

The more stringent and scrupulous one is about due diligence and vetting customers, the more likely it is that some customers will take their business to venues that ask fewer questions and present fewer obstacles. On the other hand, if a haven develops too unsavoury a reputation as a home for “dirty money” or a haunt of organised crime and drug traffickers, then not only will legitimate money go elsewhere as respectable companies move their businesses to avoid tarnishing their reputations but so too will more sophisticated criminals who want to avoid any taint by association (UNDCCP 1998: 36).

Writing specifically on how the Bahamas and Cayman Islands have conscientiously sought to foster a positive image abroad, Alan Hudson notes that since the early 1980s ‘reputation and trust became all-important’, easily dominating the tendency to engage in competitive deregulation, with the Caymans marketing itself under the motto ‘Reputation is our most important asset’ (Hudson 1998: 928; see also Hudson 2000). This came after both locations became associated with drug trafficking in the 1970s and 1980s and lost business as a result (Palan and Abbott 1996: 178). After conducting dozens of interviews among regulators and investors in the region Hudson reports that ‘reputation’ was the most often used word by his informants in discussing selling points for a particular location. When questioned on what sort of qualities the country tries to project, a former Bahamian Attorney General replied: ‘Stability, stability, stability, stability, stability’ (Hudson 1998: 930). While successfully cultivating a favourable image pays dividends it also leaves countries very vulnerable to scandals or adverse publicity. The almost obsessive concern with reputation is evidenced by the ‘Grisham effect’ with reference to the Cayman Islands, whereby the government felt moved to issue a point-by-point refutation of John Grisham’s popular novel *The Firm*, dealing with a nefarious law practice based in the Caymans.

There is a wealth of other evidence to support this conclusion, with ‘reputation’ featuring prominently and repeatedly in various offshore financial centres’ general self-promotional material and in connection with blacklists in particular. Responding specifically to being de-listed by the OECD in early 2002, the Director of the Bahamas Financial Services Board remarked: ‘The Caribbean banking centres—and I certainly can speak for the Bahamas—have always been concerned about our reputation. Our institutions live by their reputations. We’re
Intemperate language is rarely constructive. Vilification and demonisation are well known techniques which may seem to be expedient in regard to the mobilisation and shaping of domestic public opinion or some other narrow political objective when simple facts are not helpful or sufficient (Bridgetown, Barbados, 8 January 2001).

Noteworthy in setting the precedent for the use of such blacklists in international financial regulation is the US Financial Crimes Enforcement Network (FinCEN), operating as part of the Treasury Department. FinCEN set the institutional precedent for the use of blacklisting by the OECD and FATF, with Treasury Secretary Larry Summers acting as the conduit from American to international usage. First introduced in March 1996, FinCEN ‘advisories’ have since been used to caution private businesses and individuals about conducting transactions involving particular jurisdictions and calling upon banks and other financial institutions to be especially wary of illegal funds. The first advisory was issued against the Seychelles after it passed the Economic Development Act, providing any person who invested US $10 million in government approved investments with immunity from criminal prosecution or forfeiture of assets for all crimes except acts of violence and drug trafficking carried out exclusively within the Seychelles (FinCEN 1996). Regarded as a blatant attempt to attract illegal money, this measure had earlier been specifically condemned by the FATF, which at that time had not adopted the practice of issuing annual blacklists (Author’s interview, US Treasury 2002). Subsequent advisories have followed a common formula, giving a brief description of the jurisdiction, identifying the particular legal or regulatory problem, calling for increased scrutiny, offering technical assistance for correcting the particular shortcomings, but also including the clause, ‘It should be emphasised that the issuance of this Advisory and the need for enhanced scrutiny does not mean that the US financial institutions should curtail legitimate business with [the state in question].’ The advisories do not contain any mention of sanctions to be taken against the jurisdiction, nor those who continue to do business with it. When sufficient remedial action has been taken (according to FinCEN’s judgement) an advisory withdrawal is issued. Since 2000 this instance of blacklisting has followed the lead set by NCCT listings.

4. Reputation, the Link between Verdictive Blacklisting and Financial Damage

By and large, tax havens live or die by their reputation. It would be wrong to say that tax havens are undifferentiated units offering perfectly substitutable services or that customers are interested only in the bottom line. Some level of specialisation occurs as jurisdictions seek to enter or create niche markets, while investors tend to deal with havens in their own region and language group (e.g. the United States and the Caribbean, Germany and Liechtenstein, Arabs and Bahrain). Reputation is the main point of differentiation among a relatively large number of tax havens that are engaged in fierce competition with each other within and across regions (Hudson
OECD. These more inclusive efforts are missing the crucial verdictive or assertive declarative aspect that is the essential feature of blacklisting.

It bears emphasising that these judgements by the FSF, FATF and OECD did not so much provide investors with new information concerning jurisdictions (indeed because of the very non-transparency that motivated the blacklisting investors have probably been better informed than the international organisations themselves), and thus investors’ responses have not been a straightforward response to more complete information on objective factors. Instead, through labelling and re-labelling the world international organisations have re-made it. This was recognised both by those jurisdictions adjudged to be tax havens as well as media observers, and undermines any distinction between ‘mere words’ (blacklisting) and ‘real action’ (sanctions). Speaking of the combination of OECD, FATF and FSF blacklists in mid-2000 one observer notes that:

The combination of the three blacklists... has restrained capital movement and has resulted in concrete steps by banks and financial institutions to close accounts or require depositors to visit in person to provide additional identification if they wanted to maintain their accounts.... Clearly, in a practical and legal sense, the issuance of blacklists are not merely “naming and shaming”, but the imposition of economic sanctions (Zagaris 2001: 524).

Tax havens themselves were even more forthright about the damage caused by blacklisting, and saw the resulting economic damage as part of a pre-meditated strategy for applying pressure against non-compliant jurisdictions. Thus the Prime Minister of the Cook Islands complained of the OECD initiative that:

It would be an easy task to taint a small country under the gloss which the OECD has chosen to unilaterally brush over our identity in the international community... [if this happens] options will be undermined and stripped back by such a broad brush of shame, cloaked threats of financial protectionism, and destructive force of calculated targeting (Bridgetown, Barbados, 8 January 2001).

The Commonwealth has echoed these concerns in identifying ‘the potential for systemic impact and damage to [listed jurisdictions’] reputation suffered from the linkage [by the OECD] with the listings by the UN and FATF’ (Commonwealth Secretariat 2000: 14). More wide-ranging comments by the George McCarthy, Finance Minister of the Cayman Islands, illustrate how the participants in the controversy have been well aware of the impact of language and rhetoric independent of strictly material inducements or threats:

Language is very powerful. The Book of Proverbs (Chapters 12 & 18) teaches that words can play a decisive role, whether for good or evil. They can be as destructive as sword thrusts or the means of healing. Temperate language is essential in the process we are now engaged in, if there is to be progress.
Jersey that fell in Category 1, perceived as highest quality, have noted that they had no opportunity to contribute to the process, that there was no effort on behalf of the FSF to visit the relevant jurisdictions to gather information, and that there was no methodology explaining how jurisdictions had ended up with a particular classification, or what those listed Category 2 and 3 could do to improve their status (Author's interview, Jersey Financial Services Commission, 26 January 2004). These shortcomings may well have contributed to the one-off character of the FSF listing, and the body’s subsequent withdrawal from this field, as the IMF has largely assumed its functions relating to offshore centres.

In contrast to the FSF categorisation, the FATF’s Non-Co-operative Countries and Territories list did claim to represent objective, measurable criteria, and was premised on a 25-point check list against which each jurisdiction was assessed after visits by FATF officials (FATF 2000a). Because of this, the FATF listing has more of the character of an ‘assertive’, a statement about the world amenable to testing against evidence, yet even taking this into account the NCCT has been more than just objective description. Firstly because there is good reason to believe that the list reflected realpolitik as well as scientific process. Initially when the blacklist was being drawn up, Britain insisted that Switzerland be included because of its financial secrecy provisions. The Swiss delegation replied that if Switzerland was on the list, they would retaliate by making sure Britain was blacklisted as well. Subsequently both parties came to a quiet compromise whereby each agreed that the other would be left off the list (Author’s interview, former Swiss FIU official, 2004). More recently, Germany has criticised the United States for the lack of due diligence and Know Your Customer procedures for Delaware limited liability corporations, able to be established by fax inside 24 hours. The German delegation was slapped down, though on other occasions US Senator Carl Levin has acknowledged that Delaware’s standards are worse than some jurisdictions on the NCCT list. The United States (as well as Canada) has consistently been assessed as not meeting many of the FATF Forty Recommendations, yet its chances of ending up on the NCCT list are close to zero.

Far more important for my argument than back room deals among FATF members, however, is the NCCT blacklist’s declarative, rather than just descriptive, character. When jurisdictions have been officially blacklisted (FATF 2000b), this is not a description of their laws and regulations, it is an action. As such, despite some differences, this paper maintains that the FATF’s blacklist shares an essential similarity with the FSF and OECD exercises. The validity of bundling these three exercises together is supported by contrasting them with more descriptive efforts such as the IMF offshore audit, and assessments carried out by the Asia-Pacific Group on Money Laundering, the Caribbean FATF, Egmont Group and Council of Europe. While the FATF’s 25 criteria includes many poorly-operationalised concepts and produces dichotomous classifications on the basis of continuous measures, the IMF methodology runs into hundreds of pages and its audits eschew the sort of co-operative/unco-operative judgements of the FATF and
of a judge or umpire are relevant:

[T]he judge and the umpire make factual claims: “you are out”, “you are guilty”...

But, at the same time, both have the force of declarations. If the umpire calls you out (and is upheld on appeal), then for baseball purposes you are out regardless of the facts of the case, and if the judge declares you guilty (and is upheld on appeal), then for legal purposes you are guilty (Searle 1979: 19).

Once again in line with Austin’s verdictives, being able to make these declarations depends on the speaker playing a special role, a role whose legitimacy and appropriateness is acknowledged by the audience: ‘Thus, in order to bless, excommunicate, christen, pronounce guilty, call the base runner out, bid three no-trumps, or declare war, it is not sufficient for any old speaker to say to the hearer “I bless”, “I excommunicate”, etc. One must have a position within an extra-linguistic institution’ (Searle 1979).

The section below seeks to establish that the blacklisting practices of the OECD, FATF and FSF are examples of speech acts, and more specifically verdictives or assertive declarations. The particular force of these judgements is a product of the rational-legal authority each institution enjoys as an exemplar of impartial, scientific knowledge and technocratic expertise, as explored in section 6.

3. International Organisation Blacklisting as Speech Acts

In relating the discussion of speech acts to the international organisations’ blacklists it is first necessary to determine whether including jurisdictions on the OECD’s June 2000 list of tax havens and subsequently on the April 2002 list of non-co-operative tax havens, the FATF Non-Co-operative Countries and Territories List, and the FSF three-tier classification of offshore centres, were simply acts of reporting or describing. If so, all of Austin and Searle’s special terminology is redundant. In tandem with the first section on defining tax havens above, this section aims to show how the lack of any agreed definition means that official judgements by the OECD were making facts rather than just reporting on them, and were performing actions not just describing the objective factors. The same is true of the FSF and FATF.

The Financial Stability Forum’s 2000 list in particular was explicitly styled a survey of perceptions about offshore centres among FSF member states, rather than a description of objective legal or regulatory features. Thus the table released 26 May 2000 was explained as reflecting ‘the perceived quality of supervision and the perceived degree of co-operation [with FSF member states]’. Of the six cases to be examined in this paper, only Jersey received a positive rating (Category 1) while Antigua and Barbuda, Cayman Islands, Liechtenstein, St Kitts and Nevis, and Vanuatu were all placed in Category 3 (FSF 2000). The FSF report urged those in Category 3 in particular to raise their standards as quickly as possible, but also rather confusingly insisted that its categorisation ‘should not be viewed as an assessment’. Even jurisdictions like
and can only issue recommendations’ (Economist, 27 February 2002). To the extent that rationalist scholars worry about reputation it is as an objective record of past behaviour, while words as threats or promises are signals that derive their significance from the extent they coincide with payoff structures that render them credible or otherwise, or reveal private information.

A counter to these views that establish a strict separation between words and actions is the work of J.L. Austin, particularly as contained in his aptly-titled book How to do things with Words ([1962]1975), and later in the writing of his student John Searle (1969, 1979). Austin begins by outlining the shortcomings of the view that language is just there to report facts and describe, and thus can always be judged in terms of true or false. In addition to these descriptive roles, Austin looks utterances which he terms ‘speech acts’. Examples of such include promising, warning and apologising. So, for instance, ‘When I say, before the alter to the registrar, etc., “I do”, I am not reporting on a marriage: I am indulging in it’ (Austin 1975: 5). Saying ‘I name this ship the Queen Elizabeth’ while smashing a bottle of champagne against the prow is not to describe naming the ship but rather it is to actually do it. These are instances of ‘performatives’, in that by saying something the speaker is actually doing something, performing an action (see also Skinner’s approach in Tully 1988). For Austin, these performatives like ‘I do’ are restricted in that they must be said in the right way (audibly, not as a joke) in the right circumstances (in a church, at the altar) by the right person (the groom or bride, not the priest or a passer-by).

Most relevant for the issue at hand is a particular type of speech acts: ‘verdictives’ or judgements. These may occur when, for example, a referee pronounces a player offside or a jury foreman declares a defendant guilty (Austin 1975: 151-163). These utterances do not report on or describe whether a person is offside or guilty but instead they are acts of making that person offside or guilty. The force of the judgement depend on the right sort of person performing this action, saying the words in the appropriate context and performing the right rituals in order for the verdictive to be recognised as legitimate. Thus the orientation of third parties begins to intrude, as do conceptions of appropriate roles or identity, as examined in relation to international organisations with in section 6.

John Searle, although taking issue with some of Austin’s concepts, echoes these basic ideas of speech as a performance rather than an exercise in description. Searle creates a typology of speech acts, of which the class of ‘assertive declarations’ is particularly relevant to the practice of blacklisting, and is similar to Austin’s verdictives. Assertions are statements about the world that may be judged true or false according to evidence, like ‘North Korea has nuclear weapons’. Declarations, in contrast, ‘bring about some alteration in the status or condition of the referred object or objects solely in virtue of the fact that the declaration has been successfully performed’ (Searle 1979: 17). Assertive declarations are a combination, and again the examples
haven from some type of taxation and regulation for residents of other countries’ (Palan 2002: 155; see also Abbott and Palan 1996: 168). For example, Australian food companies exporting to the European Union tend to establish subsidiaries in Denmark to avoid withholding taxes on repatriated profits, yet Denmark is hardly a stereotypical tax haven. Because of the extreme, though not infinite, flexibility of the term, decisions on just which jurisdictions are classified as tax havens involve a great deal of discretion, and thus leave a great deal of room for political factors to intrude on what is ostensibly a technical adjudication.

Yet even though many have questioned the possibility, and the OECD’s willingness, to come up with an objective list of tax havens, this has not meant that to be so labelled has been without consequences. Thanks to the OECD’s campaign, aided by the activities of the FSF, FATF and other related initiatives, ‘tax haven’ has become a pejorative term with which to threaten reputation and thus (as explained below) the viability of small states’ financial sectors.

The term “tax haven” recognised in the past as a neutral description for countries offering attractive low-tax regimes to attract financial services and other economic activities, has been reinterpreted by these two reports [OECD 1998 and 2000] to mean countries indulging in harmful tax practices (Persaud 2000: 5). This reinterpretation has stuck. Tax specialists speak of the ‘international financial centres’ that were ‘previously known under the now-politically incorrect label of tax havens’ (Karp 2001: 12). Countries that came to feature on the OECD’s June 2000 blacklist (as well as Switzerland and Luxembourg) were quick to deny that they were tax havens. In a typical instance during negotiations the Bahamas told the OECD that it found the term ‘tax haven’ ‘deeply offensive’ (Bahamian Financial Services Board, 16 June 2000). The lack of any definite match between the term tax haven and objective features created the permissive environment for the OECD to reshape and employ the term in an attempt to enforce its solution to international tax competition.

2. Words as Actions

Contemporary mainstream international relations has inherited from realism a visceral suspicion of the notion that words can have much of an impact distinct from actions. Constructivists have only recently begun to chip away at this entrenched belief. This behavioural focus converges with the view from economics focusing on ‘Samuelsonian revealed preferences’, i.e. that actors’ preferences should be derived from what they do rather than what they say. And as the proverb has it, ‘sticks and stones may break my bones but words will never hurt me’. Stephen Krasner has argued for the essential irrelevance of words and norms in international politics, noting that a bullet to the head has a similar effect no matter what the target’s cognitive framework at the time of impact (Krasner 1999: 51). With direct reference to the campaign against tax havens, the Economist noted: ‘Few countries wish to end up on the OECD blacklist, but the group’s bark might be much worse than its bite. It has no legal authority,
definition of a “tax haven” are bound to be unsuccessful.... It can be argued that the “tax haven” concept is such a relative one that it would serve no useful purpose to make further attempts to define it. (OECD 1987: 20-21)

The same report did, however, go on to list features commonly associated with tax havens, including a low or zero rate of tax, strict bank secrecy, a large financial sector relative to the rest of the economy, modern communications, absence of currency controls and, significantly, being perceived to be a tax haven (OECD 1987: 22). In the 1998 report that initiated the Harmful Tax Competition initiative, the OECD admits (in a notable understatement) that the term ‘does not have a precise technical meaning’ (OECD 1998: 20), but goes on to say:

No or only nominal taxation combined with the fact that a country offers itself as a place, or is perceived to be a place, to be used by non-residents to escape tax in their country of residence may be sufficient to classify that jurisdiction as a tax haven [Author’s emphasis]. (OECD 1998: 21)

There is considerable circularity here, in that a major factor in leading third parties to perceive certain jurisdictions as tax havens is that the OECD has categorised them as such. For example, the United States Patriot Act and several members of European Union explicitly rely on the OECD (and FATF) blacklists in drawing up their own national blacklists of tax haven jurisdictions, as discussed in section 5. The report then goes on to operationalise the term looking at low or zero tax rates, lack of information exchange, lack of transparency, and investments producing no substantial economic activity, leaving the details to be developed and applied by the Forum on Harmful Tax Practices set up by the Council of Ministers in the wake of the report. It is thus significant that the OECD itself has admitted the relative and elastic nature of the term tax haven, candidly in the 1987 report, obliquely in 1998, as well as commenting that it is applicable to many and perhaps all countries depending on the definition adopted, and included the ‘reputation test’ (also known as the ‘smell test’), i.e. how third parties perceive a particular jurisdiction. A tax haven is a tax haven if enough of the right people think it is.

National governments also have not had an easy time deciding what constitutes a tax haven, and tax specialists have expressed skepticism that such a classification could ever be made objectively rather than pressed into service in the pursuit of political goals (Katsushima 1999: 18). Thus in the opinion of one member of the US Senate Finance Committee in 2002: ‘Probably the most difficult part of tackling the problem is defining tax shelters. It’s kind of like defining pornography. As the Supreme Court said, you know it when you see it’ (Financial Times, 11 April 2002). Many individual OECD countries identity tax havens on the basis of offering tax treatment ‘substantially more favourable’ than their own, keeping a list of such jurisdictions (OECD 1987). On these grounds, other analysts concur with the OECD’s 1987 judgement quoted earlier in that the ‘complexity of modern national taxation systems, combined with greater capital mobility, has rendered practically every country in the world a potential tax
categorise. The second point is to outline the notion of speech acts or ‘performative utterances’, i.e. statements that do not describe an action but rather constitute an action in and of themselves. Thirdly, I argue that blacklisting by international organisations is a particular type of speech act. The fourth goal is to show the effect of blacklisting on targeted jurisdictions, specifically how blacklisting has damaged tax havens’ reputations in the eyes of governments and investors. In turn, the fifth point is to show the material consequences of reputational damage. Evidence for these links between blacklisting, reputational damage, and the material consequences is drawn from press coverage, government statements and particularly interviews conducted by the author. The sixth section examines how the particular identity of international organisations as ‘apolitical’ technocratic actors both empowers and constrains their efforts to induce reform. Finally, the paper briefly speculates on the reasons for the decline of blacklisting.

1. What’s in a Name? International Organisations, Labelling, and Defining Tax Havens

International organisations like the OECD, FSF and FATF gain a great deal of their power from the ability to label and categorise (Barnett and Finnemore 1999). The OECD’s efforts to regulate international tax competition since 1998 have provided a classic instance of how international organisations can achieve influence through their authoritative command of language. Various OECD component bodies like the Forum on Harmful Tax Practices and the Committee on Fiscal Affairs have moulded the meanings and connotations attached to the term ‘tax haven’ and have used this label to exert pressure on non-compliant jurisdictions by threatening their reputations. ‘Tax haven’ is now regarded as a pejorative, an unfavourable judgement on a jurisdiction’s stability, financial probity and reputation. The term ‘tax haven’ is a such a persuasive exemplar of the power to label and name because there is so little agreement as to the objective features of tax haven as opposed to non-tax haven jurisdictions, and because the classification of states as such has had important political and economic consequences (see sections 4 and 5).

The OECD has come close on several occasions to admitting that, rather than being determined by any particular cluster of banking, financial and fiscal laws or regulations, its judgements are a reflection of the identity projected by the particular jurisdiction, or how that jurisdiction is perceived in the eyes of third parties. The OECD has in a sense created tax havens by the particular way it has chosen to label.

The first step to substantiating the claim that the term tax haven is very plastic and has been manipulated by the OECD in pursuit of its goals is to establish that there is no close association with one or more definite legal or economic characteristics. A logical place to start is the OECD’s own efforts to determine just what distinguishes tax havens from non-tax havens:

The concept of a “tax haven” is a relative one as any country can be a tax haven in relation to a particular operation or situation.... Attempts to provide a single
A common difficulty for international organisations looking to effect policy change in states is the lack of tools available to create incentives and disincentives for national leaders. Even those international institutions which can make conditional loans such as the IMF and World Bank have had great difficulty in holding borrower states to the terms of loan agreements. Given that most international organisations cannot make conditional loans, what hope do they have of inducing unwilling compliance from even the smallest and most dependent states? This difficulty has arisen in a particularly stark form for those international organisations tasked with inducing tax havens to reform their tax and financial laws and regulations in line with new, hopefully global, standards. Thus from 1998 the Organisation for Economic Co-operation and Development (OECD) has sought to tackle ‘harmful tax competition’, in particular as practiced by a group of roughly three-dozen tax haven states. Formed in the wake of the Asian financial crisis, the Financial Stability Forum (FSF) was charged with reforming the ‘international financial architecture’ to avoid the problem of contagion during a crisis, and to this end it tried to improve regulatory standards in offshore financial centres. Finally, the Financial Action Task Force (FATF) has been active since 1990 in seeking to combat financial secrecy in offshore and onshore centres vulnerable to being used by money launders, a mandate expanded in 2001 to include countering the finance of terrorism. Each organisation’s membership is limited to rich industrialised countries, with a few exceptions for large developing states.

In 2000, all three organisations attempted to pressure a largely overlapping group of non-member tax haven states into regulatory reform by formally and publicly blacklisting those jurisdictions judged to be non-compliant with a set of new standards. By 2003, however, blacklisting had been abandoned by the FSF and FATF and had lost its central role in the OECD initiative. A common sense interpretation might be that blacklisting had simply proven ineffective. The predominant theories in international relations would support this intuition, holding that talk is cheap, and that international actors are concerned only with power and wealth, defined in terms of material resources. Yet this paper finds the opposite: that blacklisting has indeed been an effective means of putting pressure on tax havens, and thereby in effecting policy change. This in turn creates a puzzle: if blacklisting has been so effective, why does it seem to have gone out of fashion? The primary goal of this paper is to argue that blacklisting is an effective stick with which to beat tax havens and induce policy change. Evidence is drawn largely from interview data relating to six case studies: three tax haven jurisdictions in the Caribbean (Antigua and Barbuda, the Cayman Islands, and St Kitts and Nevis) two in Europe (Liechtenstein and Jersey) and one in the Pacific (Vanuatu).

In order to substantiate this argument, the paper aims to establish six main points. The first, drawing on the example of the OECD’s treatment of the term ‘tax haven’, is that international organisations enjoy consider discretion in their ability to label, classify and
Abstract:

This paper argues that public blacklisting by international organisations is an effective means of bringing about regulatory compliance by otherwise recalcitrant states. This contention is examined in light of overlapping campaigns by the OECD, Financial Action Task Force and Financial Stability Forum to pressure non-member tax haven states into introducing costly new financial regulations. Blacklisting is a form of speech act, rather than being cheap talk or signalling, that has damaged tax havens’ reputations among investors, and thus led to capital flight and material economic damage. International organisations are able to draw on their technocratic, ‘apolitical’ identity to invest blacklists with their epistemic authority, but this role simultaneously constrains international organisations to eschew confrontation, and thus has paradoxically led to increasing limits on the use of this tactic.