INTERNATIONAL LAW AND THE PROTECTIONIST MEASURES OF THE G-20, OECD/FINANCIAL STABILITY BOARD AND THE FATF AGAINST OFFSHORE FINANCIAL CENTRES

Part 6

Were the counter-measure taken by the OECD, the Financial Stability Board and the FATF against The Bahamas and other offshore financial centres in 2000 and 2009 respectively, as exercises of power politics by high tax regimes, consistent with the principles of international law? Do these bodies have this right under International Law?

Unlike domestic legal systems, the international legal system is decentralised and effective power is concentrated in nation states which are sovereign and equal, though some nation states, such as the G-20 member countries, in the words of the Honourable Paul Adderley, **"…but some are more equal than others."** But does might make right under international law? If it does, then why pretend to be a sovereign nation? In an interdependent world, it is recognised that there is no absolute national autonomy; however, when is the line from interdependence to unlawful intervention crossed?

The development of international law, as reflected in the United Nations Charter, treaties and customary international law, is a continuing process of authoritative decisions for clarifying and securing the common interest of community members, both small and large. International Law serves not only as a limit on effective power but also as a creative instrument in promoting both order and other civilized values, such as human rights, in a world of sovereign states.

According to Article 2 (3) and (4) of the United Nations Charter:

> **"All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.**
>
> **All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."**

"Intervention" is defined by the International Law scholar, Professor Hersch Lauterpacht, as **"…dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a demand which, if not complied with, involves a threat or recourse to compulsion, though not necessarily physical compulsion, in some form."** (Hersch Lauterpacht, International Law and Human Rights, 1950).

However, International Law recognises three limited exceptions to the general prohibition against intervening in the domestic affairs of sovereign nations. The first exception is the right of **Individual and Collective Self Defense.** Under Article 51 of the United Nations Charter, the right of self-defense can be exercised if an armed attack occurs against a Member State of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. This right may also include anticipatory self-defense, such as the United States quarantine of Cuba in October 1962. Clearly, no one would seriously contend that The Bahamas made an "armed attack" on the United States or other members of the G-20. Therefore, the actions of the FATF and OECD /Financial Stability Board in 2000 cannot be justified on the basis of collective self-defense.

The second limited exception to the general rule of non-intervention in another country, under Articles 1, 3, 55 and 56 of the United Nations Charter, is **Humanitarian Intervention** in order to protect human rights. This limited right is based on the theory that where egregious violations of human rights occur within a State whose government will not or cannot stop them, the general community of nations or another State may enter the territory of the defaulting State to secure an end to the outrage and to secure compliance with a minimum international standard of human rights.

Humanitarian intervention has been used to rescue religious minorities, such as the Indian activities in Bangladesh in 1971, the Entebbe operation in Uganda undertaken by Israel in July 1976. Surely it cannot be contended that the punitive measures of the FATF and OECD/Financial Stability Board in 2000 were motivated by any humanitarian concern.

The third limited exception to the general rule of non-intervention in another country is **Self Help.** Large countries often use self Help, often called "retorsion, retaliations, reprisals, intervention, minor coercion or measures short of war" to control smaller countries or advance their national interests. For example, the International Court of Justice in the **Corfu Channel (United Kingdom v. Albania)** 1949 I.C.J. 4, allowed Britain to send its war ships in Albanian waters to ensure the freedom of maritime commerce. While countries are generally allowed to use Self Help measures in response to some act of aggression, such as refusing to trade with others or to deny benefits to others, the legality of these measures will be questioned when the counter-measures are directed to an unlawful end. An unlawful end may be a condition where the purported offending State is required to change its internal or foreign policy in order to resume trade with the intervening State. Professor Oscar Schacter, a leading scholar of

International Law, (Schacter, **International Law in Theory and Practice** 178 Rec. des Cours 185-186 (1982-V)) wrote that:

> **"In that case, an otherwise discretionary act, the retorsion, is used as a means of coercing the object of that retorsion to give up its sovereign right, quite apart from the alleged violation of law that gave rise to the retorsion. There is good reason to consider such use of retorsion as illegal because of its improper objective. One may characterize it as an abuse of rights, but it is more precise to refer to a primary rule that precludes such coercion. The rule is expressed in the unanimously agreed Declaration of Principles of International Law Concerning Friendly Relations (adopted by the United Nations General Assembly in 1970) in the following language:**
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> > **'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'**
>
> **However, its [retorsion] application in actual cases is not always readily apparent except in rather extreme situations (such as a demand that the offending State changes its government or cease relations with another State). Nonetheless, even acknowledging the impropriety of these 'extreme cases (which are by no means hypothetical) can be a significant step toward recognizing that in some cases otherwise legal acts may be rendered illicit because of the wrongful end sought."**

Accordingly, self-help measures taken by powerful countries must be consistent with the norms of customary international law and multilateral treaties, such as the United Nations Charter and the Charter of the Organisation of American States. Was the punitive

labeling of The Bahamas in 2000 as a **"non-cooperative jurisdiction"** and the counter-measures taken against The Bahamas by the FATF and OECD/Financial Stability Board a modern form of unlawful **intervention** by powerful countries into the domestic affairs of a smaller weaker country under the guise of curbing money laundering?

By the admission of the FATF, OECD/Financial Stability Board and the United States Treasury Secretary, the object of the punitive measures taken against The Bahamas in 2000 and 2009 respectively was to force offshore financial centres, pejoratively referred to as "tax havens", to dismantle their offshore financial services sectors and make certain changes in their internal administration under the guise of fighting money laundering, terrorist financing and unfair tax practices. At the time these determinations were made, The Bahamas and other offshore financial centres had neither a voice nor a vote in the deliberations of the FATF and the OECD/Financial Stability Board and did not have any reasonable opportunity to test the allegations made against them before the punitive measures were applied. However, it is now generally accepted that the real aim of these punitive measures was not in response to any aggression by offshore financial centres against the G-20 member countries, but was rather, I submit, a response to

the competition that offshore financial centres, such as The Bahamas, represent to the tax sources of the large industrialized countries that control the OECD and G-20. It is submitted that this was not a lawful end, as it was calculated to force The Bahamas and offshore financial centres to dismantle there lawful financial services sectors for the benefit of high tax regimes.

The uneven application of the anti-money laundering, terrorist financing and tax cooperation rules is reflected in the fact that The Bahamas was forced in 2000 to abandon the use of bearer shares for International Business Companies on the basis of secrecy; whereas, companies incorporated in Delaware and Nevada in the United States continue up to the present to issue bearer shares of companies incorporated in those States. This double standard raises profound concern about the legitimacy of the global regulatory anti-money laundering, terrorist financing and unfair tax practices. The punitive measures taken by the FATF and the OECD/Financial Stability Board were calculated, in part, I submit, to subordinate the exercise by The Bahamas of its "sovereign rights" and to secure from it advantages through the dismantling of its offshore financial centre. Without neither a direct voice nor a vote in the deliberations of the G-20, OECD, FATF, the Financial Stability Board, many offshore financial centres fear that the G-20 member countries with onshore financial centres

themselves may be using their influence in these organizations to advance their competitive economic interests, or may be practicing plain old protectionism, under the guise of fighting money laundering, terrorist financing and unfair tax practices.

The Bahamas has a duty to maintain an effective regulatory infrastructure to fight international financial crimes and terrorist financing, based on best practices. However, the punitive measure taken by the FATF, the OECD and the Financial Stability Board also fail, I submit, to meet the international law requirements of proportionality and reasonableness. The counter-measures taken against offshore financial centres were disproportionate to any "offense" committed by any offshore financial centre and the counter-measures taken against them were not evenly applied to both onshore and offshore jurisdictions which manifested the same weaknesses. In fact, The Bahamas and offshore financial centres simply took seriously the principles of free trade and competition in the global provision of financial services. Many G-20 member countries cannot compete with offshore financial centres because, in part, of the former's high and inefficient tax systems. Should The Bahamas and other offshore financial centres be made the scapegoats because those high tax countries cannot or

refuse to be more efficient and imaginative in their financial services sectors, tax policies and general fiscal administration?