2016-10

A strange revolution: Mock compliance and the failure of the OECD's international tax transparency regime

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During the 1990s, the international community's acquiescent attitude towards offshore financial centres (OFCs) and tax havens underwent a dramatic transformation. Previously ignored, or even extolled as development models or exemplars for the virtues of free markets, OFCs were now pilloried as 'parasites' (Palan & Abbott 1996) or 'pariahs' (Hampton & Christensen 2002) of the international financial system. The leniency of their fiscal and regulatory regimes and the opacity of their financial instruments and institutions were denounced for triggering or amplifying financial crises, permitting the laundering of the proceeds of criminal activity and monies linked to terrorist conspirators, and eroding the tax bases of developed states by allowing rich individuals and corporations to flee their resident tax authorities. Since then, as part of a wider thrust to design standards to promote financial stability, OFCs and tax havens have been under sustained pressure from advanced industrialised countries and the international organisations they dominate to hoist their fiscal and regulatory regimes up to internationally agreed standards or risk being 'blacklisted' and denied access to major markets. Unable to resist these developments OFCs appeared to be facing retrenchment or closure. Compliance with these standards would squeeze OFCs because it would necessitate ending or eroding the practices that gave them their competitive edge. Non-compliance would squeeze OFCs either because of the reputational damage induced by blacklisting or countermeasures that would prohibit or seriously raise the costs of transacting business in those jurisdictions.

Most OFCs chose the former path and, by the mid-2000s, reforms initiated by OFCs seemed to have drawn the sting from these international initiatives. By the end of 2006 only Andorra, Liechtenstein, the Marshall Islands and Monaco remained on the international blacklists drawn up by the Financial Stability Forum (FSF) (concerned with regulation), the Financial Action Task Force (concerned with money laundering) and the Organisation for Economic Cooperation and Development (OECD) (concerned with harmful tax practices). International Monetary Fund (IMF) (2006) and FSF (2007) reviews of OFC application of international standards and codes revealed that OFCs were generally compliant and, in many cases, outshone their onshore counterparts (c.f. Findlay, Nielsen and Sharman 2014). The IMF (2008) subsequently announced that improvements in the regulatory standards of OFCs were sufficient to render the offshore/onshore distinction meaningless and that its work in this area would be merged under the aegis of its Financial Sector Assessment Programme. The onset of the global financial crisis, however, breathed new life into these seemingly moribund efforts. Although they were not directly incriminated in the causes of the crisis, the feeling persisted that offshore practices hastened its arrival through tax breaks that encouraged the build up of debt and intensified the initial credit crunch because impenetrable structures prevented financiers from rapidly and accurately assessing the creditworthiness of their counterparties (Palan, Murphy and Chavagneux 2010; Shaxson 2011). At their London Summit in April 2009, the G20 leaders pledged action to 'end the era of banking secrecy' by accelerating and deepening OECD's existing work to promote international tax transparency (G20 2009). In September 2009, reforms to the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes were agreed that would expand its membership, intensify its peer review process, and speed the negotiation of agreements to exchange information.

By August 2014, 121 countries plus the European Union had become members of the Global Forum thereby making commitments to meet its standard to exchange information upon request and subject themselves to peer review, 143 peer reviews had been completed and reports agreed, and over 1,200 tax information exchange agreements (TIEAs) had been signed (OECD 2014b). OECD Secretary-General, Angel Gurria, has repeatedly boasted of the OECD's orchestration of a 'revolution' (OECD 2009b) in global tax transparency. Once again OFCs appeared to be in the invidious position of needing to choose between conformity and resistance, both of which were likely to undermine the viability of their business model. Aside from a few token casualties, however, OFCs seem to have withstood this latest regulatory onslaught. Indeed many appear to be in rude health (Economist 2013) with evidence that despite compliance with various international standards assets stashed offshore are stable or growing (Datamonitor 2013).

Several explanations for this apparent paradox have been offered. One is to suggest that conformity with international standards attracts investors because additional compliance costs are outweighed by the reputational benefits of association with an obedient jurisdiction. A second is that OFCs are being propped up by demand for offshore financial services by clients from emerging markets (Woodward 2011; Sharman 2012). Elsewhere it has been argued that the OECD's project is fundamentally flawed. For example, Meinzer (2012) denounces the 'creeping futility' of the OECD project, suggesting that an effective clampdown on tax dodgers requires tougher standards grounded in automatic information exchange. Similarly, the complexity of the OECD project is being exploited by the fertile minds of tax planning professionals, to launch new products that remain within the rules but which perpetuate secrecy (Woodward 2006).

This chapter offers an early sketch of research into another possible explanation, grounded in the literature on compliance in international relations. Although they disagree about the reasons, most theoretical approaches to compliance predict that smaller, weaker states (like many of those hosting OFCs) will be forced to adopt international standards, not least because of the material or reputational costs of defiance outlined at the end of the opening paragraph. Increasingly these predictions are being confounded by empirical research revealing considerable variations not only in levels of compliance with international financial standards (IMF 2011a) but also its quality. This chapter's is mainly concern with the quality of compliance and, in particular, what Andrew Walter (2008) has termed 'mock compliance', where states pursue the form but not the substance of compliance. For example, as the chapter discusses further below, a state might enact an elaborate legislative and regulatory framework to enable the exchange information on tax matters but this framework might then lay dormant. Mock compliance is most likely to arise in situations where states recognise that outright defiance of international standards would result in serious repercussions but where full compliance would impose significant costs on powerful domestic groups and actors (such as the financial services industry) and where it is difficult for third parties to ascertain and expose non-compliance. This chapter argues that the OECD initiative has been dogged throughout by mock compliance, moreover that revisions to the initiative announced since 2009 do not really address, and indeed might exacerbate the problem. Initially the enhanced peer review process seems to further raise the costs of non-compliance in a way that might convince states to railroad domestic groups into submission and allow third parties better insights into whether compliance is more apparent than real. Simultaneously, however, the reforms necessary to avoid the OECD's wrath will inflict considerable extra compliance costs on private actors and, even if the peer review process is more intrusive, there is no guarantee their contents will be used by third parties or that they will be sufficiently rigorous to expose mock compliance. Therefore the chapter predicts that states with OFCs will continue to adopt mock compliance strategies in order to reconcile the competing demands of international institutions and markets with their domestic veto players. The paper concludes by considering whether the OECD's recent adoption of a new international standard predicated on automatic information exchange will alter this calculation.

Compliance in International Political Economy

In the interregnum between the Asian financial crisis and the onset of the global financial crisis (GFC), International Political Economy (IPE) was awash with literature examining the emergence and efficacy of the international financial architecture. Much of this writing was highly critical, suggesting that the predilection for awarding greater freedom to private actors to manage risks would exacerbate financial instability. Nevertheless, no IPE scholar predicted the timing or the specifics of the GFC (see Helleiner 2011) which has inevitably led to much soul-searching about the shortcomings of the discipline and the sketching out of a post-crisis research agenda. One strand of this is to re-examine our understanding of the roles played by interstate power relations, domestic politics and transnational actors in the creation, strengthening and implementation of international financial standards (Helleiner & Pagliari 2011).

Much of the writing on compliance in IPE, defined here as situations in which the behaviour of actors subject to a rule conform to its prescriptions, predicts that states and private actors will apply international financial standards albeit for very different reasons. Rationalist accounts stress the role of material incentives, suggesting that states choose courses of action that maximise their gains (or minimise their losses) and thus comply if the benefits exceed the costs. These approaches suggest that compliance is best achieved by offering tangible inducements (or punishments for non-compliance) that alter the cost-benefit calculation. Simmons (2001) and Drezner (2007) suggest that standards are often developed by the most powerful states who then use their dominant market position as a weapon to foist them upon others. For example, states that do not obey the rules might face restrictions or be completely denied access to major markets, something the US is exploiting to promote compliance with its Foreign Account Tax Compliance Act (FATCA) (see Eccleston, this volume). Alternatively, and an increasingly popular tactic in global financial governance, recalcitrant territories are 'named and shamed' signalling to private financial institutions and credit ratings agencies that they are perilous investment climates that ought to be shunned (Sharman 2009). Either way the costs of disobedience would be significant making compliance the probable outcome.

Alone, the rationalist explanation is problematic. For example, accurately estimating the costs and benefits of different courses of action is almost impossible and it does assume a binary distinction between compliance and non-compliance. Moreover, if straightforward power was the sole determinant we would not expect to see the variations in the levels and quality of compliance referred to in the introduction.

Constructivist accounts of IPE argue that compliance can be explained by reference to shared norms and legitimacy. Transgovernmental networks (Slaughter 2004) and epistemic communities of regulators (Porter 2005) have a prominent role in global financial governance. These narratives emphasise the socialising role played by these bodies and how the desire of participants to sustain their reputation persuades them to push compliance with regulations reflecting their shared norms. Keck and Sikkink (1998) go on to suggest that political elites can be pressured by these transnational forces to implement these norms. If these norms are successfully internalised the issue of compliance is reduced to the status of a technical rather than political problem. That is to say non-compliance is explained not by reference to a deliberate strategy flowing from an appreciation of costs and benefits but the outcome of technical issues surrounding possible ambiguities in the rules and insufficient institutional capacity. The problem with this explanation is, firstly, that the secrecy of these networks makes norms and social learning difficult to observe. Secondly, as Finnemore and Sikkink (1998) have observed, norms only become internalised later in their 'life-cycle'. Initially new norms compete and co-exist with their predecessors and often face domestic resistance from those not party to the rarefied atmosphere the international regulatory networks. Indeed while international networks offer fertile conditions for social learning including tight groups of professionals with similar outlooks, regular interaction over long periods, and relatively de-politicised arguments, these conditions do not pertain to the domestic contexts where such policies are implemented.

The previous point serves to highlight a more general complaint levelled at the compliance literature, namely that it tends to accentuate the *international* dimension, where codes and standards are negotiated, to the detriment of the *domestic* dimension where codes and standards are ultimately implemented and applied. At the negotiation stage direct power or the power of expert authority may mean weaker countries feel compelled to enlist in an initiative but they are also freer to do so because often domestic interests who might oppose these developments are absent. However, domestic actors are vital at the implementation stage meaning enabling them to mobilise to resist compliance with international initiatives. Investigations by comparative political economists have revealed the many ways in which domestic political institutions and interests mediate the impact of external compliance pressure (Mosley 2010). Singer (2007), for example, has argued that in order to understand the implementation of international standards it is vital to examine the preferences of the regulators. Far from being passive receptors of instructions from international bodies, domestic regulators are bureaucratic agents whose desire to maintain their autonomy, prestige and future employment requires them to pacify local institutions and actors. To take a crude example from tax information exchange, revenue authorities are balancing demands from politicians to close tax loopholes to help plug fiscal gaps while trying not to undermine the competitiveness of the financial services industry upon which, especially in small states, their jobs depend. In other words, while states may be committed to an international initiative administrative forbearance might prevent its full implementation.

Walter's (2008) notion of 'mock compliance' also assigns a leading role to domestic sources of compliance. Unlike Singer, who restricts his focus almost entirely to regulators, politicians and the financial services industry, Walter focuses on a wider range of domestic actors relevant to the compliance debate including taxpayers, civil society organisations, non-financial firms and government ministries. While not dismissing the international factors identified in mainstream IPE debates, his explanations for non-compliance are rooted in the institutional and structural features of the domestic political system. He argues that existing understandings overlook the nature of compliance; in particular that compliance is often superficial. Borrowing from Raustalia and Slaughter (2002) he draws a distinction between implementation and compliance. Implementation involves the transposition of international standards into domestic law but it does not follow that private and bureaucratic behaviour will suddenly correspond to these requirements. For instance, compliance may be thwarted by governments introducing changes gradually, waiting for their main competitors to institute equivalent changes or agreeing only to share the benefits of compliance with selected counterparts, bureaucracies looking to sabotage certain elements of an agreement or, in developing states especially, lacking the resources to ensure widespread compliance, and private companies seeking to minimise their regulatory burden. Although the threats arising from non-compliance are often more imagined than real governments, bureaucrats and private actors all have incentives to adopt the *form* of compliance but not the *substance*. In other words, while actors give the outward appearance of compliance to the international community they are concurrently engaged in behaviours at considerable variance from it. It is this lack of substantive compliance that is dubbed 'mock compliance'.

The conditions under which mock compliance is more likely include, firstly, where substantive compliance would immediately impose high additional costs on discrete private sector groups. In these circumstances, states are liable to encounter very strong resistance from affected groups. Likewise, the obvious solution of introducing grave punishments for non-compliance may be politically impossible, especially where an industry makes a substantial economic contribution. Whereas the benefits of substantive compliance are often diffuse, long-term and uncertain the costs are visible, immediate, concentrated and calculable facilitating the ease which coalitions hostile to reform can advocate their case (c.f. Helleiner 1994). Second, mock compliance is likely if the costs of palpable non-compliance are high. If actors believe that international markets and the international financial institutions will respond to explicit non-compliance by significantly raising the cost the effect may be to shift the balance of domestic forces behind a solution that conforms, ostensibly at least, to international expectations. For OFCs, whose business model is overwhelmingly reliant on external capital, the imminent threat of expulsion from particular markets could have serious repercussions. Finally, mock compliance is likely under conditions where monitoring by third party is difficult or costly. Many of the aforementioned costs associated with non-compliance will only be forthcoming if outsiders can expose it. In practice, ascertaining wrongdoing with any degree of accuracy is exceedingly difficult. The frequent portrayal of international organisations, who police many international financial standards, as omnipotent bodies with endless resources and tentacles capable of poking into the dimmest recesses of domestic policy making are considerably at odds with reality. As the IMF's (2011b) experience with the Reports on the Observance of Standards and Codes reveals, international organisations often have to undertake this work on shoestring budgets, with few staff, and are overwhelmingly reliant on participant countries to supply them with the requisite information. Thus, while international organisations may help to provoke initial commitments their ability to monitor the substance of compliance is restricted, especially in cases where states and the private sector collude to conceal their failings. Furthermore, there is no guarantee that international investors or states will take notice of the findings or adjust their behaviour (IMF 2011b). For example, there is no compulsion for a private actor to use compliance with international standards as criteria in their investment decisions.

Mock compliance with the OECD's tax transparency regime – Phase one, 1998-2009

The OECD's initial forays into tax transparency left some important legacies, such as the Tax Information Exchange Agreements (TIEAs) and the Global Forum now at the heart of the contemporary process, and the mock compliance with its initiative sheds important light on the second phase of its work in the period since 2009.

Following a request from the G7, the OECD (1998) produced a report in which it argued that many jurisdictions were engaging in ‘harmful tax practices’. Essentially harmful tax practices consisted of efforts to lure non-residents capital by combining low or non-existent rates of taxation with opaque corporate structures or secrecy provisions that prevented overseas revenue authorities from identifying the owners of these assets and taxing them accordingly. The report defined a set of criteria that constituted harmful tax practices and announced that jurisdictions would be assessed against them. While OECD countries meeting the criteria were trusted to extinguish their own harmful tax practices, non-OECD countries that were found to meet the criteria were placed on a blacklist which appeared in the OECD’s (2000) follow-up report. Countries on this list were told that they must make a commitment to eradicate harmful tax practices by July 2005. Failure to do to so would result in them being placed on a revised blacklist of ‘uncooperative tax havens’ that would face ‘defensive measures’ (including withholding taxes, enhanced auditing and refusal to enter or even terminating existing tax treaties) by OECD countries. Fearing the reputational and material repercussions of blacklisting the majority of jurisdictions made commitments.

Initially this does not look a very promising background for mock compliance. The litany of defensive measures appeared to make the costs of blatant non-compliance excessive, especially given that the OECD was proposing a peer review system (to be pursued through a new OECD Global Forum on Taxation) which looked capable of exposing shortcomings. Furthermore, while the costs of compliance would fall disproportionately on private financial institutions that had politically privileged positions in many OFCs these were trumped by the threat of countermeasures by OECD countries which could effectively excommunicate these places from the global financial community. Whatever they did the competitive position of OFCs would be damaged. If OFCs denuded their secrecy provisions to avoid countermeasures they would lose clients who invested for those reasons, if they stood firm they would invite sanctions that significantly raise the material and reputational costs of transacting business. Indeed the fact that some jurisdictions complied before the OECD’s 2000 report and that many more did shortly afterwards suggests that the material and reputational costs of non-compliance were very high, indeed for places heavily dependent on their financial sectors, possibly terminal (Mistry & Sharman 2008).

Fortunately for these jurisdictions the transnational tax planning industry and battalions of free market pressure groups rallied to their aid, seeking to delegitimise the initiative by demonstrating how it ran counter to existing norms and lacked a level playing field between OECD and non-OECD countries (Webb 2004; Sharman 2006). In particular they pointed to

Switzerland and Luxembourg's abstention from the two OECD reports which meant, unlike their other OECD counterparts, they had not made formal commitments to eliminate their harmful tax practices. The real turning point, however, was the withdrawal of US support for key elements of the process which prompted a serious moderation of the harmful tax competition initiative. The prime objective of extinguishing 'harmful tax practices' was superseded by vaguer references to promoting transparency in tax affairs through the exchange of information. The scope of activities that would constitute prima facie evidence of harmful tax practices was slimmed down, not least by excluding issues connected with corporate actors to focus exclusively on individuals. Finally, the OECD conceded that countermeasures against non-OECD jurisdictions would not commence prior to those against OECD countries. This last indulgence brought the initiative to an impasse. It meant that non-OECD countries with OFCs could make a commitment to promote tax transparency, and thus escape being tarnished by blacklisting, safe in the knowledge that their commitment would not be activated because of the continued intransigence of OECD members.
The OECD's programme limped on but its momentum had vanished. The Model Agreement on Exchange of Information on Tax Matters agreed in 2002 established what remained, until April 2013, the international standard for tax information exchange i.e. that countries should have the power to obtain tax information from those operating in their jurisdiction and ensure that the information is available to be exchanged in a timely manner upon request in circumstances 'foreseeably relevant' to the enforcement of the requesting country's tax laws. The model also became the basis upon which TIEAs, bi-lateral instruments to underpin effective information exchange, were negotiated. The OECD's botched process had engendered the perfect conditions in which tax havens could engage in mock compliance. The costs of TIEAs would still fall on entrenched private interests, however, all talk of defensive measures had been dropped and peer reviews remained perfunctory. Against this background states engaged in classic mock compliance behaviour. Safe in the knowledge that no countermeasures would be forthcoming those states that had committed to the OECD either did not sign TIEAs (only twenty-three TIEAs were negotiated between 2000 and 2007) or failed to ratify them thus denying them legal effect (OECD 2010b).

The OECD's tax transparency regime – Phase two, 2009-present

Precisely why the G20 seized upon the OECD's tax work in the aftermath of the GFC is still a matter of debate. The agential entrepreneurship of the OECD Secretary-General, the growth of government deficits in many G20 economies, and that the OECD had a ready plan for a G20 desperate to demonstrate it was doing something to respond to the financial imbroglio probably all played a part (Eccleston 2013). In March 2009, the OECD countries that had previously objected to the organisation's tax transparency initiative removed their reservations, thus activating the commitments previously entered into by non-OECD members. At the G20 London Summit the following month the OECD (2009a) unveiled a 'progress report' detailing the position of countries and territories vis-à-vis the international tax standard. Jurisdictions that had signed twelve or more TIEAs were placed on a 'white list' of those who had 'substantially implemented' the standards. Those that had made commitments but not signed twelve TIEAs (or Double Tax Agreements containing equivalent information exchange articles) were placed on a 'grey list' of countries that had 'committed but not substantially implemented' the standard. Finally there was a 'blacklist' of countries that had not made a commitment. The London Summit also announced the readiness of G20 countries to take action against non-compliant states presenting a "toolbox" of countermeasures reminiscent of those in the 2000 Report, something the September 2009 Pittsburgh Summit confirmed could start from March 2010 (G20 2009a, 2009b). Suddenly non-OECD jurisdictions returned to a situation similar that of 2000 where failure to make a commitment and significant strides towards implementation would see their reputations tainted by blacklisting and suffer the material repercussions of countermeasures. Unsurprisingly there was a flurry of activity. By January 2010, all jurisdictions had been expunged from the blacklist through making commitments and more than 300 TIEAs had been signed (although twenty-three jurisdictions remained on the greylist having not yet reached the twelve TIEA threshold).

There were also important changes to the resuscitated regime. In September 2009 the Global Forum, now endorsed by the G20, was reformed and reconstituted as the Global Forum on Tax Transparency and Information Exchange. Its job would be to oversee an enhanced version of the earlier peer review process designed to evaluate implementation and compliance with the internationally agreed tax standard. The OECD (2010c) identified ten criteria against which jurisdictions would be assessed. The criteria revolve around whether states ensure that the requisite tax information is available (i.e. that it is collected by private actors), that it can be accessed (i.e. that domestic authorities have the power to obtain information held by financial institutions), and can be exchanged (i.e. that there are mechanisms in place to allow information to be exchanged with competent bodies overseas). The peer review process has two stages. Stage one simply assesses whether a jurisdiction has in place the legal and regulatory framework to enable tax information exchange. Under the pre-2009 peer review system this is where the OECD's interest ceased. However, stage two of the peer process would investigate whether that legislative framework was effectively complied with in practice. In other words, peer reviewers would now be scrutinising whether jurisdictions expeditiously exchanged of tax information in practice. Once approved by the Forum's Peer Review Group, reports on the jurisdiction's performance are placed in the public domain.

The outcomes of the reviews would also be more nuanced. For instance, rather than merely deeming countries compliant or non-compliant, first phase reviews examine each of the range of recommendations stating whether each element is 'in place', 'in place but needs improvement' or 'not in place' (OECD 2011a). Second phase reviews have four categories – compliant, largely compliant, partially compliant, not compliant. This more subtle approach has much to commend it, although it does raise problems for analysis. For example, the guidance notes which underpin the work of the Global Forum's expert team of assessors recognise 'that the rating of Compliant as a general matter is not to be viewed as requiring perfection' (OECD 2013: 59). In other words, a jurisdiction may receive a compliant rating despite not having all of the required elements in place. Likewise, should a country deemed 'largely compliant' by the Global Forum be considered to meet the international standard? Initially these reforms appear to have vitiated the conditions for mock compliance in a manner identical to that identified in the 1998-2001 period. Until 2009, tax information standards in many, especially non-OECD, countries were rudimentary. Various types of information were not collected and, if it was, would certainly not be shared. Thus, the new requirements that information should be available, accessible and transferable impose substantial additional costs on private actors. Ordinarily 'where local financial institutions benefit from the continuation of existing rule structures – and stand to lose from the adoption of new, internationally derived regulations – the process of compliance is unlikely to move forward' (Mosley 2010: 726). However, in this instance, the penalties appear very serious. Non-compliance might reduce the cost of collecting information but at the expense of overwhelming reputational damage inflicted by blacklisting and material damage inflicted by sanctions from states in the G20. Normally the high cost of outright resistance would similarly be a factor encouraging mock compliance. However, the more intrusive peer review system, specifically designed to investigate the application of the regulatory framework rather than just its existence, means mock compliance should be detected and exposed through the publication of detailed reports. Moreover, the practical use of TIEAs means the effectiveness of a jurisdiction's information exchange regime is under constant scrutiny. If competent authorities from overseas regularly find their requests for information rebuffed on spurious grounds their complaints will soon reach the public domain. With the G20 countries poised to mete out sanctions, states may reluctantly conclude mock compliance is as risky and costly a strategy as straightforward non-compliance. The alacrity with which jurisdictions have adopted TIEAs, despite the costs they impose and the major overhauls of domestic laws they have required, is arguably the best evidence of this.

Mock compliance with Phase two of the OECD's tax transparency regime

By August 2014, the Global Forum had published sixty-four phase two reports assigning compliance scores to assessed jurisdictions (OECD 2014b). The achievements of the Global Forum's peer reviews appear impressive. Four-fifths of the Global Forum membership has now undergone at least one phase of the peer review and 818 recommendations to implement the international tax standard have been issued. Moreover, the Global Forum provides evidence that these peer reviews are having the desired result of shaming errant jurisdictions into reform. Eighty-five jurisdictions have provided subsequent testimony that they intend to or already have introduced legal changes to address almost half of these recommendations. Eighteen supplementary reviews of jurisdictions reveal that seventy-eight Global Forum recommendations have been fully adopted resulting in forty-nine upgrades to the original peer reviews determinations (see OECD 2014a: 62). The phase two reports lend credence to the Global Forum's assertion that "it has effectively improved transparency and exchange of information between jurisdictions" (OECD 2014a: 54). Of the sixty-four reports undertaken twenty jurisdictions were found 'fully compliant', thirty-two 'largely compliant', eight 'partially compliant' and four 'non-compliant'. Importantly there was considerable evidence of improvements in tax transparency between the phase one and phase two reviews. In the first fifty jurisdictions which underwent phase two or supplementary reviews the proportion of the elements of the tax transparency standard that were 'not in place' fell to 3 per cent compared with 15 per cent at the end of their phase one reviews. Equally the proportion of elements in place rose from 58 to 82 percent (OECD 2013a: 31). All fifty jurisdictions were fully compliant with the standard in regard to availability of banking information while 95 per cent were fully compliant in regard to rights and safeguards in TIEAs. Finally, the implementation of TIEAs had produced a spike in the information exchange requests. In 2012 in the twenty-three jurisdictions where comparable data is available, almost 3,000 information exchange requests were made, an 81 per cent increase since 2009 (OECD 2013a: 33-34). Furthermore these requests were responded to in a timelier manner. The proportion of requests responded to in less than ninety days rose from 47 per cent in 2009 to 73 per cent in 2012 while the number of requests taking over a year to receive a response fell from 28 per cent to 1 per cent (OECD 2013a: 32).

Nevertheless, these headline figures disguise the continued prevalence of mock compliance with the OECD regime. Successive OECD reviews reveal that non-compliance is slowly tapering nevertheless the 'broad variation in the level of implementation of standards' noted in one of the OECD's (2010d: 1) earliest summaries of the post-2009 regime endures. The OECD's (2012a) Progress Report to the G20 observed 'the [compliance] situation is diverse' and while the Global Forum's Annual Report declares that there is 'a good level of compliance' it concedes there are 'a number of unresolved deficiencies' (OECD 2012b: 5, 32). These problems are amply demonstrated by the first phase-two peer reviews. Under one-third of the jurisdictions assessed to date have mustered a fully compliant score while almost one-fifth were deemed non or partially compliant. The wider synopsis of assessed jurisdictions reveals a similar pattern. The 2012 Progress Report showed that of the eighty-eight places reviewed, thirty-four had elements 'not in place' and only fourteen countries had arrangements for the availability, access and exchange of information that did not require improvement (OECD 2012b). In 2013, the picture had slightly improved with thirty-four out of 100 jurisdictions now possessing elements not in place and thirty-two with arrangements for the availability, access and exchange of information that did not require improvement (OECD 2013b). The deficiencies of eleven countries remain sufficiently severe that they have not been permitted to progress to the second phase of peer review (there being little point in reviewing the effectiveness of a tax information exchange framework that does not exist). As noted above, the OECD has trumpeted the 818 defects in tax transparency regimes uncovered by peer reviews and the seventy-eight that have so far been addressed. Another way of looking at that statistic is to note that less than 10% of the peer review report's findings have so far been implemented.

A similar story attends the steady improvement in the quality and effectiveness of TIEAs. In its most recent progress report the OECD (2014c: 29) notes that Global Forum members have now signed 1633 bi-lateral TIEAs, 1280 of which meet the international standard. Moreover, the number of tax information exchange initiatives has blossomed owing to countries signing the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Global Forum members are now bound by 3340 tax information exchange agreements, 2987 of which meet the international standard. However, as Johannesen and Zucman (2014: 70) point out this is still a long way short of a full network of tax treaties and this number is inflated by a number of essentially meaningless agreements. This is a legacy of the OECD's original demand that to escape blacklisting jurisdictions needed only to sign twelve TIEAs. Many jurisdictions responded by concluding the minimum number of treaties and doing so predominantly with microstates meaning it was unlikely the arrangements would ever be exercised (Tax Justice Network 2009). The peer reviews continue to unearth classic examples of mock compliance regularly observing that information exchange is laced with administrative obstacles that ensure it is a protracted process (OECD 2012a: 46). Doubts also persist about whether levels of administrative cooperation will be sufficient because the rapid expansion in the number of TIEAs will overwhelm the administrative capacity of many smaller jurisdictions.

That so much mock compliance lingers reflects the persistence of conditions that encourage such behaviour . First, despite the threat of material sanctions having vanished (for instance there is currently no talk of the four jurisdictions considered non-compliant after their phase two review being punished with countermeasures) potential reputational damage seems to have convinced most territories of the excessive costs of outright defiance of the OECD regime. As non-OECD countries learnt during phase one of the OECD campaign 'the bark is the bite' where blacklisting is concerned (Sharman 2009). In other words blacklisting, whether justified or not, inflicts reputational damage that prompts some business to depart. Equally there is little incentive to fully comply if this means extensive additional compliance costs and the piercing of the cloak of secrecy scare investors away. As a regulator from one small island tax haven concludes 'It is expensive to be a bad citizen but it is even more expensive to be a good citizen because of the extraordinarily high costs of compliance. Those opting for pure compliance will encounter extra costs without any extra benefits – especially in a world where capital mobility allows money to flee to places that might be applying international rules in a more flexible manner' (author interview). Thus, non-OECD countries seem to have again opted for a mock compliance strategy whereby they signal their compliance with the standards of transparency and exchange of information for tax purposes through participation in the Global Forum process but in practice are continuing to indulge in proscribed practices.

That they are able to do so reflects the presence of the second ingredient in the mock compliance recipe: the difficulties of exposing wrongdoing in a way that might elicit shifts in domestic interests that make them more supportive of compliance. The 'comprehensive and in-depth' reviews of members promised by the OECD (2010a) are compromised by the tight timetable and meagre resources. In 2013, the Global Forum's 122 members were attended by a staff of 27 controlling a budget of €3.9m (OECD 2013a: 14) who manage a congested peer review timetable. The phase one reviews have been extremely reliant on 'desk-based' appraisals of questionnaires supplied by the relevant territories. Phase two reviews involve a two-three day on site visit by an OECD peer review group (OECD 2011a) but worries that these reviews barely scratch the surface are regularly expressed. This is reinforced by the OECD's acceptance that while the system is supposed to be flexible and ongoing, resource constraints mean that it 'will not be in a position to re-evaluate jurisdictions immediately' (OECD 2010d: 5).

The shortcomings of the peer review process also extend to the TIEAs. Requests made under TIEAs are a further way in which compliance with the tax transparency regime is checked. In order to stop overseas tax authorities embarking on speculative enquiries, so-called 'fishing expeditions', TIEA require them to know almost everything about their prey, something that secrecy provisions will almost certainly preclude. As a result, as one frustrated tax inspector explains 'you already have to have pretty much all the information you're after to get the last piece. It's a catch-22' (quoted in Economist 2013). There is therefore 'significant scope for an uncooperative jurisdiction to obfuscate and stonewall while still complying with their obligations under a TIEA' (Eccleston 2013: 155; c.f.Sheppard 2009). For example, the OECD's (2011b) peer review of Switzerland noted that it was obeying the letter but not the spirit of the standards by negotiating extremely narrow interpretations of identity requirements for an exchange of information request. Furthermore because the exchange of information between competent tax authorities must be done on a confidential basis the OECD's peer review groups will be unable to examine specific examples of information exchange in practice (OECD 2011a). Many offshore tax havens are happily collecting the necessary information, and may even be more rigorous in doing so than their onshore counterparts, but they are collecting it safe in the knowledge that it will never have to be exchanged.

The final factor that persists as an obstacle to full compliance with the OECD regime is high costs of the private sector. Swiss negotiation of very tight identity requirements for information requests and its position that it will not respond to information requests deriving from whistle blowing activity reflected strong domestic pressures to obstruct effective information exchange (Eccleston 2013; Tax Justice Network 2013). Finance lobbies retain considerable weight in many countries but this is accentuated in places recognised as tax havens, especially smaller states where financial activities comprise a substantial share of GDP, where very tight and well connected financial communities have effectively captured the state and exert considerable political clout (Shaxson & Christensen 2013). The attractiveness of offshore financial services is not purely down to secrecy but nonetheless, the need to comply with secrecy provision is a substantial burden. The effects are keenly felt by OFCs who operate on thin operating margins, for example those who generate income from licensing fees, where relatively small changes in compliance costs can undermine profitability. The financial services industry in tax havens must now collect and curate a lot of information that it previously did not and states are passing on some of the costs of making their own institutions more robust onto private providers or even demanding payment from their overseas counterparts before information will be exchanged (Tax Justice Network 2010). Unlike other areas of financial regulation where at times sharp divisions have emerged between different parts of the industry (Helleiner & Pagliari 2011) the transnational tax planning industry has remained relatively cohesive. While in large developed states the domestic sands are being shifted by regular tax avoidance scandals that have mobilised groups wanting an end to tax secrecy, they have much less traction in tax havens. For the moment, in places heavily reliant on offshore financial services, the power of the pin-stripe infrastructure overwhelms domestic opponents looking for a tax haven clampdown.

Conclusion

If the rhetoric of the G20 and OECD are to be believed, offshore financial centres and tax havens face a bleak future. Either they will be forced to dilute the secrecy that gives them a critical competitive edge or they can maintain their secrecy but face blacklisting and countermeasures that will destroy their reputation as appropriate places to invest. The decision by 122 states to participate in the Global Forum process and the negotiation of over 1200 TIEAs appear to signify that many states have concluded that flagrant non-compliance would be a dangerous and counterproductive strategy. This paper has argued that states seem to be opting instead for a strategy of ‘mock compliance’ whereby they make a commitment to the initiative and adopt the form of compliance to avoid blacklisting and sanctions but then fail to implement the substance of the initiative thereby enabling them to retain features of their regulatory regime that make them an attractive investment location. From the outset, the OECD’s tax transparency and information exchange has cultivated ideal conditions for mock-compliance: the costs it imposes on entrenched domestic interests are moderate but significant, the costs of brazen defiance are seemingly considerable, and third-party monitoring costs of compliance are high. Superficially the post-2009 reforms, with their promise of harsh sanctions on territories that are not fully compliant and a more invasive system of peer review appear to address these problems by raising non-compliance costs higher than mock compliance costs that might soften domestic opposition. In practice, this is yet to happen because of shortcomings in the peer review regime and the absence of sanctions against non-compliant regimes have limited the costs of mock compliance.

In April 2013, the G20 Finance Ministers endorsed the principle of automatic exchange of tax information as the new international standard. By September 2014, sixty-five jurisdictions including all OECD members had committed to the OECD Declaration on Automatic Exchange of Information in Tax Matters, forty-seven of which have committed to early adoption by the end of 2016. This new, third phase of the OECD's tax transparency regime is considered a game changer by advocates and opponents of OFCs alike, not least because automatic information exchange removes the 'catch-22' that has limited the effectiveness of rules based on information exchange on request. Nevertheless, because it imposes significant additional costs on financial institutions, automatic information exchange may exacerbate the problems of mock compliance. Indeed there is already substantial evidence that financial institutions are lobbying their governments to garner exemptions and delay implementation (see for example, Australian Financial Review 2014). Moreover, there is no indication that the OECD will beef up the peer review system by granting it extra resources to smoke-out examples of mock compliance or material sanctions to deter wayward jurisdictions. Tax justice campaigners also point out that the effectiveness of automatic information exchange is also compromised by the absence of public registers of beneficial owners of trusts and companies (Knobel & Meinzer 2014a, 2014b). In short, although automatic information exchange marks a step-change in the campaign to limit offshore financial practice the dangers of this regime being diminished by mock compliance remains high.

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