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INVESTMENT TREATIES, OFFSHORE FINANCE, AND THE RESOURCE CURSE

KARL M.F. LOCKHART*

Abstract: Questions of how best to understand offshore financial centers ("OFCs")—countries that have low or zero tax rates, strong banking secrecy regulation, and easy-to-form legal entities—and what, if anything, the international community should do about them remain fixed on the agenda of national and international discourse. This Essay seeks to provide a new theoretical perspective on tax havens and applies this perspective to the cross-border legal regimes that govern international investment. This new analytical framework sees offshore financial centers as countries that are victims of the "resource curse," as that term is described in economic development literature. Often physically small, isolated islands with scant natural resources, OFCs lack any true commodity to exchange in the global marketplace. As a result, OFCs have transformed their legal systems into a resource, "selling" their favorable laws to businesses and individuals in exchange for corporate registration costs and money management fees as a means of gaining revenue for the state and its inhabitants. Applying this framework to international investment law yields new insights into why countries enter into bilateral investment treaties and how the true social costs of international investment should be understood.

INTRODUCTION

Offshore financial centers,[1] despite their moniker of "secrecy jurisdictions,"[2] cannot seem to stay out of the news. In 2016, an anonymous figure leaked more than 11.5 million documents from a Panamanian law firm named

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[1] Offshore financial centers ("OFCs") are also called "tax havens" and "secrecy jurisdictions." This Essay will use these terms interchangeably.

[2] *See, e.g.*, Sarah Bracking, *Secrecy Jurisdictions and Economic Development in Africa: The Role of Sovereign Spaces of Exception in Producing Private Wealth and Public Poverty*, 41 ECON. & SOC'Y 615, 617 (2012); Nick Gregory, Note, *Lax Tax: The Threat of Secrecy Jurisdictions and What the International Community Should Do About It*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 859, 861 (2012).

Mossack Fonseca. These documents—which became known as the "Panama Papers"—unveiled tax evasion and avoidance committed by over 140 politicians, celebrities, and other individuals at the highest levels of society in countries worldwide.[3] The repercussions of the leak shook global power structures, leading to the resignation of Iceland's prime minister,[4] historic Supreme Court cases in Pakistan banning a prominent politician for life,[5] and the sentencing of Argentinian soccer superstar Lionel Messi to twenty-one months in jail for tax fraud.[6] Sadly, it also led to the death of a journalist in Malta, who was killed by a car bomb after investigating corruption based on documents from the leak.[7] One year after the Panama Papers, another leak of over 13.4 million records known as the "Paradise Papers" further implicated elites around the world,[8]

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[3] INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, *Panama Papers: Explore the Panama Papers Key Figures*, ICIJ, https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/ [https://perma.cc/8ETD-X8R6]. Mossack Fonseca later closed as a result of the scandal. Cat Rutter Pooley & Barney Thompson, *Panama Papers Law Firm Mossack Fonseca 'To Close,'* FIN. TIMES (Mar. 15, 2018), https://www.ft.com/content/c2501cf4-2824-11e8-b27e-cc62a39d57a0 [https://perma.cc/6AVQ-HNLX].

[4] Adam Taylor, *Iceland Ousted One Leader Named in the Panama Papers, but Ended Up with Another on the List*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/01/11/iceland-ousted-one-leader-named-in-the-panama-papers-but-ended-up-with-another-on-the-list/?noredirect=on&utm_term=.487334aeacd6 [https://perma.cc/8CCN-N4MU]. The next prime minister of Iceland was also implicated by the leaked documents. *Id.*

[5] Asad Hashim, *Pakistani Court Bans Ex-PM Nawaz Sharif from Parliament for Life*, AL JAZEERA (Apr. 13, 2018), https://www.aljazeera.com/news/2018/04/pakistani-court-bans-pm-nawaz-sharif-parliament-life-180413072707795.html [https://perma.cc/QU5L-37QZ]. Sharif was later sentenced to ten years in prison. Asad Hashim, *Ex-Pakistan PM Nawaz Sharif Sentenced to 10 Years Over Corruption*, AL JAZEERA (July 6, 2018), https://www.aljazeera.com/news/2018/07/pakistan-pm-nawaz-sharif-sentenced-10-years-corruption-180706113036952.html [https://perma.cc/6ND9-7UXC].

[6] Robert W. Wood, *FATCA Tax Lessons from Lionel Messi Prison Sentence*, FORBES (May 25, 2017), https://www.forbes.com/sites/robertwood/2017/05/25/fatca-tax-lessons-from-lionel-messi-prison-sentence/#2bd6a0ba2ccc [https://perma.cc/M4HP-5Y99]. A Spanish court later converted Messi's prison sentence into a €252,000 fine as provided under Spanish law. *Lionel Messi Tax Fraud Prison Sentence Reduced to Fine*, BBC NEWS (July 7, 2017), https://www.bbc.com/news/world-europe-40534761 [https://perma.cc/B9H4-MECN].

[7] Jon Henley, Stephanie Kirchgaessner & Jamie Grierson, *Ten Arrested Over Murder of Maltese Journalist Daphne Caruana Galizia*, THE GUARDIAN (Dec. 4, 2017), https://www.theguardian.com/world/2017/dec/04/daphne-caruana-galizia-malta-journalist-eight-arrested-murder-inquiry [https://perma.cc/XRW9-WDQ4]. The victim of the car bomb, Daphne Caruana Galizia, wrote a popular blog that criticized high-level political corruption, suspicious business deals, and organized crime in Malta; shortly before her death, she investigated and reported on corruption relating to the Panama Papers. *Id.* Maltese and Italian officials believed that organized crime was likely to blame for her murder. *Id.*

[8] *Cf.* James Rothschild, Financier (1883), *quoted in* Niall Ferguson, *The First 'Eurobonds': The Rothschilds and the Financing of the Holy Alliance, 1818–1822*, *in* THE ORIGINS OF VALUE: THE FINANCIAL INNOVATIONS THAT CREATED MODERN CAPITAL MARKETS 313, 324 (William N. Goetzmann & K. Geert Rouwenhorst eds., 2005):

> In the past, [influential people] used to live from the rents of their estates or their offices and were therefore never entirely free, but were always chained to a distant landed estate or some local administrative center. But now the system of paper securities frees these men to choose whatever place of residence they like; they can live anywhere . . .

from the U.S. Secretary of Commerce to Queen Elizabeth.[9] Tax havens also took center stage in the indictment and prosecution of Paul Manafort. A former advisor to President Trump, Manafort has been investigated by U.S. Department of Justice special counsel Robert Mueller and faced trials for bank fraud, tax fraud, tax evasion, and money laundering in two federal courts.[10] In addition to these leaks and Manafort's criminal charges, Congress debated offshore jurisdictions in relation to the Tax Cuts and Jobs Act of 2017. The new law includes a key provision[11] which allows multinational companies with cash hoards stowed in offshore subsidiaries to repatriate the funds at steeply discounted tax rates.[12]

> from the interest on their bonds, their portable property, and so they gather together and constitute the true power of our capital cities.

Id.

[9] Michael Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, N.Y. TIMES (Nov. 5, 2017), https://www.nytimes.com/2017/11/05/world/paradise-papers.html [https://perma.cc/TC52-N3G5]; INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, *Paradise Papers: Secrets of the Global Elite*, ICIJ (Nov. 5, 2017), https://www.icij.org/investigations/paradise-papers/ [https://perma.cc/7WGU-Q9JY].

[10] Eliza Relman & Grace Panetta, *Former Trump Campaign Chairman Paul Manafort Is on Trial for Fraud—Here's What You Need to Know About Him*, BUS. INSIDER (Aug. 7, 2018), https://www.businessinsider.com/who-is-paul-manafort-and-why-is-he-at-the-center-of-the-trump-russia-probe-2017-3 [https://perma.cc/FJ8S-DEN2]; Krishnadev Calamur, *The Tax Havens at the Heart of the Manafort Indictment*, THE ATLANTIC (Oct. 30, 2017), https://www.theatlantic.com/international/archive/2017/10/manafort-indictment-tax-havens/544394/ [https://perma.cc/TAU9-5VR3]. As of the publication of this Essay, Manafort has reached a deal with federal prosecutors. Sharon LaFraniere & Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate with Special Counsel; Pleads Guilty to Reduced Charges*, N.Y. TIMES (Sept. 14, 2018), https://www.nytimes.com/2018/09/14/us/politics/manafort-plea-deal.html [https://perma.cc/W9FP-EULY].

[11] *See* Tax Cuts and Jobs Act of 2017, 26 U.S.C. § 965 (2017) ("Treatment of deferred foreign income upon transition to participation exemption system of taxation.").

[12] Jesse Drucker, *Companies Warn of Hits from Tax Cuts. Don't Be Fooled*, N.Y. TIMES (Jan. 4, 2018), https://www.nytimes.com/2018/01/04/business/corporate-tax-cuts.html [https://perma.cc/8VCA-WRFU]. To lower taxes using a subsidiary in an offshore financial center, corporations shift profits and other taxable events to the subsidiary rather than the onshore parent company. RONEN PALAN, RICHARD MURPHY & CHRISTIAN CHAVAGNEUX, TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 84 (2010). Because it is no longer the onshore company but its offshore subsidiary making money, it is taxed by the jurisdiction in which the profit is made at that jurisdiction's tax rate—which for tax havens, is extremely low or zero—rather than at the home country's tax rate, which in the United States is now 21% (formerly 35%). *See* Chelsey Dulaney, *The Tax Overhaul Could Boost U.S. Corporate Earnings by 10%*, WALL ST. J. (Jan. 3, 2018), https://blogs.wsj.com/moneybeat/2018/01/03/the-tax-overhaul-could-boost-u-s-corporate-earnings-by-10/ [https://perma.cc/M723-A6V8] (discussing the effects of the tax cut on corporate earnings). In the United States, foreign profits are not taxed until repatriated (returned to the parent corporation). James R. Hines, Jr. & Eric M. Rice, *Fiscal Paradise: Foreign Tax Havens and American Business*, 109 Q. J. OF ECON. 149, 154 (1994). Thus, if the company keeps the money offshore and re-invests it in other foreign dealings (acquisitions, etc.), it could potentially never pay U.S. tax on those profits, saving the company millions, if not billions, of dollars—which obviously provides such a company with scant incentive to ever repatriate those funds. *See* GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 106 (Teresa Lavendar Fagan trans. 2015). For example, Apple issued $17

With these events in the public eye, the question of what to do about offshore financial centers ("OFCs")[13]—countries that have low or zero tax rates,[14] strong banking secrecy regulation,[15] and easy-to-form legal entities[16]—is a

billion in debt in 2013 rather than bringing back some of the $102 billion it had sitting offshore. Wenxia Ge, Jeong-Bon Kim, Tiemei Li & Yutao Li, *Offshore Operations and Bank Loan Contracting: Evidence from Firms That Set Up Subsidiaries in Offshore Financial Centers*, 37 J. CORP. FIN. 335, 336 (2016).

[13] *See generally* Ahmed Zoromé, *Concept of Offshore Financial Centers: In Search of an Operational Definition* 26 (Int'l Monetary Fund, Working Paper No. 07/87, 2007) (providing a range of definitions of OFCs from a survey of the literature). According to Ahmed Zoromé, offshore jurisdictions display the following factors: "(i) the primary orientation of business toward nonresidents; (ii) the favorable regulatory environment (low supervisory requirements and minimal information disclosure) and; (iii) the low- or zero-taxation schemes." *Id.* at 4. Zoromé argues convincingly that the ratio of net financial services exports to Gross Domestic Product in these countries shows the provision of "financial services to non-residents on a scale that is incommensurate with the size and the financing of" their own domestic economies. *Id.* at 7. OFCs hold trillions of dollars in wealth, according to most official estimates. *See* INT'L MONETARY FUND, MONETARY & EXCHANGE AFF. DEP'T, OFFSHORE FINANCIAL CENTERS: IMF BACKGROUND PAPER 9 (June 23, 2000), https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm [https://perma.cc/69WW-TML7] [hereinafter IMF BACKGROUND] (estimating that "OFC cross-border assets reached a level of US$4.6 trillion at end-June 1999"); U.S. SENATE, COMM. ON HOMELAND SEC. & GOVERNMENTAL AFF., PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, MINORITY & MAJORITY STAFF REP., TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS, AND SECRECY 1 (Aug. 1, 2006) [hereinafter TAX HAVEN ABUSES REPORT] (citing several sources that estimate OFCs as holding between $4.8 trillion and $11.5 trillion); *see also* Art Durnev, TieMei Li & Michel Magnan, *Are Offshore Firms Worth More?*, 36 J. CORP. FIN. 131, 131–32 (2016) (noting that "[b]y 2006, OFC-based institutions managed five to seven trillion U.S. dollars, which is five times the amount of two decades ago, representing six to 8% of worldwide wealth under management"); ZUCMAN, *supra* note 12, at 3, 35 (estimating the figure at approximately $7.6 trillion, accounting for 8% of the global financial wealth of all households).

[14] *See, e.g.*, DAVID L. MCKEE, DON E. GARNER & YOSRA ABUAMARA MCKEE, OFFSHORE FINANCIAL CENTERS, ACCOUNTING SERVICES AND THE GLOBAL ECONOMY 111, 114, 118–19, 161, 162 (2000) (noting that Barbados levies taxes on international business companies ("IBCs") at a rate of only between 1–2.5%, and that Bermuda, the Seychelles, and the Cayman Islands do not tax IBC profits at all).

[15] *See* Anna Manasco Dionne & Jonathan R. Macey, *Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving toward Efficient?*, *in* OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION 8, 15 (Andrew P. Morriss ed., 2010) [hereinafter REGULATORY COMPETITION] (arguing that "confidentiality is a primary—if not *the* primary—offshore commodity"). For example, the Bahamas prevents disclosure of any confidential bank information to foreign governments unless the Supreme Court of the Bahamas approves it. MCKEE ET AL., *supra* note 14, at 105. Vanuatu has no treaties to share tax information with other countries. *Id.* at 168. Another secrecy innovation is the nominee director, who sits on a corporation's board and whose name is public, but who must vote on behalf of the person who hired him or her (often a so-called "beneficial owner" of the company) and cannot sell shares of the company without the beneficial owner's approval. BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT 183, 184 (2016) [hereinafter HARRINGTON, CAPITAL].

[16] *See, e.g.*, James McConvill, *Islands in the Financial Stream: Why Cyprus and the BVI Are Too Legit to Quit,* 31 J. TAX'N OF INVS. 3, 17 (2014) (providing an example of the ease of raising capital and other corporate law applications in the British Virgin Islands). Notable examples include Mauritius (which does not require shareholder or director meetings), the Cayman Islands (which does not require companies to release audited financial statements or have any other forms of reporting), and the Bahamas (which imposes only minimal recordkeeping requirements and does not require release

constant topic of discussion among reporters, politicians, and academics.[17] Notions of how best to understand OFCs and what, if anything, the international community should do about them remain fixed on the agenda of national and international discourse.[18] Although tax, corporate, and international criminal law are usually the focus of academic research on OFCs,[19] these conversations have rarely been extended to the field of international investment law. This Essay seeks to unite these two strands of discussion by providing a new theoretical perspective on tax havens and applying this perspective to the cross-border legal regimes that govern international investment.[20]

This new analytical framework sees OFCs as countries that are victims of the "resource curse," as that term is described in economic development literature.[21] Often physically small, isolated islands with scant natural resources,

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of most reports). MCKEE ET AL., *supra* note 14, at 107–08, 118–19, 159. Furthermore, company formation may be incredibly fast. For example, the Seychelles International Business Authority is known for its efficiency—approving company names in minutes using an automated system and typically providing final company approval within two hours of filing articles of association. *Id.* at 161–62.

[17] *See generally* TAX HAVEN ABUSES REPORT, *supra* note 13 (providing a U.S. Senate Report on the abuses allowed by tax havens and the potential national security implications); McConvill, *supra* note 16 (examining the British Virgin Islands as an example of the legitimate tax avoidance system that OFCs provide international companies); Brooke Harrington, *Inside the Secretive World of Tax-Avoidance Experts*, THE ATLANTIC (Oct. 26, 2015), https://www.theatlantic.com/business/archive/2015/10/elite-wealth-management/410842/ [https://perma.cc/RFY3-S4JL] (discussing the difficulty of reporting on the disadvantages of tax havens).

[18] Even the Vatican released a statement that addressed offshore financial centers, suggesting a "minimum tax on the transactions accomplished *offshore*" to address global hunger:

> Today, more than [] half of the commercial world is orchestrated by noteworthy persons that cut down their tax burden by moving the revenues from one site to another according to their convenience, transferring the profits into fiscal havens, and the costs into the countries of higher taxation. It appears clear that all these have removed decisive resources from the actual economy and contributed to the creation of economic systems founded on inequality. Furthermore, it is not possible to ignore the fact that those offshore sites, on more occasions, have become usual places of recycling dirty money, which is the fruit of illicit income . . . . [I]t was calculated that a minimum tax on the transactions accomplished *offshore* would be sufficient to resolve a large part of the problem of hunger in the world: why can't we undertake courageously the way of a similar initiative?

CONGREGATION FOR THE DOCTRINE OF THE FAITH AND THE DICASTERY FOR PROMOTING INTEGRAL HUMAN DEVELOPMENT, "OECONOMICAE ET PECUNIARIAE QUAESTIONES": CONSIDERATIONS FOR AN ETHICAL DISCERNMENT REGARDING SOME ASPECTS OF THE PRESENT ECONOMIC-FINANCIAL SYSTEM 12–14 (May 17, 2018).

[19] *See infra* notes 30–66 (providing a survey of academic authorities' analyses of OFCs from several different perspectives).

[20] *See infra* notes 68–106 and accompanying text.

[21] *See* RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1–2 (1993). The counter-intuitive result of "resource curse" thesis is generally summarized as follows:

> [A] growing body of evidence suggests that a favourable natural resource endowment may be less beneficial to countries at low- to mid-income levels of development than

OFCs lack a true commodity to exchange in the global marketplace. As a result, OFCs have transformed their legal systems into a resource, "selling" their favorable laws to businesses and individuals in exchange for corporate registration costs and money management fees as a means of gaining revenue for the state and its inhabitants.[22] Applying this framework to international investment law yields new insights into why countries enter into bilateral investment treaties ("BITs") and how the true social costs of international investment should be understood.

This Essay examines some of the arguments in support of and against OFCs through the novel lens of the resource curse and suggests possible implications for international investment law. Part I describes the two main viewpoints on OFCs through explaining each approach's policy rationales and analytical frameworks.[23] Part II lays out a third perspective based on the resource curse.[24] Part III applies this perspective to international investment law and offers several observations based on the new framework.[25] This Essay concludes by providing some directions for further research.[26]

I. Two Approaches to OFCs

This Part discusses the approaches taken by those opposed to and those supporting OFCs by examining the policy rationales and analytical frameworks that they invoke in framing the debate. Section A explains the main policy rationales given by each side,[27] and Section B explains the analytical frameworks that academics often use to support these policy rationales.[28]

A. Policy Rationales

On both sides of the debate over OFCs, politicians, journalists, and academics make outcome-based arguments to support their positions. This Section considers some of these policy rationales that opponents and supporters in-

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> the conventional wisdom might suppose . . . . The new evidence suggests that not only may resource-rich countries fail to benefit from a favourable endowment, they may actually perform worse than less well-endowed countries.

Id.

[22] *See* Erin A. O'Hara & Larry E. Ribstein, The Law Market 4, 66 (2009) (explaining how companies look to incorporate in countries that have laws conducive to their business needs, thus creating a "law market" in which countries compete with one another by trying to establish the most favorable legal system).

[23] *See infra* notes 27–66 and accompanying text.

[24] *See infra* notes 67–87 and accompanying text.

[25] *See infra* notes 88–105 and accompanying text.

[26] *See infra* note 106 and accompanying text.

[27] *See infra* notes 29–54 and accompanying text.

[28] *See infra* notes 55–66 and accompanying text.

voke.[29] First, opponents criticize OFCs because they facilitate tax evasion for the world's wealthiest individuals.[30] This reduces the tax base for onshore states,[31] which in turn must tax the middle and lower classes more to make up for this loss in revenue.[32] In addition, criminals often take advantage of the secrecy offered in OFCs to launder money from international illegal activities.[33]

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[29] *See infra* notes 30–54 and accompanying text.

[30] Confidentiality provided by offshore jurisdictions allows those who earn passive income abroad not to report it to the tax authorities of their home nations, even though failing to declare all or part of one's income is tax evasion—a criminal penalty in most countries. Craig M. Boise, *Regulating Tax Competition in Offshore Financial Centers*, *in* REGULATORY COMPETITION, *supra* note 15, at 50, 52; PALAN ET AL., *supra* note 12, at 83.

[31] Dionne & Macey, *supra* note 15, at 11; *see* STATEMENT OF SENATOR CARL LEVIN, U.S. SENATE, COMM. ON HOMELAND SEC. & GOVERNMENTAL AFF., PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (July 17, 2008) (stating that "[e]ach year, the U.S. Treasury loses up to $100 billion in tax revenues to offshore tax abuses"); PALAN ET AL., *supra* note 12, at 67 (estimating that the U.S. government alone loses between $10 billion and $20 billion in taxes ever year, or potentially even more).

[32] *See* Boise, *supra* note 30, at 59–60; PALAN ET AL., *supra* note 12, at 157. Those who move their money offshore to evade taxes decrease available funds for schools, highways, and police forces, even though they benefit from these public goods. ZUCMAN, *supra* note 12, at 56–57; Boise, *supra* note 30, at 60 (explaining that the use of tax havens is an example of the freerider problem). *But see* Andrew P. Morriss, *The Role of Offshore Financial Centers in Regulatory Competition*, *in* REGULATORY COMPETITION, *supra* note 15, at 102, 108–09 [hereinafter Morriss, *Role of Offshore Financial Centers*] (arguing that there is no guarantee that lost tax revenues would be spent on public goods).

[33] Money laundering is the "process by which the proceeds of a crime are converted into assets that appear to have a legitimate origin[]." MARY ALICE YOUNG, BANKING SECRECY AND OFFSHORE FINANCIAL CENTERS: MONEY LAUNDERING AND OFFSHORE BANKING 9 (2012); *see also* Sharon C. Cobb, *Why Offshore? Exploring the Geographies of Offshore Financial Centers*, *in* WORLDMINDS: GEOGRAPHICAL PERSPECTIVES ON 100 PROBLEMS 237, 240 (Donald G. Janelle, Barney Warf & Kathy Hansen eds., 2004) (describing money laundering as the "processing of illegal profits . . . by disguising the sources or moving the funds to a place where they are less likely to attract attention"). *See generally* RAYMOND W. BAKER, CAPITALISM'S ACHILLES HEEL: DIRTY MONEY AND HOW TO RENEW THE FREE-MARKET SYSTEM 23–47 (2005) (explaining the three forms of "dirty money"—criminal, corrupt, and commercial—and providing a "dirty-money user manual" that describes the main methods in which such illegal funds are moved across borders); Ping He, *A Typological Study on Money Laundering*, 13 J. MONEY LAUNDERING CONTROL 15 (2010) (describing various money laundering techniques). The predicate crime—the crime from which the money was obtained—could be nearly anything, from selling drugs, to human trafficking, to corruption at a national level; for example, dictators like Augosto Pinochet in Chile and Fernando Marcos in the Philippines used offshore legal structures to siphon off funds from their respective states. YOUNG, *supra*, at 11; Gregory, *supra* note 2, at 868; *see also* BAKER, *supra*, at 52 (providing estimates of funds that various heads of government allegedly embezzled from their countries). Money laundering usually takes place in three stages: first, the proceeds of the crime are immersed (put into the banking system); second, they are layered (mixed with funds from legitimate sources); and third, they are integrated (moved throughout the financial system). YOUNG, *supra*, at 10.

Because the United States requires declarations when transporting currency in amounts over $10,000, the first step in using an offshore financial center to launder money often involves smuggling cash from wherever the crime has taken place to the tax haven. 31 U.S.C. § 5316 (2018); He, *supra*, at 16. Once it is there, it can be deposited in corporate bank accounts or trusts, and its owner's identity is hidden from authorities. *See* Richard K. Gordon, *The International Monetary Fund and the Regula-*

Opponents also protest tax avoidance[34] by multinational corporations, which often form subsidiaries in OFCs in order to sidestep paying taxes on earnings from foreign markets. By keeping cash offshore, companies like Apple have been able to save billions of dollars on their U.S. tax bills.[35] OFCs also facilitate transfer pricing, an additional way to reduce taxes[36]—especially for companies with difficult-to-value assets or goods like intellectual property.[37] Intra-company lending is another means of achieving the same goal.[38]

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tion of Offshore Centers, *in* REGULATORY COMPETITION, *supra* note 15, at 74, 88. Governments, though, have become wise to this scheme, and many, like the United States, have instituted "Know Your Customer" ("KYC") requirements—provisions that require banks to gather information on accountholders and report to the proper authority if they believe that the source of funds could be criminal. He, *supra*, at 16. Although the extent to which KYC requirements are followed in offshore financial centers is a matter of debate, criminals who want to take extra precautions when laundering money have devised additional tricks, including mixing "dirty money" with legitimate proceeds before putting it into the system. *Id.* at 18. This can be done fairly easily in many offshore financial centers, where tourism and other hospitality businesses like hotels and restaurants are prevalent and heavy influxes of cash can be explained by fluctuations in a business cycle. *Id.* at 25.

[34] Tax avoidance involves either paying less tax due to alternate interpretations of the law, declaring profits in ways or places other than how they were actually earned, or simply deferring tax payments until a later date. PALAN ET AL., *supra* note 12, at 10.

[35] Jesse Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html [https://perma.cc/M4LN-4SH3]; *see also* Andrea Wong, *Americans Are Paying Apple Millions to Shelter Overseas Profits*, BLOOMBERG (Dec. 7, 2016), https://www.bloomberg.com/graphics/2016-apple-profits/ [https://perma.cc/SCV8-KQMV] (providing an even more infuriating explanation of Apple's tax avoidance).

[36] Sixty percent of all international trade takes place between different branches of the same company. PALAN ET AL., *supra* note 12, at 18. Because these subsidiaries function as separate companies in many ways, they are allowed to conduct business with each other. *See id.* at 68–69. One subsidiary can buy or sell goods to another subsidiary, provide or take on loans from another subsidiary, or even license technology or intellectual property rights to another subsidiary. *See id*. These transactions are legal provided that they are done at "arm's length," meaning one subsidiary must charge the other "for their goods and services at prices equivalent to those that unrelated entities would charge in an open market." *Id.* Because the companies themselves get to decide what the price would have been in an open market transaction, this standard gives companies considerable flexibility and the ability to engage in cost-cutting strategic behavior, especially with regard to company-specific and intangible assets. Specific abusive transfer pricing techniques usually include mis-invoicing or misreporting transactions between subsidiaries. *Id.* at 69.

[37] Firms create a subsidiary in a tax haven and transfer trademarks, copyrights, patents, and other forms of intangible property to the new entity; the parent company then licenses the intellectual property from the subsidiary, creating profits in the tax haven rather than in the home country. ZUCMAN, *supra* note 12, at 104; Boise, *supra* note 30, at 53; Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 120–21; Dhammika Dharmapala, *What Problems and Opportunities Are Created by Tax Havens?*, 24 OXFORD REV. ECON. POL'Y 661, 667 (2008). Technology companies like Apple, Google, and others are strongly enmeshed in the offshore world for this reason. *See* Daniel Haberly & Dariusz Wojcik, *Tax Havens and the Production of Offshore FDI: An Empirical Analysis*, 15 J. ECON. GEOGRAPHY 75, 76 (2015).

[38] *See* TAX HAVEN ABUSES REPORT, *supra* note 13, at 13–14 (describing the system of intra-company lending to individuals using OFCs); Dharmapala, *supra* note 37, at 668 (describing intra-company lending by corporations).

Critics also point to studies which show that there may be significant agency costs to these complex offshore structures. For example, the secrecy offered by OFCs allows corporations to engage in earnings management techniques to hide or smooth over quarters with poor performance.[39] This can lead to "bad news" building up until a breaking point when the news is released and a company's stock crashes.[40] Even worse, it might allow officers of these corporations to engage in illicit self-dealing behavior.[41] Research by economists indicates that firms with subsidiaries in OFCs are more susceptible to the risk of stock price crash.[42] They also face higher interest rates,[43] more covenants in loan agreements,[44] and a higher likelihood that creditors will require collateral[45] than corporations without OFC subsidiaries. For all these reasons, critics of OFCs are generally in favor of the many policies targeted at tax havens.[46]

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[39] *See* Luca Errico & Alberto Musalem, *Offshore Banking: An Analysis of Micro- and Macro-Prudential Issues* 30, 32, 33, 37 (Int'l Monetary Fund, Working Paper No. 99/51999) (providing analysis of this earnings management technique and its consequences).

[40] Jeong-Bon Kim, Yinghua Li, & Liandong Zhang, *Corporate Tax Avoidance and Stock Price Crash Risk: Firm-level Analysis*, 100 J. FIN. ECON. 639, 642 (2011).

[41] Ge et al., *supra* note 12, at 339; Jeong-Bon Kim & TieMei Li, *Multinationals' Offshore Operations, Tax Avoidance, and Firm-Specific Information Flows: International Evidence*, 25 J. INT'L FIN. MGMT. & ACCT. 38, 39 (2014). An example of this type of self-dealing occurred in the 2001 Enron scandal, which resulted in the American energy company declaring bankruptcy. Kurt Eichenwald & Riva D. Atlas, *Two Banks Settle Accusations They Aided in Enron Fraud*, N.Y. TIMES (July 29, 2003), https://www.nytimes.com/2003/07/29/business/2-banks-settle-accusations-they-aided-in-enron-fraud.html [https://perma.cc/UR4E-4N7C] (quoting Robert M. Morgenthau, the Manhattan district attorney, "[n]o more phony baloney offshore special purpose vehicles that are not understandable").

[42] Kim et al., *supra* note 40, at 641. *But see id.* at 659 (stating that the risk is "less pronounced for firms with effective external monitoring").

[43] Ge et al., *supra* note 12, at 336, 337. This relationship holds even when controlling for the liquidity risk of the parent company. *Id.* at 352.

[44] *Id.* at 352

[45] *Id.*

[46] The three major problems associated with tax havens—money laundering, tax evasion, and tax avoidance—have each been dealt with separately by the international community. Money laundering has been addressed by at least two international treaties, including the 1988 Vienna Convention and the 2000 Palermo Convention, in which signatory countries agreed to cooperate to combat transnational drug trafficking, organized crime, and the illicit proceeds from these activities. *See* YOUNG, *supra* note 33, at 49–50. In addition, the Financial Action Task Force ("FATF")—made up of investigators, prosecutors, and financial supervisors from G7 countries and OECD members—issues anti-money laundering recommendations that it updates every five years; although FATF recommends that all U.N. member states comply with these recommendations, they are not obligatory. *Id.* at 51, 65; Gordon, *supra* note 33, at 89.

Tax evasion has been attacked both at the multilateral and national levels. In 2009, a G-20 summit called for the "end of bank secrecy," proposing another blacklist if countries did not agree to sign twelve bilateral treaties with other nations to exchange tax information. ZUCMAN, *supra* note 12, at 46, 60–61. Tax havens therefore often avoided the new blacklist by promising to sign agreements with countries like Greenland, which of course has minimal tax information to share. *See* NICHOLAS SHAXSON, TREASURE ISLANDS: TAX HAVENS AND THE MEN WHO STOLE THE WORLD 213 (2011). The most recent multilateral push against tax evasion came in 2014, when over sixty countries, including tax havens like Bermuda and the Cayman Islands, signed an agreement that the OECD coordinated for the automatic exchange of

Conversely, others see OFCs as an overall boon to the global economy. These supporters of OFCs point to the ways in which the secrecy and financial products OFCs offer can enhance individual freedom. For example, those living in developing nations without strong banking systems can often access financial services and legal entities provided in tax havens that are not available in their home countries.[47] By keeping assets offshore, consumers can also protect themselves from domestic currency fluctuations[48] and other risks.[49] Proponents also note that in countries with autocratic governments or rampant levels of corruption, OFCs enable individuals to protect their wealth from seizure by dictators or those that would seek to silence political opposition.[50] In this way, OFCs allow resistance movements to secretly gather support from abroad and fund dissenters against oppressive regimes.[51]

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tax information; however, not all countries have begun to share information yet. *See* ORG. FOR ECON. CO-OPERATION & DEV., *Multilateral Competent Authority Agreement*, OECD.ORG, http://www.oecd.org/tax/exchange-of-tax-information/multilateral-competent-authority-agreement.htm [https://perma.cc/JLH5-YVAF]. At a national level, the United States passed the Foreign Account Tax Compliance Act ("FATCA"), which requires all banks to identify which accounts are held by Americans; for those foreign banks refusing to comply with such disclosure requirements, all U.S. dividend and interest income is subject to a thirty percent withholding tax before it is paid out. ZUCMAN, *supra* note 12, at 62–63, 72. The European Union (EU) now has a similar scheme known as the EU Tax Savings Directive. *Id.* at 69, 71. On this front, efforts may be working, as even countries like the Cayman Islands and Switzerland have caved to at least some demands for transparency. *See, e.g.*, Jason C. Sharman, *Canaries in the Coal Mine: Tax Havens, the Decline of the West and the Rise of the Rest*, 17 NEW POL. ECON. 493, 500 (2012) ("Every tax haven now exchanges information on criminal offences, particularly money laundering and terrorist financing . . . ." (citation omitted)).

Attempts to counteract corporate tax avoidance have mostly fallen flat. Schemes that offer a one-time tax break for corporations that repatriate overseas profits—such as the one included in the Tax Cuts and Jobs Act of 2017, *see supra* note 12 and accompanying text—have been done before. For example, under President George W. Bush, corporations were given a one-year amnesty period to repatriate foreign earnings held abroad; instead of having to pay the normal 35% tax to bring funds back, corporations were only taxed at 5.25% on those earnings, most of which had previously been held by their offshore subsidiaries. PALAN ET AL., *supra* note 12, at 55. Although these efforts do yield tax revenue, they set poor precedent. In effect, they tell U.S. companies with cash overseas that they should simply wait until the next "one-time" tax break to repatriate the funds, rather than ever pay the full corporate tax on their overseas profits. *See id.*

[47] ZUCMAN, *supra* note 12, at 52; IMF BACKGROUND, *supra* note 13, at 8.

[48] IMF BACKGROUND, *supra* note 13, at 1–2.

[49] *See, e.g.*, HARRINGTON, CAPITAL, *supra* note 15, at 147 (describing how in some countries, like Brazil and Mexico, it is possible to go to a bank and bribe the teller to turn over a list of those who own the largest accounts so that criminals can target those individuals for kidnapping, robbery, or extortion).

[50] PALAN ET AL., *supra* note 12, at 23.

[51] *See* YOUNG, *supra* note 33, at 135; Andrew P. Morriss, *Changing the Rules of the Game: Offshore Financial Centers, Regulatory Competition & Financial Crises*, 15 NEXUS: CHAPMAN'S J. L. & POL'Y 15, 23 (2009) [hereinafter Morriss, *Rules*]. Proponents of this theory argue that generational wealth is not all bad: it enables families to create institutions that challenge state ideologies and overreaches through philanthropy and supporting reformist candidates for office; heavy redistribution may otherwise act as a tool of a seminally corrupt state to ensure its dominance over civil society. *See* HARRINGTON, CAPITAL, *supra* note 15, at 252.

Supporters of OFCs also point to their benefits for businesses. Because they are able to decrease costs by paying less taxes, firms with subsidiaries in offshore financial centers tend to have higher valuations than firms that only operate in onshore markets.[52] In addition, setting up a subsidiary in an OFC for a new project—often called a special purpose vehicle ("SPV")—allows other investors to join the new enterprise, thus spreading the risk.[53] This is routine, for example, in the field of project finance.[54]

B. Analytical Frameworks

Although the debates over these policy rationales continue, the theoretical backgrounds from which each side operates are also important. This Section explores these analytical frameworks academics employ in their discussions of the benefits and consequences of OFCs.[55] And interestingly, both sides of the debate seem to start at the same place: the global market for law.[56] In the context of an international system,[57] businesses and individuals look for laws that

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[52] Durnev et al., *supra* note 13, at 132–33, 151. *But see* ZUCMAN, *supra* note 12, at 56–57 (arguing that states need revenue so that they can provide goods and services to their population—in particular, public goods such as roads, education, national defense, and public safety); SHAXSON *supra* note 46, at 286 (arguing that taxation allows for property rights and even corporations to exist in the first place because the prerequisites to having a successful business or career often rest on the state's ability to provide public goods).

[53] PALAN ET AL., *supra* note 12, at 99; IMF BACKGROUND, *supra* note 13, at 4. *But see* Haberly & Wojcik, *supra* note 37, at 77 (describing the role of offshore vehicles in the 2007–2008 financial crisis).

[54] PALAN ET AL., *supra* note 12, at 99.

[55] *See infra* notes 56–66 and accompanying text.

[56] One of the major originators of the idea of the law market was the economist Charles Tiebout in the late 1950s. *See generally* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). In his influential paper, Tiebout argued that governments provide public goods and other services that their citizens demand and tax citizens correspondingly in order to supply these goods. *Id.* at 417. Citizen "consumer-voters," however, will naturally understate their true preferences for public goods because they realize that an increase in goods supplied by the government leads to increased taxes; thus, Tiebout argued, the real test of which goods consumers want supplied is where they chose to live. *Id.* at 417–18. Moving to or from a location displays a citizen's true desire for the relative levels of taxation and public goods supplied by that jurisdiction. *Id.* at 418, 420. Tiebout notes that his model rests on at least two major assumptions: first, that consumer-voters are easily able to move to where their preferences would lead them, and second, that the goods and services provided by one government do not have positive or negative effects on other jurisdictions. *Id.* at 419. Though these assumptions make some sense within a local or domestic context (as Tiebout envisioned them), they do not hold for the international law market created by tax havens. Permanently emigrating from one country to another is costly, time-consuming, and at times nearly irreversible; for the most part, it is only available to the wealthy and well-connected. Additionally, in contrast to Tiebout's assumption in the consumer-voter analysis, tax haven legal regimes in fact impose external costs on onshore jurisdictions, as well as other tax havens. *See* Boise, *supra* note 30, at 59–60.

[57] *See* HARRINGTON, CAPITAL, *supra* note 15, at 134 (explaining that "[s]ince a fundamental principle of law holds that no sovereign state is obliged to enforce the laws or judgments of a foreign country, there is little the onshore state can do to enforce its claims"); PALAN ET AL., *supra* note 12, at 18 (explaining that under the modern state system of "sovereign equality," each state has the right to

are most favorable to them.[58] At any point where they can take advantage of one system of laws as opposed to another, they will seek to maximize that advantage.[59] OFCs happen to be the states that can provide the most favorable laws to a wide variety of consumers.

Those who object to OFCs often object precisely because of this commercialization of state sovereignty.[60] Because making law is essential to being a state, critics argue that "selling law" to those who are willing to pay for it degrades what it means to be a state in the international system[61] and perpetuates global income inequality[62] and a regulatory "race to the bottom."[63]

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govern that which occurs within its borders; all states are equal in that no state has the right to govern what takes place within another state). Many tax havens have further enshrined these international principles of sovereignty in their domestic law through conflict of laws statutes. Rose-Marie Belle Antoine, *The Legitimacy of the Offshore Financial Sector: A Legal Perspective*, *in* REGULATORY COMPETITION, *supra* note 15, at 30, 45–46.

[58] O'HARA & RIBSTEIN, *supra* note 22, at 4, 66 (2009); Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 159 (2002) [hereinafter Palan, *Sovereignty*] ("On the contrary, Tiebout did not assume, as conventional theories of tax havens do, that corporations will necessarily migrate to the least regulated or least taxed realm."). The businesses that create subsidiaries in tax havens tend to be large, international firms with high levels of intrafirm trade and research and development. Mihir A. Desai, C. Fritz Foley & James R. Hines, Jr., *The Demand for Tax Haven Operations*, 90 J. PUB. ECON. 513, 529, 530 (2006).

[59] HARRINGTON, CAPITAL, *supra* note 15, at 235–36; O'HARA & RIBSTEIN, *supra* note 22, at 67–68; *see* Ronen Palan, *Trying to Have Your Cake and Eating It: How and Why the State System Has Created Offshore*, 42 INT'L STUD. Q. 625, 628, 630 (1998) [hereinafter Palan, *Cake*].

[60] Palan, *Sovereignty*, *supra* note 58, at 165 (describing sovereignty as the ability of the people within the territory to write the law); Palan, *Cake*, *supra* note 59, at 628, 630 (discussing "states' willingness to use their sovereign privileges to devise laws and regulations that are aimed at attracting business into 'their' territory").

[61] *See* HARRINGTON, CAPITAL, *supra* note 15, at 234 (explaining that those who use OFCs prosper from manipulating states' sovereignty) Palan, *Sovereignty*, *supra* note 15, at 154, 159 ("The consensus seems to be that tax havens are deliberate development policies that aim 'to attract thereto international trade-oriented activities by minimization of taxes and the reduction or elimination of other restrictions on business operations.'" (citation omitted)).

[62] *Cf.* G.K. CHESTERTON, THE MAN WHO WAS THURSDAY 189–90 (1908):

> So you talk about mobs and the working classes as if they were the question. You've got that eternal idiotic idea that if anarchy came it would come from the poor. Why should it? The poor have been rebels, but they have never been anarchists; they have more interest than any one [sic] else in there being some decent government. *The poor man really has a stake in the country. The rich man hasn't; he can go away to New Guinea in a yacht.* The poor have sometimes objected to being governed badly; the rich have always objected to being governed at all. Aristocrats were always anarchists . . . .

Id. (emphasis added).

Several arguments exist for opposing stark income inequality. First, as alluded to by Chesterton, there is no representation without taxation. Those who avoid taxes and can flee the county at a moment's notice will not be patriotic citizens concerned with best interests of the country as a whole. Those who pay taxes have "skin in the game" in a county's policies and outcomes; not paying taxes disincentivizes attending to civic duties like voting or using influence to shape the direction of one's nation. HARRINGTON, CAPITAL, *supra* note 15, at 291–92. Second, the wealthy should be required to pay more in taxes because they have more to lose if public goods could not be provided and the state,

On the other side of the debate, some academics see this OFC-centered market for law as beneficial because it creates regulatory competition between states.[64] As states compete to provide the best services to businesses and individuals at the lowest cost, they are forced to streamline regulations and legal regimes that hinder economic growth.[65] Furthermore, this competition creates specialization and innovation, as states tailor their regulatory regimes to certain sectors or types of industries.[66]

II. A THIRD APPROACH: EXAMINING OFCS THROUGH THE CONCEPT OF THE "RESOURCE CURSE"

Although both of these analytical frameworks may be helpful in certain instances, a third perspective perhaps better describes the phenomenon of OFCs. This Part argues that the "resource curse" theory from academic litera-

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which should protect all citizens, disappeared. Boise, *supra* note 30, at 61. Third, redistribution is necessary to ensure the equality of opportunity because, if wealth is allowed to accumulate, it may lead to outsized political and legal influence. ZUCMAN, *supra* note 12, at 56–57; *see, e.g.*, HARRINGTON, CAPITAL, *supra* note 15, at 16 (describing how many recent presidential candidates, such as Presidents George W. Bush and Donald J. Trump and Governor Mitt Romney, had the means to run for political office largely because of their accumulated family wealth).

[63] O'HARA & RIBSTEIN, *supra* note 22, at 33. *But see* Dionne & Macey, *supra* note 15, at 19 (arguing that the "race to the bottom" theory is not completely true because a certain level of regulation is necessary to maintain strong capital markets, which require several protections for market users and the earned confidence of investors); Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 112 (noting that businesses need a minimal level of the rule of law to function and that they take into account other factors besides the regulatory environment, including the educational level of a workforce and the a country's preexisting infrastructure); Morriss, *Rules*, *supra* note 51, at 22 ("The differences between onshore and offshore regulators are thus not adequately described as two ends of a uni-dimensional spectrum. The regulatory competition is thus better described as a competition for the optimal level of regulation.").

[64] Assuming that, in general, businesses prefer lower levels of regulation—especially tax rates—to higher levels, countries that slash their tax rates will often be able to make up the lost revenues from the increase in the number of businesses that chose to establish a presence there. Dhammika Dharmapala & James R. Hines, Jr., *Which Countries Become Tax Havens?*, 93 J. PUB. ECON. 1058, 1059 (2009). This creates regulatory competition between countries to establish the most business-friendly jurisdictions. Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 103. Although this competition can be mitigated by making agreements with other nations to keep regulation at a certain level, it is nearly impossible to have a treaty with every other nation on all of the possible issues the jurisdictions might compete. *Id.*

[65] Dionne & Macey, *supra* note 15, at 12–13, 20–21; Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 108. *But see* PALAN ET AL., *supra* note 12, at 158 (claiming that there is no discernible impact on improved public services at lower costs due to regulatory competition).

[66] Palan, *Cake*, *supra* note 59, at 640; *see* Dionne & Macey, *supra* note 15, at 16. A clear example of this is that offshore financial centers have concentrated on different sectors of the finance industry: Switzerland leads in banking, Bermuda in reinsurance, and the Caymans in hedge funds. ZUCMAN, *supra* note 12, at 26, 28; PALAN ET AL., *supra* note 12, at 38. *See generally* CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016) (explaining the various specializations of "market-dominant small jurisdictions").

ture on economic development may better account for offshore financial centers' genesis and continued existence than other current paradigms. Furthermore, this alternative perspective may even articulate new directions for future prescriptive activity.[67]

Although certainly not the only viewpoint,[68] many scholars of economic development argue that a nation's environment and natural resources (and stewardship of those resources) has a strong effect on a country's economic success in the long run.[69] In general, one might think that countries with more resources would be more successful, but for some countries a "paradox of plenty" occurs.[70] Despite having plentiful natural resources, these countries lag behind other nations with fewer resources in terms of economic development; in addition, they often have higher rates of income inequality and corruption.[71]

Often this incongruity takes place in countries with large amounts of a single resource. Because these countries are heavily dependent on world demand for that commodity, boom and bust cycles prevent the sustained economic growth that is essential to long-term success. In addition, conflict often erupts over control of the resource because it is, more or less, the sole means of

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[67] *See infra* notes 68–87 and accompanying text.

[68] *See, e.g.*, DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 40–44 (2012) (arguing that politics are the key determinant for what economic institutions a country has); William Easterly & Ross Levine, *Tropics, Germs, and Crops: How Endowments Influence Economic Development*, 50 J. MONETARY ECON. 3, 3, 35–36 (2003) (exploring how geography, institutions, and policy affect a nation's economic development); Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Institutions, and Differential Paths of Growth Among New World Economies*, *in* HOW LATIN AMERICA FELL BEHIND: ESSAYS ON THE ECONOMIC HISTORIES OF BRAZIL AND MEXICO, 1800–1914, at 260 (Stephen Haber ed., 1997) (explaining that American economic historians often claim that factor endowments account for a country's history of economic development).

[69] *See generally* AUTY, *supra* note 21 (supporting the importance of a country's natural resources to economic development); JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2005) (advocating the importance of a country's natural resources in its economic development); ALAN H. GELB, OIL WINDFALLS: BLESSING OR CURSE? (1988) (supporting the importance of a country's natural resources to economic development); Easterly & Levine, *supra* note 68, at 5 (explaining that Montesquieu and Machiavelli supported the view that a country's economic development is influenced by its natural resources); JEFFERY D. SACHS & ANDREW M. WARNER, NATURAL RESOURCE ABUNDANCE AND ECONOMIC GROWTH, CTR. FOR INT'L DEV. & HARV. INST. FOR INT'L DEV., HARV. U. (Nov. 1997) (supporting the view that a country's natural resources influence its economic development); Jeffrey D. Sachs & Andrew M. Warner, *The Big Push, Natural Resource Booms and Growth*, 59 J. DEV. ECON. 43 (1999) (same); Jeffery Sachs, *Nature, Nurture, and Growth*, THE ECONOMIST (June 12, 1997), https://www.economist.com/special/1997/06/12/nature-nurture-and-growth [https://perma.cc/92JX-4T3J] (same).

[70] Brooke Harrington, *Why Tax Havens Are Political and Economic Disasters*, THE ATLANTIC (July 28, 2016), https://www.theatlantic.com/business/archive/2016/07/tax-haven-curse/491411/ [https://perma.cc/6SKD-H6NW] [hereinafter Harrington, *Disasters*]; *see* AUTY, *supra* note 21, at 1–2.

[71] Harrington, *Disasters*, *supra* note 70.

fiscal and political power. The faction that controls the resource also controls the country in a phenomenon known in the literature as "state capture."[72]

Applying this concept to tax havens, a new perspective on OFCs depicts them as countries that are victims of the resource curse. Most OFCs are geographically small,[73] remote[74] islands with few natural resources.[75] Lacking any true commodity to exchange in the global marketplace or the population size to have a robust domestic economy,[76] OFCs have transformed their legal systems into a valuable resource for the global market to consume. They "sell" their favorable laws to businesses and individuals[77] in exchange for corporate registration costs[78] and money management fees[79] as a means of gaining revenue for and improving the condition of the state[80] and its inhabitants.[81] States that

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[72] *See* Erika Weinthal & Pauline Jones Luong, *Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth*, 4 PERSP. ON POL. 35, 38 (2006); Terry Lynn Karl, *Ensuring Fairness: The Case for a Transparent Fiscal Social Contract* 261–62 (Initiative for Policy Dialogue Based at Columbia Univ., Working Paper Series Chapter 10, 2006), http://policydialogue.org/files/publications/papers/Ch10.pdf [https://perma.cc/6JQW-7BXA].

[73] Surveying forty-one OFCs, Boise found that their combined landmass was less than that of New Zealand and their combined population was less than that of the state of Illinois. Boise, *supra* note 30, at 62. Furthermore, the average tax haven has a twenty-nine times smaller population than the average non-haven country. Dharmapala, *supra* note 37, at 663, 664. In addition, nearly 70% of tax haven countries are islands, whereas less than a third of all non-havens are islands. *See id.* at 664.

[74] Boise, *supra* note 30, at 62.

[75] Harrington, *Disasters*, *supra* note 70; *see* Dharmapala, *supra* note 37, at 663–64 (providing statistics that suggest that tax havens, on average, have twenty-seven times lower levels of subsoil assets per capita than non-haven countries).

[76] *See* Naren Prasad, *Escaping Regulation, Escaping Convention: Development Strategies in Small Economies*, 5 WORLD ECON. 41, 41–42 (2004) (domestic marketplace in OFCs is too small).

[77] For further proof that the financial mechanisms and legal entities that OFCs provide are products and—like any other consumer good—are subject to a "keeping up with the Joneses" mentality, see HARRINGTON, CAPITAL, *supra* note 15, at 146–47. One wealth management professional explained this OFC-related, consumer-like behavior in the following way:

> [C]lients just want the same asset structures as their friends have, regardless of whether their friends' solution really fits for the client's situation . . . . [T]hey'll say, "I want a Cayman or a BVI company." We explain why that's not a good idea, and they often say, "I don't care. I want one. My friends have them."

Id.

[78] In the Cayman Islands, 14.5% of government revenues comes from international finance-related fees; in the British Virgin Islands, the number is even higher, at 55%. Esther C. Suss, Oral H. Williams & Chandima Mendis, *Caribbean Offshore Financial Centers: Past, Present, and Possibilities for the Future* 15 (Int'l Monetary Fund, Working Paper No. 02/88, 2002).

[79] *See* PALAN ET AL., *supra* note 12, at 31 (noting that some OFCs impose requirements on their clients to "maintain 'dummy' local directors" within the country).

[80] OFCs may also "sell" their law through the following non-financial mechanisms and services: ship and aircraft registrations; trademark, patent and copyright registrations; economic citizenship programs (in which individuals pay fees to become a citizen of a given country); selling the fishing rights reserved to them under international law; leasing extensive parts of what little land they have for military bases (which are important due to the island's strategic location); and, even being paid to hold refugees. Zoromé, *supra* note 13, at 7 n.9; Prasad, *supra* note 76, at 41 n.1, 54–55; NATIONAL PUBLIC RADIO, *"The Middle of Nowhere," This American Life, Episode 253* (Jack Hitt, contributing

might otherwise be among the poorest in the world have thus instead become among the wealthiest, all through the export of law.[82]

Though some OFCs have been able to diversify to some extent into other sectors such as tourism,[83] most economies remain reliant on exporting law. This causes many of the problems associated with the resource curse, including massive downturns during global economic crises and state capture[84] by

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ed.) (Dec. 5, 2003) (transcripts available at https://www.thisamericanlife.org/253/transcript [https://perma.cc/JZQ4-2AT3]). An additional mechanism that involves "selling law" is enacting legislation that provides for the release of very rare stamps, which an OFC can then sell to philatelists at high prices. Prasad, *supra* note 76, at 56. Some countries create "freeports"— plush warehouses with vaults for storing fine art, gold, and other valuables located at airports so that the goods are technically "in transit" and thus duty and tax free if bought, sold, or held in this location. ZUCMAN, *supra* note 12, at 44–45; *Freeports: Uber-warehouses for the Ultra-rich,* THE ECONOMIST (Nov. 23, 2013), https://www.economist.com/briefing/2013/11/23/uber-warehouses-for-the-ultra-rich [https://perma.cc/648E-6734]. Other mechanisms include setting low fees for registering ships (which then fly the "flag of convenience" of the offshore jurisdiction) or selling country codes or domain names to corporations interested in these items as commodities. Prasad, *supra* note 76, at 55; *see also* ZUCMAN, *supra* note 12, at 57 (detailing how some countries have sold or licensed their international country code for phone sex chat lines, and how the small Pacific Island nation of Tuvalu has licensed its assigned country internet domain name (.tv) to websites that want to promote their connection to television).

[81] Revenues from company and trust registration fees have been used in some OFCs to improve a vast array of public services. *See, e.g.*, Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960*, 45 ARIZ. ST. L.J. 1297, 1320 (2013) (mosquito eradication); Prasad, *supra* note 76, at 57 (streetlights, paved roads, and electricity). Furthermore, local residents can gain employment as the agents and administrators of the various legal entities. Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 107. *But see* HARRINGTON, CAPITAL, *supra* note 15, at 265 (describing how the best jobs in the industry are often still held by expatriates).

[82] There is no better example of this than the Cayman Islands. Up until the mid-1900s, two major sources of income for the islands were turtle fishing and handicrafts; cattle wandered through the streets of the capital city, Georgetown, which had only one paved road and one bank. Marc Montgomery, *A Portrait of Success: The Rise of the Cayman Islands as an Offshore Financial Center*, 12 REVISTA MEXICANA DEL CARIBE 33, 47 (2001); Freyer, *supra* note 81, at 1304, 1326. Today, forty-three of the world's top fifty banks have a branch on the islands. Suss et al., *supra* note 78, at 28–29. Approximately twice as many corporations are domiciled in the Caymans as people who live there, and 79% of the population is employed in the service industry. PALAN ET AL., *supra* note 12, at 27–28; CENT. INTELLIGENCE AGENCY, *Cayman Islands*, *in* THE WORLD FACTBOOK (2013), https://www.cia.gov/library/publications/the-world-factbook/geos/cj.html [https://perma.cc/UE3X-MAQA] [hereinafter CIA, *Cayman Islands*]. Overall, the Cayman Islands boasts a 4% unemployment rate and a per capita GDP higher than France, Japan, and the U.K., despite the fact that it must import 90% of its food and consumer goods. CIA, *Cayman Islands*, *supra*.

[83] Suss et al., *supra* note 78, at 3 (tourism alone cannot sustain economic growth in most cases).

[84] Because the domestic economies of offshore financial centers are highly reliant on fees paid by non-resident corporations and individuals, tax havens are particularly susceptible to shifts in foreign capital, which is highly mobile. PALAN ET AL., *supra* note 12, at 186; Suss et al., *supra* note 78, at 17. As an example of how easy it would be for financial services firms to move elsewhere, when Hurricane Ivan struck the Cayman Islands in 2004, it destroyed ninety-five percent of structures on Grand Cayman (the largest island). Freyer, *supra* note 81, at 1387. By relocating staff and essential technology prior to the storm, the Caymans were able to avoid negative effects on its major industries, and the number of company registrations actually increased during the month that storm hit. *Id.* at 1387–

foreign[85] investors. For example, in 2012, the Cayman Islands tried to enact a new payroll tax that would have targeted expatriates in the financial sector.[86] Foreign investors opposed this, so the government was forced to withdraw the planned tax so as not to put in jeopardy the sixty-five million dollars in fees collected annually from the offshore sector.[87]

III. APPLICATION TO INVESTMENT LAW

This new "resource curse" framework through which to view OFCs has potentially broad applications. As previously discussed,[88] corporate and international tax law are almost certainly implicated when discussing tax havens. Yet the topic of international investment law is infrequently part of the conversation. This Part argues that this alternative approach provides some new implications for understanding international investment law, three of which are discussed below.[89] The main goal of this discussion, however, is simply to offer a possible application of the new analytical framework to an area of the law that is seldom associated with OFCs.

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88. This "vulnerability to competition and dependence on the financial sector make their politicians' and voters' incentives differ from those of politicians and voters in onshore jurisdictions." Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 134. Instead of focusing on the interests of the electorate, politicians in tax havens must cater to the demands of foreign investors, even though these businesses and individuals cannot vote for them. HARRINGTON, CAPITAL, *supra* note 15, at 248, 289; PALAN ET AL., *supra* note 12, at 158. The freedom that enables firms to choose in which jurisdictions to invest simultaneously decreases the freedom for voters in offshore financial centers to control their law and economic policies. SHAXSON, *supra* note 46, at 73. By raising government revenues through company registration fees and the like, offshore financial centers shift the majority of the tax burden off voters and onto non-residents. Morriss, *Role of Offshore Financial Centers*, *supra* note 32, at 107. It should come as no surprise, then, that these non-residents expect to have considerable sway over the government's actions—they have been given a vote by paying into the system. *See id.*

85. It is also problematic that finance and investment flows are most strongly linked to nations that were OFC's former colonial masters. Haberly & Wojcik, *supra* note 37, at 88. In some sense, the old system of slavery and plantations has been replaced by a new system in which foreign capital once again extracts a valuable resource—only now, this resource is the OFC's favorable laws rather than tangible products like minerals or crops. Nevertheless, the actors and their relative positions of dominance are the same as in the former era. *See id.* at 79, 93 (calling tax haven links between the U.K. and its former colonies a second British empire).

86. Freyer, *supra* note 81, at 1390.

87. *Id.* at 1386. This example shows a serious effect of state capture: the "unbundling" of state sovereignty. Sovereignty usually consists of the power to both decide the subject matter of the law as well as compel those within the sovereign's jurisdiction to follow it. Bracking, *supra* note 2, at 618. Although tax havens still have the capacity to pass and enforce law, they can no longer dictate its content. *Id.* This loss of control over law's content is equivalent to a partial destruction of state sovereignty and—for countries with representative governments—the loss of popular sovereignty. Gregory, *supra* note 2, at 893; Palan, *Cake*, *supra* note 59, at 630. "Although they claim their sovereign rights, these states have an independence that is more apparent than real, for their developmental and social goals are subject to the whim of foreign capital." PALAN ET AL., *supra* note 12, at 187.

88. *See* Part I, *supra* notes 27–66 and accompanying text.

89. *See infra* notes 92–105 and accompanying text.

First, BITs with Investor State Dispute Settlement ("ISDS") mechanisms are part of the total package of law that OFCs use as a resource to attract companies, along with their low tax rates, secrecy, and easy-to-form legal entities. For example, Mauritius is an island nation off the coast of Africa with favorable tax rates.[90] It is also highly ranked in the World Bank's annual "ease of doing business" survey, which measures how conducive a jurisdiction is to starting and operating a business.[91] These two factors alone would no doubt attract foreign capital. But in addition to all of this, Mauritius also has forty-seven BITs either signed or in force, many of which are with African countries.[92] Because Mauritian entities will have increased protections compared to those formed in other countries without BITs in place, Mauritius's numerous BITs makes it an even more attractive location for multi-national corporations to form subsidiaries and SPVs in when they invest in Africa.

To further elaborate on the Mauritian example, Mauritius has a BIT in place with Tanzania[93] that provides for compensation of losses due to conflict[94] and state expropriation,[95] as well as ISDS.[96] This ensures that multi-national

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[90] It is, by many accounts, a tax haven. *See, e.g.*, Will Fitzgibbon, *Rise of Tax Haven Mauritius Comes at the Expense of Rest of Africa,* IRISH TIMES (Nov. 7, 2017), https://www.irishtimes.com/business/rise-of-tax-haven-mauritius-comes-at-the-expense-of-rest-of-africa-1.3282982 [https://perma.cc/75UJ-DWKZ].

[91] *See Rankings & Distance to Frontier*, WORLD BANK (2017), http://www.doingbusiness.org/en/rankings [https://perma.cc/KC9M-P44B] (ranked twenty-fifth, above countries like Spain and Japan).

[92] United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Navigator: Mauritius*, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/134#iiaInnerMenu [https://perma.cc/7LD3-BSSE].

[93] The Investment Promotion and Protection Agreement (United Republic of Tanzania) Regulations 2009, Mauritius-Tanzania, Oct. 15, 2009, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1996 [https://perma.cc/RSK3-X6T3].

[94] *See id.* Art. 5, Compensation for Losses:

> Investors of either Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

Id.

[95] *See id.* Art. 6, Expropriation:

> Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.

Id.

corporations looking to invest in Tanzania, but wanting lower tax rates, will regard Mauritius as a perfect conduit because their investments through a Mauritian entity will likely remain well-protected.

The BIT package is thus only a part of the inducement for foreign investors to create Mauritian entities. It would seem that Mauritius would not be terribly concerned with ensuring that its interests are protected because most of the investment into Mauritius does not stay there; instead, it goes into other countries. As such, Mauritius—as well as other OFCs with BITs—likely will not fight to rectify imbalances in agreements that favor investors. This inconsistency has implications for reforming international investment law, which is already seen as favoring investors[97] over states in many cases.[98]

Second, BITs play a signaling role for OFCs to inform investors of their level of sophistication and differentiate them from other players in the market. There is a fair bit in the OFC literature about so called "tiers" of OFCs.[99]

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[96] *See id.* Art. 8, Settlement of Disputes Between an Investor and a Contracting Party ("If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to . . . initiate arbitration proceedings either to [ICSID or based on UNCITRAL rules] . . . .").

[97] *See, e.g.*, Philip De Man & Jan Wouters, *Improving the Framework of Negotiations on International Investment Agreements*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 233, 238 (Oliver De Schutter, Johan Swinnen, & Jan Wouters eds., 2013) ("[T]he one-sidedness of most BITs currently in force shows that the potential for a balanced outcome of investment negotiations is rather limited . . . ."); ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 85, 93 (2012) (arguing that investors can trump a state's exercise of public authority through IIAs and that tribunals thus usurp the power of nations' constitutions and highest courts); Fabio Morosini & Michelle Ratton Sanchez Badin, *Reconceptualizing International Investment Law from the Global South: An Introduction*, *in* RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 1, 3 (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2018) ("[T]here is a growing demand for a more balanced approach between investors and states, imposing more obligations on the former."). *But see* DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 322–24 (2017) (disagreeing with such criticisms because BITs were not meant to an provide equal distribution of rights and because there are fewer responsibilities held by investors than critics claim). Collins notes that although international investment agreements ("IIAs") place many obligations on host states, such as "non-discrimination, FET, FPS, and guarantees against expropriation without compensation," there are "remarkably few" features that assign responsibilities to investors. *Id.* Because Collins sees IIAs as "voluntary commitments" that were "never meant to apportion rights and obligations evenly," however, he disputes these criticisms of imbalance. *Id.*

[98] This one-sidedness of many investment treaties has been further exacerbated by third-party financing of investor claims against states. *See* FRANK J. GARCIA, HYUN JU CHO, TARA SANTOSUOSSO, RANDALL SCARLETT & RACHEL DENAE THRASHER, THE CASE AGAINST THIRD-PARTY FUNDING IN ISDS: EXECUTIVE SUMMARY, B.C. L. SCH.-PUC UNIV. OF CHILE, WORKING GRP. ON TRADE & INV. L. REFORM, THIRD-PARTY FUNDING TASK FORCE (2018), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2130&context=lsfp (describing various issues, including lack of appellate review and rule of law issues). For examples of firms involved in third-party arbitration finance, see the following webpages: Buford Capital, http://www.burfordcapital.com/; Fullbrook Management, https://fulbrookmanagement.com/; and Calunius, http://www.calunius.com/.

[99] *See, e.g.*, Javier Garcia-Bernardo et al., *Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network*, 7 SCI. REP. 1 (2017) (describing tiers of OFCs based on the industries and regions they serve and whether they are "sinks" where capital stays or

Though all OFCs—rightfully or wrongfully—have developed the reputation as "tax havens" or locations for "dirty money," some OFCs are seen as more legitimate than others in the eyes of the international business community and thus can attract more capital and investment.[100] BITs tell investors that a particular OFC is of a higher tier than others and help the OFC to better sell its tax and corporate legal regimes and their corresponding benefits. Top-tier OFCs like Mauritius and Singapore[101] have many BITs, whereas bottom-tier OFCs,

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"conduits," where capital flows to another jurisdiction from). Providing another example of the importance of reputation, in 2000, the Financial Action Task Force (FATF) put together a list of Non-Cooperative Countries or Territories ("NCCTs") and condemned them for their excessive secrecy, legal provisions, minimal mechanisms to report suspicious transactions, loopholes in regulation, and lack of administrative and judicial oversight of the finance industry. Gordon, *supra* note 33, at 91; Suss et al., *supra* note 78, at 19. Thirty-five jurisdictions were listed in the report, with fifteen being labeled non-compliant. Boise, *supra* note 30, at 66; Suss et al., *supra* note 78, at 8. By creating this "blacklist," FATF had essentially labeled all businesses with financial entities in these countries as potentially engaged in criminal activity, but going further than this, FATF recommended that other countries take countermeasures against the fifteen NCCTs, which could include "conditioning, restricting, targeting, or even prohibiting transactions with uncooperative jurisdictions." Gordon, *supra* note 33, at 92; *see* William Vlcek, *Competitive or Coercive? The Experience of Caribbean Offshore Financial Centres with Global Governance,* 97 THE ROUND TABLE 439, 443 (2008), https://doi.org/10.1080/00358530802057418. Not wanting to be known as a haven for "dirty money," which would discourage legitimate business, countries did whatever they needed to get themselves removed from the blacklist, and within six years, the blacklist had shrunk from fifteen nations to zero. Montgomery, *supra* note 82, at 62; Sharman, *supra* note 46, at 501; Dionne & Macey, *supra* note 15, at 14. The changes that tax havens put in place to get themselves removed from FATF's disapproval, however, were mostly cosmetic and did not substantially change the existing legal regimes. YOUNG, *supra* note 33, at 163; *see* Antoine, *supra* note 57, at 32 (the Bahamas abolishing bearer shares); James L. Butkiewicz & Leo-Rey C. Gordon, *The Economic Growth Effect of Offshore Banking in Host Territories: Evidence from the Caribbean*, 44 WORLD DEV. 165, 168 (2013) (the Cayman islands requiring banks to open and staff offices); Suss et al., *supra* note 78, at 11 (providing examples of the various cosmetic changes that OFCs made to their processes to ensure their removal from the blacklist). At least part of the reason more changes were not made was due to the high costs of implementing a comprehensive reform of the financial sector. Vlcek, *supra*, at 443 (noting that actualizing and maintaining all of the requirements to be in compliance with FATF recommendations would have cost the Bahamas up to $45 million a year, according to some estimates).

[100] Suss et al., *supra* note 78, at 18. In fact, there is some evidence that the act of moving off FATF's blacklist actually benefited several countries, leading to improved credit ratings, positive press, and even better reputations than before. KLAUS-WALTER RIECHEL, FINANCIAL SECTOR REGULATION AND SUPERVISION: THE CASE OF SMALL PACIFIC ISLAND COUNTRIES, INT'L MONETARY FUND, ASIA & PACIFIC DEP'T, POLICY DISCUSSION PAPER 4 (2001). This seems to make sense on an intuitive level. Before the blacklist, there was no external body measuring standards; companies and individuals seeking to consume tax haven law had few ways to judge which offshore financial centers were better than others. The blacklist acted as a stamp of approval for those countries that were *not* on it, and by removing itself from the list, a jurisdiction could show that a reputable third party had in effect certified its legitimacy. *See id.*

[101] UNCTAD, *International Investment Agreements Navigator: Singapore*, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/190#iiaInnerMenu [https://perma.cc/4NQW-MM5X] (showing that Singapore has entered into 44 BITs). Some top-tier OFCs, however, do not have BITs. *See, e.g.*, UNCTAD, *International Investment Agreements Navigator: Cayman Islands*, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/37#iiaInnerMenu [https://perma.cc/Z3LP-P83K] (no BITs); UNCTAD, *International Investment Agreements*

like Nauru, lack these investment agreements.[102] To draw a domestic parallel, BITs signal to multi-national companies that they should view an OFC like American companies view the state of Delaware: a jurisdiction with a sophisticated legal regime and preferential tax treatment that offers a robust setting in which to form companies and invest from.

Finally, on a different note, a recurring question in international investment law is how to curb the negative environmental and social effects of investment.[103] Often, this question is framed in terms of a particular project or issue,[104] like how a given factory might affect endangered species living nearby or cause disruption in a local community. This example of OFCs highlights how investment in the aggregate might impact an entire country. The resource curse analytical framework demonstrates how relying solely on foreign investment might spur far-reaching outcomes across social and political institutions, especially through the dangerous consequences of state capture by industries that are largely foreign-controlled and subject to severe market fluctuations.[105]

Navigator: Bermuda, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/22#iiaInnerMenu [https://perma.cc/8NZJ-EMT5] (no BITs). This may be because these OFCs have found other ways to signal their status or perhaps because they were so well-regarded before BITs became widespread they did not need to enter into BITs to boost their reputation.

[102] UNCTAD, *International Investment Agreements Navigator: Nauru*, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/146#iiaInnerMenu [https://perma.cc/8DWM-3W5V] (no BITs); *see also* UNCTAD, *International Investment Agreements Navigator: Cook Islands*, INV. POL'Y HUB (2013), http://investmentpolicyhub.unctad.org/IIA/CountryBits/48#iiaInnerMenu [https://perma.cc/3GUX-EMSR] (no BITs).

[103] *See* Olivier De Schutter, *The Host State: Improving the Monitoring of International Agreements at the National Level*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 157, 177 (Oliver De Schutter, Johan Swinnen, & Jan Wouters eds, 2013) ("[A]rbitral tribunals['] . . . general attitude has been to dismiss arguments based on human rights as irrelevant to investment disputes."). *See generally* Collins, *supra* note 97, at 250–83 (discussing public interest issues affected by international investment agreements, including the environment, human rights, and culture).

[104] *See, e.g.*, Morosini & Badin, *supra* note 97, at 10–11 (arguing that "[e]nforcement of these treaties in several jurisdictions negatively impacted some host countries' ability to regulate in the public interest" in areas such as the "right to water, right to health, the protection of cultural sites, the protection of the rights of indigenous people" and other similar issues and collecting cases from NAFTA/UNCITRAL and ICSID tribunals involving Argentina, Tanzania, Mexico, Nicaragua, Canada, Australia, and Uruguay, among others, illustrating these specific disputes).

[105] A powerful example of state capture comes from Antigua, where R. Allen Stanford, an American businessman, relocated his enterprises in return for enormous tax breaks and legal concessions by the government. Harrington, *Disasters*, *supra* note 70. Stanford was able to ensure these breaks continued by giving money for hospitals and various other seemingly philanthropic works, many of which ultimately benefitted him. *Id.* His business and philanthropies eventually grew to the second largest employer on the island, but when it was discovered that he was actually running a Ponzi scheme and jailed, Antigua suffered a massive setback—GDP dropped by 10%, and even tourism revenues declined because of the bad publicity. *Id.*

CONCLUSION

This Essay chronicled the two major viewpoints on tax havens and provided a third analytical framework—which draws on economic development research—to describe offshore financial centers as sellers of law in a global marketplace in which they have little else to offer. This new perspective provides an alternative vantage point from which others can pursue further studies, in addition to the suggestions offered here for how the framework might be applicable to international investment law. By looking at offshore finance through the lens of academic literature on the resource curse, it may be possible to better understand this global phenomenon and suggest avenues for meaningful reform or remediation.[106]

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[106] Seeing offshore financial centers as countries struggling with the resource curse could mean that solutions that were successful for other resource-cursed countries could similarly work for offshore financial centers. One such promising solution is channeling profits from the dominant resource into a sovereign wealth fund. Sovereign wealth funds are government-administered pools of financial assets used to achieve macroeconomic objectives, often savings or fiscal stabilization. Udaibir S. Das, Yinqiu Lu, Christian Mulder & Amadou Sy, *Setting Up a Sovereign Wealth Fund: Some Policy and Operational Considerations* 4–5, 12 n.18 (Int'l Monetary Fund, Working Paper No. 09/179, 2009). They are usually put in place after commodity booms in countries where a single commodity dominates. *Id.* at 10. For example, Norway set up its sovereign wealth fund in 1990 after riding the ups and downs of the prices of oil, one of the major commodities that it produced; the proceeds from good years were placed in the fund, which could then create a return and help reduce the short fallings during bad years. Mehmet Caner & Thomas Grennes, *Sovereign Wealth Funds: The Norwegian Experience*, 33 WORLD ECON. 597, 599, 602 (2010); *see also* DAVID KINLEY, NECESSARY EVIL: HOW TO FIX FINANCE BY SAVING HUMAN RIGHTS 145–46 (2018) (discussing the fund's refusal to invest in companies with poor environmental or social records).

These funds are a way to defy the resource curse through diversification. Especially if the fund is externally managed, it would seem that sovereign wealth funds could also improve governance and perhaps prevent state capture. For countries experiencing the resource curse, whoever controls the major resource controls the state because the major resource is the primary locus of the state's revenue. If the state has revenue from a sovereign wealth fund that is externally managed, the state has other means to provide for itself and therefore cannot be corrupted by those who control the resource. If tax havens were to set up sovereign wealth funds and channel some of the proceeds from the sale of their laws into those funds, they could create alternative sources of revenue, minimizing the need to structure their legal system favorably for outsiders. In fact, at least one offshore financial center has taken a step in this direction: the tiny Pacific island nation of Tuvalu created the Tuvalu Trust Fund, managed with help from Australia and New Zealand, which provides over twenty-one percent of revenue for public expenditures. *See* Prasad, *supra* note 76, at 56; TUVALU TRUST FUND, http://tuvalutrustfund.tv/ [https://perma.cc/JAJ3-L7KG].