

## Why 'jurisdiction'? Determining boundaries in offshore finance

*William Vlcek*

*School of International Relations*

*University of St Andrews*

*Scotland, United Kingdom*

[wbv2@st-andrews.ac.uk](mailto:wbv2@st-andrews.ac.uk)

**Abstract:** This article examines the terminology used when analysing offshore finance, specifically the application of 'jurisdiction' in this context. The analysis is developed by first explicating the non-sovereign territory and the shape of sovereignty as experienced and practised in these territories. This foundation then is used to outline the shape and extent of an 'archipelago' of offshore finance composed of both sovereign states and non-sovereign territories. The offshore archipelago serves as an intermediary in the transfer of capital from its source location to its destination, which brings it into direct contact with the global financial governance initiatives promulgated by the G20 for the welfare of its membership. In closing, the implications for the offshore jurisdiction are briefly considered in the case of the constitutional relationship governing the Overseas Territories of the United Kingdom (UK).

**Keywords:** global financial governance, jurisdiction, non-sovereign territories, offshore finance, Panama Papers, Paradise Papers, small states, subnational jurisdictions, tax haven

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### Introduction

Select small states or territories have been accorded prominence in media presentations of late: first, because of the Panama Papers; and, more recently, the so-called 'Paradise Papers' (ICIJ, 2018). The designation for the latter trove of stolen confidential documents is emblematic for a conscious effort to frame the small, tropical island, with its imaginary as a 'paradise', as a central element in the story that the involved media outlets seek to tell (BBC News, 2017). There are clear and distinct differences between the material (and the client accounts documented) contained in the Panama Papers from Mossack Fonseca (Panama) as compared to the Paradise Papers from Appleby (Bermuda). This distinction was noted, for example, in one article on the revelations of the Paradise Papers, that whereas the Panama Papers revealed corruption and money laundering, the Paradise Papers revealed 'a lot of tax planning' (Marriage & Thompson, 2017). In most, if not all, of the material released by the Paradise Papers' media partners, somewhere at the bottom of the article, perhaps as a footnote, or at the end of the broadcast story, there would be the brief statement (possibly required by the corporation's house attorney) that nothing in the events described is illegal. For example, 'The BBC said there was nothing illegal in the investments and no suggestion that the Queen was not paying tax' (Houlder, 2017a; also Kitchener, 2017). Yet, there is a profound sense of moral outrage expressed surrounding the revelations arising from these formerly confidential legal documents (Patrick, 2016). 'Just because it is legal, does not make it right' is the refrain of many politicians, tax activists, international bureaucrats and the ordinary citizens for whom legal tax minimisation at the international scale is beyond their reach (Hopkins, 2017).

The moral indignation factor in discussions over tax avoidance or tax evasion will not be addressed in this paper; nor will it analyse the specific aspects of law which demonstrate that the actions revealed by the publication of the Paradise Papers are legal. Instead, the topic considered here is the capacity for a small state or territory to operate in this international

economic environment and the legal provision of non-resident corporate and financial services. This question involves my past usage of the term ‘jurisdiction’ to identify both the sovereign states and the non-sovereign territories that create an offshore archipelago in the domain of global finance (Vlcek, 2017, p. 12). To a great extent, this question concerns the practice of sovereignty in the states system and leads initially to that question familiar to every first year student of international relations: what defines the sovereign state? Consequently, the nature and practice of sovereignty in the contemporary world is critical, along with the determining characteristics of the ‘state’. At the same time, sovereignty is an essentially contested concept, at least within the discipline of international relations (Slomp, 2008) as well as among scholars dealing with international relations in the social sciences. The application of this concept frequently excludes territories not recognised in the states system *as a state*, while they also possess some degree of independent action and determination of local law. It is for this reason that the discussion includes a diversity of territories, those that are sub-national (e.g. Delaware) as well as those that are outside the territorial borders of a sovereign state (e.g. Cayman Islands). In addition to the sovereignty aspect to this topic, I should also note my recurrent disclaimer regarding my preference for the term ‘offshore financial centre’ (OFC) rather than the more popular ‘tax haven’, or the term increasingly used by tax activists because of their assertion that ‘secrecy jurisdiction’ is a neutral and more accurate descriptor for the territory (Vlcek, 2009a, p. 274). The latter two terms retain, however, embedded assumptions about what is offshore finance and how these privilege the speakers’ developed economy residencies over the sovereign rights and responsibilities of the many developing economies they are critiquing. Thus, there is an air of *noblesse oblige* and a whiff of neo-colonialism concealed in many of the arguments offered to suppress those offshore financial sectors beyond the shores of Europe and North America (Marshall, 2009; Sanders, 2002).

## Defining Jurisdiction

Before interrogating the nature of the application of ‘jurisdiction’ with regards to global financial governance, an initial definition or understanding of the term should be established. The Oxford English Dictionary (online) has four definitions for the word. The third declares:

The extent or range of judicial or administrative power; the territory over which such power extends (OED, 2018).

This definition includes the designation of the space or territory (with permanent population, government, etc.) over which a specific legal regime operates and is enforced. It also reflects the word’s usage regarding the law, its practice and the range or extent of legal enforcement. Concurrently, it opens up a further variant term, extra-territorial jurisdiction, with regard to state efforts to enforce its domestic law beyond the territorial boundaries over which that state nominally presides (Putnam, 2009). The latter term is often used in conjunction with descriptions of US legal activity with respect to the offshore (to enforce its taxation on US citizens), as well as activity to enforce US legislation involving targeted economic sanctions, money laundering and terrorist finance (Emmenegger & Eggenberger, 2018; Vlcek, 2008a). To some extent, the ‘offshore’ dimension may be relevant in the domain of global finance more than any other aspect of the states system and the global political economy. Beyond finance and the oil extraction industry, the term ‘offshore’ is little used, though there are examples in global manufacturing and the application of ‘offshore’ to identify and describe company operations that have been relocated to a foreign territory (Urry, 2014).

The application of the term 'jurisdiction' to encompass territories with varying degrees of internationally-recognised sovereignty implements several aspects from the four meanings of sovereignty analysed by Krasner (1999, pp. 9-25): domestic, interdependent, international legal and Westphalian. For an analysis of offshore finance, the term jurisdiction cuts across these four meanings to incorporate selected elements: an appreciation for the application of domestic sovereignty within a defined territory; the interdependent nature of offshore finance within the realm of global finance; the limitations imposed on some territories because they lack full international legal sovereignty; and finally, the Westphalian meaning, with its understanding for the centrality of territory.

To expand on the relevance of jurisdiction as the appropriate terminology, this article first identifies the range of non-sovereign territories that emerge as actors in one way or another in transnational trade and commerce. Second, it sketches the elements of sovereignty as experienced and practised by these non-sovereign territories. In the third section, the conjunction of these two features – the non-sovereign territory and the praxis of sovereignty – results in the formation of 'offshore' finance centres as a distinct political economic space somehow different from the domestic and foreign spaces that the offshore is juxtaposed against in the discourse. Finally, the complexities of the UK's Overseas Territories are presented as an example for politics, the praxis of sovereignty, and the nature of constitutional relations in a liberal, democratic society constrained by the expectations of a liberal international society.

### **Who are the non-sovereign territories?**

Many states possess sub-national jurisdictions which may engage in commercial activity extending beyond their national borders. Some of these jurisdictions physically exist beyond those national borders and as a result effectively extend the national border in that location. In particular, when these territories are islands or coastal regions at a distance from the main territory of the state, this specific geography can serve to establish a further exclusive economic zone (EEZ) beyond the shoreline of the state, as established since 1994 by the coming into force of the 1982 UN Convention on the Law of the Sea (UNCLOS, 1982). But other sub-national jurisdictions exist as the political/geographic sub-divisions of the territorial state. The latter are recognised, for example, as 'states' in the United States of America, 'länder' in the Federal Republic of Germany, or 'provinces' in Canada. There are semi-autonomous territories due to domestic constitutional arrangements, such as Scotland within the United Kingdom, and Greenland within the Kingdom of Denmark. A number of former French colonies retain a constitutional arrangement with metropolitan France as *Départements d'Outre-Mer* (DOMs) or *Régions d'Outre-Mer* (ROMs); while the United Kingdom retains a constitutional arrangement with a number of former colonies under the term Overseas Territories (OTs). Simultaneously, the British Crown (and not the UK government in Parliament) retains a constitutional relationship with its Crown Dependencies: the Bailiwicks of Guernsey and Jersey, and the Isle of Man (Gov UK, 2018).

The iteration of the many names and their accompanying legal/constitutional relationship with a sovereign state demonstrates the complexity behind the practice of sovereignty within the international system of states. And, there are further exceptional relationships including the legal status of the US base at Guantánamo Bay in Cuba, and US bases around the world in which the legal system enforced on base premises is determined by the Status of Forces agreement between the US and the host state. The latter situation is a further example for the role of the law and the nature of the legal system in shaping and

constraining the non-sovereign territory.<sup>1</sup> The structure of the relationship with the metropole or federal authorities in turn influences the structure of any relationship with another sovereign territory (or *its* sub-national jurisdiction). In the case of those sub-national jurisdictions with a place in the archipelago of offshore finance, the constitutional relationship permits the jurisdiction the capacity to craft its own legislation and local legal system to support this structure of global finance. This capacity also may be used to create a legal environment supporting the operations of other forms of business activity targeting non-resident customers and clients. The nature and variety of some of these economic activities for a selection of jurisdictions are presented in the next section.

### **Sovereignty for a non-sovereign territory**

As noted, sovereignty and the definition of the sovereign state is a perennial question posed to undergraduate students on an international relations course. One commonly featured definition arises from the *Montevideo Convention on the Rights and Duties of States* (1933), which defines the nature of the state as a person in international law in its first article. Thus, a sovereign state possesses four attributes: a permanent population, a defined territory, a government and the capacity to conduct relations with other states. The critical attribute for the purposes of this paper, however, involves the recognition of a territory *as* sovereign by the already designated sovereign state members of the states system (Krasner's international legal sovereignty): those other states with which a newly designated state must have the capacity to conduct relations. Such a recognition comes with all the rights and responsibilities accorded to a sovereign state, which in turn are policed and regulated by other members of the states system.

#### *Taiwan*

Recognition as a state is influenced by practices of state power: thus, typically the largest/strongest states determine who is in and who is out. While Taiwan, for example, *de facto* possesses the attributes for a state and is recognised as a state by a number of other, small states, that recognition is not sufficient for Taiwan (as the Republic of China) to be a voting member of international organisations (IOs) such as the United Nations where membership is limited to recognised sovereign states. Yet, Taiwan does have observer status at some IOs, such as the World Health Organisation, and its status as an important trading territory is reflected in membership of the World Trade Organisation as the 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)' (Tubilewicz, 2012; WTO, 2018).

The relationship between China and Taiwan does not fit the paradigmatic relationship between a non-sovereign territory and its affiliated sovereign state. Rather, the paradigmatic constitutional relationship between a non-sovereign territory and a sovereign state facilitates the transnational political economic relations of these non-state territories. Yet, each relationship reflects the specific historical trajectory experienced by the territory on its journey to the present moment, a situation exemplified by Taiwan and a number of other territories.

#### *Åland*

One example of the complexities of a non-sovereign territory possessing limited, local sovereign capacity is the Åland Islands in Scandinavia. The status of these islands is a product of the shifting geographies of Scandinavia and Russia over the past several centuries. The

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<sup>1</sup> One complex case involving postcolonial rights, the Cold War and national security is the Chagos archipelago, part of the British Indian Ocean Territory, with the US military base at Diego Garcia (Harris, 2014; Sand, 2009).

islands lie in the Baltic Sea between Sweden and Finland with a predominantly Swedish-speaking population. Ceded by Sweden to Russia as part of a war settlement in the early 19<sup>th</sup> century, the islands were part of the Grand Duchy of Finland in Tsarist Russia. They were 'demilitarised' as part of the Crimean War settlement, and remained part of Finland following its independence from Russia in 1917. But local Åland identity emerged to challenge the young Finnish state, leading to a dispute over Åland's political status. The dispute was sent to the League of Nations which led to a convention emerging in 1921 that established significant autonomy for Åland within Finland. It recognised Swedish as the official language for the islands, maintained its demilitarised and neutral status, and granted a local Åland assembly legislative freedom in a number of policy areas. This legislative freedom includes the requirement that any future treaty acceded to by Finland which could impact Åland's status as an autonomous part of Finland must be approved by the Åland assembly (Joenniemi, 2014, pp. 82-86).

As suggested by the historical trajectory of Åland, in turn a territorial part of Sweden, Russia and Finland leading to its autonomous status within Finland, the relationship of the non-sovereign territory with sovereign states is shaped and constrained by its relationship with the sovereign state it is identified as being part of by other states. In the case of Åland, these relationships were established in part by international conventions. Many non-sovereign territories retain a set of domestic policy responsibilities while the sovereign state deals with many (if not all) of the state-to-state interactions. In general, the latter includes diplomatic and security (defence) issues, leaving the non-sovereign territory to determine its own economic and social policy (e.g., Vlcek, 2013). For the case of small island non-sovereign territories, these policies will often include asymmetrical limits on property ownership and 'citizenship' within the territory in order to maintain a sense of local identity across generations (e.g. 'belonger' status, see Vlcek, 2013, p. 356).

### *Hong Kong*

Which is not to say that non-sovereign territories are not involved with, or are not members of, international organisations normally limited to sovereign states. The case of Taiwan was already mentioned for its limited participation in IOs. A different experience is that of Hong Kong, a Special Administrative Region (SAR) of China.<sup>2</sup> For example, as a financial centre, Hong Kong is represented at a number of IOs, including the Bank for International Settlements, the Financial Action Task Force, and the Financial Stability Board.<sup>3</sup>

A similar situation exists with a number of non-sovereign territories that also serve as financial centres within the world economy. As Maurer (2013, p. 131) observed about the British Virgin Islands (BVI), an Overseas Territory of the United Kingdom:

Between the most local-level scale of legislative autonomy and the highest-level scale of international governance, one finds the BVI speaking as a consolidated, sovereign entity to other sovereign states and to global institutions.

The position and conduct of non-sovereign territories which function as financial centres in the world economy, such as the BVI, are outlined in the next section.

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<sup>2</sup> The government of Hong Kong includes an Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region: <http://www.fmcofrc.gov.hk/eng/>

<sup>3</sup> A listing of international fora in which Hong Kong participates is found on its government website at: <http://www.cmab.gov.hk/en/issues/external.htm>

## An archipelago of offshore finance

The geographic imaginary of an offshore financial archipelago is intended to situate the multitude of jurisdictions labelled, by themselves or by others, as locations for offshore finance within the more extensive geography of global finance (Vlcek, 2008b, p. 20). More commonly, the geographical imaginary consists of an onshore composed of sovereign states with their highly regulated financial sectors, alongside smaller offshore territories with lightly regulated financial sectors. But: offshore is not equivalent to the level and nature of regulation; rather, it is characterised by the provision of financial services to *non-resident* individuals and firms. In other words, offshore is about doing business with foreigners and not this imaginary promulgated in the popular press accompanied by images of tropical beaches (Houlder, 2017b). A more suitable image would be of a network map with nodal points of varying size reflecting the quantity of assets recorded on deposit, with connecting edges of varying size representing the quantity of capital flowing between any two nodes. Just such an image is contained in an analysis of global foreign direct investment (FDI) flows, situating OFCs in the network between origin and destination jurisdictions (Haberly & Wójcik, 2015b). But there is a point of contention in this and other research on the OFC/tax haven/secretary jurisdiction: which jurisdiction is a member of this group of OFCs, and which one is not? To be labelled a member has become a politically-fraught issue over the past couple of decades. Where once the term may, in fact, have simply referred to some idyllic tropical location where the wealthy kept their money, in more recent years the term(s) have assumed the weight of normative judgement.

The Organisation for Economic Cooperation and Development (OECD) determined membership of its 'tax haven' group in 1998 on the basis of four 'key factors': no taxation, no exchange of tax-related information, a lack of transparency, and no substantial business activity to explain the presence of the capital (OECD, 1998, pp. 21-25). When the OECD published its list in 2000, however, six jurisdictions that would have otherwise satisfied its selection criteria were excluded because of a prior pledge to end their 'harmful tax practices' (Organisation for Economic Co-operation and Development, 2003). The decision to filter the publicly published list based on side agreements reveals the international politics embedded in any list, whether created by an international agency or by a national government. The OECD list consisted of 35 mostly small states and territories, in part because other, larger states were separately identified by the OECD in 2000 as having a 'harmful preferential tax regime' using a different set of evaluation criteria (OECD, 2000, pp. 25-35). Various tables collating lists of OFCs have been published over the years, an activity that exposes the commonality of membership across time and by source (Palan, Murphy, & Chavagneux, 2010, pp. 41-44; Vlcek, 2009b, pp. 181-185).

In any case, a critical issue for the originating organisation of any list is that questions can and will be raised over the politics behind the designation process. A recent exercise to produce a list of tax havens by the European Commission reveals the role played by politics in this process. There were three criteria to be met in order to avoid being placed on this 'tax haven blacklist'. But a jurisdiction that did not satisfy all three criteria could still avoid inclusion on the blacklist by again promising to change and become compliant (Toplensky, 2017b). Those committing to change were placed on a 'grey list', indicating they would be subjected to surveillance and could be moved to the blacklist if they failed to comply with the assurance to become EU tax policy compliant. In the end, only seventeen jurisdictions were listed by the EU; the NGO Oxfam accused the EU of a whitewash and claimed that an objective and transparent application of the criteria would have resulted in a list of 35 jurisdictions, including Hong Kong, Switzerland and Taiwan (Chardonnet & Langerock, 2017; Toplensky, 2017a).

Independent of whether or not any particular location has been named an OFC (tax haven), the praxis of offshore finance provides 'liquidity pipelines' transporting global capital, to investment destinations, corporate treasuries and financial institutions offering privacy to the owners of capital (Vlcek, 2008b, p. 20). A non-sovereign territory becomes part of this global capital transportation network by exercising its capability to legislate for the territory and craft legislation conducive for the operation of a financial centre. In many instances, that legislation will be applicable to non-resident capital as a measure for insulating the small domestic economy from the uncertain flow of global capital travelling onward to its ultimate destination. This archipelago of OFCs has been characterised as providing 'conduits and sinks' for capital in support of a 'global corporate ownership network' (Garcia-Bernardo, Fichtner, Takes, & Heemskerk, 2017, p. 2). The study demonstrated the location of non-sovereign territories with an OFC alongside sovereign states with an OFC and together supporting a network of multinational corporations and their subsidiaries. In doing so, it also revealed 'a clear geographical specialization in the offshore financial network' comparable to that described in research elsewhere (Garcia-Bernardo et al., 2017, p. 9; Haberly & Wójcik, 2015a; 2015b). The five largest capital 'sinks' in the list were the BVI, Taiwan, Jersey, Bermuda and Cayman Islands; while the five largest 'conduit' jurisdictions were the Netherlands, United Kingdom, Switzerland, Singapore and Ireland (Garcia-Bernardo et al., 2017, p. 6). There were other sovereign states identified in this study; but the prominence of non-sovereign jurisdictions reinforces the central role they perform in global finance. At the same time, the geographical specialisation equally reflects a form of financial sector specialisation.

### *Cayman Islands*

One example of specialisation is the Cayman Islands, home to 10,586 investment funds at the end of 2016 (Cayman Islands Monetary Authority, 2017, p. 1). These investment vehicles afford the investment management firm, wherever based, to minimise the cumulative tax wedge extracted from the investment activity. This minimisation is achieved because Cayman is 'tax neutral' from the perspective of the fund: it does not collect taxes on profits generated by fund investments. The procedure for a fund involves paying taxes as required at the investment location, with all dividends and profits repatriated to the investment vehicle in Cayman. The dividends and capital gains produced by the investment vehicle are distributed to fund investors, who are obligated to pay relevant taxes in their residence jurisdiction. The success of the offshore specialisation is clear: Cayman is the registered home for many more investment funds than any other offshore jurisdiction. Cayman is thus identified as the 'premier domicile of choice for funds' (Cayman Islands Monetary Authority, 2016, p. 31).

Local legislative capacity created the environment in which this 'premier domicile' operates and a consideration of the historical record supports an argument that the Cayman Islands OFC is part of Britain's postcolonial settlement in the Caribbean. The 'Jamaican Governor's Intelligence Report for November-December 1960' included a discussion of the public perception in the Cayman Islands against its membership in the mooted West Indies Federation<sup>4</sup>. The political economic position of Cayman in 1960 was comparable to the Bahamas and Bermuda, with government revenue derived from customs duties in the absence of a local income tax. To further their emulation of these other territories, the Cayman Islands Legislative Assembly had "recently passed a new Companies Law (which has not yet received the Governor's assent) to facilitate (as in Bermuda and the Bahamas) the registration of foreign

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<sup>4</sup> The Cayman Islands at the time was part of Britain's Jamaica colony, and thus governed from Jamaica.

companies in the Islands” (Cayman Islands National Archive, 1960-1961, folio 26A). An earlier letter from the Governor-General of the West Indies, dated 5 April 1960, discussed the legislation and explained the rationale behind it as a measure to attract “free capital seeking a statutory home for general investment elsewhere”, following the example of Delaware in the US (Cayman Islands National Archive, 1960-1961, folio 1). The proposed West Indies Federation never formed and the Cayman Islands chose to remain a Crown Colony (now known as an Overseas Territory) rather than joining with an independent Jamaica (Roberts, 1995, p. 240). This situation was acceptable to the UK government of the day because, among all the small Caribbean territories, the Cayman Islands was not ‘in receipt of grant-in-aid’ from Westminster and thus not a cost to the UK national treasury (Cayman Islands National Archive, 1962, folio 63). Importantly for the Cayman Islands’ economy, its goal of seeking ‘free capital’ desiring a legal domicile before investing onward has been successful, as reflected in the large number of investment funds registered there (Fichtner, 2016, pp. 1048-1053).

### *British Virgin Islands*

Where the Cayman Islands evolved as a specialised location for investment funds under company registration legislation, the BVI has specialised as a home for international business companies (IBCs). As noted by Garcia-Bernardo, et al., many of the company vehicles revealed in the Panama Papers were IBCs registered in the BVI (Garcia-Bernardo et al., 2017, p. 5). This fact reflects the ease with forming an IBC in the BVI as well as the cost-effective annual fee charged to maintain it on the active company registry. Some of the particularities with the location and role of the BVI in global capital flows are explored in more detail elsewhere, while the feature to highlight here concerns the use of these IBCs in the transnational structure of multinational corporations (Vlcek, 2014). The BVI-registered IBC has the capacity for its shares to be listed on prominent stock exchanges in Hong Kong and the US, allowing the underlying firm to raise capital through the sale of equity shares (Buckley, Sutherland, Voss, & El-Gohari, 2015). In turn, this feature of the BVI offshore sector leads to its identification as a ‘sink’ for global capital flows. Beyond gaining access to investment capital, the BVI IBC can litigate any corporate dispute through the Commercial Division of the Eastern Caribbean Supreme Court, which sits in Road Town, Tortola and serves to replicate for Caribbean-registered IBCs the specialised court system available to Delaware-registered companies in the US. In 1897, the Delaware state legislature revised its company incorporation law and specified that the Delaware Court of Chancery was to be used in any legal dispute involving a Delaware-registered company (Quillen & Hanrahan, 1993, p. 834). Consequently, a court system staffed with lawyers and judges well versed in the technicalities of corporate law handles all corporate litigation involving companies registered in Delaware.

### *Delaware*

As should be clear from the preceding discussion, the US state of Delaware is identified as the role model by other jurisdictions establishing a specialised legal regime to attract company registrations and their associated fee revenue. This sub-national jurisdiction of the United States is home to more than a million corporate entities, including ‘more than 66% of the Fortune 500’.<sup>5</sup> While its supporters may claim that Delaware is disconnected from and not part of the offshore archipelago, and patently not facilitating tax arbitrage practices, one study did find that it has served as a US domestic tax haven (Dyrenge, Lindsey, & Thornock, 2013). Beyond the practice of corporate tax minimisation between sub-national jurisdictions in the

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<sup>5</sup> See <http://corp.delaware.gov/aboutagency.shtml>.



US, Delaware-registered entities have been implicated in transnational money laundering cases since the 1990s. A study prepared for the Permanent Subcommittee on Investigations in the US Senate reported in 2000 that Delaware-registered companies enabled the transfer of over US\$1.4 billion from Russia, via US banks and then on to another jurisdiction (General Accounting Office, 2000). The issue with Delaware-registered companies and money laundering remains a concern at the present time, with interventions by Delaware state representatives in the drafting of new federal regulations (Baker, 2016). While the registration of companies in the US is devolved to the state level, as seen in the case of Delaware, federal legislation to tackle the use of these companies for transnational bribery, corruption and money laundering has been on the national agenda for some time, with limited progress (Rubinfeld, 2017). This situation reflects the tensions that exist in the constitutional relationship between a sub-national jurisdiction operating an offshore finance legal regime and the sovereign state.

### **The offshore jurisdiction in practice**

The answer to the title question – why jurisdiction? – is simple: the use of the term serves to be inclusive in any analysis of offshore finance. The term acknowledges the variety of national and sub-national territories involved in some aspect of offshore finance. It also serves to underscore the legal dimension: that these territories are sovereign in their constitutional capacity to legislate local financial regulation with implications for cross-border economic activity (Bruner, 2018, p. 173). At the same time, the term is neutral regarding the size or capacity of the territory: thus, it does not explicitly evaluate the territory's financial sector nor imply any evaluation for its quality. Such is the situation, however, with the use of either 'tax haven' (explicit) or 'secrecy jurisdiction' (implicit) as demonstrated in the debates and media reporting in the UK concerning its relationship with the Crown Dependencies and Overseas Territories. One response to the revelations of the Paradise Papers in the UK was reinvigorated calls to force the OTs to establish open access public registries for all companies registered in those non-sovereign territories, along with the identities of their registered owners. As reported in the *Financial Times*, representatives for the OTs resisted the proposal for public access to company registries, observing that doing so would simply encourage the relocation of businesses to other jurisdictions that continue to provide privacy (Marriage, 2017).

An amendment was introduced in the UK Parliament to the 'Sanctions and Anti-Money Laundering Bill' in April 2018, directing the establishment of public company registries in the OTs which identify their beneficial owners. Domestic UK politics meant the executive was forced to accept this legislative amendment in order to achieve passage of the bill. Part 2 of the final Sanctions and Anti-Money Laundering Act 2018 directs the Secretary of State to provide the OTs with "all reasonable assistance" for setting up "a publicly accessible register of the beneficial ownership of companies registered in each government's jurisdiction" (Sanctions & Anti-money Laundering Act, 2018, p. 43). It further directs the Secretary of State 'to prepare a draft Order in Council' no later than 31 December 2020 requiring the creation of a public registry in any OT that has not done so by that time. This action, however, involves overturning the existing constitutional relations between the British state and these jurisdictions: after all, it is not the government in Westminster (Parliament) that has the constitutional capacity to take action, but the government in the Crown (Privy Council) because the relationship of these territories is not with Parliament, but with the Crown (Privy Council, 2009). In other words, the legislative mandate directs that an Order in Council be drafted, because the legislation does not, itself, have direct effect in the OTs. The government in Westminster may not directly determine the nature and substance of local legislation for tax and finance (subject to continued adherence with international standards) as this capability has been derogated to the local

government via the Order in Council defining the constitutional structure of the OT and its relationship with the British state (Hendry, 2012). The text of the Sanctions and Anti-Money Laundering Act 2018 thus seeks to circumvent this constitutional arrangement by directing the Secretary of State to draft an Order in Council, which requires approval by a resolution in both Houses of Parliament before being enacted by the Privy Council.

The challenge with implementing financial governance over sub-national or affiliated territories goes beyond the constitutional architecture of the UK. As discussed above in the case of Delaware, the federal structure crafted by the US Constitution similarly delegates a wide range of policy responsibility to the fifty sub-national jurisdictions comprising the United States. This delegation permits regulation at state level over a range of business activities that would be recognised in the operations of any offshore jurisdiction. The issue over identifying and recording the beneficial ownership behind a company is similar in the US as it is in the UK: how to convince the sub-national jurisdiction to comply with the desires of the central government. Thus, each distinct state determines the regulatory guidance of corporate registrations, and efforts in the US Congress to address, for example, the issue of beneficial ownership, remain futile.<sup>6</sup> The situation has historical roots in competition between US states about being preferred locations for company registrations (Vlcek, 2017, pp. 49-50). Each state's representatives at national level in turn promote the preferences of their state government and their local voters in the debates of the US Congress. The workaround applied by the federal government has been to extend existing legislation via a rule promulgated by the US Department of the Treasury. Operating under the scope of the Bank Secrecy Act (1970), the US Treasury has initiated the reporting of beneficial ownership information as an anti-money laundering measure. For purposes of customer due diligence to prevent money laundering via anonymous corporate entities, financial institutions and intermediaries are required from May 2018 to "identify and verify the identity of beneficial owners of legal entity customers" (Financial Crimes Enforcement Network, 2016, p. 29398).

This comparative example suggests that the relationship between the British OTs and the British state is similar to the constitutional structures in place for other sub-national jurisdictions. In turn, the intricacies of these constitutional arrangements can require creative solutions to comply with global financial governance initiatives, while remaining within the legal scope of their constitutional architecture.

## **Conclusion**

This challenge with (global) financial governance returns the discussion to the legal dimension of the definition and usage of jurisdiction, in that it references the scope of territory covered by a government's judicial power. The circumstances surrounding the judicial range of the legal jurisdiction exercised by small states and territories rely on a liberal international order where states and territories alike follow international rules and norms, along with the soft and hard dimensions of international law. Should the conditions be different or in locations where a liberal international order does not appear to operate, then the small states and non-sovereign territories are faced by the core implications of Stephen Krasner's analysis on sovereignty in the states system: that it is in fact "organised hypocrisy" privileging the few and powerful (Krasner, 1999). In such a setting, the boundaries of offshore finance would not be

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<sup>6</sup> For example, at the time of writing, there are two bills in committee in the US Senate: S.1454 (<https://www.congress.gov/bill/115th-congress/senate-bill/1454>) and S.1717 (<https://www.congress.gov/bill/115th-congress/senate-bill/1717>).

determined by the notional practice of state sovereignty as studied at university, but rather by the consent of the jurisdictions possessing the power to enforce their view on the structure and operation of global finance. One may argue that this situation prevails, with the global financial governance programme directed by the G20; but continued resistance by small jurisdictions suggests the opposite case. Global financial governance remains a contested terrain.

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