Executive Summary

In 1996 the Organisation for Economic Cooperation and Development (OECD) embarked on its Harmful Tax Competition Initiative. As the name implies, the initial objective of this exercise was to identify types of tax competition which OECD members would agree to label as ‘harmful’ on the basis that types of tax competition deemed harmful would not be permitted. The tax scope of the exercise was initially intended to be broad, while the regulatory scope was to be confined to the membership of the OECD. By 1997 the tax scope of the exercise had been significantly reduced so as to include only competition for mobile financial and other services, while the list of countries which it was intended would comply with the rules had expanded to include a group of some 47 small and developing countries perceived as competing with OECD countries in the financial services sector, which were invited to submit information to assist the OECD in determining whether they met its tax haven criteria. Based on this information, the OECD chose to label 41 of these countries as ‘tax havens’.

The 47 small and developing countries were not consulted in the development of the OECD’s criteria for unacceptable forms of tax competition, nor in the OECD’s unique criteria for ‘tax havens’, nor in the determination of countries deemed to fit the criteria. Not unexpectedly, the 41 ‘targeted’ countries objected to both the procedural and substantive aspects of the OECD exercise. They asserted the right to a ‘level playing field’, not only in terms of what was expected from them with regard to tax information exchange and standards for transparency relative to what was expected of OECD members or other competitor countries, but also in terms of a fair basis for financial services sector competition, that is, one that was not biased in favour of OECD members.

After an initial period of occasionally heated debate, the OECD, in conjunction with a sub-group of the targeted 41 non-OECD countries, developed a set of standards for the exchange of information in taxation matters which was published in the form of a non-binding Model Agreement on Tax Information Exchange in 2002. The publication of these standards afforded the basis for a relatively objective assessment of both the tools that are available for tax information exchange in OECD member states and other countries, as well as actual exchange of information practices.

In 2003 the OECD agreed that there was in fact no ‘level playing field’ and undertook to work with the targeted countries to develop one. In 2004, as part of this exercise, the relevant countries agreed to conduct a benchmarking exercise of the legal and administrative frameworks for exchange of tax information in all the OECD member states, the small and developing countries targeted in the harmful tax competition exercise and a group of non-OECD countries which had significant financial services sectors. The results of the exercise were published in 2006.

This report sets out the background to the 2006 Assessment and a review of the relevant academic literature, together with the results of an analysis of the legal and administrative frameworks of a sample of 25 countries selected from the 82 countries which participated in the 2006 Assessment. The sample was selected to reflect the geographic, population and GDP dispersion of countries included in the 2006 Assessment. It includes member countries of the OECD, member countries of the International Trade and Investment Organisation (ITIO), an organisation formed to represent the interests of the targeted small and developing countries, and non-OECD/non-ITIO countries. The data in the Assessment were correlated with publicly available data from international bodies such as the World Bank, the International Monetary Fund (IMF) and the Financial Action Task Force (FATF), as well as governmental sources. Information derived from interviews with government officials from some of the ITIO countries sampled was also used.

The analysis indicates that in virtually all the countries examined, whether they are OECD member states, ITIO countries or non-OECD/non-ITIO countries:

- there are mechanisms in place for the exchange of information under certain conditions;
- there are limitations to the manner and circumstances under which countries are able to provide tax information; and
- there are limitations to the information which is available to be provided in relation to tax information exchange.

Further, the analysis does not indicate that the legal and administrative frameworks available for tax information exchange in OECD countries are objectively superior to those in ITIO or non-OECD countries.

The findings also show that, in the overwhelming majority of cases, the international instrument made available to small and developing countries is the stand-alone tax information exchange agreement (TIEA), which does not afford them the same economic advantages as are offered to more geopolitically influential countries which are able to use the conventional double taxation conventions (DTCs) as their mechanism for the exchange of information. The net effect of this limitation to TIEAs is the exclusion of small and developing countries from the treaty network; this puts them at an economic disadvantage and creates an ‘unlevel playing field’ for competition in the global financial services sector.

The financial services sector is the most rapidly growing component of the global economy. If a level playing field is to be achieved, where the option of competing in the financial services sector is made available to small and developing countries rather than only to the most developed countries, then either access to the treaty network will have to be made available to these small and developing countries or other means of removing the present, and potential future, discrimination will be required. It is suggested in this paper that the use of fair treaty instruments and non-discrimination in the treatment of small and developing countries will provide a stable long-term basis on which a global community of cooperation in taxation matters will prosper.