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A Way Forward

There has been considerable rapprochement between the representatives of the OECD and non-OECD participants in the Global Forum process. Both OECD and non-OECD participants have recognised that ‘the level playing field is fundamentally about fairness’.¹²⁸ At the ITIO meeting in Melbourne in November 2005, it was noted that:

... [t]he objective of the global level playing field: to achieve high standards of transparency and information exchange in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD.¹²⁹

In essence the principle of ‘fairness’ is intended to be verified on two separate levels, which are:

1. The mechanisms used for the exchange of information must be fair and equitable;
2. The outcome of the exchange of information must allow ‘fair competition between all countries’.

The available evidence is that the domestic tools for exchange of information are in place and available to the vast majority of participants in that process. That is not to minimise the hurdles which remain.

The position of the OECD countries in simplified terms appears to continue to be that they require tax information from other countries in order to effectively and efficiently apply their taxation regimes in a manner which meets the standards of integrity and fairness which they wish to apply between their own taxpayers. In addition, they wish to obtain this information at as low a cost and with as little disruption to their competitive positions and existing international arrangements as possible. In that regard, there may be a wish not to ‘devalue’ the granting of a DTC or incur extra administrative costs, which might arise from making DTCs available to less geopolitically powerful countries from which they want tax information. It is likely that the OECD as a collective body will wish to continue to set the parameters for tax information exchange instruments to be used with non-members in order to maintain a competitive advantage.

The latitude for bilateral negotiations between OECD and non-OECD participants in the Global Forum process appears to have expanded since 2000 to include the possibility of mutual benefits. As was noted in the 2005 Global Forum outcomes report:

Ensuring that mutual benefits are derived by both parties will further the goal of helping financial centres that meet the high standards set for transparency and effective exchange of information in tax matters to be ‘fully integrated into the international financial system and the global community.’ Further, it is hoped that by providing

mutual benefits, greater progress towards a level playing field will be made. The nature of any such benefits would necessarily depend on the legal systems and particular circumstances of the two parties to the arrangement. Countries are encouraged to try to ensure that their bilateral arrangements for effective exchange of information for all civil and criminal tax matters provide benefits for both parties.¹³⁰

The position of the non-OECD countries which were targeted in the Harmful Tax Competition Initiative remains that they are willing to advance the work of the Global Forum, but that fairness must be applied across borders and not constrained by geographic limits or power politics. They are aware of the economic implications of DTCs as opposed to TIEAs and how the application of a 'second-class' solution may adversely affect their development objectives over the long term. A number are of the view that not only must they take into account the potential impact of 'second-class' solutions, but they must also work to counter the ongoing effects brought about by past stigmatisation produced by the 2000 'blacklist', the fairness and objectivity of which is questioned.

Concern has also been expressed in relation to the fact that some rapidly developing financial centres such as Dubai, part of the United Arab Emirates, are taking shape inside countries which are within the existing OECD treaty networks, albeit that such treaties existed before the Dubai International Financial Centre in its current form was created. While recognising that all countries should be free to compete for international financial services, there is concern that further distortions created by the geopolitics of the tax treaty network will unfairly influence the development opportunities of the small, less geopolitically influential, countries targeted by the 1998 Harmful Tax Competition Initiative.

Rhetoric is another area in which issues exist. While the use of the 'tax haven' description has declined, it has not disappeared from high-level OECD documents.¹³¹ On the other hand, the use of descriptions such as 'neo-imperialist' has disappeared. However, while from one perspective the OECD appears to be adopting a limited collaborative approach with the smaller economies, there is some concern that from another perspective the OECD may be opening up a new front of attack. By way of example, the recent report issued by the OECD Forum on Tax Administration pays no attention to the work done and the progress made to date.¹³² The communiqué's focus on offshore centres, the lack of reference to those financial centres outside the original OECD 1998 report and the failure to address the political sub-divisions or actual general domestic regimes of member countries indicates organisational blindness and may be viewed as a retrograde step which is damaging to the whole process.

What scope does this analysis leave for a way forward? Arguably there is considerable scope for progress. There is clearly no evidence that the most geopolitically powerful states recognise any obligation to provide tax information to other states apart from a form of international agreement or arrangement or domestic legislation of their own choosing. Similarly, there is clearly no requirement in international law that exchange of tax information outside the context of DTCs should be an obligation restricted to the

least geopolitically powerful states. The overwhelming evidence is that the trappings of DTCs are the accepted context and standard accompaniments for exchange of information provisions. Yet the reality is that a considerable amount of political capital has been spent on the assumption that small and developing countries could be manoeuvred into accepting onerous obligations without the benefits of a DTC, on the basis of something called a TIEA, or at least in association with something called a TIEA. Political capital has also been spent on stigmatising small and developing countries in order to legitimise this process.

On the other hand, a considerable amount of political capital has been spent on trying to replace that assumption with a proposition that a more stable and productive basis for expanding international cooperation in taxation matters would be based on the creation of a 'level playing field', which would allow fair competition in the international financial services sector. It should be noted that recently the Isle of Man, an ITIO member, working with the Kingdom of the Netherlands, an OECD country, agreed a package of arrangements which provide for the exchange of tax information together with other economic measures, including the specification that the exchange of information should not operate in the context of discrimination. It is apparently the intent of these countries to enter into further negotiations with the objective of producing a more conventional comprehensive taxation agreement. This approach may be viewed as an example of an innovative collaboration that serves the interests of both countries in advancing the exchange of tax information in a manner which obviates potential for the specified discriminatory effects. It remains to be seen what progress can be achieved from this approach.