Some Legal Issues Arising out of the OECD Reports on Harmful Tax Competition[1]

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The Government of Barbados has a number of concerns about the legal implications of the OECD initiative in fighting alleged 'harmful tax practices'. I merely wish to highlight some of those concerns in the hope that discussion may be stimulated and responses offered by delegates of the OECD.

The Issue of Sovereignty

The Government of Barbados does not accept that the OECD has any lawful authority to seek to cause any sovereign government to so order its taxation regime in a way that fetters the supremacy of that government's parliament. Taxation policy is essentially a matter within the sovereign authority of a parliament. Only the government or state in a jurisdiction has the authority to tax. It is a sovereign power and under public international law the sovereignty of a state is recognised as being territorial in scope.

OECD countries have chosen particular ways of establishing their tax bases, whereas countries described as 'tax havens' or those offering 'preferential tax regimes' have chosen different modes of taxation as is their sovereign right. That is the essence of tax competition between states and a characterisation of such competition as harmful is really the imposition of a subjective opinion. Essentially, what is at issue between the OECD countries and ourselves is a difference in approach, policy and philosophy to taxation and fiscal engineering.

We would thus be concerned with the implications of that part of the OECD's Memorandum of Understanding headed '(E) Stand-Still', requiring a State 'to refrain from introducing any new regime that would

1 This paper is based on a speech given by David Simmons, former Attorney-General of Barbados, at the High Level Consultations on the OECD Harmful Tax Competition Initiative, Barbados, 8–9 January 2001.

constitute a harmful tax practice under the OECD 1998 *Report on Harmful Tax Competition*', and indeed modifying existing regimes.

From this premise springs the second major concern of Barbados.

The Principle of Non-Intervention

This principle of international law has developed to go beyond practices involving the threat or use of armed force.

Thirty years ago the United Nations issued its 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN'.

The Declaration provides that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

It continued:

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Those general principles have been enacted in the Charter of the Organisation of American States (OAS). Barbados, like the USA, is a member of the OAS and both are equally governed by the law as expounded in Articles 18 and 19 of the Charter. Article 18, for example, states:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

In Article 19 it is provided that:

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Most recently, in 1984, the British Foreign and Commonwealth Office commented that 'apart from force, there are other means, of which economic coercion and propaganda are two examples, of violating a state's absolute sovereignty over its domestic affairs'.

There is little doubt that the principle of non-intervention forms part of customary international law.

The issues which arise, therefore, are these:

✍ Is it legitimate, under public international law, for states within the OECD to seek to violate the absolute sovereignty of blacklisted states over their domestic fiscal affairs by the propaganda and threatened sanctions contained in the 1998 and 2000 Reports?

✍ Do the threats of sanctions and propaganda breach the principle of non-intervention?

✍ Have any OECD member states considered that in threatening sanctions and giving bad publicity to countries, they may well be about to act in breach of international law?

The Nature and Extent of Sanctions

The language of the OECD reports is imprecise. The reports speak of 'co-ordinated defensive measures', 'counter measures', 'enforcement measures', 'defensive measures' and 'counteracting measures'. What precisely is intended? The OECD needs to take this opportunity to clarify its terms and intentions.

This is not simply an issue of vocabulary. It is a matter of substance because the International Law Commission has identified at least four attributes of a countermeasure. Most importantly, countermeasures can only be taken in response to an unlawful act in international law.

It will thus be particularly relevant for the OECD to identify what rule of international law has been broken by, say, Barbados. One may go further and ask: What is the international standard, established by law, that Barbados has not attained?

In other words, to what extent are the tax practices of Barbados in violation of international legal obligations?

The OECD and the WTO

We appreciate that the OECD only enjoys observer status in the WTO but each of its members is a member of the WTO and, to that extent, if there were a challenge to the actions of the WTO, cases would have to be brought against individual states parties.

We see great difficulties in the threats. Under GATS, it seems that any measures taken by an OECD member that limit consumption of services in third countries will, in principle, infringe any concessions offered by that WTO member under the GATS.

For example, any direction by a national bank of a member not to deal with banks or financial institutions in a third country may well be in breach of the GATS.

Similarly, we think that if an OECD country were to enforce its recommendations by restricting access to the services market of a WTO member, it would be in violation of the GATS. Threats to close down certain jurisdictions fly in the face of the principle of reciprocity which runs through much of the content of the GATS and the WTO agreements.

Over and above all that, it is our understanding that, under the WTO, special permission of the WTO has to be sought for retaliatory measures.

I have dwelt on potential sanctions because the 2000 Report indicates that OECD members 'reserve the *right* to apply defensive measures on a unilateral basis'.

Transparency and the Need for Reciprocity

In the 1998 OECD report it is argued that lack of transparency is a harmful practice. There can be no doubt that, in the larger context of controlling international crime, including tax crime, all jurisdictions need on a collective basis to discuss a series of legal mechanisms aimed at increasing transparency to determine the true ownership of assets.

But at present the playing field, as they say, is 'not level'. US law, for example, does not have simple procedures for exchange of tax information and much of the reciprocity in the exchange of information with the USA rests upon special treaties or agreements such as the one negotiated with Barbados in 1983.

We believe that the blacklist has been compiled on an arbitrary basis with small countries targeted for naming and shaming. On the contrary, countries within the OECD and some outside with harmful practices have escaped black listing. France, Canada, Ireland, Portugal have tax schemes which could reasonably cause them to be listed as tax havens.

Barbados believes that there should be a new approach to identify the principles which could lead to greater transparency but to which all countries will be subject to evaluation.

In Section B of the Memorandum of Understanding dealing with

Beneficial Ownership information, it is proposed that regulatory or tax authorities should have access to information regarding the beneficial ownership of companies and trusts.

As I conceive it, we are on the way to creating the demise of the legal phenomenon of the trust.

Take this example:

'B', an Englishman living in England, wishes to invest £300 000 in a company in England by way of a trust arrangement. He appoints 'T' as his trustee of the shares.

What appears on the Register of Companies in England is that the shares are owned by 'T'. The share certificate is issued in his name. However, the fact of the trust is not disclosed on the register and a third party dealing with the company will have no means of knowing that the beneficial owner of these substantial shares is 'B' who may, in fact, be a money launderer. Why? Because under Section 360 of English Companies Act 1985 'no notice of any trust, express, implied or constructive, must be entered on the Registrar or be receivable by the Registrar …'

So, how is there transparency in that scenario? Will the UK now repeal Section 360 and require all companies to unfrock their shareholders and disclose who are the trustees and who are the beneficiaries?

In Barbados we have a similar provision (S. 171) to the English provision. Barbados should not be asked to lift the veil of the trust to increase transparency unless the UK is required to do the same.

In other words, we must be firm that the principle of reciprocity guides our desires for transparency.

Towards a Shared Perspective

In the new global architecture it is almost axiomatic that new mechanisms will have to be developed to preserve the integrity of financial services. The 1998 OECD report refers to 'internationally accepted standards'. But the international community has not developed standards. One section of the international community has purported to impose a set of rules on others. It is more like dictation than consultation. The development of a set of international standards requires a multilateral environment in which all countries can contribute. Thereafter, those internationally agreed standards may be raised to the level of positive international law through an appropriate international instrument. After that, talk of sanctions can be entertained.

We should seek first to develop a set of agreed principles applicable to all nations in the business. The development of these principles can fairly and properly take place only in a consultative environment across regions of the world in a context of multilateralism.

An Instrument to which OECD countries and other individual states will subscribe to the negotiated document may be an International Instrument in the nature of a Convention relevant to those countries offering offshore services.