The OECD, Harmful Tax Competition and Tax Havens: Towards an Understanding of the International Legal Context

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Introduction

The primary purpose of this paper is to provide an initial and necessarily partial contribution to an understanding of the general international legal aspects which arise from that part of the OECD initiative on harmful tax competition which relates to so-called tax havens. In this regard the OECD initiative has been taken to be that represented by the reports entitled *Harmful Tax Competition: An Emerging Global Issue*[2] and *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs*.[3] Account has also been taken of associated governmental and intergovernmental documents (the majority of which are in the public domain) including the 'Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices'.[4]

The practical need for analysis in this area is evident from the fact that while the central OECD reports which give expression to the initiative on harmful tax competition are not couched in legal terms, certain members of the international community whose interests are affected by it have specifically invoked legal arguments in response. For example, the 'Statement on OECD Harmful Tax Policy' that formed part of the communiqué issued by CARICOM Heads of Government on 6 July 2000 reiterated the view 'that the proposed OECD actions have no basis in international law and are alien to the practice of inter-state relations'.

A range of complex and in some instances controversial legal issues arise

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2 OECD, 1998, Paris. Hereafter referred to as the 1998 Report.

3 OECD, 2000, Paris. Hereafter referred to as the 2000 Report.

4 B. Zagaris, 'OECD Releases MOU on Harmful Tax Practices', *International Enforcement Law Reporter*, 2001, 17, pp. 13–15. The text can be consulted at www.oecd.org.

in an examination of the international legal context in which the OECD initiative operates and of the matters to which it gives rise. What follows is not intended to be comprehensive in its coverage. Its focus is on general international law matters. The examination of the compatibility of what is contemplated with specific treaty obligations which may subsist between affected jurisdictions (such as with the Charter of the OAS for members of that regional body or those which arise in the WTO context) lie beyond its scope. In addition, it deals exclusively with issues which are relevant for jurisdictions which are states for the purposes of international law. Additional factors which relate to the legal position of entities which enjoy an international legal status other than that of full statehood have not been addressed.

The Context

The adoption by the Committee on Fiscal Affairs of the OECD of the 1998 Report represented a significant milestone in what has been a lengthy engagement with the range of issues addressed therein. Tax matters and international co-operation are central to the OECD's mandate.[5] Similarly, the issues of tax avoidance and evasion and the subject of 'tax havens' have commanded considerable attention over the years. For example, in 1987 the OECD published the influential monograph *International Tax Avoidance and Evasion: Four Related Studies*.[6]

In subsequent years, concern over these issues gradually intensified as OECD member governments came to focus on the perceived drawbacks, as well as the manifest advantages, which flow from economic globalisation.[7] As Jeffrey Owens, a senior OECD official, has remarked:

Similarly, increased liberalization of financial markets has improved the international allocation of savings and capital and reduced the cost of capital to enterprises. But it has also widened opportunities for tax evasion and avoidance. In this new environment, tax havens have thrived and some governments have adopted preferential tax regimes specifically targeted at attracting mobile activities.

5 See, for example, H. Hahn, Organisation for Economic Co-operation and Development, 1997, III *Encyclopedia of Public International Law*, pp. 790–799 and the literature cited therein.

6 OECD, 1987, Paris.

7 See, for example, R. Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State', *Harvard Law Review*, 2000, 113, pp. 1573 *et seq*. See also 'A Survey of Globalisation and Tax', *The Economist*, London, 29 January 2000 and 'Who will collect taxes in a global village?' *The Times*, London, 10 April 2000.

If nothing is done, governments may increasingly be forced to engage in competitive tax bidding to attract or retain mobile activities. That 'race to the bottom', where location and financing decisions become primarily tax driven, will mean that capital and financial flows will be distorted and it will become more difficult to achieve fair competition for real economic activities.[8]

Eventually, in May 1996, OECD Ministers called upon the organisation to 'develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and to report back in 1998'.[9] At their summit meeting in Lyon, France, later the same year Heads of State and Government of the G7 countries offered their support and encouragement to this initiative.[10]

The Committee on Fiscal Affairs established the 'Special Sessions on Tax Competition', under the joint Chairmanship of France and Japan, to carry forward the mandate in this area. The resulting report was adopted by the Committee on 20 January 1998 and approved by the OECD Council on 9 April. In its Recommendation on Counteracting Harmful Tax Competition, the Council took note of the report and recommended, *inter alia*, that member countries implement its recommendations. In order to facilitate this process it instructed the Committee on Fiscal Affairs to establish a Forum on Harmful Tax Practices.[11] Luxembourg and Switzerland abstained.[12] In May of 1998 G7 Finance Ministers warmly welcomed the above developments and strongly endorsed the OECD recommendations, including the establishment of the Forum.[13]

At a general level the report 'is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally'.[14] The underlying perspective is that 'such harmful tax competition diminishes global welfare

8 J. Owens, 'Curbing Harmful Tax Competition – Recommendations by the Committee on Fiscal Affairs', *Intertax*, 1998, 26, pp.230–231.

9 1998 Report, p. 1.

10 Ibid.

11 1998 Report, pp. 65–66.

12 Ibid., pp. 73–78.

13 Conclusions of G7 Finance Ministers, 8 May 1998, paras 13–14.

14 1998 Report, p. 8. Other related issues such as tax competition in relation to consumption taxes and the treatment of cross border savings instruments fall outside the scope of the report. For an interesting overview see J.M. Weiner and H. Ault, 'The OECD's Report on Harmful Tax Competition', *National Tax Journal*, 1998, 11, pp. 601–608.

and undermines taxpayer confidence in the integrity of tax systems'.[15] From this base the report proceeded to articulate a strategy for the identification of harmful tax practices and a programme of action to counter them.

As noted above, a major focus of the OECD initiative is on tax havens – jurisdictions perceived as having a significant and increasingly negative impact on the revenues available to other countries.[16] Several significant difficulties confronted the authors of the 1998 report as they sought to articulate a strategy to deal with the alleged negative consequences of the activities of such jurisdictions. Of these, perhaps the most fundamental was the absence of an internationally agreed definition of a tax haven. This difficulty had, by way of illustration, been identified but not satisfactorily resolved in the 1987 OECD study *Tax Havens: Measures to Prevent Abuse by Taxpayers*.[17] That no subsequent international consensus on this matter had emerged is acknowledged in the 1998 Report which notes that the concept 'does not have a precise technical meaning ...'.[18]

Notwithstanding this fact, the report proceeded to provide the Forum with guidance through which tax havens could be identified for OECD purposes. The approach adopted is reflected in para. 52 which reads, in relevant part, as follows:

The necessary starting point to identify a tax haven is to ask (a) whether a jurisdiction imposes no or only nominal taxes (generally or in special circumstances) and offers itself, or is perceived to offer itself, as a place to be used by non-residents to escape tax in their country of residence. Other key factors which can confirm the existence of a tax haven … are: (b) laws or administrative practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction; (c) lack of transparency and (d) the absence of a requirement that the activity be substantial, since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven (transactions may be booked there without the requirement of adding value so that there is little real activity, i.e., these jurisdictions are essentially 'booking centres'). No or only nominal taxation is a necessary condition for the identification of a tax haven. As noted … above, if combined with a situation where the jurisdiction offers or is perceived to offer itself as a place where non-residents can escape tax in their country of residence, it may be sufficient to identify a tax haven. In general, the importance of each of the other

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15 1998 Report, p. 8.

16 For example, 1998 Report, pp. 17, 22.

17 See, *supra*, note 5, pp. 21–22.

18 1998 Report, p. 20.

key factors referred to above very much depends on the particular context. Even if the tax haven does impose tax, the definition of domestic source income may be so restricted as to result in very little income being taxed.[19]

It will suffice for present purposes to note that the use of specific criteria in the definitional process constitutes a (welcome) retreat from a heavy reliance within OECD circles on the reputation or 'smell' test[20] (though this element has not been entirely abandoned).[21] Unfortunately, however, certain of the key criteria, such as 'lack of transparency' and 'lack of effective exchange of information'[22] are neither self-defining nor afforded sufficient substantive treatment elsewhere in the report to permit the ready identification of the minimum standards envisaged. This is an issue to which this paper will return below.

The 1998 Report also initiated a process for determining which countries and territories were to be classified as tax havens for these purposes. This matter was assigned to the new Forum on Harmful Tax Practices which, in Recommendation 16, was mandated to establish a list of such jurisdictions. The list, as originally conceived, was intended to 'enable Member countries to co-ordinate their responses to the problems posed by tax havens and to encourage these jurisdictions to re-examine their policies'.[23]

Chapter 3 of the report, entitled 'Counteracting Harmful Tax Competition', addresses numerous measures, variously described, which could be used to counter practices deemed objectionable. Specific recommendations were subject to a threefold division: those concerning domestic legislation, those concerning tax treaties and those requiring intensification of international co-operation. In addition, the report identified a series of topics (including possible non-tax measures) where further study might result in the emergence of new recommendations directed at harmful tax competition. This dimension of the OECD initiative is discussed later in this paper.

Recent Developments

Developments in the implementation of the OECD initiative have been numerous and varied. Many are summarised in the 2000 Report. For the

19 1998 Report, pp. 22–23.

20 For example, Avi-Yonah, *supra*, p. 1659, note 6.

21 See, for example, 1998 Report, p. 21.

22 Several of the tax haven criteria are also utilised in the identification of harmful preferential tax regimes in OECD member countries. See 1998 Report, pp. 25–35.

23 1998 Report, p. 57.

purposes of this paper perhaps the most significant relate to the identification of specific jurisdictions deemed by the OECD to meet the tax haven criteria as reflected in the 1998 Report and the clarification of the consequences of such a listing.

The 35 countries and territories so listed[24] are:

Andorra
Anguilla – Overseas Territory of the UK
Antigua and Barbuda
Aruba – Kingdom of the Netherlands
Commonwealth of the Bahamas
Bahrain
Barbados
Belize
British Virgin Islands – Overseas Territory of the UK
Cook Islands – New Zealand
The Commonwealth of Dominica
Gibraltar – Overseas Territory of the UK
Grenada
Guernsey/Sark/Alderney – Dependency of the British Crown
Isle of Man – Dependency of the British Crown
Jersey – Dependency of the British Crown
Liberia
The Principality of Liechtenstein
The Republic of the Maldives
The Republic of the Marshall Islands
The Principality of Monaco
Montserrat – Overseas Territory of the UK
The Republic of Nauru
Netherlands Antilles – Kingdom of the Netherlands
Niue – New Zealand
Panama
Samoa
The Republic of the Seychelles
St Lucia
The Federation of St Christopher and Nevis
St Vincent and the Grenadines
Tonga
Turks & Caicos – Overseas Territory of the UK
US Virgin Islands – External Territory of the USA
The Republic of Vanuatu

24 2000 Report, p. 17.

Several factors are important for present purposes. First, prior to the publication of the 2000 Report six jurisdictions – Bermuda, the Cayman Islands, Cyprus, Malta, Mauritius and San Marino – made what are known as 'advance commitments' to comply with the principles of the 1998 Report and to remove all harmful tax practices by December 2005. In recognition of this fact they were omitted from the list 'even if they presently meet the tax haven criteria'.[25] Second, the listing of the 35 jurisdictions in question, as endorsed by the OECD Council on 16 June 2000, is 'not intended to be used as the basis for possible co-ordinated defensive measures'.[26] Rather, a further list of 'unco-operative tax havens' was to be developed within the OECD by 31 July 2001. In the intervening period listed jurisdictions were provided with an opportunity to make a commitment to the progressive elimination of those of their tax practices deemed to be harmful. This 'scheduled commitment' process is examined in greater detail below. The consequence of a failure to take such a step was directly addressed in the OECD Council Recommendation of 16 June 2000. This instructed the Committee on Fiscal Affairs to:

3. Include automatically on the OECD List of unco-operative Tax Havens any jurisdiction identified in the 2000 Report as meeting the tax haven criteria if the jurisdiction does not by 31 July 2001 commit to eliminate harmful tax practices in accordance with the 1998 Report in a manner satisfactory to member countries.[27]

Some jurisdictions had, at the time of writing, made the required commitment.[28] Yet others may follow. Such countries and territories, if any, as appear on the eventual list of unco-operative tax havens, and any that may subsequently be added, can expect to be subject after 31 July 2001 to co-ordinated action within the context of an evolving framework for a common OECD approach to restraining harmful tax practices. As the 2000 Report notes: 'The Committee on Fiscal Affairs will be working within the next six months to a year to consider these possible measures, finalise its recommendations, and adopt an implementation strategy and timetable'.[29]

As noted above, the 2000 Report has been endorsed by the OECD Council. It was been warmly welcomed by G7 leaders at their meeting in Okinawa, Japan. In a statement issued on 21 July 2000, the OECD initi-

25 Ibid.

26 Ibid.

27 2000 Report, p. 30.

28 For example, the Isle of Man, the Netherlands Antilles and the Republic of Seychelles.

29 2000 Report, p. 24.

ative on harmful tax practices was addressed in conjunction with certain of the activities of the Financial Action Task Force on Money Laundering and the offshore financial centres dimension of the work of the Financial Stability Forum. The statement reads:

We will take steps to encourage jurisdictions to make the necessary changes and provide technical assistance where appropriate. Where jurisdictions fail to meet certain standards and are not committed to enhancing their level of compliance with international standards, we will also take measures to protect the international financial system from the effects of these failures.[30]

While this process has been supported, often at the highest political levels, by the world's richest countries, it has proved to be a source of 'profound disquiet' in other circles[31] with associated calls for dialogue and compromise. Commonwealth Finance Ministers, for example, have called 'with some urgency, for greater regional and multilateral dialogue at both the political and technical levels on the implications of the OECD proposals, with a view to developing multilateral approaches to take forward the work on all aspects of global tax issues'.[32]

Within this context a multilateral meeting was hosted by the Government of Barbados (a listed state) in early January 2001 in association with the Commonwealth Secretariat and the OECD. These high-level consultations, chaired by the Prime Minister of Barbados, were attended by representatives of more than 40 countries and territories.[33] Sufficient common ground among the participants emerged in relation to the 'broad principles' of transparency, non-discrimination and effective exchange of information to justify establishing a working group to be co-chaired by Australia and Barbados.[34] Its twofold remit was as follows:

- First, to take the three principles noted above and to find a mutually acceptable political process by which these principles could be turned into commitments. This process, if successful, would replace the OECD's process in the context of its Memorandum of Understanding.
- Second, to examine how to continue the dialogue begun in Barbados.

30 G7 Statement, Okinawa, 21 July 2000, para. 26.

31 See, for example, 'Harmful Tax Competition', Statement by Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions, Jersey, 17 May 2000.

32 Commonwealth Finance Ministers Meeting, St Julians, Malta, 19–21 September 2000, Communiqué, para. 21.

33 B. Zagaris, 'Consultations in Barbados on OECD Harmful Tax Competition Initiative Yield Progress', *International Enforcement Law Reporter*, 2001, 17, pp. 50–54.

34 See, for example, Task for Joint Team, Barbados Advocate (Bridgetown), 10 January 2001, pp. 1–2.

The Group was to examine how the recently created Global Forum on taxation could evolve into a truly inclusive Global Forum, which would promote global co-operation on tax matters. It would also identify further relevant tax issues for consideration by such a Forum.[35]

Since that time the group has met on two occasions – in London on 26–28 January and in Paris on 1–2 March 2001. No fixed consensus as to the way forward has so far emerged from this process. Consequently the remainder of this paper has been prepared on the assumption that the core elements of the OECD Initiative are still in play.

Scheduled Commitments

Process Issues

The process of preparing the list of jurisdictions considered to meet the tax haven criteria established by the OECD involved the preparation by study groups of specific jurisdictional reports, certain bilateral and other contacts with countries and territories on an initial indicative list, and discussion within the Forum.[36] As the OECD has noted: 'During the process of consultations, a number of the jurisdictions under review indicated an interest in the possibility of co-operating with the OECD by committing to the elimination of harmful tax practices. The extent of the interest in co-operation was not fully foreseen at the time that the 1998 Report was presented to Ministers'.[37]

In the light of these developments it was decided, *inter alia*, to elaborate a special procedure in respect of such countries and territories included on the list of tax havens which, by 31 July 2001, had made a commitment, in a manner and form acceptable to the OECD, to the elimination of harmful tax practices. Any such jurisdiction would not, for an initial period of one year, be included in the planned list of unco-operative tax havens. Such a 'scheduled commitment' or 'co-operative' jurisdiction would also be 'eligible for successive renewals of its status by making a new public commitment to move to the next stage of the plan of progressive changes'.[38] By virtue of being classified as 'co-operative', and for so long as such a designation subsists, any such jurisdiction would not be subject to the 'co-ordinated defensive measures', examined in greater

35 Commonwealth Secretariat Press Release, 9 January 2001, Barbados, p. 2.

36 2000 Report, pp. 10–11.

37 2000 Report, p. 18.

38 2000 Report, p. 19.

detail below. The report notes, however, that OECD member countries reserve the right to apply defensive measures on a unilateral basis.[39]

At the core of the 'scheduled commitment' process as envisaged in the 2000 Report is a 'public political commitment' to the progressive elimination of harmful tax practices by 31 December 2005. In its words:

The procedure for making a scheduled commitment is that a jurisdiction submits a written statement of the commitment of its government. … The statement is to be in the form of a letter to the Secretary-General of the OECD, and signed by an authorised official. This letter is to be accompanied by an annex setting forth the specifications to which the jurisdiction is agreeing, as discussed with the Forum.[40]

It was anticipated that within six months of the making of such a commitment the jurisdiction in question would develop with the Forum an acceptable plan 'describing the manner in which the jurisdiction ... intends to achieve its commitment, the timetable for so doing, and milestones to ensure steady progress, including the completion of a concrete and significant action during the first year of the commitment'.[41] The jurisdiction was also to agree to a 'standstill' provision[42] and to participate in an annual review process with the Forum. As an inducement to secure compliance with such undertakings, the 2000 Report notes that 'a jurisdiction would be placed on the list of unco-operative tax havens if any harmful aspects of its regime remain after the deadline for their elimination. Also, if the milestones and timetable are not met and there is at any time evidence that the jurisdiction is not acting in good faith in accordance with its commitments, the Committee will place the jurisdiction on the List of unco-operative Tax Havens'.[43]

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39 2000 Report, p. 26.

40 Ibid., p. 19.

41 Ibid.

42 In the Framework for a Collective Memorandum of Understanding (hereafter Collective MOU) the 'stand-still' concept is defined as follows:

Each Party will refrain from

(i) introducing any new regime that would constitute a harmful tax practice under the OECD 1998 Report on Harmful Tax Competitions.

(ii) with respect to any existing regime related to financial and other services that currently does not constitute a harmful tax practice under the OECD Report, modifying the regime in such a way that, after the modifications, it would constitute a harmful tax practice under the OECD Report; and

(iii) strengthening or extending the scope of any existing measure that currently constitutes a harmfultax practice under the OECD Report.

43 2000 Report, p. 19.

Following further consideration and dialogue on this matter, the decision was taken to introduce certain 'process enhancements' which were set out in an electronic fax from the co-Chair of the Forum on Harmful Tax Practices to the listed jurisdictions. Under this revised scheme the individual commitment process, outlined above, remained available on a somewhat revised basis. In particular, 'the Forum has dispensed with the earlier format of the commitment that envisioned a letter sent by the jurisdiction to the Secretary-General of the OECD. Instead, a jurisdiction can make the individual commitment by issuing a press release accompanied by an annex setting forth the terms of the commitment'. The publication of that annex is regarded as essential.

The letter from the co-Chair of the Forum also introduced a new option, participation by listed jurisdictions in a collective Memorandum of Understanding (MOU) with the OECD as such, rather than with its individual member states. As the letter explains: 'A jurisdiction can become a party to the Collective MOU by a press release announcement. Neither a physical signature nor a letter to the OECD is necessary'. Annexed to that communication is a text entitled 'Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices'. In addition to clauses on duration and termination, the MOU includes a common schedule for the achievement by listed jurisdictions of specified standards and expectations in relation to such matters as transparency, information exchange, not attracting business without substantial domestic activity and 'standstill'. The deadline for the completion of this process is set at 31 December 2005. Under the heading of 'Collateral Issues' the text also details commitments on the part of the OECD in relation to the listing of unco-operative jurisdictions and resort to co-ordinated defensive measures.[44]

Both the envisaged options for the making of the requisite commitments, unilateral action and participation in the Collective MOU, give rise to issues of interest from the perspective of public international law. By way of illustration, while the designation of an international instrument as a MOU is, generally speaking, an indication of the intent of the parties to

44 The Collective MOU is worded, in relevant part, as follows:

List of unco-operative Tax Havens: The OECD will refrain from including the name of a Party on any List of unco-operative Jurisdictions during the duration of the MOU, provided that the Party is proceeding in good faith to satisfy the terms of the MOU.

Defensive Measures: The OECD will refrain from recommending that any common framework of defensive measures (within the meaning of the 1998 Report) be implemented against a Party during the duration of the MOU, provided that the Party is proceeding in good faith to satisfy the terms of the MOU.

enter into an arrangement which, in contrast to a treaty, is not legally binding,[45] it still may, in certain circumstances, give rise to legal consequences. For example, in a recent work one well-recognised authority has noted the potential relevance of the international law principle of estoppel, or preclusion, in the context of MOUs between states. In his words: ‘The exact scope of the international law doctrine is far from settled, but in general it may be said that where a clear statement or representation is made by one state to another, which then in good faith relies upon it *to its detriment*, the first state is estopped (precluded) from going back on its statement or representation. If two states choose to record the settlement of a dispute between them in an MOU rather than in a treaty … they are clearly estopped from denying that the terms of the settlement are binding’.[46] Among issues which are relevant in the current context is the impact, if any, on the legal position of potential listed jurisdiction participants of the facts that the instrument is multilateral rather than bilateral, and that it envisages participation by the OECD rather than its individual members.[47]

Interesting and potentially significant though the above process issues are,[48] the emergence of the MOU is of perhaps even greater significance in its articulation of the standards of conduct expected of co-operative tax havens. It is to that crucial matter that this paper now turns.

Standards

As noted above, the Collective MOU makes a significant contribution to an understanding of the scope and ambition of the tax havens element of the OECD initiative. This it does by setting out in some detail the substantive content of the broad principles of transparency, effective exchange of information, non-discrimination and standstill to which listed countries and territories were being asked to commit themselves. These are described in the MOU as ‘international standards’.

45 An examination of the form and content of the text in issue here suggests that an arrangement which is not legally binding is in contemplation.

46 A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2001, p. 46.

47 Several associated issues also require clarification, For example, what impact, if any, these ‘process enhancements’ were intended to have on the annual review process through which determinations were to be reached concerning the progress recorded in the fulfilling of scheduled commitments. See 2000 Report, p. 19.

48 As noted above, the procedures through which listed jurisdictions might make the anticipated commitments is currently under discussion in the Working Group established at the Barbados meeting in January 2001.

In the course of the High Level Consultations held in Barbados in early January 2001 a spirited exchange of views took place as to the source and nature of these standards. The underlying perspective of the OECD delegations was that the principles in question enjoyed a wide acceptance in the international community and that their appropriate interpretation was as reflected in the text of the MOU. Doubts as to the soundness of this perspective were voiced by the representatives of several non-member countries and territories. The strength of this latter perspective can be illustrated by reference to the treatment of elements of two of the central principles as set out in the text – transparency and effective exchange of information.[49]

Transparency

As was noted above, 'lack of transparency' is a factor common to the identification of tax havens and harmful preferential tax regimes for the purposes of the 1998 Report.[50] Part of that broad concept, as envisaged by the MOU, is the complex area of the availability of beneficial ownership information. In particular, the MOU envisages that, by 31 December 2002:

Each Party will ensure that its regulatory or tax authorities have access to information regarding beneficial owners of companies, partnerships and other entities organised in its jurisdiction, including collective investment funds, and to information on the identity of the principal (as opposed to agent or nominee) of those establishing trusts (settlors) and foundations under their laws and those benefiting from trusts and foundations.

The issue of the identification of beneficial ownership is perhaps most strongly associated at the international level with the work of the FATF in relation to the establishment of anti-money-laundering standards.[51] Of particular relevance is Recommendation 11, by virtue of which '[f]inancial institutions should take reasonable measures to obtain information about the true identity of the persons on whose behalf an account is opened or a transaction conducted …'. Further detail of expectations in this regard is provided in an Interpretative Note to Recommendations 11 and 15–18. Importantly, in the course of 2000 the OECD Committee on Fiscal Affairs committed itself to this standard and indicated that it would

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49 Some support for this questioning view is to be found in the 2000 Report, p. 7, which speaks of contributing 'to emerging international principles of transparency, fairness, and disclosure'.

50 1998 Report, pp. 23–24, 27–29.

51 For an examination of the work of the FATF see W. Gilmore, *Dirty Money*, Strasbourg: Council of Europe Publishing, 2nd ed, 1999, Ch. IV.

'rely on the work of the Financial Action Task Force in ensuring the implementation of these measures by Member countries'.[52]

It is, however, open to serious doubt if compliance with the above FATF standard, which emerged in the specific and limited context of client identification for credit and financial institutions, would be regarded as relevant to, let alone satisfaction of, the conditions set by the MOU.[53] Rather it would seem that the intention is to address the related but broader issue of access to beneficial ownership information in relation to the registration of corporate and other legal entities.

In this regard, there is a growing awareness at the international level of the problems which can arise from inadequate regulation in this sphere. By way of illustration, in 1996 the FATF amended its 40 Recommendations so as to encourage countries to 'take notice of the potential for abuse of shell corporations by money launderers' and to 'consider whether additional measures are required to prevent unlawful use of such entities'.[54] More recently a greatly increased emphasis has been placed on this issue by various governments and intergovernmental organisations.[55]

Action has been at its most robust in the framework of the FATF's recent and controversial initiative directed against 'Non-Co-operative Countries or Territories' (NCCTs). This is a somewhat similar 'name and shame' exercise which is directed, in the main, towards inducing jurisdictions which offer financial services to improve their co-operation in the fight against the laundering of the proceeds of criminal activity. A 'black list' of NCCTs was drawn up in the course of 2000,[56] following an evalu-

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52 *Improving Access to Bank Information for Tax Purposes*, OECD, Paris, 2000, p.14.

53 An argument could be made that the satisfaction of these FATF standards is implicitly required by the MOU under the separate heading of 'access to bank information' to be satisfied by 31 December 2003.

54 FATF Recommendation 25.

55 For example, para. 57 of the conclusions of the Tampere Special European Council of October 1999 stated, in relevant part: 'Common standards should be developed in order to prevent the use of corporations and entities registered outside the jurisdiction of the Union in the hiding of criminal proceeds and in money laundering'. The issue has been revisited since by EU countries. The ECOFIN and Justice and Home Affairs Council, meeting in Luxembourg in October 2000, called on the Commission 'to submit to it an additional report examining in particular the possibility of establishing minimum transparency criteria for various types of legal entities (such as trusts, trust funds and foundations) for the purpose of identifying the beneficial owners more easily'. Doc. 12128/00 (Presse 381–G), para. 5.

56 See *Financial Action Task Force on Money Laundering. Annual Report: 1999–2000,* 22 June 2000, FATF, Paris, Annex A. The 15 jurisdictions listed were: Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St Kitts and Nevis, and St Vincent.

ation conducted on the basis of 25 criteria.[57] Two directly relate to the lack of identification of the beneficial owners of legal and business entities.[58]

While these criteria 'are consistent with the international anti-money-laundering standards set out in the Forty Recommendations of the FATF'[59] there can be little doubt that, in this sphere at least, the NCCT formulation goes beyond the requirements of those Recommendations as currently drafted. Indeed, the weight of evidence clearly points to a growing appreciation of the need to develop relevant standards. For example, in July 2000 G7 Finance Ministers, in their report to Heads of State and Government meeting in Okinawa, called upon the FATF to consider the scope for revising its Recommendations in order to better address the unlawful use of corporate structures. In so doing they welcomed the OECD's forthcoming review of this subject.[60] It is understood that the report in question is in the course of preparation by the OECD Steering Group on Corporate Governance and is due to be presented to Ministers at their meeting in May 2001. It will address, *inter alia*, factors which limit the ability of appropriate national authorities to access beneficial ownership information relating to corporate vehicles and identify options available to improve such access at a domestic level and to share the same on an international basis. It is anticipated that this report will help to inform opinion within the current FATF review of the adequacy of its package of anti-money-laundering measures where the issue of the registration and regulation of legal or business entities or arrangements is likely to be a focus of particular attention.

In the light of the above, it is difficult to resist the conclusion that there is, at present, no fixed international standard in respect of access to beneficial ownership information in the sense contemplated by the MOU. That said, it is equally clear that there is a growing appreciation within the international community of the urgent need both to establish and enforce such a standard.

Exchange of Information

Lack of effective exchange of information is also a factor common to the identification of tax havens and harmful preferential tax regimes for the purposes of the 1998 Report.[61] In classifying this as a particularly harmful

57 See *Financial Action Task Force on Money Laundering: Report on Non-Co-operative Countries and Territories*,14 February 2000, FATF, Paris. Text available at www.oecd.org/fatf.

58 See criteria 13 and 14.

59 FATF Annual Report, *supra*, note 55, p. 19.

60 'Actions Against Abuse of the Global Financial System', 21 July 2000, Okinawa', para. 5(c).

61 For example, 1998 Report, pp. 23, 27.

characteristic of a tax haven the Report notes: 'The most obvious consequence of the failure to provide information is that it facilitates tax evasion and money laundering'.[62] It should not be thought, however, that the concern is by any means exclusively with international co-operation in relation to such criminal matters. For example, having noted that progress had been recorded by certain tax havens in relation to criminal co-operation, the Report continues:

Nevertheless, these tax haven jurisdictions do not allow tax administrations access to bank information for the critical purposes of detecting and preventing tax avoidance which, from the perspectives of raising revenue and controlling base erosion from financial and other service activities, are as important as curbing tax fraud.[63]

In the light of the above, it was to be expected that the MOU would contain extensive provision on the co-operation issue. This it does in some detail. Thus, by 31 December 2001 '[e]ach Party will have in place a legal mechanism that allows information to be provided to the tax authorities of OECD countries upon request for the investigation of criminal tax matters'. A similar legal mechanism is to be in place by 31 December 2005 to facilitate the provision, upon request, of information 'for the determination, assessment, collection and enforcement of all other tax matters (hereafter referred to as "civil tax matters")'. The terms 'criminal' and 'civil' tax matters are not otherwise defined in the text.

Several points of interest emerge from the treatment of co-operation in criminal tax matters in the MOU. First, and most fundamentally, it appears to be based on the assumption that there exists an international standard requiring co-operation in this sphere. While it is true that over the last 25 years or so a clear trend has emerged to facilitate the provision of co-operation in criminal tax matters[64] the stage has not yet been reached where it is possible to say that refusal to assist in relation to fiscal offences is beyond the bounds of formally sanctioned international conduct.[65]

62 Ibid., p. 24.

63 Ibid.

64 For example, an Additional Protocol of 1978 to the European Convention on Mutual Assistance removes the right, originally contained in Article 2(a) of the 1959 text, to refuse co-operation on the sole ground that the request concerns a fiscal offence.

65 Even some modern multilateral texts continue to sanction the use of the fiscal exemption. See, for example, Article 18(1)(d) of the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime. Similarly, the fiscal offence exemption has been circumscribed but not eliminated by Article 18(22) of the 2000 UN Convention against Transnational Organized Crime. But see criterion 25 of the FATF's NCCT initiative.

Second, while mutual legal assistance (or judicial assistance) is an orthodox and widely accepted mechanism for the provision of co-operation in criminal tax matters[66] the use of such a procedure is not specifically mentioned among the 'various approaches' detailed in the MOU. These appear to contemplate the direct involvement of the tax authorities of the requesting OECD country in the relevant channels of communication. While OECD tax administrations will, no doubt, have a strong preference for administrative assistance permitting direct contact with either the holders of relevant information in a tax haven or with the appropriate regulatory authorities in such country or territory, it would be both surprising and a significant departure from established international practice if reliance on mutual legal assistance in criminal matters agreements or arrangements was regarded as an unacceptable basis for the satisfaction of this requirement of co-operation for MOU purposes.

A third and final issue arises out of the articulation of a condition in the MOU that information in the criminal tax sphere 'must be provided without the requirement that the conduct being investigated would constitute a crime under the laws of the Party, if it occurred in its jurisdiction'. This requirement to abolish double criminality in the context of tax offences responds to a well-recognised practical difficulty. As a recent OECD report has remarked: 'where there are marked differences in the definitions of tax crimes, application of a "double incrimination" standard in the tax area can significantly hinder effective exchange of information between treaty partners on criminal tax matters'.[67] Such problems would be particularly acute in relationships with zero tax jurisdictions. It can also be said that the international trend in the sphere of mutual legal assistance would seem to be towards the gradual diminishing of the significance of this traditional, and normally discretionary, ground for the refusal of co-operation.[68] However, it is also clear that there is not yet an international consensus favouring the abolition of this doctrine. Such a position has not even been reached within the membership of the OECD. Thus, in 2000 the Committee on Fiscal Affairs limited itself to encouraging member states 'in the context of their bilateral tax or mutual assistance treaties, to search for solutions to this issue so that they can in practice exchange bank information' and agreed to review progress 'at the end of 2002 and thereafter periodically'.[69]

66 For example, *Tax Information Exchange Between OECD Member Countries*, 1994, OECD, Paris, p. 24.

67 *Supra*, note 51, p. 15, note 7.

68 For example, W. Gilmore (ed.), *Mutual Assistance in Criminal and Business Regulatory Matters*, Cambridge University Press, Cambridge, 1995, p. xvii.

69 For the position in the UK, see C. Murray and L. Harris, *Mutual Assistance in Criminal Matters*, Sweet & Maxwell, London, 2000, pp. 69, 97–98.

In short, the language of the MOU in relation to criminal tax co-operation could perhaps be characterised as an attempt to reflect 'international best practice'. It certainly cannot at present be said to reflect an existing minimum standard even for OECD members.

As noted above, the MOU also calls for a legal mechanism to be put in place by 31 December 2005 to permit the exchange of information upon request in relation to 'civil' tax matters. In this context it should be noted that international co-operation of this kind is of relatively recent origin and has emerged in the face of rules of national law antagonistic to its development. While this process has been fostered in a variety of institutional settings, the OECD has constantly been at the forefront of developments. In a practical sense, the most influential of its products has been Article 26 of the OECD Model Tax Convention on Income and Capital,[70] a provision which has gradually evolved over time and to which refinements continue to be made.

However, for various reasons Article 26 could not, without amendment, be used as a basis for securing the *effective* exchange of information with some, at least, of the countries and territories on the tax havens list.[71] This can be illustrated by reference to the limitations on the obligation to exchange information contained in Article 26(2).

Paragraph 2 directs itself to three situations: where there is lack of reciprocity; where there is a risk of the disclosure of business and professional secrets; and where disclosure would be contrary to public policy. As has been pointed out elsewhere: '[i]f any of these conditions prevail, the exchange is no longer mandatory. Thus the requested State has the discretionary power to refuse to supply information, even though it may equally accede to the request'.[72] These grounds for the refusal of assistance can, either alone or in combination, result in significant restrictions in the scope of the obligation to co-operate. In the present context, for example, where there may well be significant differences in the tax laws and national administrative practices of OECD and tax haven jurisdictions, the operation of the principle of reciprocity, as reflected in Article 26(2)(a) and (b), is likely to have a particularly acute impact. As one leading authority has explained: 'Under that rule an obligation to investigate exists for both States only to the extent that the measures involved are allowed under the law, and are usual in the administrative practice, of both States. What is decisive in each instance is the *lower of the two levels*

70 The text can be consulted on the OECD website: www.oecd.org.

71 For example, *supra*, note 5, p. 46.

72 *Supra*, note 65, p. 25.

of intensity of investigation'.[73] Thus the greater the differences in national approach the greater the limitations.[74]

It is no doubt for these reasons, among others, that both the MOU and the 2000 Report envisage the participation of those jurisdictions which have made the required commitments in multilateral discussions. This dialogue is to include the 'development of a model vehicle for exchange of information (for example an OECD Model Tax Information Exchange Agreement or a multilateral agreement').[75]

Looked at in this light, what the relevant MOU provision seeks to accomplish might be characterised as the setting of a framework within which such dialogue will take place. It is of interest to note, however, that in so-doing the MOU uses in some respects a best practice rather than the existing OECD minimum standards approach. This is perhaps most clearly seen in the requirement that 'the Party will provide the information without regard to whether or not the Party has an interest in obtaining the information for its own domestic tax purposes'. In its recent study, *Improving Access to Bank Information for Tax Purposes*, five OECD members were identified as using a domestic tax interest requirement.[76] However, OECD members have agreed unanimously[77] to re-examine such requirements 'with a view to ensuring that such information can be exchanged by making changes, if necessary, to their laws, regulations and administrative practices'.[78] The Committee on Fiscal Affairs has suggested that the necessary changes be brought about by 2003.

Suffice it for present purposes to note from this brief examination of the treatment of the issues of access to beneficial ownership information and effective exchange of information that the MOU cannot be said to confine its ambition solely to a plan to achieve existing international minimum standards of conduct by tax haven jurisdictions. Some at least of its elements could be more appropriately described as reflecting either standards of an evolving or aspirational nature or of perceived 'best practice'.

73 Klaus Vogel, *Double Taxation Conventions*, Kluwer, The Hague, 3rd ed., 1997, p. 1441.

74 For example, *supra*, note 65, p. 51.

75 2000 Report, p. 20.

76 *Supra*, note 51, pp. 82–83.

77 Ibid., p. 3.

78 Ibid., p. 14. The UK took this step in s.146 of the Finance Act 2000, c.17.

Co-ordinated Measures Against Unco-operative Tax Havens

A central feature of the 1998 Report was the emphasis placed on the need for enhanced measures to counteract harmful tax competition. To this end it formulated a range of Recommendations concerning: (1) the more effective use of measures currently found in the domestic legislation of member countries; (2) action to be taken in the context of tax treaties; and (3) the possible intensification of international co-operation. Furthermore, the Report identified a series of topics, including the possibility of having resort to non-tax measures, which required further consideration of their potential to supplement the framework for action.[79] This work was to be carried forward by the Forum.

While the Report acknowledges the continued relevance of unilateral and bilateral measures taken by states in this sphere, it places particular stress on the need to develop co-ordinated multilateral responses to what it perceives as a global problem. This dimension to the approach of the OECD is further emphasised and developed in the 2000 Report which details an evolving framework for implementing a common approach to restraining harmful tax practices. Paragraph 35 of the 2000 Report sets out the then state of development of the consideration of the possible range of elements to which recourse might be made within the context of this common framework. Furthermore, '[t]he Committee on Fiscal Affairs will be working within the next six months to a year to consider these possible measures, finalise its recommendations and adopt an implementation strategy and timetable'.[80] The evolving nature of this process is apparent elsewhere in the Report as, for example, in the statement that the Committee 'also intends to continue to explore what other defensive measures can be taken, including non-tax measures'.[81]

As was noted above, it is anticipated that the Committee on Fiscal Affairs will invite members of the OECD 'to adopt such of the measures recommended by the Committee to the extent possible and appropriate within their national systems, to be implemented against unco-operative Tax Havens as of 31 July 2001'.[82] Similar action is envisaged against any 'scheduled commitment' or 'advance commitment' jurisdiction which is

79 See generally 1998 Report, pp. 37–62.

80 2000 Report, p. 24.

81 Ibid., p. 26.

82 Ibid., p. 24.

determined not to have met relevant milestone or timetable undertakings or is deemed no longer to be acting in good faith.[83] It is also possible that entirely new jurisdictions may be classified as unco-operative and thus become liable for consideration within the common framework.[84]

The analysis of this critical feature of the initiative taken by the OECD, in so far as it relates to states considered to be unco-operative tax havens, is far from straightforward from the perspective of public international law. The complexity arises in part from the fact that important elements are still evolving. Furthermore, neither the 1998 nor the 2000 Report appears to have been written with a legal audience in mind. Perhaps for that reason neither contains an explicit legal justification for the action contemplated. Similarly, there is a lack of standardisation in the use of certain terminology – a factor which tends to further obscure the underlying legal basis for the initiative. By way of illustration, while the 2000 Report talks of 'co-ordinated defensive measures', the 1998 text uses a range of terms ('countermeasures', 'enforcement measures', 'counteracting measures' and 'defensive measures') seemingly interchangeably. A similar tendency is evident in the News Releases of and public statements made on behalf of the OECD in this context.[85] While such terms may be capable of use as synonyms in political or economic discourse, this is not the case within the context of general international law where certain of the above have a broadly settled technical meaning.

Within the international system there are several circumstances in which resort to economic measures are undoubtedly lawful. Of these the most obvious and well accepted is when economic sanctions are authorised or imposed by a competent organ of the international community (as with measures ordered by the Security Council under Chapter VII of the UN Charter). Sanctions in this sense are not relevant to the current debate. No such action has been taken by the UN Security Council and the OECD has not held itself to possess such authority. As a senior official of the Financial, Fiscal and Enterprise Affairs Directorate of that institution has explained: 'The OECD does envision co-ordinated defensive measures, but it is the member countries, not the OECD, which will apply

83 For example, ibid., p. 18, note 14 and p. 19.

84 For example, ibid., p. 20.

85 For example, 'OECD Moves Forward in Countering Harmful Tax Practices', OECD News Release, Paris, 24 November 1999 ('co-ordinated countermeasures'); 'Statement by Mr. Makhlouf, Chairman of the Committee on Fiscal Affairs', OECD, Paris, 26 June 2000 ('co-ordinated sanctions').

those measures. All the OECD does is provide a framework in which co-operation can take place'.[86]

As has been noted elsewhere, 'one frequent but less firmly established usage speaks of sanctions in describing the measures, particularly in an economic context, taken by a State acting alone or jointly with others in reply to the behaviour of another State which, it maintains, is contrary to international law'.[87] In this sense sanctions are part of the law of counter-measures (sometimes known as measures of reprisal).

The nature and extent of the right to resort to countermeasures has generated extensive discussion in academic circles and has been the subject, on several occasions, of judicial clarification.[88] Most recently, the issue was treated in some detail by the International Court of Justice in the *Case concerning the Gabcíkovo-Nagymaros Project*.[89] The noted Australian scholar, Professor Crawford, in his capacity as Special Rapporteur of the International Law Commission on the subject of state responsibility, has summarised the position taken by the Court in these words:

The Court, in a bilateral context in which no issue of prohibited countermeasures were at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in response to an unlawful act; (b) it must be preceded by a demand for compliance by the injured State; (c) the countermeasure must be proportionate, in the sense of 'commensurate with the injury suffered, taking account of the rights in question', and (d) the countermeasure must have as its purpose 'to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.[90]

Three points should be emphasised concerning the above formulation. First, the Court was dealing with countermeasures adopted in a bilateral context. Recourse to the use of such measures on a collective basis raises-further issues of legal complexity which were not explored.[91] Second, it is

86 Interview, 19 October 2000 with J. Owens, available at www.oecdobserver.org/news/fullstory. Site visited 17 November 2000.

87 J. Combacau, 'Sanctions', *Encyclopedia of Public International Law*, Vol. 9, 1986, p. 338.

88 See, for example, Restatement of the Law (3rd): The Foreign Relations Law of the United States, 1987, American Law Institute Publishers, St Paul, Minn., Vol. 2, pp. 380–384; K. Partsch, *Reprisals*, *supra*, note 86, pp. 330–335.

89 *ICJ Reports*, 1997, p. 7, at pp. 55–57.

90 International Law Commission, Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur (hereafter ILC Report), UN doc. A/CN.4/507/Add.3 (18 July 2000), p. 3.

91 See generally International Law Commission, Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur: UN doc. A/CN.4/507/Add.4 (4 August 2000) (hereinafter ILC Report 2).

broadly accepted that certain categories of conduct are prohibited as countermeasures such as recourse to the threat or use of force contrary to the UN Charter. This issue was not addressed by the Court in 1997. It will suffice to note that the International Law Commission is currently considering whether resort to extreme economic and political coercion could ever be so categorised.[92] Third, other rules of international law in force between the injured and the target state may restrict or abrogate the right to have recourse to such measures.[93] Notwithstanding these restraining or complicating factors, there is no doubt that when countermeasures can properly be resorted to, the initiating state has a broad, but not unlimited, right to suspend the performance of its legal obligations towards the responsible state.

While the term 'countermeasures' has been used within the context of the OECD initiative, the legal concept has not been specifically invoked. Nonetheless, there are elements in the 1998 and 2000 Reports which, in the abstract, raise the possibility that the underlying legal justification for the measures currently in contemplation may be found, at least in part, in this doctrine. For example, a central thrust of the OECD initiative is to induce unco-operative tax havens to comply with international standards. In the words of the 1998 Report: 'Countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so'.[94] Similarly, in other parts of the main reports one finds wording which echoes central elements of the legal regime of countermeasures such as proportionality.[95]

There is, however, no direct evidence that the OECD Secretariat or member states regard the threat to impose co-ordinated economic measures against unco-operative tax havens as deriving legal validity, even in part, from prior internationally wrongful acts committed by such jurisdictions. Indeed, given the analysis of aspects of the principles of transparency and effective exchange of information contained in this study, it would be surprising if such a justification were to be proffered.

92 See, ILC Report, pp. 13–16, 30–31.

93 As has been pointed out elsewhere: 'No doubt a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement. Under the WTO, special permission has to be obtained for retaliatory measures, and this again would exclude any residual right to take countermeasures under general international law for breaches of the WTO and related agreements'. ILC Report, pp. 26–27.

94 1998 Report, p. 15.

95 2000 Report, p. 24.

In these circumstances the somewhat different question of the nature and extent of the closely associated right of retorsion necessarily arises. For present purposes retorsion may be taken to denote a measure not affecting the legal rights of another state taken in response to an unfriendly or objectionable act by that state. Here the central point of contrast with the doctrine of countermeasures is that the latter consists of acts which would otherwise be illegal.[96] As Professor Crawford has explained, the 'distinction is that between "unfriendly" but not unlawful reactions to the conduct of another State (retorsion) and those reactions which are inconsistent with the international obligations of the State and are justified, if at all, as legitimate countermeasures. While the distinction may sometimes be difficult to draw in practice, especially in the context of collective action, it is crucial for the purposes of State responsibility'.[97] In the practice of states, economic relations have been the primary sphere of application of this doctrine in the post-World War II period.

While the concept of retorsion is rooted in the assumption that one state may respond to the acts of another by recourse to measures that do not violate its legal obligations with respect to that member of the international community with a view to inducing it to adopt an alternative posture or policy, the important question is whether or not the international legal order places any limits on the extent of such freedom of action. Put another way, the issue is whether or not general international law contains rules distinguishing between permissible and impermissible acts of retorsion.

This is one of the most complex and controversial issues confronting the modern law of nations; one which revolves around the legitimacy or otherwise of economic and political coercion.[98] While a comprehensive review of this matter lies beyond the scope of this paper, it would be of value to outline certain of the essential elements of that debate.

There exists no consensus among states or in the scholarly literature as to the existence of a general legal limitation on the right to have recourse

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96 See, for example, I. A. Shearer (ed.) (1994). *Starke's International Law*, 11th ed., Butterworths, London, p. 472.

97 ILC Report 2, p. 13.

98 See, for example, M. Shaw, *International Law*, Cambridge University Press, Cambridge, 4th ed., 1997, p. 783. See also D. Bowett, 'International Law and Economic Coercion', *Virginia Journal of International Law*, 1976, 16, pp. 245–259; R. Lillich, 'Economic Coercion and the "New International Economic Order": A Second Look at Some First Impressions', ibid., pp. 233–244; T. Farer, 'Political and Economic Coercion in Contemporary International Law', 1985, 79, *American Journal of International Law*, pp. 405–413.

to differing forms of economic and political pressure as an instrument ofnational policy. Among those who argue in favour of such a prohibitory norm there exists a variety of views as to both its source and nature.[99] Of these the form of analysis which has perhaps attracted the greatest level of support is that the legal limits to the use of economic and other types of pressure are to be found in the general international law principle of non-intervention.[100] While this doctrine is most commonly associated with practices involving the threat or use of armed force, it is widely acknowledged that it has a broader scope. As a study prepared by the Planning Staff of the British Foreign and Commonwealth Office in 1984 noted: ‘Many commentators describe intervention in which force, or the threat thereof, is not used as no more than interference. But, 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. To define as intervention only those instances of interference in which armed force is used or threatened thus seems artificially restrictive.[101]

The rule of non-intervention had its origins in the practice of the states of Latin America in the nineteenth and first half of the twentieth centuries. That process of gradual evolution culminated in the inclusion of specific and wide ranging regulation of the subject in Chapter IV of the Charter of the Organization of American States.[102] Of special relevance for present purposes are the following provisions:

Article 19

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.

Article 20

No State may use or encourage the use of coercive measures of an economic or

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99 See, for example, S. Neff, ‘Boycott and the Law of Nations’, *British Year Book of International Law*, 1988, 59, pp. 113–149; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Clarendon Press, Oxford, 1988, pp. 190–213.

100 See, for example, E. Jimenez de Arechaga, ‘International Law in the Past Third of a Century’, *Recueil des Cours*, 1978, 159, pp. 111–116; B. Simma (ed.), *The Charter of the United Nations*, Oxford University Press, Oxford, 1994, pp. 112–113.

101 Is Intervention Ever Justified?, Foreign Policy Document No.148, Annex 1, para. 7, 1984.

102 H. Caminos. ‘The Role of the Organization of American States in the Promotion and Protection of Democratic Governance’, *Recueil des Cours*, 1998, 273, pp. 196–208.

political character in order to force the sovereign will of another State and obtain from it advantages or any kind.

Throughout the United Nations era the General Assembly has come to recognise the general legal relevance of this principle in a succession of declarations and resolutions. By way of illustration, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (G.A. Res.2625 (XXV) (1970)), which was adopted by consensus, contains extensive treatment of this issue.[103] It reads, in part, thus:

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.

The same Resolution also declares, *inter alia*, that 'No State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'. It also proclaims that 'Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'.

This UN General Assembly Resolution was afforded a position of considerable importance in the reasoning of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.[104] In the course of its judgement the Court affirmed that the principle of non-intervention formed part of modern customary international law. It stated:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (ICJ Reports 1949, p.35)*, and international law requires political integrity also to be respected. Expressions of an* opinio juris *regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements*

103 G. Arangio-Ruiz, 'Friendly Relations Resolution', Vol. II, *Encyclopedia of Public International Law*, 1995, pp. 485–490.

104 ICJ Reports, 1986, p. 14.

whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal or external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the opinio juris *of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States.*[105]

The World Court also took the opportunity to provide some clarification of the content of the principle (though in doing so it concentrated on those aspects especially relevant to the resolution of the actual dispute before it). In this regard it emphasised the importance of the notion of coercion. A prohibited intervention must be one:

bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones. The element of coercion which defines and indeed forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force either in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another State.[106]

Elsewhere in its judgement, however, the Court had occasion to consider in brief an argument advanced by Nicaragua that certain economic measures taken against it by the USA, culminating in the unilateral imposition of a trade embargo in 1985, constituted a prohibited form of intervention in its internal affairs.[107] The Court disagreed.[108] This determination has led some commentators to conclude that customary international law does not prohibit economic coercion.[109] Others have argued that,

105 Ibid., p. 106.

106 Ibid., p. 108.

107 Ibid., pp. 69–70.

108 Ibid., pp. 126, 138.

109 See,for example, C. Cameron, 'Developing a Standard for Politically Related State Economic Action', *Michigan Journal of International Law*, 1991, 13, p. 249; R. Porotsky, 'Economic Coercion and the General Assembly: a Post-Cold War Assessment of the Legality and Utility of the Thirty-Fife-Year Old Embargo against Cuba', *Vanderbilt Journal of Transnational Law*, 1995, 28, p. 919.

properly construed, the conclusion of the court does not have that absolute character.[110] This perspective is well expressed by the distinguished Canadian jurist, Professor R. St J. MacDonald, who has remarked that the court 'simply held that the above facts did not constitute a violation of the principle'.[111] This latter view finds further support in, among others, the subsequent practice of the UN General Assembly.[112]

Even if one accepts that the legal norm of non-intervention extends to economic measures, difficulties remain in determining whether or not in any particular case the threshold between lawful economic pressure has been crossed and improper economic coercion has commenced.[113] A further factor of importance concerns the implications which flow from resort to economic measures on a collective or co-ordinated basis, as in this instance, rather than unilaterally.[114]

Conclusions

In his opening address to the High Level Consultations held in Barbados in January 2001, OECD Deputy Secretary General Kondo remarked:

Globalisation can pose problems, not just for individuals, but for governments as well. New opportunities are opened up for individuals and enterprises to engage in illegal activities, such as hard core cartels, bribery, money laundering and tax abuses, which distort trade and investment flows.[115]

Few would disagree with the sentiment that countering the 'dark side of globalisation'[116] presents significant challenges for the international community and that 'offshore' financial centres have an important role to play in so doing.[117]

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110 Neff, *supra*, note 99.

111 R. MacDonald, 'The Nicaragua Case: New Answers to Old Questions?', *Canadian Yearbook of International Law*, 1986, p. 138.

112 See, for example, General Assembly Resolution 53/10 on the 'elimination of coercive economic measures as a means of political and economic compulsion', reproduced in (1999) 38 International Legal Materials, pp. 759–760. See also 'Economic measures as a means of political and economic coercion against developing countries', UN doc. A/48/535, 25 October 1993.

113 See, for example, Lillich, *supra*, note 97, pp. 238–240.

114 For example, C.C. Hyde and L.B. Wehle, 'The Boycott in Foreign Affairs', *American Journal of International Law*, 1933, 27, pp. 4–5.

115 Speech, Monday 8 January 2001, typescript, p. 2.

116 Ibid.

117 For example, UNODCCP, *Financial Havens, Banking Secrecy and Money-Laundering*, United Nations, New York, 1998.

That said, however, this overview of the tax havens aspects of the OECD initiative on harmful tax competition gives rise to certain concerns as to both process and substance. For example, it has been demonstrated that central elements of the conduct expected of listed jurisdictions cannot readily be classified as constituting generally accepted international standards; indeed, in some respects they appear to go beyond what might be termed existing minimum standards for OECD members in their relationships *inter se*. Viewed in this light there is considerable scope for a truly inclusive global forum on tax issues, of the kind contemplated in the remit for the working group established at the Barbados meeting, to contribute to the formulation of such standards and to the subsequent monitoring of their implementation by relevant members of the international community.

To some, resort to co-ordinated economic measures in order to induce compliance with standards of an evolving or aspirational nature on the part of countries and territories which have had no participation in their formulation will be viewed as objectionable in principle. Such a strategy is also controversial when viewed in terms of public international law. For that reason an authoritative clarification of the legal position would be of considerable value. One possibility would be to seek, through the UN General Assembly, an Advisory Opinion on this general issue from the International Court of Justice in The Hague.[118] In the light of such a clarification a proper and much-needed debate could be conducted as to the overall acceptability of and limits to a name, shame and punish strategy at the international level in the opening years of the twenty-first century.

118 UN Charter, Article 96(1); Statute of the International Court of Justice, Article 65.