MULTILATERAL INITIATIVES TO SWIFTLY IMPLEMENT THE STANDARDS OF TRANSPARENCY AND EXCHANGE OF INFORMATION

Introduction

1. All jurisdictions surveyed by the Global Forum have now endorsed the standards of transparency and exchange of information. They are now seeking ways to swiftly implement them. There is also a desire among many jurisdictions to extend the benefits of the more cooperative tax environment to developing countries. This note contains an overview of three multilateral initiatives which are currently being pursued to achieve these goals. These initiatives are:

- multilateral negotiations of bilateral TIEAs;
- promoting the use of the multilateral model TIEA; and
- updating the Convention on Mutual Administrative Assistance in Tax Matters.

Multilateral negotiations of bilateral TIEAs

2. Smaller jurisdictions often have few resources to devote to TIEA negotiations. Similarly, other jurisdictions are often unable to devote the resources necessary to negotiate TIEAs with small and geographically distant jurisdictions. Developing countries face similar resource constraints. As can be seen from the Nordic initiative,[1] multilateral negotiation allows a number of jurisdictions to pool their resources and enable small jurisdictions to agree to a large number of TIEAs at one time. This approach also facilitates a greater standardisation which will help lead to consistent implementation.

3. At the moment three pilot projects are being pursued. Each pilot project includes a project co-ordinator that liaises with the "represented jurisdictions" involved and leads negotiations with the "project jurisdictions". Once the negotiation is finalized, each of the represented jurisdictions signs a bilateral TIEA with each of the project jurisdictions. The pilot projects typically involve 5 or 6 represented jurisdictions, and 3 or 4 project jurisdictions. The three projects currently under way are:

- the Southern Caribbean Project, coordinated by the Netherlands;
- the Northern Caribbean Project, coordinated by the United Kingdom; and
- the Pacific Project, coordinated by the OECD Secretariat.

Multilateral Model TIEA

4. The 2002 Model Agreement on Exchange of Information on Tax Matters sets out two options: a bilateral and a multilateral TIEA[2]. The multilateral model TIEA does not provide for a "multilateral"

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1 The seven Nordic countries (Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden) have successfully concluded a number of bilateral TIEAs through multilateral negotiations. These countries have signed a total of 42 TIEAs with Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man and Jersey. The Nordic strategy has been to have one lead negotiating team negotiate on behalf of all seven countries; however, each Nordic country signs a standalone TIEA with the other jurisdiction. For further information about this initiative, please contact Torsten Fensby (tel: +33 6 78 25 12 89, e-mail: torsten.fensby@wanadoo.fr).

2 See http://www.oecd.org/dataoecd/15/43/2082215.pdf.

agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties, so that a party to it would only be bound by the Agreement vis-à-vis the specific parties with which it agrees to be bound. To implement the Agreement, Article 15 of the multilateral model requires that the instruments of ratification, acceptance or approval shall be submitted to the depositary of the Agreement, which is the OECD Secretary-General. Furthermore, it provides that each contracting party shall specify in its instruments of ratification, acceptance or approval vis-à-vis which other parties it wishes to exchange information with and the Agreement shall enter into force only between contracting parties that specify each other in their respective instruments of ratification, acceptance or approval.

5. To date, the model TIEA has been implemented only as a bilateral instrument. While the potential to use the multilateral model is clear, the benefits of this approach have yet to be realised. Prior to the Global Forum, a practical note explaining what steps jurisdictions need to take to use this instrument, including sample ratification instruments, will be provided to all participants.

6. Jurisdictions will have to obtain the ratification, acceptance or approval in their capitals (in most cases by their Parliaments), indicating towards which jurisdictions they want to be bound, but without knowing in advance whether these jurisdictions so wish. In that sense it is similar to the unilateral approach adopted by the Cayman Islands and St. Kitts, both of which had the TIEA terms ratified and then identified the jurisdictions with which they agreed to exchange information. Thus the ratification of the Agreement may not bring with it the immediate benefit of receiving credit for having established an exchange of information relationship consistent with OECD standard, though if it is agreed that the unilateral approach is acceptable, ratification of the multilateral model could also obtain the same recognition under appropriate conditions.

7. An option that could be considered is to convert the multilateral Model TIEA into a real multilateral instrument. It would be relatively easy to technically adapt the model and then open it up for signature. This could be done quickly as it would only affect the operational aspects (e.g. to allow signing, multilateral exchange) and not the substantive provisions.

Convention on Mutual Administrative Assistance in Tax Matters

8. The Convention on Mutual Administrative Assistance in Tax Matters is a multilateral agreement drawn up under the aegis of the Council of Europe and of the OECD. It provides for administrative assistance in tax matters and is open for signature by the countries members of the Council of Europe or of the OECD.[3] At the moment the Convention is in force among the following fourteen countries: Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, Netherlands, Norway, Poland, Sweden, United Kingdom, United States, and Ukraine. Canada and Germany have signed the Convention but not yet ratified it. The Convention[4] is a truly multilateral instrument, in the sense that each Party is bound to all the others in a way which allows for multi-country exchanges and assistance.

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[3] The following countries are members of the Council of Europe: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus,* Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, and the United Kingdom.

* Note by Turkey:
The information in this document with reference to «Cyprus» relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Note by all the European Union Member States of the OECD and the European Commission:
The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

[4] See http://www.oecd.org/dataoecd/11/29/2499078.pdf.

9. As the Convention was drafted before the adoption of the internationally agreed standard, the exchange covered by the Convention is subject to limitations existing in the domestic laws of the signatories, such as a domestic tax interest requirement or strict bank secrecy rules. The Coordinating Body of the Convention[5] decided to explore the possibility of amending the Convention to ensure that it conforms to the internationally agreed standard. It also agreed to explore an amendment to the Convention in order to open it up for adherence by other jurisdictions.

10. Technical work is currently being carried out to bring the Convention in line with the internationally agreed standard and possibly to open it up to a wider range of jurisdictions. Once these changes are agreed, and the applicable OECD and Council of Europe procedures for amendment are completed, the revised/a protocol/a new Convention will be open for adherence. Once opened for adherence, the updated Convention could be a suitable instrument to ensure that jurisdictions that have committed to the standard have an instrument they can use to effectively implement their commitment.

Issues for Discussion

11. Delegates are invited to consider whether their jurisdiction is interested in pursuing any or all of the multilateral initiatives outlined above. In particular, delegates are invited to discuss the following issues:

- Would your jurisdiction be interested in pursuing multilateral negotiations of bilateral TIEAs (as a project coordinator, a represented jurisdiction, or a project jurisdiction)?
- Would your jurisdiction be interested in using the multilateral model TIEA?
- Do you agree that these multilateral instruments offer a useful way to involve a wider group of countries, including developing countries, in the exchange of information?
- Would your jurisdiction be interested in entering a true multilateral treaty based on the multilateral model TIEA?
- Would your jurisdiction be interested in becoming a Party to the revised Convention on Mutual Administrative Assistance in Tax Matters?

[5] The Coordinating Body is established under the auspices of the Convention and composed of representatives of the competent authorities of the Parties. It has the task of monitoring the implementation and development of the Convention and, where necessary, it may recommend modifications to the Convention.

UNILATERAL MECHANISMS TO IMPLEMENT THE STANDARD

I. Introduction

1. The Cayman Islands and St. Kitts and Nevis recently enacted domestic legislation which allows their tax authorities to exchange information with certain countries[1] ("scheduled countries") on a unilateral basis. Following the enactment of the legislation, these jurisdictions sought guidance from the OECD as to whether their legislation enables the Cayman Islands and St. Kitts and Nevis to achieve the OECD standard for effective exchange of information.

2. In principle, the standard for effective exchange of information may be achieved by a variety of methods, which include double tax conventions (DTCs), tax information exchange agreements (TIEAs), multilateral instruments and unilateral mechanisms as identified in the note "Taking the Process Forward in a Practical Way" discussed by the Sub-Group on Level Playing Field Issues. Unilateral mechanisms can be considered as a useful tool to accelerate implementation of the standard, in particular for smaller jurisdictions, given the urgency of the issue and the time and other resources required to negotiate bilateral agreements. Following their implementation, the performance and effectiveness of unilateral mechanisms must of course be monitored in the same manner as other exchange of information mechanisms.

3. Certain issues may, however, sometimes prevent unilateral legislation from fully achieving its goal. These issues include the possible absence of notification as to whether a country has been scheduled or is no longer a scheduled country and domestic law confidentiality provisions that could (in the absence of a DTC or TIEA) bar the tax authorities of some countries from making requests for information pursuant to the legislation. It is accordingly recommended that any endorsement of unilateral mechanisms be conditioned upon certain general requirements with respect to: transparency; openness to DTC or TIEA negotiations with other jurisdictions; and the effectiveness of underlying mechanisms for exchange of information.

4. This note identifies potential issues with unilateral mechanisms (Section II) and proposes a set of general conditions that could be applied with respect to any endorsement of unilateral mechanisms in order to ensure that their adoption represents a meaningful implementation of the international standard (Section III).

II. Potential issues

A. Weight of international agreements

5. Prima facie, the weight of the international commitment manifested by signature of an international agreement such as a TIEA or DTC exceeds that of a commitment undertaken unilaterally through domestic legislation. International agreements clearly reflect an intent to be legally bound and generally contain express, mutually-agreed provisions on their amendment, modification and termination. In addition, a well-established body of international law governs their interpretation, application and enforcement. Domestic legislation, in contrast, does not reflect the same formal and reciprocal assumption of obligations and is relatively more easily modified or repealed.

6. International law does, however, accept the idea that a jurisdiction can bind itself *vis-à-vis* third parties through a unilateral act. Indeed, a state may evidence a clear intention to accept obligations *vis-à-vis*

[1] References in this document to "countries" should be taken to apply equally to "territories", "dependencies" or "jurisdictions".

certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from the states concerned. For example, in 1957 the Egyptian Government made a *Declaration on the Suez Canal and the Arrangements for its Operation* in which certain obligations were accepted. The Declaration was communicated to the Secretary General of the United Nations together with a letter which explained that the Declaration was to be considered as an 'international instrument' and registered as such by the Secretariat. In the 1974 *Nuclear Test* case (Australia v. France) the International Court of Justice held that France was legally bound by publicly given undertakings, made on behalf of the French Government to cease the conduct of atmospheric nuclear tests. The criteria of obligation were: the intention of the state making the declaration that it should be bound according to its terms; and that the undertaking be given publicly. In both cases there was no requirement of a *quid pro quo* of any subsequent acceptance or response.[2]

B. Designation and Notification of Scheduled Countries

7. In general, it would be reasonable and appropriate for a jurisdiction considering the enactment (or expansion) of a unilateral mechanism to consult with scheduled countries in advance of their designation as such. This consultation would permit both jurisdictions to identify any potential issues that may arise and provide scheduled countries with notice that they will be or have been scheduled (note that there is no provision in either the Cayman Island or St. Kitts and Nevis legislation for notification to scheduled countries). The criteria used to select scheduled countries, as well as any process by which a non-scheduled jurisdiction might request to be scheduled, would also optimally be set out publicly.

8. Issues also arise in connection with the potential "de-scheduling" of a country and/or material changes to (or the repeal of) the relevant legislation. Unilateral mechanisms should appropriately provide for the notification of a scheduled country that is being de-scheduled. Scheduled countries should additionally be informed of changes to the relevant legislation that would materially affect the ability of the jurisdiction to exchange information. Similary, just as a DTC or TIEA contains specific notice provisions connected with its termination, there should be analogous provisions with respect to the repeal of the legislation.

C. Domestic law secrecy/confidentiality provisions

9. Unilateral mechanisms for the exchange of information may raise issues in a number of jurisdictions with respect to domestic law provisions on confidentiality of taxpayer information. These issues arise because a request for information under a unilateral mechanism generally requires the country making the request to provide the country to which the request is made certain specific information regarding the relevant taxpayer, including the identity of the person under examination or investigation, the nature and form of the requested information and the tax purpose for which the information is sought.[3] In the absence of a DTC or TIEA, however, the tax authorities of many countries are generally prohibited from disclosing such taxpayer-specific information to third parties by domestic law provisions intended to protect the secrecy or confidentiality of taxpayer information. By its terms, a DTC or TIEA authorises the disclosure of taxpayer information by the parties' tax authorities, subject to a reciprocal obligation to treat any information received as confidential (generally in the same manner as information obtained under domestic law).[4]

10. Where domestic law prohibitions on disclosure would bar the tax authorities of one jurisdiction from disclosing to the tax authorities of another jurisdiction the taxpayer information that is required to be contained in a request for information pursuant to a unilateral mechanism, the unilateral mechanism will not fully achieve its goals. In practice, for certain countries the disclosure of the information that a requesting state would have to provide to demonstrate the foreseeable relevance of the information requested would constitute a breach of their rules on the confidentiality of taxpayer information. Certain scheduled countries would in fact need to amend their domestic laws to be able to request information

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2 ICJ Reports (1974°, 253 at 267-271.

3 See, for example, Article 5.5 of the Model TIEA.

4 See Article 8 (Confidentiality) of the Model TIEA and Article 26(2) of the OECD Model Tax Convention.

pursuant to the legislation.[5] Given the notification issues discussed above, however, scheduled countries may not even be aware of the existence of a unilateral mechanism, much less the need for such modifications to their domestic laws, which, in addition, are likely to be politically controversial.

D. Unilateral mechanisms as a stop-gap measure until bilateral agreements can be negotiated

11. Certain issues may also arise in connection with the clearly expressed policy preference of some countries for bilateral agreements for exchange of information, both in light of the weight of the international commitment manifested by an international agreement and because they do not present the transparency and domestic law disclosure issues discussed above. These countries may therefore consider unilateral measures as solely stop-gap measures until appropriate bilateral agreements can be negotiated (or appropriate multilateral mechanisms can be put in place).

III. General requirements for unilateral mechanisms

12. Notwithstanding these concerns regarding the weight of the international commitment manifested by a unilateral mechanism, potential transparency and domestic law confidentiality issues, and the preference of certain countries for multilateral or bilateral mechanisms for exchange of information, unilateral mechanisms are a useful tool to accelerate implementation of the standard. This may particularly be the case for smaller jurisdictions, given the urgency of the issue and the time and other resources required to negotiate bilateral agreements. There is thus a need for a framework of conditions to assure that unilateral mechanisms fully achieve their goals and that countries using them can be considered as implementing the international standard on exchange of information.

13. It is accordingly recommended that the Global Forum agree to the following general requirements to assess the effectiveness of unilateral mechanisms.

A. Designation and Notification of Scheduled Countries

14. The following conditions are recommended to ensure the transparency of unilateral mechanisms:

- *Consultation with countries to be scheduled or otherwise designated pursuant to the unilateral mechanism.* As a general matter, a jurisdiction that intends to schedule or otherwise designate another jurisdiction pursuant to a unilateral mechanism for information exchange should ideally consult that other jurisdiction in the process of preparing the relevant domestic legislation. Given the bilateral nature of an exchange of information relationship, such consultation will allow the other jurisdiction to inform the first jurisdiction whether it considers the unilateral mechanism acceptable and to identify and (where appropriate) remove potential domestic law barriers to the effectiveness of the unilateral mechanism, such as domestic law provisions on the secrecy/confidentiality of taxpayer information.

- *Notification provisions.* A unilateral mechanism for tax information exchange will be ineffective if a scheduled country is unaware that the mechanism exists or that it has been scheduled by the relevant jurisdiction. Unilateral mechanisms should accordingly provide for notification to scheduled countries, preferably establishing a standardised procedure for such notification. Unilateral mechanisms should also provide for notification when a country is de-scheduled and when the relevant legislation is modified in a manner that would materially affect the ability of the jurisdiction to exchange information. Scheduled countries should additionally be notified should a jurisdiction repeal the relevant legislation.

- *Broader indicia of international commitment.* Beyond a jurisdiction's consultation with and notification to scheduled countries, a jurisdiction implementing its commitment to the

[5] Based on delegate comments at the recent meeting of the Forum on Harmful Tax Practices, these countries may include Ireland, the Netherlands, Norway, Sweden and Switzerland.

international standard through a unilateral mechanism should clearly communicate to the broader international community its intent to be bound by the international obligations assumed through such measures.

- *Scheduling criteria and procedures*. Jurisdictions using unilateral mechanisms should clearly identify the criteria used to designate a jurisdiction as a scheduled country. These jurisdictions must be open to requests from other jurisdictions to be scheduled, in particular requests from jurisdictions with which they have significant economic relationships, and should establish appropriate procedures to this end.

B. Openness to Bilateral negotiations

15. For the reasons discussed above, including the reciprocal nature of a bilateral agreement and domestic law confidentiality issues, some countries have a clear policy preference for bilateral exchange of information relationships. For these countries, unilateral mechanisms would generally serve as a short-term or stop-gap measure until a TIEA could be negotiated. It is therefore recommended that jurisdictions with a preference for unilateral mechanisms publicly commit to negotiate TIEAs if requested. Such commitments should, of course, take into account the capacity of a specific jurisdiction to conduct and complete such negotiations.

C. Effectiveness of underlying measures for exchange of information

16. As a final matter, a country that enacts a unilateral mechanism should have in place appropriate domestic administrative and other measures to collect information and respond in a timely and complete manner to requests from scheduled countries. Recognising that these same issues exist with respect to any mechanism for exchange of information, it is recommended that unilateral mechanisms be subject to the same Global Forum assessment process as bilateral and multilateral mechanisms. As the Global Forum assessment process continues to evolve, it is expected to adopt a rigorous system of peer review to evaluate, among other criteria, the performance and effectiveness of a jurisdiction's underlying mechanisms to collect and exchange information.

ANNEX

A. The Cayman Islands legislation

1. The Cayman Islands Tax Information Authority (Amendment) Law 2008 (the 2008 Cayman Law) amends the Cayman Islands Tax Information Authority Law 2005 (the 2005 Cayman Law) to authorise the Governor to identify specific countries ("scheduled countries") to which the Tax Information Authority (TIA) of the Cayman Islands will provide tax information upon request. The 2005 Cayman Law gives effect to and provides for the domestic law implementation of Cayman Islands bilateral agreements for the exchange of tax information. The amendments made by the 2008 Cayman Law thus provide a means by which the Cayman Islands may exchange tax information in the absence of a bilateral agreement for such exchange.

2. Pursuant to authority granted by the 2008 Cayman Law, the Tax Information Authority (Scheduled Countries) Order 2009 (Scheduled Countries Order) specifies 11 OECD member countries[6] to which the TIA may provide tax information plus South Africa. The basis on which these countries were identified is not stated in the legislation, and no explanation has been provided of the criteria used for their selection. It is additionally not clear under what circumstances a scheduled country could be de-scheduled or the Scheduled Countries Order could be amended (*e.g.* to include additional scheduled countries).

B. The St. Kitts and Nevis legislation

3. The Saint Christopher and Nevis (Mutual Exchange of Information on Tax Matters) Act 2009 (the 2009 St. Kitts Act) and the Rules for Exchange of Information on Tax Matters (the Rules), which are included as a schedule to the 2009 St. Kitts Act, provide for the exchange of tax information between St. Kitts and Nevis and other jurisdictions in a manner similar to the Cayman Islands legislation discussed above. Like the Cayman Islands legislation, the 2009 St. Kitts Act applies to give effect to bilateral agreements for the exchange of tax information ("scheduled agreements") and to permit the exchange of tax information, pursuant to the Rules, to specifically identified countries ("scheduled countries"). The 2009 St. Kitts Act appears in significant part to reproduce the Cayman Islands legislation.

4. The 2009 St. Kitts Act provides for the establishment of a Tax Co-operation Authority (the Authority) and the procedures for executing a request for tax information, and grants the Authority the powers needed to perform its functions. The Rules are based on the Model TIEA and govern the exchange of information with scheduled countries.

5. Unlike the Cayman Island legislation, however, the 2009 St. Kitts Act and Rules appear to permit St. Kitts and Nevis only to schedule countries with which it has DTCs or other bilateral investment treaties or arrangements, presumably reflecting a policy of requiring reciprocal benefits.7 It should be noted, however, that at least one of the scheduled OECD member countries does not have a DTC with St. Kitts and Nevis (Sweden's DTC with St. Kitts and Nevis was terminated in the 1980s).

6. The 2009 St. Kitts Act provides that TIEAs signed by St. Kitts and Nevis may be added to the scheduled agreements by order of the Minister of Finance. As a result, St. Kitts and Nevis will not be required to enact enabling legislation for every new TIEA it concludes.

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[6] The 11 OECD member countries named in the Scheduled Countries Order are Austria, Belgium, the Czech Republic, Germany, Ireland, Japan, Luxembourg, the Netherlands, the Slovak Republic, Switzerland and the United Kingdom.

[7] See section 4.(1.)(a) of the Rules (definition of "scheduled country"). On 2 April 2009, the Minister of Finance of St. Kitts and Nevis scheduled the following jurisdictions: Denmark, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the members of the Caribbean Community (CARICOM). The 14 CARICOM members (in addition to St. Kitts and Nevis) are: Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; St. Lucia; St. Vincent and the Grenadines; Suriname; and Trinidad and Tobago.