THE DEATH OF TAX HAVENS?

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Abstract: The Organization for Economic Co-operation and Development has been fighting for the elimination of harmful tax practices since 1998, through the creation of a global co-operative framework. In June, 2000, the OECD listed thirty-five jurisdictions considered to be tax havens. These jurisdictions originally had until July 31, 2001 to make commitments for the elimination of harmful tax practices. Through subsequent meetings between the OECD and the jurisdictions, various modifications were made to the OECD guidelines, including an extension of the commitment deadline until February, 2002, and the postponement of the defensive measures until April, 2003. This Note will examine the OECD, the various meetings held between the OECD and the tax havens, the results achieved by the OECD, and the implications of the pending deadline.

INTRODUCTION

Globalization has resulted in the erosion of business boundaries.[1] However, with law enforcement still nationally implemented, the freedom gained through globalization is being abused from such acts as tax evasion.[2] Tax evasion undermines a government's ability to raise revenue whereby tax abusers shift financing burdens onto others.[3] This forces governments to cut back on social and infrastructure projects.[4] Although tax evasion drains a substantial amount of revenue from the economy, it is spread across the entire population, and thus the direct effect on any individual citizen is minimal.[5] This, however, should not undercut the subtle injustices suffered by citizens.[6] It is such conditions that led the Organization for Economic Co-

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[1] Seiichi Kondo, *Tax Evaders Are Not Like Robin Hood. They Take From All of Us and Don't Give Any Back,* THE GUARDIAN (LONDON), Jan. 8, 2001, *available at* 2001 WL 2911782.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Kondo, *supra* note 1.

operation and Development (OECD) to address the global issue of harmful tax practices.[7]

Recently, the representatives of wealthy and Caribbean nations agreed to set up a task force to reform offshore financial centers during the two-day OECD-sponsored meeting in Barbados.[8] This was a step in the creation of a multilateral forum for dialogue and decision-making regarding the elimination of harmful tax practices.[9] The group is comprised of OECD Members and offshore centers, and will try to find a mutually acceptable political process of turning the three principles of transparency, non-discrimination, and effective exchange of information into lasting commitments.[10]

The task force convened in London to draw up an agreement, which was presented at the OECD conference in Tokyo on February 15–16, 2001.[11] Unfortunately, during the meeting, the task force failed to produce an agreement on how to eliminate harmful tax practices.[12] However, the two sides agreed to continue discussions to come to an agreement as soon as possible.[13] Subsequent discussions led to some modifications in the OECD's guidelines and most importantly extended the commitment deadline to February 28, 2002, and postponed the implementation of the sanctions until April, 2003.[14]

This Note will examine the possible results of the OECD initiative to eliminate harmful tax practices. Part I provides a historical background on the OECD. It will discuss the purpose of the OECD and the reports and blacklist published by the OECD. Part II will discuss the potential impact on the jurisdictions identified as tax havens and their reactions. Part III will discuss the outcome of the recent meet-

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[7] *Id.*

[8] *Nations Agree to Task Force on "Tax Havens,"* N.Y. TIMES, Jan. 10, 2001, *available at* http://www.nytimes.com/2001/01/10/world.10HAVE.html.

[9] Christopher Vogt, *Commonwealth Countries and OECD Team Up to Fight Fiscal Corruption,* AGENCE FR. PRESSE, Jan. 10, 2001, *available at* 2001 WL 2317861.

[10] *Working Toward a Consensus,* INT'L MONEY MARKETING, Feb. 8, 2001, *available at* 2001 WL 13947445. Transparency involves adequate regulatory supervision or financial disclosure. Report to the 200 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practice* (2000), *at* http://www.oecd.org/daf/fa/harm_tax/Report_En.pdf (last visited Mar. 1, 2002) [hereinafter *The 2000 Report*].

[11] *Commonwealth and OECD Fail to Agree on Anti-Tax Evasion Campaign,* AGENCE FR. PRESSE, Jan. 28, 2001, *available at* 2001 WL 2331102.

[12] *Id.*

[13] *Id.*

[14] *See* OECD, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* (2001), *at* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-home-22-nodirectorate-no-no-22,ff.html (last visited May 31, 2001) [hereinafter *The 2001 Report*].

ings held by the OECD and various countries to achieve global cooperation regarding harmful tax practices. Part IV explains the results achieved through the OECD initiatives and co-operative dialogue, including the recent modifications. Finally, Part V forecasts the possible outcome in light of the recent modifications.

I. HISTORICAL BACKGROUND

A. *The Organization for Economic Co-Operation & Development*

The OECD came into force on September 30, 1961, to promote policies designed to:

> [1] [A]chieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; [2] contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and [3] contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.[15]

Since 1998, the OECD has promoted a global co-operative framework to offset harmful tax practices.[16] A harmful tax practice is defined as one that meets one of four criteria: (1) no effective exchange of information; (2) lack of transparency; (3) no substantial activities or ring-fencing from domestic activities; (4) and simultaneously offering low, non-existent, or nominal tax rates.[17] The OECD's work on harmful tax practices is aimed at establishing an effective exchange of information and transparency for tax purposes.[18] The project also aims to eliminate ring-fencing tax regimes because such regimes enable one country to benefit at the expense of others.[19] By establishing a

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[15] *The 2000 Report, supra* note 10, at 2.

[16] *See generally* Jeffrey Owens, *Promoting Fair Tax Competition* (2000), *at* http://www.oecd.org/daf/fa/harm_tax/PromotingFairTaxComp.pdf (last visited Mar. 1, 2002) [hereinafter Owens, *Promoting Fair Tax Competition*].

[17] *Id.*

[18] *Id.*

[19] *Id.* Ring-fencing is where a "jurisdiction facilitates the establishment of foreign owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy." *The 2000 Report, supra* note 10, at 10 n.4.

framework to eliminate harmful tax practices, the OECD strives to foster global economic growth and development.[20]

Harmful tax practices have increased over the years, with the number of funds increasing by more than 1400% over the last fifteen years.[21] Currently, over $1 trillion is invested in offshore funds.[22] According to the study by the British poverty-fighting organization Oxfam, developed countries lose approximately $50 million in revenue annually from citizens utilizing tax havens.[23]

The OECD's work has been mischaracterized by others as seeking to set taxes at a high rate, as forcing countries to change their tax structures, and as attacking legitimate tax planning.[24] It is also alleged that the OECD is threatening the fiscal sovereignty of other countries.[25] However, this is a misconception because the OECD has no power to dictate any government's actions.[26] Rather, the OECD reaches its results through debate, analysis, persuasion, and the voluntary actions of the respective governments.[27] It argues that effective global cooperation to eliminate harmful tax practices would create more fiscal sovereignty.[28]

Another significant misconception is that the OECD Members are afraid of competition from low cost offshore financial centers.[29] The OECD Members are open to competition as long as it is transparent, non-discriminatory, and by jurisdictions that support the elimination of harmful tax practices.[30] They view their work as increasing the viability of the offshore financial centers because cooperation would enhance a jurisdiction's reputation and encourage the development of stable financial activities.[31] They also believe that instituting greater transparency, equal treatment of resident and non-resident investors, and a commitment to exchange information with

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[20] *The 2001 Report, supra* note 14, ¶ 3.

[21] Jeffrey Owens, *Towards World Tax Co-operation,* OECD OBSERVER, Oct. 19, 2000, *available at* http://www.oecdobserver.org [hereinafter Owens, *Towards World Tax Co-operation*].

[22] *Id.*

[23] Vogt, *supra* note 9.

[24] Owens, *Promoting Fair Tax Competition, supra* note 16.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Owens, *Promoting Fair Tax Competition, supra* note 16.

[30] *Id.*

[31] *Id.*

other countries does not undermine the ability of the offshore financial centers to compete.[32]

B. *The 1998 Report—Harmful Tax Competition: An Emerging Global Issue*

In 1998, the OECD published *Harmful Tax Competition: An Emerging Global Issue* (1998 Report), which proposed the establishment of an international framework—the Forum on Harmful Tax Practices (Forum)—to prevent harmful tax competition.[33] Its goal was to secure the integrity of tax systems by addressing issues, such as the erosion of the tax bases of other countries and the distortion of capital and service allocations, caused by mobile financial activities.[34] Through the Forum, the OECD sought to ensure that the burden of taxation was shared fairly and to support the effective fiscal sovereignty of countries' tax systems.[35] The 1998 Report recommended guidelines and timetables for OECD Members to identify, report, and eliminate the harmful features of their tax systems.[36] It also provided non-member countries assistance in the implementation of the guidelines.[37] The 1998 Report distinguished between tax havens and harmful preferential tax regimes.[38] Tax havens are jurisdictions with the ability to finance their public services with no or nominal income taxes and are used by nonresidents to escape tax in their country of residence.[39] On the other hand, harmful preferential tax regimes are jurisdictions that raise significant amounts of revenue through its income tax, but whose tax systems have harmful tax competition features.[40]

The OECD Ministerial Council (Council) adopted the Guidelines for Dealing with Harmful Preferential Regimes in Member Countries, which requires the removal of harmful tax features by April 2003.[41] For countries with such harmful regimes in place before December 31, 2000, the harmful features have to be removed at the latest by December 31, 2005.[42] Also, the Guidelines include a "stand-

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[32] *Id.*

[33] *The 2000 Report, supra* note 10, at 5, 8.

[34] *Id.* at 5.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See The 2000 Report, supra* note 10, at 5; David E. Spencer, *OECD Report Cracks Down on Harmful Tax Competition*, 9 J. INT'L TAX'N 26, 28 (1998).

[39] Spencer, *supra* note 38, at 26.

[40] *Id.*

[41] *The 2000 Report, supra* note 10, at 9.

[42] *Id.*

still" provision that prohibited Member countries from adopting new harmful tax practices.[43] Harmful tax regimes are identified by four factors: (1) low or no taxes on income are imposed; (2) the "regime is ring-fenced from the domestic economy;" (3) lack of transparency; and (4) no effective exchange of information.[44] Through a process of self-reviews, cross-country reviews, and peer reviews, preferential regimes are to be identified.[45]

The 1998 Report also addressed tax havens and stated that the key initial criteria for a jurisdiction to be considered a tax haven is that there is no or nominal taxation on financial or other service income, and offers itself as a place where non-residents can escape tax in their country of residence.[46] Other factors include no effective exchange of information based on bank secrecy and nondisclosure rules, lack of transparency in legal, legislative, or administrative provisions, and that "the jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy."[47] Whether or not any jurisdiction meets these criteria is dependent on all the facts and circumstances.[48] The purpose of tax havens is to provide a location for holding passive investments, for booking "paper" profits, and for preventing individual taxpayer's activities to be scrutinized by other countries.[49]

Because of the global nature of the problem and the "limitations on the effectiveness of unilateral and bilateral measures, the [1998] Report emphasize[d] the importance of multilateral cooperation and the participation by non-OECD Member countries."[50] The more the countries are involved in the dialogue, the more effective the measures will be and the less likely displacement activities will occur to jurisdictions with harmful tax practices outside of the OECD membership.[51]

The implementation of the nineteen recommendations in the 1998 Report would limit bank secrecy and increase bilateral and mul-

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[43] *Id.*
[44] *Id.* at 9 n.3.
[45] *Id.* at 9–10.
[46] *The 2000 Report, supra* note 10, at 10.
[47] *Id.* at 9 n.4.
[48] *Id.* at 10.
[49] Spencer, *supra* note 38, at 28.
[50] *Id.*
[51] *Id.*

tilateral intergovernmental cooperation of tax enforcement.[52] This would affect international banking and finance as well as the structure of the financial markets.[53] The recommendations are divided into three categories: "(1) those concerning domestic legislation and practice; (2) those concerning tax treaties; and (3) those to intensify international cooperation."[54] The Council recommended, *inter alia,* the following enforcement strategies to counteract the harmful preferential tax regimes and tax havens: (1) removal of barriers of access to banking information by tax authorities; (2) greater and more efficient use of exchanges of information; (3) strengthening coordinated enforcement regimes; (4) increased assistance in recovery of tax claims; and (5) strengthening foreign information reporting rules.[55]

The success of the implementation of the recommendations by the Council may depend on the participation of other international organizations such as the multilateral development banks, e.g., the World Bank and the International Monetary Fund (IMF).[56] "The support of non-governmental organizations (NGOs) will also be critical."[57]

C. *The 2000 Report—Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*

On June 26, 2000, the OECD published another report, *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices* (2000 Report), a progress report on the implementation of the 1998 Report that aimed at preventing the spread of harmful tax competition.[58] The 2000 Report identified potentially harmful preferential regimes in Member countries, identified jurisdictions that qualified as tax havens under the factors of the 1998 Report, and updated the work with non-member countries.[59] The OECD committed to work with other international and national organizations to assist

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[52] *Id.*

[53] *Id.*

[54] Spencer, *supra* note 38, at 28.

[55] *OECD Agrees to Series of Steps to Increase International Tax Enforcement,* 14 INT'L ENFORCEMENT L. REP. 1 (1998).

[56] *Id.*

[57] *Id.*

[58] *The 2000 Report, supra* note 10, at 5, 8; OECD, *Harmful Tax Practices, at* http://www.oecd.org/daf/fa/harm_tax/harmtax.htm (last visited Jan. 23, 2002).

[59] *Id.* at 6.

co-operative jurisdictions in restructuring their economies since there is the possibility that the removal of harmful tax practices may adversely affect their economies.[60] Its work has evolved into a "consensus-building, co-operative approach" amongst parties who are willing to make changes and contribute to the international principles of transparency, fairness, and disclosure.[61]

Through reviewing the preferential tax regimes, the Forum identified forty-seven potentially harmful regimes, with some included in more than one category.[62] The 2000 Report indicated that the next phase was to develop guidance on applying the preferential regime criteria of the 1998 Report to the categories of "regimes identified as potentially harmful."[63] The guidance is applicable to any regime and will identify the types of features that are problematic for different categories and types of regimes.[64] With the guidelines established, the Member countries will be able to assess potentially harmful regimes and to determine how to remove the harmful features of those regimes.[65] The Forum will institute a verification process to discover the Member countries that have met their commitments by the deadline.[66] The guidelines are also expected to assist non-member countries and co-operative jurisdictions in their efforts to eliminate harmful tax practices.[67] The removal of harmful features is not contingent on the Forum first determining that the regime is harmful.[68] Additionally, defensive measures may be taken against those countries that have not eliminated harmful features by the deadline.[69]

The 2000 Report states that the effort to remove harmful tax practices must continue to parallel the efforts to fight tax havens.[70] On June 16, 2000, the OECD released its blacklist, a list of thirty-five jurisdictions meeting the tax haven criteria set out in the 1998 Report.[71] However, it did not include the names of the jurisdictions that

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[60] *Id.* at 7.

[61] *Id.*

[62] *Id.* at 12 n.6.

[63] *The 2000 Report*, *supra* note 10, ¶ 13.

[64] *Id.*

[65] *Id.* ¶ 15.

[66] *Id.*

[67] *Id.*

[68] *The 2000 Report*, *supra* note 10, ¶ 15.

[69] *Id.*

[70] *Id.*

[71] *Id.* ¶ 17. The OECD identified the following countries as tax havens: Andorra, Anguilla, Antigua and Barbuda, Aruba, Commonwealth of the Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, The Commonwealth of Dominica, Gibraltar,

made advance commitments to eliminate their harmful tax practices by the deadline and comply with the 1998 Report even if they met the criteria.[72] From this list, the Committee was to produce an OECD List of Uncooperative Tax Havens by July 31, 2001.[73] The Committee, in an effort to encourage others to make commitments to the elimination of harmful tax competition, proposed that the coordination of a common defensive measure should not be undertaken against those jurisdictions that have committed to the tax competition.[74]

Those jurisdictions that made a public political commitment will have to develop a plan with the Forum within six months.[75] The jurisdictions must also agree to a "standstill" provision that prohibits the extension of existing regimes, prohibits the introduction of new harmful tax practices, and establishes an annual review process with the Forum.[76] The co-operative jurisdictions would not be placed on the List of Uncooperative Tax Havens; however, if any harmful feature remains after the deadline or if they are not acting in good faith, they would be placed on the list.[77] The Committee plans to continue to communicate openly with the co-operative jurisdictions through such methods as the development of a vehicle for the exchange of information, the creation of a multilateral framework on information ex-

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Grenada, Guernsey/Sark/Alderney, Isle of Man, Jersey, Liberia, The Principality of Liechtenstein, The Republic of the Maldives, The Republic of the Marshall Islands, The Principality of Monaco, Montserrat, The Republic of Nauru, Netherlands Antilles, Niue, Panama, Samoa, The Republic of the Seychelles, St. Lucia, The Federation of St. Christopher & Nevis, St. Vincent and the Grenadines, Tonga, Turks & Caicos, U.S. Virgin Islands, and the Republic of Vanuatu. *Id.*

[72] *The 2000 Report, supra* note 10, at 17. On June 19, 2000, the OECD announce that six jurisdictions—Bermuda, Cayman Islands, Cyprus, Malta, Mauritius, and San Marino—had made advanced commitments to eliminate harmful tax practices by the end of 2005. In the first half of 2001, the Isle of Man, Netherlands Antilles, and Seychelles also made advance commitments. For a report of such progress, see OECD, *Advance Commitment Letters, at* http://www.oecd.org/daf/fa/harm_tax/advcom.html (last updated Mar. 9, 2001) [hereinafter *Advance Commitment Letters*]. In July and September of 2001, two additional countries, Aruba and Bahrain, announced their commitment to eliminate harmful tax practices by December, 2005. For the 2001 additions, see OECD, *Aruba Commits to Co-operate with OECD on Eliminating Harmful Tax Practices* (July 3, 2001), *available at* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3880,EN-document-103-nodirectorate-no-12-3969-22.FF.htm [hereinafter Aruba Commitment Letter]; OECD, *Bahrain Commits to Co-operate with OECD on Eliminating Harmful Tax Practices* (Sept. 11, 2001), *available at* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3880,EN-document-103-nodirectorate-no-12-3969-22,FF.htm [hereinafter Bahrain Commitment Letter].

[73] *The 2000 Report, supra* note 10, ¶ 19.

[74] *Id.* ¶ 20.

[75] *Id.* ¶ 21.

[76] *Id.*

[77] *Id.* ¶ 22.

change, determining the type of assistance that these jurisdictions will require in the transition, and encouraging the jurisdictions to work with existing organizations such as the Intra-European Organization of Tax Administrations (IOTA) and the Caribbean Community (CARICOM).[78] Although the Committee is promoting and encouraging the jurisdictions to implement the changes necessary to eliminate harmful tax practices, they recognize that such changes "may adversely affect the economies of some of those jurisdictions."[79] In light of such possible outcomes, the OECD will work with other international and national organizations to determine how "to assist co-operative jurisdictions in restructuring their economies."[80]

Non-member countries must have an important role in the restructuring because harmful tax competition is a global issue.[81] Before the finalization of the 1998 Report, three regional seminars with over thirty non-member countries in attendance were held to better understand their concerns.[82] Failure to address the harmful tax practices in non-member countries may cause a shift of activities to economies outside the OECD membership and thereby give them a competitive advantage and limit the effectiveness of the entire effort.[83] The OECD has recognized the importance of non-member participation in its fight against harmful tax competition.[84] Thus, it encourages non-members to adopt the 1998 Report and holds regional seminars encouraging and assisting non-member economies.[85]

One of the most important aspects in the implementation of the framework includes the ability of the countries to take coordinated defensive measures quickly, effectively, and equally against jurisdictions that have refused to eliminate harmful tax practices.[86] Defensive measures are necessary to prevent un-cooperative jurisdictions from gaining a competitive advantage over co-operative jurisdictions.[87] These measures are enacted at the discretion of the countries, incor-

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[78] *The 2000 Report, supra* note 10, ¶ 26.
[79] *Id.* ¶ 27.
[80] *Id.*
[81] *Id.* ¶ 28.
[82] *Id.*
[83] *The 2000 Report, supra* note 10, ¶ 29.
[84] *Id.* ¶ 30.
[85] *Id.*
[86] *Id.* ¶ 33.
[87] *Id.*

porated into their domestic legislation or tax treaties, and may be enforced proportionately to the degree of harm inflicted.[88]

The Forum identified potential defensive measures to be utilized against harmful tax regimes and tax havens as of July 31, 2001.[89] Some possible defensive measures are the following:

> [1] To disallow deductions, exemptions, credits, or other allowances related to transactions with Uncooperative Tax Havens or to transactions taking advantage of harmful tax practice.
> [2] To require comprehensive information reporting rules. . . .
> [3] To [withhold] taxes on certain payments to residents of Uncooperative Tax Havens.
> [4] Not to enter into any comprehensive income tax conventions with Uncooperative Tax Havens, and to consider terminating any such existing conventions unless certain conditions are met. . . .
> [5] To impose "transactional" charges or levies on certain transactions involving Uncooperative Tax Havens.[90]

Additionally, the Council listed a few recommendations in the 2000 Report.[91] It recommended that the Members collectively continue to pursue an active dialogue with the jurisdictions identified as tax havens and to try to obtain commitments from these jurisdictions to eliminate harmful tax practices.[92] It also recommended that the Members refrain from using the tax haven criteria as a basis of instigating new defensive measures but to use the list of un-cooperative tax havens for such a purpose and to explore collectively different methods to assist co-operative jurisdictions in eliminating harmful tax practices.[93] The Counsel also instructed the Committee to take several actions, including establishing a "process to promote the elimination of harmful tax practices" by those identified as tax havens, carrying out its work through the Forum on Harmful Tax Practices and other subsidiary bodies of the Committee to develop guidance to assist Members and non-members in determining whether they have harmful tax

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[88] *The 2000 Report*, *supra* note 10, ¶ 33.
[89] *Id.* ¶ 34.
[90] *Id.* ¶ 35.
[91] *Id.* at 30.
[92] *Id.*
[93] *The 2000 Report*, *supra* note 10, at 30.

regimes and how to remove the harmful features, search for ways to include non-member countries in active dialogue with the Forum, update the List of Uncooperative Tax Havens, and work with "international and bilateral assistance agencies to assist co-operative jurisdictions."[94]

D. *Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices*

The OECD published the *Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices* (MOU), on November 24, 2000, which provides the jurisdictions identified as tax havens and guidelines required by the OECD to demonstrate their commitment to transparency, non-discrimination, and effective cooperation.[95] The Committee believes that the MOU will provide the framework necessary to "continue its co-operative dialogue with each jurisdiction."[96] A jurisdiction becomes a party to the MOU by a press release announcement accompanied by a detail of the terms of the commitment.[97] A physical signature or a letter to the OECD is not necessary.[98]

The duration of the commitment is from July 31, 2001, to December 31, 2005.[99] By December 31, 2001, each party was to adopt a plan to achieve transparency and effective exchange of information and eliminate any regimes that attract business without substantial activity.[100] By December 31, 2002, each party was also to ensure that, "authorities ha[d] access to information regarding beneficial owners of companies, partnerships and other entities" and required that they adhere to generally accepted accounting standards in the preparation of financial statements.[101] By December 31, 2003, each party will institute an effective exchange of information for criminal tax matters and

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[94] *Id.*

[95] For more details on the MOU, see OECD News Release (Nov. 24, 2000), *at* http://www.oecd.org/media/release/nw00-123a.htm.

[96] *Id.*

[97] This procedure is described by Letter from the Co-Chairs of the Forum on Harmful Tax Practices, to the jurisdictions identified in their Report (Nov. 20, 2000), *available at* http://www.oecd.org/media/MOUletter20nov.pdf.

[98] *Id.*

[99] The commitment is elaborated by OECD, *Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices* (Nov. 20, 2000), *available at* http://www.oecd.org/media/MOUrev20novRI.pdf [hereinafter *MOU*].

[100] *Id.*

[101] *Id.*

will ensure access to bank information and the transparency of tax systems by prohibiting such activities as departure from accepted laws and negotiation for tax rates.[102] Also, each party will remove restrictions on the abilities of entities to engage in business activity in the domestic market.[103] Finally, by December 31, 2005, each party will establish the means to provide OECD authorities with information on all tax matters, to ensure access to bank information, and to remove restrictions that deny the benefits of preferential tax treatment "to resident taxpayers, to entities owned by resident taxpayers, or to income derived from doing the same type of business in the domestic market."[104]

In addition, the MOU contains a "stand-still" provision.[105] Each party to the commitment will refrain from introducing any new harmful tax practice, from modifying an existing system into one constituting a harmful tax practice, and from extending the scope of existing features that constitute a harmful tax practice.[106] Those jurisdictions that adhere to the terms of the MOU will not be included in the List of Uncooperative Jurisdictions.[107] Those that do not may have defensive measures implemented against them.[108]

II. Countries Reaction to the Reports and Blacklist and the Potential Impact on the Listed Jurisdictions

The OECD believes that there will be an adverse impact on the economies of the jurisdictions listed because some reputable companies may relocate their activities.[109] It is possible that those jurisdictions may regain some of their lost business in the long run if they comply with the new standards.[110] Due to this potential impact, the OECD has contacted its Development Assistance Committee and has participated in conferences and meetings with international organizations to discuss the development plans of these jurisdictions.[111]

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[102] *Id.* at 2–3.
[103] *Id.*
[104] *MOU, supra* note 99, at 3–4.
[105] *Id.* at 4.
[106] *Id.*
[107] *Id.* at 5.
[108] *Id.*
[109] Owens, *Towards World Tax Co-operation, supra* note 21.
[110] *Id.*
[111] *Id.*

The CARICOM leaders considered the blacklisting of Caribbean tax havens and the sanctions to be imposed as "ill-advised."[112] The Caribbean countries argued that the listing of tax regimes as harmful is a matter of sovereignty and should not be ordered by "external agencies or countries."[113] Anthony Bryan, a Miami-based international relations expert, commented that, "Caribbean countries with offshore jurisdictions fear that, as earnings from traditional industries such as banana and sugar exports fall, . . . the crackdown on tax havens will hinder their efforts to develop new businesses."[114] Also, some countries have "already suffer[ed] from economic recessions and have few viable economic alternatives."[115] The attack on the Caribbean countries has "created a hostile environment."[116]

The Pacific Islands Forum Secretariat has also expressed concern over the creation of such a hostile environment.[117] The Secretariat stated that the July deadline "placed a dark cloud over the future operations of the offshore financial cent[ers]," which contributes eight to ten percent of the GDP of those nations.[118] Thus, any punitive measures against these nations would have a severe impact on government expenditures and long-term growth.[119]

Even Barbados, the host of the consultation between the OECD and other nations, was resentful of the blacklisting.[120] According to Phillip Nicholls, president of the Canada Barbados Business Association, the OECD blacklist sent conflicting signals to investors who regarded Barbados as being a "top-class jurisdiction for international tax planning."[121] Those in opposition to the OECD actions argued that twenty years ago they were encouraged by Britain and other countries to establish "financial services industries to build self-sustaining economies and are now being betrayed."[122]

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[112] Wesley Gibbings, *Economy-Caribbean: Region Unites Behind Offshore Banks,* INTER PRESS SERVICE, June 9, 2000, *available at* 2000 WL 4091567.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Michael Field, *Pacific Tax Havens Heading for International Showdown,* AGENCE FR. PRESSE, Feb. 13, 2001, *available at* 2001 WL 2341018 [hereinafter Field, *Pacific Tax Havens Heading for International Showdown*].

[118] *Id.*

[119] *Id.*

[120] *Caribbean Tax Havens in Spotlight,* CARIBBEAN UPDATE, Feb. 1, 2001, *available at* 2001 WL 2126105.

[121] *Id.*

[122] *Id.*

In Barbados, the financial services industry employs approximately 2000 people, directly affects other industries, and provides about a third of government revenues.[123] Because of the extent of the interrelation between the industries, a collapse of the financial services industry would have "dire social and economic consequences," triggering the outbreak of corruption and crime.[124]

Blacklisted countries also feel that they have been unfairly targeted.[125] Other major countries also avoid taxes, including the United States, which has billions of untaxed dollars.[126]

III. Dialogue With the OECD

A. *The Barbados Meeting of January 8–9, 2001*

The OECD held a high level consultation with OECD Members, Caribbean nations, representatives of the IMF, the World Bank, the United Nations (U.N.), the World Trade Organization, relevant regional organizations, and the OECD's Development Assistance Committee on harmful tax competition in Barbados from January 8–9, 2001, in an effort to improve the dialogue between the OECD and the various jurisdictions.[127] The parties agreed to set up a task force that would find a mutually acceptable process to establish the three principles as commitments, which would replace the OECD's process noted in the MOU and to examine the methods of continuing the dialogue.[128] The objective of the meeting was to establish early confidence building measures, to develop common perspective in the effort to eliminate harmful tax practices, and to examine ways to improve the administrative and regulatory capabilities of the jurisdictions and provide assistance in restructuring their economies if necessary.[129]

Barbados Prime Minister Owen Arthur, the host of the conference, explained that the service sector is the fastest growing area of

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[123] *Id.*

[124] *Id.*

[125] *Caribbean Tax Havens in Spotlight, supra* note 120.

[126] *Id.*

[127] Bruce Zagaris, *Consultations in Barbados on OECD Harmful Tax Competition Initiative Yield Progress,* 17 Int'l Enforcement L. Rep. 1, 1 (2001).

[128] *Id.* The task force includes the following countries: Antigua and Barbuda, Australia, Barbados, the British Virgin Islands, the Cook Islands, France, Ireland, Japan, Malaysia, Malta, the Netherlands, the United Kingdom, and Vanuata. *Id.*

[129] OECD News Release (Jan. 2, 2001), *at* http://www.oecd.org/media/release/nw01-01a.htm.

the global economy and everyone should be able to share in the market.[130] He stated that the integrity of the international financial system and the prevention of tax crimes could only be achieved through cooperation and an agreement to establish an international standard of regulation, operation, and practices.[131] Prime Minister Arthur believed that a process of meaningful dialogue among the parties, without coercion or the threat of arbitrary deadlines, could achieve an understanding to move towards a mutually beneficial resolution.[132] Because of the global nature of harmful tax practices, Prime Minister Arthur discouraged the use of unilateral actions by one country or a group of countries as a means of resolution.[133]

The Commonwealth Secretary General, Don McKinnon, believed that the meeting would not produce a mutually acceptable definition of a harmful tax practice or the level of investigative assistance to be provided by one country to another.[134] Rather, he believed that the goal of the meeting should be to adopt common principles, which would then evolve into mutually accepted definitions and agreed levels of inter-state involvement over time.[135] He noted the opposition by Commonwealth members to the OECD actions that challenges their sovereignty over their domestic tax affairs and the threat of sanctions.[136] He also suggested that the "MOU must be reworked into 'a convention by agreement between equal partners.'"[137]

Seichi Kondo, the Deputy Secretary General of the OECD, tried to alleviate some of the concerns by stating that the OECD did not want to establish minimum tax rates or to interfere with the privacy of individual citizens.[138] Instead the OECD encourages competition between different tax regimes in a globalized economy and supports competition that promotes diversity in tax systems while allowing countries to decide their own tax rates and structure.[139] The OECD's initiative has created uncertainty, which needs to be resolved quickly

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[130] Zagaris, *supra* note 127, at 1.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Zagaris, *supra* note 127, at 1.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

and through long-term dialogue with interested parties to eliminate harmful tax practices.[140]

The CARICOM Secretariat stated that, "members will continue to cooperate with any attempt to build a sounder international financial architecture and to develop international best practices."[141] Most members have made a number of changes in their tax regimes to adhere with international standards.[142] CARICOM members created a Policy Advisory Committee in 1999 to review the legislative and administrative framework of various jurisdictions, and in 2000 they created the Caribbean Association of Regulators of International Business (CARIB) to advance the reform process.[143] However, they have noted that its members, especially the Bahamas and the OECS, have become dependent on the offshore sector and have expressed their concern that the process must take into account the special situation of the small and developing countries.[144] Offshore activities account for 5% of Barbados' income and 22% of governmental revenues from 1992 to 1997, while it accounts for 15% and 20%, respectively, in the Bahamas.[145] CARICOM strongly supports the dialogue and negotiation process.[146]

The Pacific Islands Forum Secretariat also expressed its concern over the restrictions on offshore financial sectors.[147] The Pacific Islands Forum acknowledges the need for reform in the international financial markets; however, it expressed concern regarding the fairness of the OECD's process.[148] It suggested greater consultation with the states under examination and the opportunity for feedback.[149]

Dr. Terepai Maoate, the Prime Minister of the Cook Islands, was not as cooperative or understanding as the other countries during the meeting.[150] He stated that the Cook Islands is not ready to make commitments because of the lack of internationally agreed definitions

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[140] Zagaris, *supra* note 127, at 1.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Vogt, *supra* note 9.

[146] Zagaris, *supra* note 127, at 1.

[147] *Id.* The Pacific Islands Forum Secretariat consists of the Cook Islands, Federated State of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. *Id.*

[148] *Id.*

[149] *Id.*

[150] Zagaris, *supra* note 127, at 1.

and the lack of unanimity among OECD Members regarding the harmful tax practice initiative.[151]

Sir Neville Nicholls, the President of the Caribbean Development Bank, warned that the Caribbean countries should not have to behave like the OECD Members due to "[d]ifferences in resource endowments, resource accessibility, patterns of utilization, and, critically important, culture and outlook."[152] He also stated that international cooperation and the principles of self-determination require that countries do not impose their own cultures on others.[153]

Overall, the meeting was considered successful because the deadlines set in the MOU were implicitly withdrawn.[154] If the task force were successful, it would replace the deadline contained in the MOU.[155] However, the OECD did not agree to remove the MOU, the deadlines, or the sanctions and maintained its right to "impose unilateral sanctions after July 31, 2001."[156] Even in light of the continued tension, the meeting showed the willingness of the parties to continue in its efforts.[157]

Although the meeting was thought to be a no-loose situation, the Center for Freedom and Prosperity (Center) interpreted the situation differently.[158] The OECD wanted the tax havens to agree to the MOU, which would have eliminated privacy laws so that tax collectors could access financial accounts; however, they were unable to convince a single country to sign the MOU.[159] The Center stated that such an attack on the fiscal sovereignty of the countries could devastate the economies in the Caribbean region.[160] This would then cause emigration and political instability.[161]

The representatives of the Center in attendance heard several nations in opposition of the OECD's "arm-twisting" and perceived the OECD as a "rich nation's club arrogantly rewriting the rules of international competition to protect the interest of politicians from high-

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[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Nations Agree to Task Force on "Tax Havens," supra* note 8.

[156] Zagaris, *supra* note 127, at 1.

[157] *Id.*

[158] *See* Daniel J. Mitchell, *OECD Wants Tax Havens to Tell All*, WALL ST. J., Jan. 22, 2001, at 10, *available at* 2001 WL-WSJE 2841121.

[159] *Id.*

[160] *Id.*

[161] *Id.*

tax nations."[162] They interpreted the creation of the task force to be a failure on the part of the OECD and a retreat of the high-taxed nations.[163]

It is believed that the OECD would ignore task force recommendations that do not promote the OECD's initiatives.[164] In addition, the OECD has not officially withdrawn the sanctions to be imposed to those tax havens that refuse to agree to the MOU.[165] Also, there is the possibility that the OECD could turn around and attack U.S. tax law considering it imposes very low taxes on foreign investors and generally does not require financial institutions to disclose financial data with foreign tax collectors.[166] Thus, the Center believes that the United States should not participate in the OECD's efforts.[167]

B. *Task Force Meeting in London on January 26–28, 2001*

The newly created task force met in London for a three-day summit to prepare guidelines to develop a mutually acceptable process by which the principles of transparency, non-discrimination, and effective exchange of information could evolve into firm commitments.[168] Ministers and senior officials attended the meeting from thirteen countries, as well as representatives of the OECD, CARICOM, and the Pacific Islands Forum.[169] The OECD's objective was to obtain public political commitments, which would prevent the jurisdiction from being listed on the non-co-operative list, from as many jurisdictions as possible.[170]

However, this meeting was not as successful as the Barbados meeting with the threat of it "dissolving into a war of words."[171] The two sponsors of the meeting, the OECD and the Commonwealth Secretariat, engaged in a "slanging match" wherein the Commonwealth accused the OECD of "dictatorial behavior" and the OECD, in return,

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[162] *Id.*

[163] Mitchell, *supra* note 158.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *OECD Tax Haven Summit Opens with Accusations of Bad Faith,* AFX NEWS, Jan. 26, 2001, *available at* 2001 WL 10282955.

[169] *Agreement Elusive Between OECD and Offshore Centres,* INT'L MONEY MARKETING, Feb. 8, 2001, *available at* 2001 WL 13947400.

[170] These objectives are set forth in OECD News Release (Jan. 26, 2001), *at* http://www.oecd.org/media/release/nw01-09a.htm.

[171] *See OECD Tax Haven Summit Opens with Accusations of Bad Faith, supra* note 168.

accused the Commonwealth of acting like an "irritant to the process."[172]

The mutual mudslinging could threaten the process of creating a multilateral forum.[173] The harmful practices targeted by the OECD are those that affect developing countries, while other potentially harmful practices that do not affect those countries are ignored.[174] According to Diane Stafford, the Commonwealth Director of Legal and Constitutional Affairs, the initiative only deals with mobile capital, which disregards the tax-related investment practices of OECD Members.[175] However, OECD officials denied such charges of partiality since the list of harmful tax regimes included OECD Members.[176] Cheryl Dorall, the Commonwealth Secretariat spokesperson, described the two sides as being far from agreement in determining the strategy to develop the issues of transparency, non-discrimination, and effective exchange of information.[177]

At the end of the meeting, the task force failed to create an agreement on how to combat tax evasion and money laundering.[178] In a joint statement, the two sponsors stated that they would continue their dialogue in an effort to come to a mutual agreement.[179] However, the OECD did not relax its July, 2001 deadline, which was coming up within six months.[180] The result of this meeting was presented at the conference in Japan on February 15-16, 2001.[181]

C. *OECD Conference in Tokyo on February 15–16, 2001*

The OECD and the Pacific Islands Forum organized the conference in Tokyo to discuss tax issues in the global environment.[182] It was designed to provide the OECD and the Pacific Islands Forum an opportunity to exchange their perspectives on international tax issues in an effort to reach a mutual understanding and to identify methods to

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[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *OECD Tax Haven Summit Opens with Accusations of Bad Faith, supra* note 168.

[177] *Agreement Elusive Between OECD and Offshore Centres, supra* note 169.

[178] *Commonwealth and OECD Fail to Agree on Anti-Tax Evasion Campaign, supra* note 11.

[179] *Id.*

[180] *See Agreement Elusive Between OECD and Offshore Centres, supra* note 169.

[181] *Commonwealth and OECD Fail to Agree on Anti-Tax Evasion Campaign, supra* note 11.

[182] OECD News Release (Feb. 9, 2001), *at* http://www.oecd.org/media/release/nw01-14a.htm.

continue the co-operative dialogue.[183] The representatives from twelve Pacific Islands Forum members, nine OECD Members, the Asian Development Bank, the World Bank, and the IMF attended the meeting.[184]

By the time the OECD conference took place in Tokyo, some Pacific and Caribbean countries faced harsh measures.[185] For example, both Nauru and Niue have been isolated from the world banking system.[186] Nauru was accused of providing 400 banks to launder Russian Mafia money, and Niue was accused of giving a Panamanian law firm the right to access its tax haven.[187]

With this in mind, the Pacific Islands Forum requested to have the deadline withdrawn or at least postponed as a sign of good faith.[188] Due to the islands' dependency on offshore financial centers, the deadline threatened the gross national product and the operations of the small, developing pacific islands.[189] It also stated that the implementation of the sanctions would cause greater reliance on aid.[190]

The parties engaged in co-operative and constructive bilateral and multilateral discussions aimed towards the formation of a joint OECD-Commonwealth working party for the meeting in Paris from March 2–3, 2001.[191] They discussed issues such as the methods to improve the regulatory and administrative capabilities, and to provide assistance to the existing tax administrations.[192] The OECD reported that the discussions were "frank and fruitful" and the participants made significant contributions by sharing their expertise and views.[193]

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[183] *Id.*

[184] *Id.* Those present for the conference were Australia, Canada, Cook Islands, Fiji, France, Japan, Korea, Republic of Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Niue, Norway, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, United Kingdom, and Vanuatu. OECD News Release (Feb. 16, 2001), *at* http://www.oecd.org/media/release/tokyotaxfinal.htm.

[185] Field, *Pacific Tax Havens Heading for International Showdown, supra* note 117.

[186] *Id.*

[187] *Id.*

[188] Michael Field, *Pacific Nations Call for Withdrawal of Deadline Against Tax Havens,* AGENCE FR. PRESSE, Feb. 19, 2001, *available at* 2001 WL 2344899 [hereinafter Field, *Pacific Nations Call for Withdrawal of Deadline Against Tax Havens*].

[189] *See Id.*

[190] *Id.*

[191] *Id.*

[192] Such methods are set forth in OECD News Release (Feb. 16, 2001), *at* http://www.oecd.org/media/release/tokyotaxfinal.htm.

[193] *Id.*

D. *OECD-Commonwealth Task Force Meeting in Paris on March 1–2, 2001*

The OECD and non-member countries, identified as tax havens, have continued to go over new proposals in an effort to come to an agreement during a meeting in Paris.[194] This meeting was attended by Prime Minister Arthur of Barbados, Tony Hilton, Australia's ambassador to the OECD, the ministers, senior finance, and tax officials from thirteen countries, representatives of the Commonwealth Secretariat, the OECD Secretariat, and the CARIB Secretariat.[195]

Some of the new proposals introduced by the Commonwealth countries included the full membership of non-members involved in the initiative, the ability to stop the initiative if the OECD Members fail to comply, and the "continuation of a collective rather than bilateral approach to negotiation."[196] They expressed their willingness to work with the OECD, but that the terms had to be suitable to them.[197]

The Commonwealth countries argued that the OECD's threat of sanctions is "high-handed and undemocratic."[198] They asked the OECD to postpone the July, 2001 deadline; as usual the OECD refused.[199] Prime Minister Arthur of Barbados expressed his anger by "snubbing" a dinner held in his honor and accused the OECD of "'technocratic tyranny' by 'nameless, faceless' people with 'no common sense.'"[200] In addition, he accused the OECD of double standards by holding the Commonwealth countries to the July, 2001 deadline, while allowing OECD Members until 2003 to eliminate their harmful tax practices.[201]

The targeted jurisdictions also claimed that they were legitimate financial centers and argued that the U.N. would be the appropriate framework to achieve the elimination of harmful tax practices rather than direct OECD pressure.[202] On the other hand, the OECD believes

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[194] *OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains*, AFX NEWS, Mar. 7, 2001, *available at* 2001 WL 15582379.

[195] Julio Godoy, *Economy: Off-Shore Bankers Continue to Resist OECD Pressure*, INTER PRESS SERV., Mar. 4, 2001, *available at* 2001 WL 4802950.

[196] *OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains*, *supra* note 194.

[197] *OECD, Commonwealth Fail to Agree on Tax Havens*, AFX NEWS, Mar. 4, 2001, *available at* 2001 WL 14640759.

[198] Mark Atkinson, *OECD Accused of Tyranny: Caribbean Leader Alleges Double Standards at Tax Havens Talks*, THE GUARDIAN (LONDON), Mar. 3, 2001, *available at* 2001 WL 14955197.

[199] *OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains*, *supra* note 194.

[200] Atkinson, *supra* note 198.

[201] *Id.*

[202] Godoy, *supra* note 195.

that the bilateral forum is the more appropriate medium in discussing harmful tax practices.[203] It believes that multilateralism, as exemplified by the U.N. forum, would include countries that are not involved with the issue at hand during the negotiation process.[204]

Again, the parties were in a deadlock, failing to reach an agreement.[205] The meeting was extremely tense; however, the OECD stated that they "made good progress."[206] The chairmen, Barbados' Prime Minister Arthur, and Australia's ambassador to the OECD Tony Hinton, were asked to continue negotiations.[207]

III. Results from the OECD's Initiative

A. *Advanced Commitments*

Although the meetings between the OECD and the various jurisdictions have not been completely successful, some progress has been made. On June 19, 2000, "the OECD announced that six jurisdictions had made commitments in advance" to eliminate harmful tax practices by December 31, 2005, which prevented these jurisdictions from being listed on the initial blacklist.[208] The six jurisdictions consisted of Bermuda, Cayman Islands, Cyprus, Malta, Mauritius, and San Marino.[209] Then, in January, 2001, two additional countries, the Isle of Man and the Netherlands Antilles, made advance commitments.[210] In February, 2001, Seychelles also gave its commitment to eliminate harmful tax practices.[211] Furthermore, in July and September of 2001, Aruba and Bahrain expressed their commitment to work with the OECD.[212] Most recently, in February, 2002, Antigua and Barbuda also made its commitment to transparency and effective exchange of information.[213] Finally, due to legislative reforms in Tonga, it no longer met the criteria as a tax haven. The committed jurisdictions have been

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[203] *Id.*

[204] *Id.*

[205] *See OECD, Commonwealth Fail to Agree on Tax Havens, supra* note 197.

[206] *Id.*

[207] *Id.*

[208] *Advance Commitment Letters, supra* note 72.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Aruba Commitment Letter, *supra* note 72; Bahrain Commitment Letter, *supra* note 72.

[213] *Nations, Agency to Work on Havens*, AP Online, Feb. 20, 2002, *available at* 2002 WL 13778836.

actively participating in the Global Forum Working Group on Effective Exchange of Information, which is dedicated to the development of a legal framework for the achievement of effective exchange of information.[214] Also, the Bahamas, Anguilla, the British Virgin Islands, Monserrat, and the Turks and Caicos Islands are expected to join the other countries in their commitments shortly.[215] Furthermore, the remaining jurisdictions identified as tax havens have contacted the OECD for further co-operative dialogue.[216]

B. *United States' Opposition & the OECD's Modification*

In May, 2001, U.S. Treasury Secretary, Paul O'Neil, unexpectedly withdrew U.S. support for the OECD's initiative.[217] He was particularly concerned with the presumption that low tax rates are inherently suspicious. In addition, the idea that any country or group of countries should interfere with another country's tax system, and the potential unfair treatment of non-OECD countries were cause for concern.[218] The United States "[did] not support efforts to dictate to any country what its own tax rates or tax system should be, and will not participate in any initiative to harmonize world tax systems."[219] Although he recognized the great accomplishments of the OECD, O'Neil believed that the OECD initiative against harmful tax practices should be refocused towards the need for specific information exchange in the detection and prevention of illegal tax evasions.[220]

The U.S. Treasury Secretary is not alone in his lack-luster support for the OECD initiative.[221] The Centre for Freedom and Prosperity, which is funded by wealthy Americans, along with various large multinationals, has been pressuring the present Bush Administration not to support the initiative.[222] However, there has been some support for

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[214] *OECD Statement on "Harmful Tax Practices,"* PACNEWS DIG., Feb. 1, 2002, *available at* 2002 WL 3322044.

[215] *OECD Tax Haven Talks Discuss Fresh Proposals, But July Deadline Remains, supra* note 194; *U.S. Ambivalence Grows Towards OECD Initiative,* PRIVATE BANKER INT'L, May 14, 2001, *available at* 2001 WL 13301052.

[216] Richard M. Hammer & Jeffrey Owens, *Promoting Tax Competition,* OECD Online, *at* http://www.oecd.org/daf/fa/first_en.htm (last visited Mar. 12, 2001).

[217] Paul O'Neil, *Confronting the OECD's 'Harmful' Tax Approach,* WASH. TIMES, May 11, 2001, at A17, *available at* 2001 WL 4152992.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *U.S. Ambivalence Grows Towards OECD Initiative, supra* note 215.

[222] *Id.*

the OECD initiative from the Democrats, and specifically the Afro-American congressional caucus.[223]

In an effort to secure U.S. cooperation, the OECD held a meeting with the tax officials from the United States and other industrialized countries in Paris in June, 2001, whereby the OECD gave into the U.S.' demands and agreed to a less aggressive approach in its initiative to combat tax evasion.[224] The major concession made was that the OECD would not impose sanctions on tax havens that simply offer favorable tax breaks to foreign companies and investors (also called "ring fencing").[225] The United States, in return, agreed to continue its campaign to disclose various account informations of those suspected of tax evasion to the Internal Revenue Service and the OECD tax authorities.[226] The negotiations led to several modifications to the original plan.[227]

The modifications have been set out in the OECD's most recent report, *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report.*[228] First, sanctions would not apply to uncooperative jurisdictions any sooner than its April, 2003 deadline imposed on OECD Members to abolish their harmful tax regimes.[229] Each OECD Member retains the sovereign right to apply or not apply any appropriate and proportionate sanctions.[230] This modification enables both similarly situated OECD Member countries and non-OECD countries to be equally subjected to the same provisions; thus establishing the initiative's legitimacy.[231] Although coordinated defensive measures are allowed to reduce the effects from harmful tax practices, the OECD prefers to resolve such problems through dialogue and consensus.[232] Second, the OECD will only seek commitments regarding transpar-

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[223] *Id.*

[224] Michael Peel, *OECD May Have Deal to Fight Tax Evasion,* FIN. TIMES, June 28, 2001, *available at* 2001 WL 24309558.

[225] Daniel J. Mitchell, *The OECD Pulls a Bait-and-Switch on the U.S. Treasury,* WALL ST. J. EUR., July 11, 2001, at 7, *available at* 2001 WL-WSJE 21832801; Michael M. Phillips, *OECD Reaches Pact on Tax Havens,* WALL ST. J. EUR., June 29, 2001, at 3, *available at* 2001 WL-WSJE 21832014.

[226] Peel, *supra* note 224.

[227] *The 2001 Report, supra* note 14, ¶¶ 23–35; Peel, *supra* note 224; Phillips, *supra* note 225.

[228] *The 2001 Report, supra* note 14, ¶¶ 23–35.

[229] *Id.* ¶ 32; Peel, *supra* note 224; Phillips, *supra* note 225.

[230] *The 2001 Report, supra* note 14, ¶¶ 32, 48.

[231] Paul O'Neill, Congressional Testimony on Efforts to Eliminate Tax Havens (July 18, 2001), *available at* 2001 WL 21757353.

[232] *The 2001 Report, supra* note 14, ¶¶ 48–49.

ency and effective exchange of information and will not focus on the difficult application of the no substantial activity criteria to determine whether or not a tax haven is uncooperative.[233] Third, due to the ongoing discussions with the various jurisdictions and in line with its objective of obtaining as many commitments as possible, the OECD has finally extended the deadline for making commitments to cooperate with the new guidelines that requires the revelation of their tax policies and information when a foreign tax authority is investigating a case involving suspected tax evasion to February 28, 2002.[234] Finally, in an effort to ensure that the committed jurisdictions have sufficient time to develop and implement their plans, the time for developing the plan has been extended from six to twelve months after the making of the commitment.[235]

Although the modifications were made in response to the concerns of various jurisdictions, it was not unanimously accepted within the OECD.[236] Luxembourg and Switzerland have withheld their approval from the latest report as they had done with the previous two reports.[237] Additionally, Belgium and Portugal abstained on the grounds that while they have committed to eliminating ring fencing, other countries would not be required to modify their rules.[238]

C. *Last Minute Commitments & Defiance*

As the deadline approached, several more jurisdictions agreed to comply with the OECD mandate. Guersney, Jersey, Grenada, and St. Vincent and the Grenadines have all agreed to co-operate with the OECD to improve the transparency of its tax systems and establish effective exchange of information by December 31, 2005.[239] For Guersney and Jersey, and most likely the other jurisdictions, the possibility of harming business confidence by being labeled uncooperative was the primary incentive for entering into the agreement.[240] Additionally, these jurisdictions have felt increased pressure to become

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[233] *Id.* ¶¶ 27–30.

[234] *Id.* ¶ 33.

[235] *Id.* ¶ 34.

[236] *OECD Sets February Compliance Deadline for "Tax Havens,"* INT'L MONEY MARKETING, Dec. 6, 2001, *available at* 2001 WL 13948015.

[237] *Id.*

[238] *Id.*

[239] *Grenada, St. Vincent and the Grenadines Pledge Tax Cooperation With OECD,* AGENCE FR.-PRESSE, Feb. 27, 2002, *available at* 2002 WL 2350096; *Islands, State Try to Escape Stigma of OECD Tax-Haven List,* Agence Fr.-Presse, Feb. 27, 2002, *available at* 2002 WL 2350174.

[240] *Islands, State Try to Escape Stigma of OECD Tax-Haven List, supra* note 239.

more open since the September 11 attacks on the United States and the subsequent search for terrorist assets in the global financial system.[241] Barbados also reached a settlement with the OECD; however, according to Barbadian officials, they have neither made concessions nor signed the MOU with the OECD to change their system.[242] By February 28, 2002, only twelve jurisdictions originally blacklisted have made commitments with the OECD, leaving twenty-three to be named as uncooperative tax havens and to be subjected to possible sanctions.[243]

Of the twenty-three remaining uncooperative jurisdictions, the Pacific island of Vanuatu openly expressed its defiance.[244] It declared that it would not take part in the OECD initiative mainly due to the fact that significant OECD Members, specifically Switzerland, Luxembourg, Belgium, and Portugal, have not committed to the standards demanded upon the non-members.[245] The government of Vanuatu has claimed that it has demonstrated its commitment to international cooperation and transparency and has already increased regulatory supervision of its offshore banks.[246] Vanuatu's Finance Minister stated that the OECD measures was equivalent to blackmail and reflected "'neo-colonial attitude' of countries such as Britain, France, and Germany."[247] Australia has come to Vanuatu's aid, urging the OECD to avoid imposing sanctions on the Pacific islands accused of being tax havens, which also includes the Cook Islands, the Marshall Islands, Nauru, Niue, and Samoa.[248] The Australian government is concerned with the special circumstances faced by these small countries, such as their fragile economies, resource constraints, and infrastructure limitations.[249] Because these countries are in an economic decline, they will not be able to survive without the income generated from their offshore banking fees.[250] Australia is, thus, strongly in favor of working

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[241] *OECD Will Take Two Channel Islands Off Tax-Haven List*, Wall St. J. Europe, Feb. 28, 2002, *available at* 2002 WL-WSJE 3355769.

[242] Canute James & Michael Peel, *Barbados Deal Under Fire From Tax Havens*, Fin. Times, Mar. 5, 2002, *available at* 2002 WL 13656396.

[243] *Islands, State Try to Escape Stigma of OECD Tax-Haven List, supra* note 239.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *We Will Not Comply, Vanuatu Tells OECD*, Pac. Islands Broad. Assoc. News. Serv., Feb. 26, 2002, *available at* 2002 WL 332240.

[248] *Australia Calls for OECD Leniency for Pacific Tax Offenders*, Agence Fr.-Presse, Mar. 1, 2002, *available at* 2002 WL 2351617.

[249] *Id.*

[250] *Id.*

out a solution with these countries through a cooperative and consultative approach.[251]

CONCLUSION

Since the implementation of the OECD's initiative to eliminate harmful tax practices and the publication of the blacklist, only twelve jurisdictions identified as tax havens committed to adhere to the terms of the MOU and eliminate such practices by 2005, and only one has taken steps to reform its tax system. To make matters worse, the meetings held in Barbados, London, Tokyo, and Paris, as well as the recent U.S. opposition, support the conclusion that a hostile environment still exists between the various jurisdictions identified and the OECD. It is apparent that both sides recognize the damaging impact of harmful tax practices in the global economy. However, the parties seem to disagree regarding what constitutes damaging tax practices, to whom it is damaging, and how to go about resolving the problem. Many Commonwealth countries view OECD actions as an infringement on their sovereignty and have accused the OECD of tyranny.

The meetings that took place from January to June, 2001 did not produce any agreement between the parties, and the already existing hostilities seem to have escalated. The parties failed to establish a mutually acceptable political process of turning the principles of transparency and effective exchange of information into commitments. Unless such an agreement is reached, the terms and sanctions of the MOU, along with the modifications, will not be replaced. Because the prospect of reaching an agreement before the original July, 2001 deadline and thereby avoiding the MOU sanctions was viewed to be slim, the OECD not only extended its commitment deadline to February 28, 2002, but also postponed the implementation of sanctions until April, 2003.

Throughout the various meetings, the OECD adamantly stated that it is not postponing the deadlines. With the recent extension of this deadline in response to the complaints of the various countries, especially that of the United States, the OECD Members will almost be forced to impose the sanctions against the countries remaining on the tax haven list in order to maintain its integrity and reputation as a force to be dealt with. The OECD Members may follow the measures

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[251] *Id.*

taken against Nauru and Niue and isolate the existing tax havens from the world banking system. This, of course, will have damaging effects on the economies of those countries that heavily rely upon the financial services industry and will most likely increase already existing tensions between the OECD and the jurisdictions, which will be a significant detriment to the initiative. However, it should be kept in mind that the OECD has no power to force its Members to impose sanctions against the tax havens. It is merely an advisory body. The national government of each country ultimately decides whether or not to take defensive measures and the nature of the defensive measures to implement. Moreover, the sanctions will not be enforced until at least April, 2003; therefore, the uncommitted jurisdictions will have some time to continue its discussions with the OECD in an effort to avoid the potential sanctions. Because of this lack of actual enforcement power, the OECD should continue to persuade and ultimately reach a unanimous agreement with its Members to impose sanctions as of April, 2003. The OECD may not be able to persuade every Member to take action, nevertheless, the tax havens should not take the OECD's lack of enforcement powers lightly.

Similar to the twelve jurisdictions that either made advance commitments to the OECD or reformed, the threat of impending sanctions and the removal from the blacklist may entice the remaining tax havens to commit to the MOU before the end of April, 2003. Economists have argued that sanctions may have substantial detrimental effects on the economies of the various countries. Additionally, the mere fact that a country is blacklisted may discourage future investments and thus detrimentally affect its economy. Therefore, there is the possibility that the tax havens will eventually agree to the terms of the MOU because they will be unable to sustain their economic viability. This, of course, is dependent on the actual enforcement and extent of the sanctions implemented by the OECD and the ability of the countries to endure such sanctions. Thus, it is imperative that the OECD continue to assert its position and persuade its Members to impose sanctions on any remaining uncooperative jurisdictions.

To date, the OECD's initiative to eliminate harmful tax practices has not been completely successful. However, it has not been pursued in vain since the parties are still willing to continue the co-operative dialogue and seem optimistic of eventually reaching an agreement. With the passage of time, the death of tax havens seems to be inevitable.