EXCHANGE OF INFORMATION

Step 2002 National Conference
Toronto, Ontario
June 3-4, 2002

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The need to encourage exchanges of information by tax advantaged jurisdictions has been the focus of the Organisation of Economic Cooperation and Development ("O.E.C.D.") for several years. The organization ultimately spawned a cottage industry of think tanks formed for the sole purpose of thwarting any attempt to obtain information from the offshore industry. It has only been in recent months, that the forces opposed to exchanges of information have themselves been thwarted as offshore jurisdictions have been beside themselves to sign on to the most recent version of the O.E.C.D. principles. This article will review much of the history of the recent battles and will address the treaty activity in the area.

I. The 1998 Report

In 1998, the O.E.C.D. released a report entitled "Harmful Tax Competition – an Emerging Global Issue" in which it sought to end tax havens as we know them. At the same time, it called upon its own members to eliminate their own preferential tax regimes. Included in the report were recommendations that countries ought to review their banking laws and regulations and make the changes necessary to allow tax authorities access to banking information. The Report's emphasis was on those practices that harm other countries by preventing them from finding the income that they have a legitimate right, under their own laws, to tax.

It recommended that countries that did not have the equivalent of subpart F and foreign information reporting rules adopt them. Countries were also asked to increase the exchange of information about transactions with tax havens and preferential tax regimes that constitute harmful tax competition. The O.E.C.D. asked Member states to eliminate harmful tax practices by 2003, non-Member countries by 2005. Switzerland and Luxembourg abstained from the Report on the bank secrecy issue. Together they could have vetoed the Report. Neither ended up on the list of tax havens finally published in June of 2000, although they were found to have preferential tax regimes.

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The reaction to the report was decidedly mixed. The O.E.C.D. did not publish its list of tax havens and the preferential tax regimes of its members until two years later, in June of 2000. It set July 31, 2001 as the date by which the tax havens would need to indicate their cooperation. There was considerable controversy in the Spring of 2001 and the date was extended until February 28, 2002. After the attack on the World Trade Center on September 11, 2001, the O.E.C.D. narrowed the focus of its requirements to increasing the exchange of information and improving transparency. Still dealing with the effects of September 11th and new U.S. legislation mandating increased cooperation with other jurisdictions on information exchanges, those tax havens that did not signify their cooperation with the O.E.C.D. by the end of February disappeared, with a few notable exceptions. By mid-April, only seven tax havens had not signed on to cooperate.

Although much of the commentary over the last four years has focused on the O.E.C.D.'s recommendations to eliminate various harmful tax practices, the bulk of the report is an in-depth review of those practices. It will be helpful at this time to review the 1998 Report to provide a basic framework for the material that will follow.

In the 1998 Report, the O.E.C.D. stated that its intention was to "develop a better understanding of how tax havens and harmful preferential tax regimes…affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally… (and) taxpayer confidence in the integrity of tax systems."[‡]

The 1998 Report focused on the provision of financial services and similar activities, including intangibles, that are "geographically mobile," not on those tax incentives that attract investment in plant and equipment. The latter were to be addressed at some point in the future. Similarly, the 1998 Report deals only with harmful tax competition with respect to income tax, not consumption taxes. Those, also, were to be dealt with in the future. The O.E.C.D. insisted that this project was not linked to tax harmonization, nor did it pretend to set acceptable minimum levels of tax.[§]

A. Tax Havens and Harmful Preferential Tax Regimes – the Specifics

Tax havens generally provide no or nominal taxation. The Report acknowledged that, by itself, low or no income taxes do not constitute harmful tax competition. Only when low or no taxes are combined with other legislative or administrative features is harmful tax competition likely to arise. Often, this occurs when there are minimal administrative and regulatory constraints. As a rule, tax havens generally were viewed as not terribly forthcoming with information on those taking advantage of the haven's tax regime.

[‡] "Harmful Tax Competition – an Emerging Global Issue," O.E.C.D., 1998, p. 8.

[§] Jeffrey Owens, head of Fiscal Affairs for the O.E.C.D., quoted in Worldwide Tax Daily, 4/30/98.

Because they divert financial capital away from other countries, tax havens have a significant adverse impact on the revenue bases of those countries.

Preferential tax regimes provide favorable locations for holding passive investments or booking paper profits.[**] Often they are designed to serve as conduits for routing capital across borders. A company may relocate activities to take advantage of such tax regimes that are not available to residents and where there is no supply or demand in the host country's domestic market for the company's business.[††]

There are four key factors used to confirm the existence of a tax haven or preferential tax regime. The first three are identical; only the fourth factor is different for tax haven and preferential tax regimes.

1. <u>Absence of true taxes</u>. No taxes, or nominal taxes, in the case of tax havens and no or low effective tax rates on relevant income in the case of preferential regimes. If this factor is met, analysis of the other factors will follow.

2. <u>Lack of effective exchange of information</u>. Tax havens and to a lesser extent, preferential tax regimes, have laws or administrative practices that prohibit the disclosure to other governments of information, particularly banking information, on taxpayers that benefit from the tax haven.[‡‡]

3. <u>Lack of transparency</u>. The concern here is that tax laws are not being applied openly and consistently because of the use of advanced private and unpublished rulings, negotiated tax rates and similar practices. Often there is inadequate regulatory supervision or financial disclosure. Other more nefarious practices enable taxpayers to evade (not just avoid) taxes and launder money. Transparency does not exist if the countries own tax authorities do not have legal access to taxpayers' records from financial institutions, let alone the ability to exchange that information under tax treaties.[§§]

4. <u>Lack of Corporate Activity</u>. In the case of tax havens, no substantive activity; in the case of preferential tax regimes, ring fencing of benefits to attract nonresident investors. If businesses

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[**] 1998 Report, pg. 25.

[††] <u>Id.</u>

[‡‡] <u>Id.</u>, pg. 23.

[§§] <u>Id.</u>, pg. 24.

do not engage in substantial activities in a particular tax haven it would tend to indicate that: i) that the tax haven may be trying to attract investment and encourage transactions that are purely tax driven; and ii) the tax haven doesn't have much of a legal or commercial environment that would attract substantive business activities if tax minimization were not available.[***]

With respect to preferential tax regimes, ring fencing occurs if a country does not offer the preferential tax regime to resident taxpayers and enterprises that do benefit from the regime are often prohibited from operating in the domestic economy.[†††] Essentially, such countries are willing to let other jurisdictions lose tax revenue, but not willing to lose revenue itself.

B. Other Factors Indicating Harmful Preferential Regimes

The following non-exhaustive list includes several tax-driven techniques that were identified as problems by the late 1990's. A common theme is the promotion of tax regimes for tax minimization purposes.

1. Artificial Tax Base. An artificial definition of tax base such as unconditional participation exemptions or credits used to avoid double taxation; the deduction of costs even where the underlying income is not taxable; deduction of expenses not incurred. Often these provisions are not transparent.[‡‡‡]

2. International Norms Ignored. Failure to follow international transfer pricing principles.

3. Territorial System. A complete territorial tax system where all foreign source income is exempt from tax and thus, encourages the use of conduits and treaty shopping.[§§§]

4. Negotiable Rates. Tax rates or bases are negotiable or rate depends on country where investor is resident.

5. Treaty Network Availed Of. Access to extensive treaty network, such as through the Netherlands, can help spread harmful preferential tax regimes unless treaties contain protections such as

[***] Id., pg. 24.

[†††] Id., pg. 21.

clear definitions of residence, anti-abuse provisions and effective mechanisms for the exchange of information.[****]

6. Hawking of Benefits. Regimes that are promoted for tax minimization purposes attract flows of funds for no legitimate purpose other than tax reduction.

7. Promotion of Tax Schemes. Regimes that encourage operations or arrangements that are purely tax driven divert capital for inappropriate benefits.

C. The Recommendations

The 1998 Report makes 19 recommendations, divided into three specific categories: those dealing with domestic legislation and practices, those addressing tax treaties, and those designed to intensify international cooperation as a response to harmful tax competition.

1. Recommendations Concerning Domestic Legislation and Practices.

a) Controlled Foreign Corporation ("C.F.C.") rules. Countries that do not have C.F.C. rule should consider adopting them to counter harmful tax competition. Those countries that have C.F.C. rules should consider applying them to counteract harmful tax practices.

b) Foreign Investment Fund or Equivalent Rules. Countries that do not have rules which accelerate income recognition for residents who invest in foreign funds should consider adopting them and those that do should consider applying to counteract harmful tax practices, such as by eliminating deferral on passive investments in foreign entities.

c) Restrictions on Participation Exemptions. Countries that use the exemption method to eliminate double taxation should consider adopting rules that would ensure that foreign income benefiting from tax practices that constitute harmful tax competition will be denied the exemption. Targeted practices should include foreign income from tax

‡‡‡ Id., pg. 30-31.

§§§ Id., pg. 32.

**** Id., pg. 33.

havens or countries with preferential tax regimes and income not subject to at least a minimum rate of tax.[††††]

d) Information Reporting Rules. Countries that do not have rules requiring the reporting of international transactions and the foreign operations of resident taxpayers should consider adopting such rules. Countries should exchange the information collected under these rules.

e) Advance Rulings. Countries in which taxpayers can receive advance rulings from administrative agencies with respect to planned transactions should make public, in a way that protects taxpayer confidentiality, the conditions for granting, denying or revoking such rulings. Particular areas of concern include the allocation of profits or losses between related entities or between head offices and P.E.'s, as well as the arm's length value of certain services.[‡‡‡‡]

f) Transfer Pricing Rules. Countries should follow the principles of the O.E.C.D.'s 1995 transfer pricing guideline so that the application of their own transfer pricing rules does not constitute harmful tax competition. Of particular concern are deviations from the arm's length standard and to regimes under which a taxpayer's specific taxpayer position is determined by administrative decision.[§§§§]

g) Access to Banking Information For Tax Purposes. Countries should review their laws, regulations and practices that govern access to banking information so that impediments to the access to such information by tax authorities is removed.

2. Recommendations covering tax treaties.

†††† Id., pg. 43.

‡‡‡‡ Id., pg. 44.

§§§§ Id., pg. 45.

a) Greater and More Efficient Use of Exchanges of Information. Countries should undertake programs to increase the exchange and sharing of relevant information about transactions in tax havens and preferential tax regimes that constitute harmful tax competition.

b) Entitlement to Treaty Benefits. Countries should consider including in their tax treaties provisions that restrict entitlement to treaty benefits for entities, and income resulting from practices, that are harmful tax practices. For example, they could deny treaty benefits to companies with no real economic function because they are not really the beneficial owner of the profits attributed to them.[*****] They should consider how the existing provisions of their tax conventions can be similarly applied. Finally, the Model Tax Convention should be modified to include those provisions or clarifications required to do this.

c) Clarification of Status of Domestic Anti-Abuse Rules and Doctrines In Tax Treaties. In order to ensure anti-abuse and judicial doctrines are compatible with tax treaties, the commentary on the Model Tax Convention should be clarified to remove any uncertainty or ambiguity regarding the compatibility of domestic anti-abuse measures with the Model Tax Convention.

d) List of Specific Exclusion Provisions Found in Treaties. The Committee should prepare and maintain a list of provisions used by countries to exclude certain specific entities or types of income from tax treaty benefits that can be used as a reference by Members when negotiating tax treaties.

e) Tax Treaties with Tax Havens. Countries should consider terminating their tax treaties with tax havens. They should not enter into treaties with tax havens in the future.

f) Coordinated Enforcement Regimes. Countries should consider coordinated enforcement programs such as simultaneous exams, specific exchange of information projects or joint training to deal more effectively with harmful tax practices.

g) Assistance in Recovering Tax Claims. Countries should be encouraged to review current rules that apply to the

[*****] Id., pg. 47.

enforcement of tax claims. The Committee should consider drafting provisions covering enforcement that could be included in tax conventions.

3. Recommendations to Increase International Cooperation in Response to Harmful Tax Competition.

a) Guidelines and a Forum on Harmful Tax Practices. Members should endorse guidelines on harmful preferential tax regimes and establish a Forum to implement the guidelines and other recommendations. Members should review existing legislation and administrative procedures that constitute harmful tax practices and remove them within five years from the date the guidelines are approved. Members should not adopt new provisions, or strengthen others, that constitute harmful tax practices.

b) Production Of a List of Tax Havens. The list is to be published within one year from the date of its first meeting.

c) Links With Tax Havens. Countries that have links with tax havens must ensure that they don't contribute to harmful tax competition. This is particularly true where countries have dependencies that are tax havens.

The last two recommendations deal with various principles for enforcing the other recommendations and starting a dialogue with non-member countries on the recommendations and the guidelines.

II. The Commentary – the Charges and Countercharges

A. The Wright Attack

Perhaps because the 1998 Report was long and somewhat tedious, perhaps because summer was coming, perhaps because the Clinton Administration supported the O.E.C.D.'s pronouncements,[†††††] for the next three months little more than straight forward summaries appeared in the tax press.

[†††††] Worldwide Tax Daily, December 15, 1998

However, in mid-August a rather scathing review was published in Worldwide Tax Daily[‡‡‡‡‡] by the economist, Arthur Wright. The author acknowledged that the authors of the O.E.C.D. were clearly knowledgeable about their subject. However, he offered little hope that it would succeed. The basic reason is that the report does not provide a meaningful distinction between low taxes and harmful tax schemes. Mr. Wright also pointed out that the targets were primarily undeveloped countries while Switzerland and Luxembourg – both O.E.C.D. members – were allowed to opt out of the strictures of the report in return for abstaining from any act that would scuttle the whole project. Mr. Wright viewed the goal of the report to be unobtainable. Globalization of capital markets and the existence of movable capital are features of the current worldwide economy; if certain countries wish to tax the profits from investment, other countries will offer opportunities to avoid the tax, with little downside. The elimination of tax is a rational investment decision. An income tax cannot stop persons from making rational investment decisions.

According to Mr. Wright, globalization pushes governments away from income taxes toward consumption taxes, making it harder for governments to redistribute income through tax policy. Until governments are financed by consumption taxes, the effort to define and eliminate tax competition will have little opportunity for success. Mr. Wright also pointed out that the text of the report was riddled with "qualifiers and demurrers," and lacked a clear definition of harmful tax competition. It was virtually impossible to read the text and to separate beneficial tax reduction from harmful international tax preferences.

Finally, he suggested that the O.E.C.D. report recommends the formation of a "cartel that will restrict the supply of tax dodges" for the purpose of enabling national governments to regain their "clout in defining and enforcing tax bases, setting rates, and favoring the deserving." Mr. Wright prophesied that the cartel "will be nibbled to death by cheating." He concluded with the following observationon–

> The O.E.C.D. would be better off working for a redesign of national tax systems so they can adapt better to economic change. Tax havens and other preferences should be used as 'guideposts for needed change,' effectively putting something of a positive spin on them.

B. Francke's Response

Mr. Wright's article released a storm of correspondence. Jan Francke, Chairman of the O.E.C.D. Committee on Fiscal Affairs, responded for the O.E.C.D.[§§§§§]

[‡‡‡‡‡] August 17, 1998.

[§§§§§] Tax Notes Today, October 13, 1998.

According to Mr. Francke, the report was misunderstood by Mr. Wright, as the report was not about maintaining high levels of income taxation. The report did not attempt way to harmonize tax rates or call for some minimum level of taxation. The issue was not a zero rate of tax, which by itself would not constitute harmful tax competition. Rather, it was the combination of zero rate tax and other administrative or legislative features that impair equity and transparency. The O.E.C.D. was not trying to eliminate preferential tax regimes; it was merely trying to "make them transparent and fair."

Mr. Francke disagreed with Mr. Wright's view that countries have no choice but to accept the inevitable and move from income taxes to consumption taxes in the face of the problems of taxing mobile activities. According to Mr. Francke, the alternative is for countries to cooperate internationally and adopt general principles for the operation of direct tax systems. Thus, the report encourages a dialogue with non-O.E.C.D. countries to encourage them to become involved in the efforts to stem harmful tax competition.

According to Mr. Francke, unfettered competition promotes not only a race to the bottom, but increases friction between countries. To those who feel the proposals are impotent, he counters that what has been proposed is an international contract in which countries will "undertake serious political commitments." Success will depend on whether or not the O.E.C.D. will be able to encourage non-members to get involved and that the project makes economic sense.

C. Others Respond

Another correspondent,[******] Eric Osterweil of Oppenheimer Wolff & Donnelly LLP, acknowledged that although precise definitions are difficult to achieve in any area of tax, the O.E.C.D. skillfully set forth the criteria that can be used to identify havens and harmful preferential regimes.

> The authors have skillfully set forth the criteria pursuant to which tax havens and harmful tax practices in non-tax-haven jurisdictions can be identified. Practitioners know that precise definitions in the tax field are difficult to achieve. Indeed, one-liners are rarely useful in the context of a sophisticated economic. Try providing a precise definition of "taxable income." When it comes to tax havens, the report identifies four factors that are deemed to be relevant, including (i) no or nominal taxes, (ii) lack of effective exchange of information, (iii) lack of transparency, and (iv) no substantial activities. Sure there is an "elephant" or "smell" test which is helpful as a starting point. But when various so-called tax

[******] Eric Osterweil, Tax Notes Today, October 13, 1998.

> havens are examined closely, very substantial differences may be identified. Some do have a sophisticated tax system; many of them may be said to apply rules that meet the transparency criterion and, in several cases, they have a developed industrial, commercial, and financial infrastructure. Most, but not all, tax havens do not meet the exchange of information principle. Note, for example, that in the context of the Caribbean Basin Initiative arrangements with the United States, several presumed tax havens have exchange of information agreements with the United States. * * *

On a more practical level, Bruce Zagaris authored an article about the 1998 Report's effect on various Caribbean jurisdictions.[††††††] He expressed the belief that it would be intellectually difficult and risky for the Caribbean nations to attack the report and that opposition would merely be a delaying tactic. To have any chance of succeeding would require that governments would need to make the challenge as part of a responsible group, such as multiple international organizations respected for their moderation and good practices. He suggested that Caribbean nations should try to become members of the O.E.C.D. and "engage in discussions with other jurisdictions with strong international financial sectors to plan strategy." In the end, Mr. Zagaris stated that the most effective approach may be for jurisdictions to show that they do not meet the report's definition of a tax haven. Of course, many would have to make some changes before they could show that they had effective exchange of information agreements with other countries and that they strongly supported transparency.

D. <u>B.I.A.C. Takes on O.E.C.D.</u>

In the summer of 1999 there were some rumblings from the business community, particularly from the Business and Industry Advisory Committee to the O.E.C.D. ("B.I.A.C."), an independent advisory committee to the O.E.C.D., representing business interests. In a conference of European and American businessmen, opposing views were expressed by the B.I.A.C. Chair, Richard Hammer, and the Chair of the O.E.C.D.'s Committee on Fiscal Affairs, Joe Guttentag. Mr. Hammer suggested that the O.E.C.D. should spend its money on more important issues, that the BI.A.C. had not been involved in the process of developing the policy expressed in the report, and if it had participated, the report would have reflected a different tone to reflect the views of the business communities in the U.S., Europe and Japan.[‡‡‡‡‡‡] B.I.AC. viewed the project as an attempt by high-tax countries to protect their tax bases, harming certain jurisdictions, and restricting freedom of motion.

[††††††] Tax Analysts Worldwide Tax Daily, November 16, 1998.

[‡‡‡‡‡‡] Tax Notes Today, June 11, 1999.

Although Mr. Hammer argued in favor of the business community becoming involved, Mr. Guttentag expressed the opposite view. While B.I.A.C. comments were welcomed by the O.E.C.D., B.I.A.C. had no official role to play. Some matters handled by the O.E.C.D. are better left at the government level.

Mr. Guttentag attempted to explain the definition of a harmful tax regime. It entails two features. The first is a low rate of tax or no tax. The second is that iat must lack any one or more of the following: (i) effective exchange of information, (ii) transparency, or (ii) corporate activity. Mr. Guttentag also clarified that the difference between "harmful" and "preferential" tax regimes in that a harmful regime will have an element of "poaching" in it.

E. <u>Congressional Testimony</u>

The commentary both for and against the O.E.C.D. report reflected an almost ethereal approach to the problem. In stark contrast, Congressional testimony of Robert Morgenthau, the Manhattan District Attorney, in July 2001 placed the problem of uncooperative tax havens in the harsh light of reality. Testifying before a Senate Governmental Affairs Permanent Investigations panel hearing on offshore tax havens, Mr. Morgenthau provided examples of the underside of the offshore industry.

According to Mr. Morgenthau, off-shore tax havens serve as powerful magnets for U.S. dollars. According to the Federal Reserve Bank of New York, there are now more than $800 billion U.S. dollars on deposit in Grand Cayman, which is more than twice the amount on deposit in all the banks in New York City. It amounts to approximately $20 million for every resident of the Cayman Islands.

Mr. Morgenthau expressed the belief that strict bank and corporate secrecy, lack of transparency in financial dealings, and the lack of any meaningful law enforcement or supervision in the financial area make the offshore community attractive for criminals. To illustrate, the lack of transparency and the existence of strict secrecy prevents law enforcement from "following the money" in the case of financial fraud. It breaks the trail of dirty money, often leaving investigators at a dead end.

Mr. Morgenthau recounted that reputable attorneys, accountants, and bankers who have been found to readily assist clients bent on violating laws in their home countries. To illustrate, the Manhattan District Attorney's Office obtained indictments charging a British solicitor and magistrate and a Canadian lawyer who was a Queen's Counsel with establishing a network of shell corporations and bank accounts in bank-secrecy jurisdictions, including Liberia and Belize, to assist their clients in violating securities, banking and tax laws in the jurisdictions where they lived. The defendants paid a Liberian diplomat, among others, to serve as nominal owners of the companies and to sign blank documents used in the fraud. Among the clients of this enterprise was a New York plastic surgeon, who,

when one of his patients died on the operating table, decided to put his assets off-shore in an asset protection trust to render himself judgment-proof.

Several examples of serious crimes or arguments raised to prevent disclosure to government prosecutors were provided in the testimony.

1. Securities Fraud.

A.R. Baron & Co. and 13 of its former officers and employees were convicted for running an organized criminal enterprise. Baron touted questionable stocks and manipulated the market through unauthorized trading in customers' accounts and countless other methods of taking advantage of innocent investors.

The lead defendant in the Baron case used Liberian shell companies and accounts in the Isle of Jersey to trade in the stock the firm was underwriting, a violation of U.S. securities laws. He also sheltered his illegal profits from tax authorities, creditors and the Bankruptcy Court in a Cook Islands trust. A New York lawyer drew up the papers for Mid-Ocean Trust Co. in Rarotonga, the Cook Islands, to act as the trustee. The affairs of the trust were, however, managed here in New York by the "protector", the lead defendant's father. Mid-Ocean Trust did business in New York through one of the largest banks in Australia, which had branches in Rarotonga and New York, and which refused to honor a New York subpoena on the grounds that to do so would violate Cook Islands bank secrecy laws.

In another securities fraud case, Meyers Pollock, and 37 individual defendants were convicted for enterprise corruption and securities fraud. Promoters used off-shore vehicles to trade illegally in their own stocks, to drive up prices cheat on their taxes.

2. Bribery.

One case prosecuted in New York involved the bribery of bank officers in U.S. and foreign banks in connection with sales of emerging markets debt, transactions which earned millions for the corrupt bankers and their co-conspirators. In the case, a private debt trader in Westchester County, New York, formerly a vice president of a major U.S. bank, set up shell companies in Antigua with the help of one of the 'Big Five" accounting firms; employees of the accounting firm served as nominee managers and directors. Several payments were arranged by the accounting firm on behalf of the shell companies, including bribes to a New York banker

through a British Virgin Islands company – the bribes were wired into a Swiss bank account; bribes to two bankers in Florida in the name of another British Virgin Islands corporation; and bribes to a banker in Amsterdam into a numbered Swiss account.

3. Depository for Criminal Gains.

A mother and son team of "grifters" were convicted of murdering an elderly woman and having her house "transferred" to them. The fees used to pay the transfer taxes on the deed came from a brokerage account in Bermuda in the name of The Atlantis Group, a shell company. The money, which was part of the proceeds of a separate fraud committed in Las Vegas, came to Bermuda by way of an account established by the defendants at Swiss American Bank in Antigua. It was Swiss American (a bank that was neither Swiss nor American) that arranged for the formation of the Atlantis Group shell company in Antigua.

4. B.C.C.I. Matter – Refusal to Turn Over Information.

In the case of the Bank of Credit and Commerce International ("B.C.C.I."), which was involved with drug money laundering, the illegal shipment of arms, and bribery of government officials, the majority of money transfers went through B.C.C.I. Overseas, chartered in Grand Cayman. A B.C.C.I. official in New York to whom a grand jury subpoena was issued refused to produce any records, claiming Cayman bank secrecy. The Manhattan District Attorney's Office was told it had to invoke the Mutual Law Enforcement Assistance treaty between the U.S. and the Cayman Islands. When the treaty was invoked, it was told by the Cayman Islands Attorney General that the records would be produced to the Department of Justice but only on the condition that they would not be made available by the U.S. government to state and local prosecutors -- more than 98% of all criminal prosecutions in the United States are brought by state and local prosecutors. Ultimately, the matter was resolved and information was provided.

5. Guardian Bank and Trust Company.

The bank was set up by an American and used to launder money for its depositors, 95% of whom were U.S. residents. It ultimately turned out that the Guardian Bank's U.S. depositors had $300 million offshore, hidden from tax authorities, litigants and creditors. The official Cayman liquidators of the bank – two partners in a major world-wide accounting firm – brought suit in U.S. District Court in New Jersey seeking the return

> of the computer tape to the Caymans prior to decoding. In their brief, the liquidators argued that disclosure of the contents of the records to the I.R.S. would have a significant negative impact on the integrity, confidentiality, and stability of the financial services industry of the Cayman Islands. The confidence of the offshore financial community in the privacy afforded to legitimate account holders of Cayman Islands offshore banks is at the heart of the Territory's financial services industry and economy, as a whole.

Mr. Morgenthau's testimony is reproduced in Appendix A.

III. The First List – Tax Havens and Preferential Regimes – 2000 Progress Report

In June of 2000, after a considerable period of increasing expectation, the O.E.C.D. issued its lists of 35 tax havens (See Appendix B) and 47 preferential tax regimes among its own members grouped by specific preferences(see Appendix C). Six countries – Bermuda, Cayman Islands, Cyprus, Malta, Mauritius, and San Marino – made advance commitments to adopt a schedule of progressive changes designed to eliminate harmful tax practices and to comply with the 1998 Report and, therefore, were not included in the list of tax havens even though they technically still met the criteria.

A. <u>O.E.C.D. Refines Policy</u>

The 2000 Report attempted to counter some of the criticism that followed the 1998 Report. For example, the 2000 Report stated that the project was not primarily about collecting taxes and was "not intended to promote the harmonization of income taxes or tax structures generally within or outside of the O.E.C.D., nor [was] it about dictating to any country what should be the appropriate level of tax rates."[§§§§§§] The O.E.C.D. insisted that the "project [was] about ensuring that the burden of taxation is fairly shared and that tax should not be a dominant factor in making capital allocation decisions."[*******]

The 2000 Report stated that both member and non-member states have been exposed to significant revenue losses. As if to counter arguments that attacking tax haven amounted to an attack on developing countries by high-tax O.E.C.D. jurisdictions, the 2000 report argued that tax base erosion that resulted from harmful tax practices "can be a particularly serious threat to the economies of developing countries."[†††††††] In addition to listing those jurisdictions that met the

[§§§§§§] O.E.C.D., 2000 Report – Towards Global tax Co-operation, pg. 6

[*******] <u>Id</u>.

[†††††††] <u>Id.</u>

criteria for tax havens and those Member states with potentially harmful preferential tax regimes, the report contains an update on work with non-member countries.

The list of Member states with potentially harmful preferential tax regimes was developed through a combination of self-reviews using detailed questionnaires and peer reviews. Holding company regimes were not included in the final list. The Forum believed that it could not reach a conclusion on their status as potentially harmful preferential regimes at that time largely because of their possible interaction with tax treaties and with generally applicable principles of domestic law. It expected to continue working on this issue. Member countries were asked to eliminate the harmful elements of their preferential tax regimes by April 2003. The benefits taxpayers derive from a regimes were to be eliminated by the end of 2005, if the taxpayer was benefiting from the regime at the end of 2000.

With respect to tax havens, the starting point was whether a jurisdiction had little or no tax on financial or other service income or was "perceived to offer itself as a place where non-residents can escape tax in their country of residence."[‡‡‡‡‡‡‡] Again, perhaps as an answer to its critics, the 2000 Report went on to state that "[t]he fact that a jurisdiction may impose no or nominal tax on the relevant income is a <u>necessary but not [by itself] sufficient</u> condition for the jurisdiction to be considered a tax haven."[§§§§§§§] The O.E.C.D. stressed that whether the tax haven criteria have been met is a facts-and-circumstances test, "including whether the jurisdiction has a significant untaxed offshore financial/other services sector relative to its overall economy."[********]

To determine whether the applicable tax haven criteria were met, the O.E.C.D. started with published sources and then requested and received information from the 47 countries initially considered. The O.E.C.D. stressed that the list only reflected technical conclusions and was no to be used for possible coordinated defensive measures. That list, of uncooperative tax havens, was to be completed by July 31, 2001. Any tax haven that did not sign a commitment to eliminate harmful tax practices by that date would end up on the list. In order to keep the dialogue going and encourage jurisdictions to commit, the O.E.C.D. stressed that it would not undertake coordinated defensive measures against any jurisdiction that made a commitment.

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‡‡‡‡‡‡‡ <u>Id.</u>, pg. 10.

§§§§§§§ <u>Id</u>. Emphasis added.

******** <u>Id</u>.

B. Potential Defensive Measures

It is clear from the 2000 Report that the O.E.C.D. was receiving cooperation from its Members. It is also clear that it was making a concerted effort and having some success in reaching out to non-members. Yet, the publication of what follows must have unnerved at least some of the tax haven jurisdictions. The Report concluded with the following list of possible defensive measures that could be used against Tax Havens that would be deemed to be uncooperative if they did not make a commitment to cooperative by July 31, 2001.

1. Denial of Benefits. Tax laws in Member States should be revised to disallow deductions, exemptions, credits or other allowances resulting from transactions with uncooperative tax havens or from transactions that take advantage of their harmful tax practices. This could include, for example, a denial of foreign tax credits or participation exemptions with respect to distributions that are sourced from uncooperative tax havens or in connection with transactions that take advantage of harmful tax practices. It could also include a denial of deductions for fees and expenses incurred in establishing or acquiring entities incorporated in uncooperative tax havens.

2. Enhanced Reporting. Member states could require comprehensive information reporting rules for transactions involving uncooperative tax havens or those that take advantage of their harmful tax practices, supported by substantial penalties for inaccurate reporting or failure to report such transactions.

3. C.F.C. Rules. Countries could adopt C.F.C. rules to eliminate harmful tax practices in uncooperative tax havens by accelerating recognition of offshore income .

4. Enhancement of Penalties. Domestic law of Member states could be revised to enhance the likelihood and severity of penalties. For example, defenses that are based on reasonable cause might not be allowed in the case of transactions involving entities organized in uncooperative tax havens or transactions that take advantage of their harmful tax practices.

5. Mandatory Withholding Tax. Countries could impose withholding taxes on certain payments to residents of uncooperative tax havens.

6. Enhanced Examinations. Countries could provide for enhanced audit and enforcement activities with respect to transactions involving uncooperative tax havens or to transactions that take advantage of harmful tax practices.

7. Least Favored Treatment. Member states could ensure that any existing or new domestic measures against harmful tax practices will be applied to transactions involving uncooperative tax havens and to transactions that take advantage of harmful tax practices.

8. Denial of Treaty Coverage. Member states could terminate tax treaties with tax havens and should not enter into future ones.

9. Transactional Charges. Member states could impose transactional charges or levies on certain transactions involving Uncooperative Tax Havens.[††††††††]

IV. The Battles Ensue

A. Clinton Administration Responds

On the same day that the O.E.C.D. issued its list of tax havens and member countries with potentially harmful preferential tax regimes, Treasury Secretary Lawrence Summers issued a statement welcoming the report that he stated was designed to protect the integrity of national tax systems from harmful tax competition.[‡‡‡‡‡‡‡‡] In July, 2000 the O.E.C.D. held a symposium with member countries and 30 non-member countries, including many less-developed countries, so that the O.E.C.D. could begin a high-level dialogue with nonmember governments.

B. Congressional Response

In September 2000, several Congressmen attacked the O.E.C.D. but their arguments seemed to be more orchestrated than real.

1. Congressional Correspondence

Dick Armey, a senior Republican member of the House Committee on Ways & Means, issued a statement criticizing the Clinton administration's "active support" of the O.E.C.D.'s effort to stamp out "tax competition." Mr. Armey said that the effort was designed to "create a tax cartel." [§§§§§§§§] If it succeeded, the U.S. would risk higher taxes and a weakened

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[††††††††] Id., pg. 25.

[‡‡‡‡‡‡‡‡] Tax Notes Today, June 27, 2000.

[§§§§§§§§] Tax Notes Today, September 12, 2000.

economy and developing nations would be "hamstrung in their attempts to promote economic growth." Mr. Armey said that, in practice, what the O.E.C.D. was trying to do was to terminate "low tax policies that attract investment from overseas." He was much chagrined that the O.E.C.D. was demanding that low-tax nations "(so-called tax havens) agree to dismantle financial privacy or face financial protectionism." With respect to money laundering, he preferred a case by case approach rather than an approach that would "destroy personal privacy." Moreover, he felt that these developing nations would have little incentive to support U.S. criminal investigations, if the O.E.C.D. inhibits their ability to create an attractive investment climate. Mr. Armey characterized the O.E.C.D.'s policy as hindering Congressional efforts to reduce the U.S. tax burden and reform the tax code.

Congressman Tom Reynolds championed jurisdictions such as the U.S. which impose low rates of tax.

> This low-tax status has allowed us to attract trillions of dollars of wealth to our economy, all of which has boosted job creation and economic performance * * * I am concerned that some of our high-tax competitors eventually would use the OECD's attack on low-tax nations as a precedent to pressure us to eliminate our favorable tax and privacy laws . . . .

Similar views were expressed by Senator Richard Shelby.[*********]

Congressman Tom Reynolds wrote:

> The United States has an interest in helping other nations enact market-based reforms that promote private-sector wealth creation. As we know from our own history, tax competition, lower tax rates and a pro-growth tax code are key determinants of an economy's performance. A modest tax burden rewards entrepreneurial initiative and attracts investment. This, of course, leads to rising income levels and broadly shared prosperity. * * * Unfortunately, the Organization for Economic Cooperation and Development (OECD) is threatening this successful formula.[†††††††††]

U.S. House Del. Donna M. Christensen, representing the U.S. Virgin Islands wrote:

[*********] Tax Analysts Worldwide Tax Daily, March 22, 2001.

[†††††††††] Tax Analysts Worldwide Tax Daily, March 12, 2001.

> The free flow of capital plays a critical role in improving economic conditions in poorer nations. Workers benefit from increased job opportunities and higher wages. Governments also benefit because, even at low rates of tax, there are both direct and indirect increases in revenue. These are funds that are critically needed to provide education, health care, and other social services. The OECD should not be encouraged to use a high-handed approach and to act in bad faith by ignoring the principles of transparency and fairness in this matter.[‡‡‡‡‡‡‡‡‡]

2. Correspondence of Senators

Several Senators weighed in against the O.E.C.D. in separate letters to the Secretary of the Treasury.[§§§§§§§§§] Among them was Senator Jesse Helms who wrote, asserting:

> I find troubling that the O.E.C.D. threatens many low-tax countries simply because they are luring investment away from high-tax nations. I believe this to be economically unwise and morally questionable . . . . If high-tax countries are worried that they are losing their tax base, the proper response is their lowering their own tax burdens rather than trying to force low-tax nations to raise tax rates or to serve as vassal tax collectors.

Senator Judd Gregg attacked the approach of the O.E.C.D. report which favored worldwide taxation for companies. He wrote:

> An important long-run component of our tax reduction/tax reform agenda is the shift to a territorial tax system; such an approach will improve our competitiveness and simplify the tax code . . . .

3. Congressional Black Caucus

In March, over 75% of the members of the Congressional Black Caucus signed a letter addressed to the Secretary of the Treasury, urging the Administration to back away from cooperation with the O.E.C.D. According to the writers of the letter, which included Charles Rangel, the

[‡‡‡‡‡‡‡‡‡] Tax Analysts Worldwide Tax Daily, March 19, 2001.

[§§§§§§§§§] Tax Analysts Worldwide Tax Daily, March 14, 2001.

ranking Democrat on the House Ways & Means Committee, the attack by the O.E.C.D. was directed to Caribbean jurisdictions with predominantly black populations.

> This initiative threatens to undermine the fragile economies of some of our closest neighbors and allies, as well as the U.S. Virgin Islands. These countries are already grappling with reduced tariffs and declining preferences for their industrial and agricultural products. * * * Wealthy OECD nations should not have the right to re-write the rules of international commerce on taxation simply because they are upset that investors and entrepreneurs are seeking higher after- tax returns.* * * The primary concern that we wish to address in this letter, however, is that the initiative will impose serious economic harm on developing nations - including many in our hemisphere who belong to, have an association with or have long-established friendly ties with the United States.**********

4. O.E.C.D. Response

At the end of November 2000, the O.E.C.D. approach to identified tax havens was tempered as a less aggressive approach to identified tax haven jurisdictions was adopted. The new approach announced a uniform set of standards that would be applied across the board in an attempt to provide evenhanded treatment. Moreover, the period was lengthened for the adoption of rules of compliance by the identified countries.

Under the revised approach, the identified countries would participate in a 4-stage approach to cooperation. The stages would be consecutive and each would last for one year, beginning with 2001, except for the final stage, which would last for two years. In the first stage, the identified jurisdictions would be required to adopt an action plan for achieving transparency and effective programs for the exchange of information for all tax matters. The action plan would also address the elimination of internal tax regimes that attract business without substantial local business activity. In the second stage, the action plan would be adopted for local regulatory purposes. Thus, beneficial ownership information and financial books kept in accordance with generally accepted accounting principles would be made available to domestic regulatory agencies and tax authorities. In the third stage, information regarding criminal tax matters would be available for exchange with O.E.C.D. members. The tax authorities of O.E.C.D. member states would have access to banking information relevant to the investigation of financial crimes during this

********** Tax Analysts Worldwide Tax Daily, March 27, 2001.

stage. In the final stage, information regarding civil tax matters would be available for exchange with O.E.C.D. members. The identified jurisdictions would be required to eliminate local rules that depart from accepted laws and practices, such as the issuance of secret rulings or the ability of investors to elect or negotiate the rate of tax. In addition, transfer-pricing rules would have to be adopted that would not deviate materially from the O.E.C.D. transfer pricing guidelines.

The Secretary General of the O.E.C.D. responded to correspondence from a U.S. legislator representing a district in Texas by stating:

> [T]here seem to be widespread misunderstandings as to what the project is all about. It has nothing to do with insisting that a jurisdiction use a particular tax structure or rate. The fact that the commitments of …Bermuda and the Cayman Island s—which have NO income taxation – have been welcomed by the O.E.C.D. without any requirement to impose an income tax underscore that point."[††††††††††]

The response goes on to say that project is directed at, in the vernacular, tax cheats and that this message has not gotten through in the U.S.

C. Pundits Weigh In

1. Marshall Langer Challenges O.E.C.D.

In late November, Marshall Langer gave a speech to the International Tax Planning Association that challenged the O.E.C.D. members to clean up their own tax systems before attacking nonmembers for harmful tax competition.[‡‡‡‡‡‡‡‡‡‡] He attacked the O.E.C.D. as a cartel of rich countries, most of whom have high taxes. According to Mr. Langer, the O.E.C.D. abhors nonmember countries with low taxes and characterized the people who run the O.E.C.D. as government bureaucrats who live in high-tax Paris on tax-free salaries paid for by the taxpayers.

Mr. Langer suggested that low tax or no tax regimes were prevalent within the member countries of the O.E.C.D. For example, the U.S. had only one preferential regime identified, *viz.*, the F.S.C. Nonetheless, Mr. Langer pointed out that the U.S. does not tax interest on bank deposits of foreigners. It only requires reporting of bank interest for Canadians;

[††††††††††] Tax Notes Today, March 2, 2001.

[‡‡‡‡‡‡‡‡‡‡] Tax Notes Today, January 29, 2001.

consequently, it cannot give any information to other countries.[§§§§§§§§§§§] The U.S. also exempts foreigners from tax on portfolio interest and on most forms of capital gains. U.S. citizens and residents pay tax on these items. This would cause the U.S. to have "ring fenced" certain benefits exclusively for foreigners. Also, U.S. law does not permit the I.R.S. to give any tax information to a foreign country, unless that country has a treaty or a tax information exchange agreement in place with the U.S. The U.K. had no preferential regimes identified, Switzerland only one tax regime identified (administrative/ service company regimes), and Ireland also had only the international financial services center and the Shannon Airport Zone regimes identified. Nonetheless, these countries have preferences similar to those of the U.S. Mr. Langer concluded that the O.E.C.D. has not done a good job in identifying the preferential regimes of its members and should address those issues before attacking nonmembers.

2. Lee Sheppard Attacks Attackers

In April, Lee Sheppard of Tax Analysts commented on the "boatload of no-name" legislators who signed letters opposing U.S. participation in the O.E.C.D. project. According to Ms. Sheppard, this was a result of sophisticated lobbying by the Center for Freedom and Prosperity ("C.F.P."), the lobbying arm of the Freedom and Prosperity Foundation, a new tax exempt organization whose sole purpose was to oppose the O.E.C.D. project.[***********] The letters accuse the O.E.C.D. of trying to force every country, including the U.S., to raise taxes to the levels of Western Europe. Ms. Sheppard commented that the capital that was accumulating in offshore jurisdictions was most likely flight capital in the form of bank deposits, rather than long term direct investment in plant and equipment and Congressional letter writers should have known it. Ms. Sheppard expressed the view that the O.E.C.D.'s real concern is bank secrecy, anonymous debt instruments, and bearer shares, all of which hinder tax enforcement and information exchange.

D. Bush Administration

The Bush Administration has waffled on the subject of the O.E.C.D. report. On the one hand, the Administration is concerned with enhancing

[§§§§§§§§§§§] This was changed the following year by the section 6049 bank deposit reporting regulations. With those regulations, the U.S. was able to collect information on interest paid to nonresidents and share it with treaty partners.

[***********] Tax Notes Today, April 16, 2001.

voluntary compliance, a bedrock of the U.S. tax system. On the other hand, it is sympathetic with the concept of low taxes as a means of allowing taxpayers to retain a greater share of their income.

1. Weinberger Letter

Mark Weinberger, Assistant Secretary For Tax Policy of the Treasury, responded to concerns over the O.E.C.D. project raised by one Senator. Mr. Weinberger commented that the Administration was undertaking a review to determine whether the O.E.C.D. report rests on two fundamental principles of comity in tax matters. The first is that countries should be free to pursue their own tax policies. This bedrock principle supports the attackers of the O.E.C.D. The second principle is that countries "should not engage in practices that make it easier for other countries' laws to be broken."[†††††††††††] This bedrock principle supports the O.E.C.D.

2. O'Neill Statement

The Secretary of the Treasury, Paul O'Neill, issued a statement that reflected the dual approach enunciated by Mark Weinberger.[‡‡‡‡‡‡‡‡‡‡‡] In part, he expressed concern about the treatment some nonmembers were receiving, referring to the listed tax havens, and stated that he had no interest in stifling competition that forces governments to create efficiencies. At the same time, he said the U.S. will not turn a blind eye to cheating in any form and will aggressively pursue those who illegally evade taxes by hiding money offshore.

Those who attacked the O.E.C.D. initiative, such as the Heritage Foundation and the C.F.P., put a positive spin on MR. O'Neill's statement. They painted it as evidence that they had won a dramatic victory. On the other hand, the O.E.C.D. Secretary General expressed his understanding of the U.S. position to be support for the focus on transparency and exchange of information which are the core aspects of this work.[§§§§§§§§§§§] He recognized that the U.S. was not pulling out. It was merely a case of the U.S. exercising its muscles to get what it wants

The O.E.C.D. Secretary General turned out to be the more prescient of the two commentators. On June 14, 2001, the U.S. decided to continue

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[†††††††††††] Tax Notes Today, April 5, 2001.

[‡‡‡‡‡‡‡‡‡‡‡] Tax Notes Today, May 11, 2001.

[§§§§§§§§§§§] Tax Notes Today, May 18, 2001.

negotiations with the O.E.C.D. to combat inappropriate use of uncooperative tax haven transactions.[************] Evidently, the administration had had daily conversations with the O.E.C.D. ever since Secretary O'Neill's statement in June.

E. O.E.C.D. Response

In response to the discussions with the U.S. Treasury, the O.E.C.D. modified certain of its previously stated positions.

1. Compliance Deadline. The July 31st date for tax haven compliance was moved to November 30,2001.

2. Sanctions. Uncooperative jurisdictions would not face sanctions until 2003.

3. Member Preferences. Members must get rid of their tax preferential systems by then as well. In response to U.S. demands, jurisdictions would be allowed to keep their low tax systems and could continue to offer ring-fenced tax breaks to foreign investors without sanctions, although ring-fencers would still appear on the blacklist. The new focus would be on information exchange.

V. The 2001 Report

Released in November 2001, the 2001 Report documents an extensive dialogue with the 35 tax havens in the 2000 Report. As a result of the concerns expressed with regard to the standard for measuring activity, the criterion of "no substantial activities" was dropped. In addition, the O.E.C.D. decided that commitments would be sought only with respect to transparency and effective exchange of information.[††††††††††††] This reflects the view that if a regime is not transparent, there will not likely be sufficient information available for exchange. Jurisdictions that made prior commitments regarding substantial activities were offered the opportunity to drop related commitments.

Defensive measures regarding tax havens were to be put in place at the same time as the application of defensive measures on Member countries with harmful preferential regimes. The July 31 date, originally moved to November 30 was extended, again, to February 28, 2002. A jurisdiction will not be considered uncooperative if it commits to transparency and the effective exchange of information. Countries will now have a year from the date when the make a commitment to develop an implementation plan.

[************] Tax Notes Today, June 14, 2001.

[††††††††††††] O.E.C.D., 2001 Report, pg. 10.

A. Transparency

A tax haven jurisdiction must agree that non-transparent features, such as rules that depart from established laws and practices, secret tax rulings, and the ability of persons to negotiate tax rates will be eliminated from their tax regimes.[‡‡‡‡‡‡‡‡‡‡‡‡] Accounts must be prepared in accordance with generally accepted accounting standards and must be either audited or filed. The only exceptions are if the transactions are *de minimis* or the entity's activities are exclusively local and it has no foreign ownership, beneficiaries or management. Governmental authorities must have access to beneficial ownership information for all types of entities and to bank information relevant to both criminal and civil matters. All information maintained to meet transparency criteria should be available for exchanges of information.[§§§§§§§§§§§§]

B. Exchanges of Information

A jurisdiction making a commitment must agree to establish a mechanism for an effective exchange of information. The mechanism must allow information to be given to the tax authority of another country in response to a request that may result from a specific tax inquiry. Appropriate safeguards are to be put in place to ensure that the information obtained is used only for the purpose for which it was sought. Taxpayers' rights and the confidentiality of their tax affairs must be protected. With respect to criminal tax matters, the information should be provided without a requirement that the conduct would be criminal in the jurisdiction to which the request is addressed. In civil tax matters, information should be provided whether or not the jurisdiction providing the information has an interest in the information for its own domestic tax purposes. The jurisdiction making the commitment must agree that it will put in place administrative practices to monitor the mechanism to ensure that it is functioning properly.[*************]

‡‡‡‡‡‡‡‡‡‡‡‡ Id., pg. 11.

§§§§§§§§§§§§ Id.

************* Id.

C. Framework of Coordinated Defensive Measures

The O.E.C.D. adopted a more moderate tone. It continued to stress that a coordinated defense is better than unilateral or bilateral procedures, but acknowledged that each Member has the right to implement measures it believes are necessary to counteract harmful tax practices. The framework for coordinated defense measures should be proportionate and targeted at neutralizing the negative effects of harmful tax practices, yet each country should be free to choose whether or not to enforce defensive measures that are proportionate to the degree of harm that a particular practice could inflict.[†††††††††††††]

Although nothing is stated in the 2001 Report, the decision to focus on transparency and exchange of information seems to have been the result of the concern over the abuse of bank secrecy by terrorist networks involved in the September 11th attack on the World Trade Center in New York. The tremendous pressure put on other countries by the U.S. to open their bank records and share information with the U.S. in an effort to track the flow of money to terrorists may have given the O.E.C.D. the feeling that it could successfully press non-member states more rigorously for the same kind of information on the tax side.

VI. February 28, 2002 and Beyond

In the period since February 28, 2002, several important events have taken place regarding exchanges of information and the O.E.C.D. tax haven initiative.

A. Almost Universal Sign-up

As of April 18, 2002, all but seven identified tax haven jurisdictions have agreed to come into compliance with the transparency and exchange of information provisions of the O.E.C.D. initiative. The members of the "Gang of Seven" are:

[†††††††††††††] Id., pg. 13.

1. Andorra,
2. The Principality of Liechtenstein,
3. Liberia,
4. The Principality of Monaco,
5. The Republic of the Marshal Islands
6. The Republic of Nauru, and
7. The Republic of Vanuatu.

The OECD said that it hoped to have a continuing dialogue with those countries and that it would monitor the emergence of new uncooperative tax havens. Secretary O'Neill took credit for the O.E.C.D.'s gains because of his efforts to limit the project to transparency and information exchange.

B. <u>Model Exchange of Information Agreement</u>

The O.E.C.D. released its model tax information exchange agreement for both bilateral and multilateral transactions. The introduction stresses the "it is not in the interest of the participating economies that the implementation of the standard contained in the agreement should lead to a migration of business to economies that do not cooperate in the exchange of information."[‡‡‡‡‡‡‡‡‡‡‡‡‡] The model agreement appears in Appendix D.

Article 5 (Exchange of Information Upon Request) is the heart of the agreement. In principal part, it provides as follows:

1. <u>Provide Tax Related Information</u>. The basic obligation of each party to the Agreement is, upon request, to provide information that is possibly relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. The information is to be exchanged even if the conduct being investigated would not constitute a crime under the laws of the requested State.

2. <u>Power to Obtain Information</u>. If the information in the possession of the requested State is not sufficient to enable it to comply with the request, it is obligated to use all relevant information gathering

[‡‡‡‡‡‡‡‡‡‡‡‡‡] "Agreement on Exchange of Information in Tax Matters," Introduction, pg. 1.

measures even if it does not need the information for its own tax purposes.

3. Form of Information. To the extent allowable under its domestic laws, the requested State is obligated to provide the information in the form of depositions of witnesses and authenticated copies of original records.

4. Empowerment of Tax Authority. Each State is to take steps to ensure that the tax authorities can obtain information held by banks, other financial institutions, agents, fiduciaries, nominees and trustees regarding the ownership of companies, partnerships, trusts, foundations, *Anstalten*, including all persons in a chain of ownership. Power to obtain comparable information would have to exist with regard to settlors, trustees and beneficiaries of trusts and founders, members of the foundation council and beneficiaries of *Anstalten.*

5. Procedural Rules. Each State is to adopt procedural rules calling for prompt responses regarding any deficiency in the request for information (60 days) and notice of the reasons for any noncompliance with the request (90 days).

The model agreement also contemplates cross border examinations of witnesses and documents, provided the witness or holder of the document approves. Limitations are provided so that only information obtainable in the requesting state can be requested, and trade, business, industrial, commercial or professional secrets or trade processes are not obtainable. Lawyer-client communication is not obtainable where the communication related to legal advice with regard to a particular transaction or advice regarding litigation. Information that is exchanged is generally confidential, but may be introduced at a public court hearing.

C. U.S. Exchange of Information Agreements. The U.S. has entered into information exchange agreements with the Cayman Islands, Antigua and Barbuda, the Bahamas, the British Virgin Islands and the Netherlands Antilles. The agreement with the Netherlands Antilles appears in Appendix E.

Article 4 (Exchange of Information) of that agreement is the heart of the exchange of information obligation in the agreement with the Netherlands Antilles. In particular, it provides that the requested State (i.e., the Netherlands Antilles) must take all relevant measures, including compulsory measures, to provide the U.S. with requested information that is not in the files of the tax authority in the Netherlands Antilles. As a result, the Netherlands Antilles has undertaken to do all of the following:

1. Examination of Records. The tax authority will examine books, papers, records, or other tangible property which may be relevant or material to the U.S. inquiry.

2. Examination of People. The tax authority will question any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry.

3. Compelled Testimony. The tax authority will compel any person having knowledge or possession, custody or control of information which may be relevant or material to appear at a stated time and place and for purposes of testifying under oath and to produce books, papers, records, or other tangible property;

4. Form of Testimony. The tax authority will be empowered to take testimony under oath.

When it carries out the foregoing undertakings, privileges under the laws or practices of the requesting State (i.e., the U.S.) will not apply in the execution of a request, but will be preserved for resolution by the requesting State at a later time.

VII. Conclusion

Exchanges of information between authorities in the developed world and authorities in tax advantaged jurisdictions are no longer a debatable subject, at least within the view of the U.S. Those who contend that concepts of international comity demand that governments of the developed world respect the secrecy laws of tax advantaged jurisdictions have a point; however, obligations among nations generally flow both ways. If the governments of the tax advantaged countries wish to have their laws respected, they must take care to have their laws reflect international norms. It is too late in the day to believe that bank secrecy is an accepted international norm.

APPENDIX A

TESTIMONY
OF
ROBERT M. MORGENTHAU
BEFORE THE
UNITED STATES SENATE
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

July 18, 2001

Mr. Chairman, members of the Committee, I am grateful for the opportunity to testify on a subject that has long been of interest to me and is becoming more important every day.

Increasingly, off-shore tax havens are serving as powerful magnets for U.S. dollars. Deposits of U.S. dollars in the Cayman Islands have been increasing by about $120 billion a year; according to the Federal Reserve Bank of New York, there are now more than $800 billion U.S. dollars on deposit in Grand Cayman. That is more than twice the amount on deposit in all the banks in New York City and the equivalent of nearly 20% of all the dollar deposits in the United States. It amounts to almost $3000 for every man, woman and child counted in the last U.S. census. It is about what the federal government now spends on Social Security, Medicare and Medicaid combined in a year.

It also amounts to approximately $20 million for every resident of the Cayman Islands. Obviously, this huge cache of U.S. money does not reflect any real economic activity in the Caymans. In fact, of the nearly 600 banks and trust companies licensed in the Caymans -- which include 47 of the world's largest 50 banks -- only 100 or so have a physical presence there. According to the website of the Cayman Islands Monetary Authority, only 31 banks are currently licensed to do business with Cayman residents. Similarly, there are some 45,000 companies registered in the Caymans whose only business is outside the country. Notably, Long Term Capital, the giant hedge fund that almost collapsed 3 years ago, was chartered in the Caymans, but managed out of offices in Greenwich, Connecticut.

Though the Caymans have proven particularly attractive to U.S. residents, they do not stand alone as an off-shore haven for U.S. dollars. There are countless others: Antigua, the British Virgin Islands, the Cook Islands, Nassau, Belize, Cyprus, to name just a few. And the list is growing all the time.

What is all this money doing off-shore? It is not there because of the sunshine and the beaches. To be blunt, it is there because those who put it there want a free ride -- depositors, investors, banks and businessmen want to avoid or evade laws, regulations and taxes in their home

countries, including the U.S. Some of this avoidance is legal under present law, but much of it is not. And whether legal or not, the presence of $800 billion in a single off-shore jurisdiction -- hidden from the scrutiny of bank supervisors, securities regulators, tax collectors and law enforcement -- is a huge problem.

A few examples from the cases prosecuted by the Manhattan District Attorney's Office illustrate just how attractive tax havens and off-shore jurisdictions offering strict bank and corporate secrecy have become for tax cheats and other white-collar criminals. When you consider that we only come across a small fraction of the illegal activities in these jurisdictions and are successful in prosecuting only a small number of the crimes we discover, the dimensions of the problem may become clearer.

It is becoming increasingly commonplace to find an off- shore connection to security frauds and other major sophisticated white-collar crimes. For example, in 1997 and 1998, my office convicted A.R. Baron & Co. and 13 of its former officers and employees for running an organized criminal enterprise. Baron was what is commonly known as a "boiler room" or "bucket shop," pushing questionable stocks and specializing in market manipulation, unauthorized trading in customers accounts and countless other methods of taking advantage of innocent investors. Baron's illegal activities over 5 years cost investors more than $75 million.

The lead defendant in the Baron case used Liberian shell companies and accounts in the Isle of Jersey to trade in the stock the firm was underwriting, a violation of U.S. securities laws. He also sheltered his illegal profits -- from tax authorities, creditors and the Bankruptcy Court -- in a Cook Islands trust. The Cook islands are a New Zealand protectorate in the South Pacific.

A New York lawyer drew up the papers for Mid-Ocean Trust Co. in Rarotonga, the Cook Islands, to act as the trustee. The affairs of the trust were, however, managed here in New York by the so-called "protector" of the trust, the lead defendant's father. Mid- Ocean Trust did business in New York through one of the largest banks in Australia, which had branches in Rarotonga and New York, and which refused to honor a New York subpoena on the grounds that to do so would violate Cook Islands bank secrecy laws.

In another securities fraud case, which is still ongoing, we have thus far convicted the company, Meyers Pollock, and 37 individual defendants for enterprise corruption and securities fraud. In this case, we again came across shell companies and off-shore bank accounts. Promoters used these off-shore vehicles to trade illegally in their own stocks, to "paint the tape" -- that is to generate fictitious trades to drive up prices -- and, of course, to cheat on their taxes.

Securities fraud is not the only area where we have found tax havens used for criminal purposes. In 1996, my office concluded a case involving the bribery of bank officers in U.S. and foreign banks in connection with sales of emerging markets debt, transactions which earned millions for the corrupt bankers and their co-conspirators. In this case, a private debt trader in Westchester County, New York, formerly a vice president of a major U.S. bank, set up shell companies in Antigua with the help of one of the "big five" accounting firms; employees of the accounting firm served as nominee managers and directors.

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The payments arranged by the accounting firm on behalf of the crooked debt trader included bribes paid to a New York banker in the name of a British Virgin Islands company, into a Swiss bank account; bribes to two bankers in Florida in the name of another British Virgin Islands corporation; and bribes to a banker in Amsterdam into a numbered Swiss account. Because nearly all the profits in this scheme were realized in the name of the off-shore corporations or off-shore accounts, almost no taxes were paid.

A year ago, in a very different sort of case, a Manhattan jury convicted Sante and Kenneth Kimes, a mother-son team of so- called "grifters," for murdering an elderly Manhattan widow to gain control of her expensive townhouse. In our investigation of the case, we found that to arrange for the payment of filing fees and taxes on a forged deed to the townhouse, the pair drew on funds held in a brokerage account in Bermuda in the name of The Atlantis Group, a shell company. The money, which was part of the proceeds of a separate fraud committed in Las Vegas, came to Bermuda by way of an account established by the defendants at Swiss American Bank in Antigua. It was Swiss American (a bank that was neither Swiss nor American) that helped the Kimes' set up the Atlantis Group shell company in Antigua.

For the defendants in these cases, the principal attraction of doing business in off-shore havens was not the low or non-existent tax rates. They sought to take advantage of other benefits that are almost invariably provided in tax haven jurisdictions: strict bank and corporate secrecy, lack of transparency in financial dealings and the lack of any meaningful law enforcement or supervision in the financial area. For white-collar criminals, the lack of transparency and the code of strict secrecy is particularly useful because it prevents law enforcement from "following the money;" it breaks the trail of dirty money, often leaving investigators at a dead end.

The obstacles created for law enforcement take many forms. In some cases the laws in off-shore jurisdictions do not require adequate records, as when the ownership of an off-shore corporation is evidenced only by bearer shares or off-shore trust documents reveal the identity of the trustee or the protector, but not the beneficial owners.

Secrecy laws and the culture of secrecy may be impediments to disclosure even where legal mechanisms ostensibly permit disclosure to responsible authorities abroad. In the case of the Bank of Credit and Commerce International (BCCI), which was involved with drug money laundering, the illegal shipment of arms, and bribery of government officials, the majority of money transfers went through BCCI Overseas, chartered in Grand Cayman. When my office sought to subpoena BCCI bank records from the Caymans, we met a stone wall. A BCCI official in New York to whom a grand jury subpoena was issued refused to produce any records, claiming Cayman bank secrecy.

We were told we had to invoke the Mutual Law Enforcement Assistance treaty between the U.S. and Grand Cayman. We did just that and were then told by the Caymans Attorney General that the records would be produced to the Department of Justice but only on the condition that they not be made available by the U.S. government to state and local prosecutors -- including, of course, the New York County District Attorney's office, which had sought them in the first place.

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I note that more than 98% of all criminal prosecutions in the United States are brought by state and local prosecutors.

In the end, we did make some headway, after our relations with the British Serious Frauds Office improved, and the Attorney General of Grand Cayman, a lawyer from the Midlands in England, appointed by Her Majesty's Government, came to my office in New York. As a result of this personal diplomacy, we got some, but not all, of the records we sought.

Sometimes the problems continue even after U.S. authorities get their hands on the evidence. In 1996, the U.S. Department of Justice came into possession of a tape containing computerized records of a defunct Caymans bank, Guardian Bank and Trust Company. The bank was set up by an American and used to launder money for its depositors, 95% of whom were U.S. residents. The official Cayman liquidators of the bank -- two partners in another major world-wide accounting firm -- brought suit in U.S. District Court in New Jersey seeking the return of the computer tape to the Caymans. In their brief, the liquidators argued that disclosure of the contents of the records to, among others, the U.S. Internal Revenue Service would:

> Have a significant negative impact on the integrity, confidentiality, and stability of the financial services industry of the Cayman Islands. . . . The confidence of the offshore financial community in the privacy afforded to legitimate account holders of Cayman Islands offshore banks is at the heart of the Territory's financial services industry and economy, as a whole. . . . Thus, not only would the Bank be irreparably injured by the government's retention of the Tape, but the international bank and Eurocurrency industries of the Cayman Islands (and, indeed, the economy of the Territory), could suffer irreparable injury as well.

After decoding the tape -- without the help of the Caymans government -- authorities discovered that the Guardian Bank's U.S. depositors had $300 million offshore, hidden from tax authorities, litigants and creditors.

Access to off-shore accounts, shell companies and even private banks in tax haven jurisdictions is no longer limited to a small number of sophisticated professional criminals. John Mathewson, who set up Guardian Bank in the Caymans, started out in the construction and home remodeling business in Illinois. Years after opening a numbered Swiss bank account while vacationing in the Caymans, he was persuaded by a Caymans banker to open his own bank. According to Mathewson, his application for a bank license asked for little more than his name, address and previous work history.

In another investigation, my office obtained indictments earlier this year charging a British solicitor and magistrate and a Canadian lawyer, a Queen's Counsel, with establishing a network of shell corporations and bank accounts in bank-secrecy jurisdictions, including Liberia and Belize, to assist their clients in violating securities, banking and tax laws in the jurisdictions where they lived. The defendants paid a Liberian diplomat, among others, to serve as nominal owners of the companies and to sign blank documents used in the fraud. Among the clients of

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this enterprise was a New York plastic surgeon, who, when one of his patients died on the operating table, decided to put his assets off-shore to render himself judgment-proof.

In the debt trading case I spoke about, we found there was a virtual cottage industry in New York and elsewhere in the United States of accountants and lawyers willing to assist in setting up companies in tax haven and secrecy jurisdictions, and willing to serve as agents for the companies or to provide references where required. Similar services are also available through an assortment of financial advisers and financial services companies that advertise in airline magazines and the International Herald Tribune and the Financial Times.

A popular paperback guide by a leading trusts and estates lawyer on how to "die richer" touts the advantages of off-shore Asset Protection Trusts. According to the book, APTs, as they are known, are structured to permit a foreign trustee to ignore U.S. court orders and to simply transfer the trust to another jurisdiction in the face of legal action threatening the trust's assets.

Countless internet sites solicit applications to open bank accounts, purchase shell companies or even establish personal banks off-shore; many take applications by e-mail. According to one web page, a personal bank may be formed in Montenegro "by any natural person or company worldwide with no tiresome background checks." With the bank, the site promises a correspondent account at the Bank of Montenegro and access to the Bank of Montenegro's correspondent network, including Citibank, Commerzbank and Union Bank of Switzerland. While this website may be in need of updating, it illustrates how easy it is today to take advantage of off-shore venues.

Sadly, Mutual Law Enforcement Assistance Treaties (MLATs), where they exist, have not proved to be an answer to the problems associated with off-shore tax and secrecy havens.

As in the BCCI case, countries sometimes withhold meaningful compliance despite the existence of a treaty. In some cases, the existence of an MLAT is even used as a shield to obstruct normal cooperation with law enforcement. In one recent case a financial institution with offices in New York and Switzerland transferred accounts from New York to Switzerland, to conceal the distribution of funds. When we issued a subpoena for the records, the institution insisted that we proceed by way of Treaty.

Where there is compliance under an MLAT, the process is often much too slow to be helpful. It routinely takes a year and often much longer to obtain critical bank records and other evidence. This is a significant problem, especially where funds, as they often are, have been funneled through companies and bank accounts in several jurisdictions, requiring LAT applications to several jurisdictions to trace a single transaction. As time passes, leads dry up, suspects and witnesses disappear and statutes of limitations continue to run.

Finally, the treaties themselves are often inadequate, as when they do not provide for the exchange of information for all tax crimes. As the cases I have cited illustrate, tax crimes are often intertwined with other serious offenses such as securities fraud and bribery. Furthermore, in the early stages of an investigation, when bank records and other documentary evidence may

be all we have to go on, it is often impossible to tell exactly what crimes have been committed. For that reason, treaties which exclude significant offenses, such as tax evasion, can prevent an investigation of serious crimes from ever getting underway.

In part because of the inadequacy of the MLAT procedures, we have had only very limited success in making criminal cases involving tax havens and secrecy jurisdictions. In some cases, like BCCI, we have succeeded by virtue of personal diplomacy, in other cases by fortuitous contact with a sympathetic off-shore official.

But all too often, we just have to get lucky. For example, in the Brazilian debt case, a key witness who had managed the shell companies in Antigua was willing to cooperate because he had relocated to England. We also discovered computer records when we searched the defendant's house. In the Kimes murder case, the defendants happened to keep wire transfers and other bank records in their Lincoln Town Car, which was seized by the police. But law enforcement should not have to rely on diplomacy, a fortuitous personal connection or good luck to make these cases.

There have been signs in some recent cases of real progress toward cooperation in a few formerly uncooperative off- shore jurisdictions. One such case involved Robert Brennan of First Jersey Securities, whom federal law enforcement officials have been pursuing for 25 years for assorted financial crimes. These efforts were unsuccessful until Brennan filed for bankruptcy to avoid a civil judgment the Securities and Exchange Commission won against him in 1995. Brennan had several million dollars concealed in accounts on the Isle of Man which he did not disclose to the bankruptcy court. He also had $22 million in three asset protection trusts, one of which, the Cardinal Trust, he directed to be moved, first to Mauritius and then to the island of Nevis during the course of the bankruptcy proceedings.

In 1999 my office started to deal with authorities on the Isle of Man, to gather evidence in connection with several securities fraud cases we were working on. The Manx authorities were quite helpful, and using available legal processes we were able to obtain evidence against several people, including Brennan. By the spring of 2000, we obtained court orders on the Isle of Man directing one Peter Bond, who managed Brennan's off-shore companies and served as director of one of the corporate trustees, to give evidence; Mr. Bond then agreed to come to the United States and testify. The United States Attorney's Office in New Jersey, using that evidence and other proof convicted Brennan, who is scheduled to be sentenced next week.

The Manx cooperation, like that of Jersey and Guernsey officials in other cases, has been invaluable in bringing criminal charges against American swindlers stealing from Americans. More such cooperation is needed.

But progress in this area has been much too slow; we may even be going backwards. As one off-shore jurisdiction attempts to reform, the bad guys simply look for another -- and they are all too easy to find. Just last week, my office secured indictments in a $6 million fraud in the export of meat products from the United States to Russia, in which a Russian-owned company incorporated in the Island of Niue played an important role. Niue, for those, like me, who are

unfamiliar with it, is a tiny Polynesian atoll with a population of 1800; it is described in the internet literature as a "self-governing territory in free association with New Zealand."

Obviously, there is much work to be done to get the off-shore genie back in the bottle.

I have long maintained that you cannot fight "crime in the streets" without also fighting "crime in the suites," which is to say white-collar crime. To be credible the law must be enforced without fear or favor. To do so, in today's interconnected world, law enforcement in the United States, including state and local prosecutors, needs access to critical evidence wherever it may be physically located. There must be a legal mechanism to require the production of off-shore records on a reasonable and timely basis for all serious crimes, including tax crimes.

Make no mistake about it, tax fraud and evasion are serious crimes. As Justice Oliver Wendell Holmes said, "Taxes are what we pay for a civilized society." We must see to it that everyone pays his or her fair share of the taxes mandated by federal and state legislation. In a democracy such as ours, where we rely largely on voluntary compliance with the tax laws, the tax system must not only be fair, it must be perceived as fair.

Only two days ago, the Financial Times reported a complaint by the deputy speaker of the assembly in the Caymans that, "It's the poor who pay taxes in this country." In the Caymans there are no income, capital gains, corporations, inheritance or sales taxes, but most food is taxed at 20 percent. In a more cynical vein, a notorious New York tax delinquent once observed that "only the little people pay taxes." We cannot afford to allow that cynical view to become accepted wisdom in this country.

Tax havens which rely on bank and corporate secrecy are knowingly assisting customers of theirs to commit tax fraud; lawful tax shelters do not need to be kept secret. We need to make certain that there is a free exchange of accurate information between these nations and the U.S. I am not advocating the indiscriminate disclosure of financial information on a wholesale basis, but rather the disclosure of specified information to appropriate tax and prosecuting authorities where they have reason to request it. That is the same basis on which disclosure of bank information is made to tax authorities and criminal investigators in the U.S.

Of course, it is not only enforcement of the tax laws that requires access to information from abroad. Last year, New York enacted a strong money laundering statute. We need access to off-shore records to make this law effective against the money brokers that service drug dealers and their foreign suppliers and generate cash to bribe Wall Street stockbrokers.

What is at stake here is not just the ability of the police and prosecutors to make a few more criminal cases. Criminal conduct can have far-reaching consequences. In the early 1990's, Venezuelan bankers used as many as 3500 off-shore corporations, in Aruba, Curacao and elsewhere, to loot banks in Venezuela, resulting in the collapse of one-half of the banks in that country, with predictably disastrous effects for the nation's economy.

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The unfairness of allowing some citizens to avoid paying their fair share of taxes erodes confidence in the tax system and the voluntary compliance on which the system is based. In addition, permitting some businesses to gain unfair tax advantages in off-shore venues destroys the level playing field on which our system of free enterprise depends.

The absence of responsible supervision in off-shore jurisdictions also encourages players in the financial markets to engage in reckless behavior which, as the near-collapse of Long Term Capital taught us, will likely have disastrous consequences for our domestic financial institutions and the economy if we do not do something to control such activities. The recent failure of just two such funds, Manhattan Capital and Evergreen Security, Ltd., has cost investors $500 million.

Finally, and perhaps most important, the obvious inequity of a system that allows certain individuals and companies to hide their financial affairs in off-shore havens undermines respect for government and the rule of law.

This is too important a matter to be left to the desultory ways of authorities in these off-shore jurisdictions. The United States, in cooperation with other OECD countries, must explore and implement effective measures to break down the culture of secrecy and obstruction that prevails in the tax havens. Legislation or regulations that made doing business in off-shore jurisdictions less attractive and profitable for U.S. taxpayers might have salutary effects, as would stricter oversight of financial institutions that do business with off-shore entities. In extreme cases, we should consider denying U.S. correspondent banking services to financial institutions in intransigent off-Bhore jurisdictions.

Certainly, more aggressive enforcement of the tax laws against off-shore hedge funds and limited partnerships would be a sound first step to restoring confidence in the fairness of the American tax system. It might even bring some of that $800 billion in the Caymans back to our shores.

APPENDIX B

Tax Havens Identified - June 2000

The O.E.C.D. Committee on Fiscal Affairs identified 35 tax haven jurisdictions that have not cooperated with the organization's two-year global campaign to stamp out harmful tax practices. The blacklisted countries that promote harmful tax competition are:

Andora
Anguilla
Antigua and Barbuda
Aruba
The Bahamas
Bahrain
Barbados
Belize
British Virgin Islands
Cook Islands
Dominica
Gibraltar
Grenada
Guernsey (including Sark and Alderney)
Isle of Man
Jersey
Liberia
Liechtenstein
The Maldives
The Marshall Islands
Monaco
Montserrat
Nauru
The Netherlands Antilles
Niue
Panama
Samoa
The Seychelles
St. Lucia
St. Christopher & Nevis
St. Vincent and the Grenadines
Tonga
Turks & Caicos
U.S. Virgin Islands
Vanuatu.

APPENDIX C

Potentially harmful preferential tax regimes

Insurance

Australia	offshore banking units
Belgium	coordination centers
Finland	Aland captive insurance regime
Italy	Trieste financial service and insurance centers
Ireland	international financial centers
Portugal	(Madeira international business centers
Luxembourg	provisions for fluctuations in reinsurance companies
Sweden	foreign non-life insurance companies

Finance and Leasing

Belgium	coordination centers
Hungary	venture capital centers
Hungary	preferential regime for companies operating abroad
Iceland	international trading companies
Ireland	international financial service centers
Ireland	Shannon airport zones
Italy	Trieste financial services and insurance centers
Luxembourg	finance branch regime
Netherlands	risk reserve regime for international group financing
Netherlands	intra-group financing regime
Netherlands	finance branch regime
Spain	Basque Country and Navarra coordination centers
Switzerland	administrative companies

Fund Management

Greece	mutual fund and portfolio investment companies
Ireland	international financial service centers
Luxembourg	management companies, 1929 holdings
Portugal	Madeira international business centers

Banking

Australia	offshore banking units
Canada	international banking centers
Ireland	international financial service centers
Italy	Trieste financial service centers
Korea	offshore activities of foreign exchange banks
Portugal	external branches in Madeira business centers
Turkey	Istanbul offshore banking regime
Belgium	coordination centers
France	headquarters centers
Germany	monitoring and coordinating centers
Greece	offices of foreign companies
Netherlands	cost-plus rulings

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Portugal	Madeira international business centers
Spain	Basque Country and Navarra coordination centers
Switzerland	administrative companies
Switzerland	service companies

Distribution Activity

Belgium	distribution centers
France	logistic centers
Netherlands	cost-plus and resale minus rulings
Turkey	Turkish free zones

Service Centers

Belgium	service centers
Netherlands	cost-plus rulings

Shipping

Canada	international shipping regime
Germany	international shipping regime
Greece	shipping offices
Greece	shipping regime law 27/75
Italy	international shipping regime
Netherlands	international shipping regime
Norway	international shipping regime
Portugal	international shipping register of Madeira

Miscellaneous Activities

Belgium	ruling on informal capital
Belgium	ruling foreign sales corporation activities
Canada	nonresident-owned investment companies
Netherlands	ruling on foreign sales corporation activities
Netherlands	ruling on informal capital
United States	foreign sales corporation regime

APPENDIX D

MODEL EXCHANGE OF INFORMATION AGREEMENT

II. TEXT OF THE AGREEMENT

MULTILATERAL VERSION

The Parties to this Agreement, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

BILATERAL VERSION

The government of _______ and the government of ______, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

Article 1

Object and Scope of the Agreement

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

Article 2

Jurisdiction

A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes Covered

MULTILATERAL VERSION

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1. This Agreement shall apply:

a) to the following taxes imposed by or on behalf of a Contracting Party:

i) taxes on income or profits;

ii) taxes on capital;

iii) taxes on net wealth;

iv) estate, inheritance or gift taxes;

b) to the taxes in categories referred to in subparagraph a) above, which are imposed by or on behalf of political sub-divisions or local authorities of the Contracting Parties if listed in the instrument of ratification, acceptance or approval.

2. The Contracting Parties, in their instruments of ratification, acceptance or approval, may agree that the Agreement shall also apply to indirect taxes.

3. This Agreement shall also apply to any identical taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

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1. The taxes which are the subject of this Agreement are:

a) in country A, ________________________;

b) in country B, _______________________.

2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

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Article 4

Definitions

MULTILATERAL VERSION

1. For the purposes of this Agreement, unless otherwise defined:

a) the term "Contracting Party" means any party that has deposited an instrument of ratification, acceptance or approval with the depositary;

b) the term "competent authority" means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval;

BILATERAL VERSION

a) the term "Contracting Party" means country A or country B as the context requires;

b) the term "competent authority" means

i) in the case of Country A, _______________;

ii) in the case of Country B, _______________;

c) the term "person" includes an individual, a company and any other body of persons;

d) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

e) the term "publicly traded company" means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold "by the public" if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

f) the term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company;

g) the term "recognised stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties;

h) the term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the

public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed "by the public" if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

i) the term "tax" means any tax to which the Agreement applies;

j) the term "applicant Party" means the Contracting Party requesting information;

k) the term "requested Party" means the Contracting Party requested to provide information;

l) the term "information gathering measures" means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;

m) the term "information" means any fact, statement or record in any form whatever;

n) the term "depositary" means the Secretary-General of the Organization for Economic Co-operation and Development;

This paragraph would not be necessary

o) the term "criminal tax matters" means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;

p) the term " criminal laws" means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 5

Exchange of Information Upon Request

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the

information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

(c) the tax purpose for which the information is sought;

(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party

would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) Confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

Article 6

Tax Examinations Abroad

MULTILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of another Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of a Contracting Party, the competent authority of another Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party. examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first- mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

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BILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of the other Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first- mentioned Party to be present at the appropriate part of a tax examination in the second-mentioned Party. examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first- mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

Article 7

Possibility of Declining a Request

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.

2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

(a) produced for the purposes of seeking or providing legal advice or

(b) produced for the purposes of use in existing or contemplated legal proceedings.

4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).

5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Article 9

Costs

Incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties.

Article 10

Implementation Legislation

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

Article 11

Language

This article may not be required.

Requests for assistance and answers thereto shall be drawn up in English, French or any other language agreed bilaterally between the competent authorities of the Contracting Parties under Article 13.

Article 12

Other International Agreements Or Arrangements

This article may not be required

The possibilities of assistance provided by this Agreement do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting Parties which relate to co-operation in tax matters.

Article 13

Mutual Agreement Procedure

1. Where difficulties or doubts arise between two or more Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities of those Contracting Parties shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of two or more Contracting Parties may mutually agree:

a) on the procedures to be used under Articles 5 and 6;

b) on the language to be used in making and responding to requests in accordance with Article 11.

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reaching agreement under this Article.

4. Any agreement between the competent authorities of two or more Contracting Parties shall be effective only between those Contracting Parties.

4. The paragraph would not be necessary.

5. The Contracting Parties may also agree on other forms of dispute resolution.

Article 14
Depositary's functions

The article would be unnecessary

1. The depositary shall notify all Contracting Parties of:

a. the deposit of any instrument of ratification, acceptance or approval of this Agreement;

b. any date of entry into force of this Agreement in accordance with the provisions of Article 15; 12 c. any notification of termination of this Agreement; d. any other act or notification relating to this Agreement.

2. At the request of one or more of the competent authorities of the Contracting Parties, the depositary may convene a meeting of the competent authorities or their representatives, to discuss significant matters related to interpretation or implementation of the Agreement.

Article 15

Entry into Force

1. This Agreement is subject to ratification, acceptance or approval.

Instruments of ratification, acceptance or approval shall be submitted to the depositary of this Agreement.

1. This Agreement is subject to ratification, acceptance or approval by the Contracting Parties, in accordance with their respective laws. Instruments of ratification, acceptance or approval shall be exchanged as soon as possible.

2. Each Contracting Party shall specify in its instrument of ratification, acceptance or approval vis-a-vis which other party it wishes to be bound by this Agreement. The Agreement shall enter into force only between Contracting Parties that specify each other in their respective instruments of ratification, acceptance or approval.

3. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

For each party depositing an instrument after such entry into force, the Agreement shall enter into force on the 30th day following the deposit of both instruments.

2. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

4. Unless an earlier date is agreed by the Contracting Parties, the provisions of this Agreement shall have effect

- with respect to criminal tax matters for tax able periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;

- with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

In cases addressed in the third sentence of paragraph 3, the Agreement shall take effect for all taxable periods beginning on or after the sixtieth day following entry into force, or where there is no taxable period for all charges to tax arising on or after the sixtieth day following entry into force.

3. The provisions of this Agreement shall have effect:

- with respect to criminal tax matters for taxable periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;

- with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

Article 16

Termination

1. Any Contracting Party may terminate this Agreement vis-a- vis any other Contracting Party by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party. A copy shall be provided to the depositary of the Agreement.

APPENDIX D

1. Either Contracting Party may terminate the Agreement by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the depositary.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.

3. Any Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

3. A Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

In witness whereof, the undersigned, being duly authorised thereto, have signed the Agreement.

APPENDIX E

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS IN RESPECT OF THE NETHERLANDS ANTILLES FOR THE EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

The Government of the United States of America and the Government of the Kingdom of the Netherlands in respect of the Netherlands Antilles;

Considering that it is more important than ever not to allow the institutions in either jurisdiction to be used to further illicit financial activity of any kind and recognizing the critical importance of sharing information with one another to prevent abuse of their respective fiscal laws; and

Therefore, desiring to cooperate to prevent financial crimes and combat terrorism, including through the sharing of information, and to conclude an Agreement for the exchange of information with respect to taxes (hereinafter referred to as the "Agreement");

Have agreed as follows:

Article 1
Object and Scope of the Agreement

1. The Contracting States shall assist each other to assure the accurate assessment and collection of taxes, to prevent fiscal fraud and evasion, and to develop improved information sources for tax matters. The Contracting States shall provide assistance through exchange of information authorized pursuant to Article 4 and such related measures as may be agreed upon by the competent authorities pursuant to Article 5.

2. Information shall be exchanged to fulfill the purpose of this Agreement without regard to whether the person to whom the information relates is, or whether the information is held by, a resident or national of a Contracting State, provided that the information is present within the territory, or in the possession or control of a person subject to the jurisdiction, of the requested State.

3. As regards the Kingdom of the Netherlands, this Agreement shall apply only to the Netherlands Antilles.

APPENDIX E

Article 2
Taxes Covered by the Agreement

1. This Agreement shall apply to the following taxes imposed by or on behalf of a Contracting State:

a) in the case of the United States of America, all federal taxes;

b) in the case of the Netherlands Antilles, the following taxes: the income tax inkomstenbelasting), the wages tax (loonbelasting), the profit tax (winstbelasting) and the surtaxes on the income and profit taxes (hereinafter referred to as "Netherlands Antilles taxes").

2. This Agreement shall apply also to any identical or substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. The competent authority of each Contracting State shall notify the other of changes in laws which may affect the obligations of that State pursuant to this Agreement.

3. This Agreement shall not apply to the extent that an action or proceeding concerning taxes covered by this Agreement is barred by the applicant State's statute of limitations.

4. This Agreement shall not apply to taxes imposed by states, municipalities or other political subdivisions, or possessions of a Contracting State.

Article 3
Definitions

1. In this Agreement, unless otherwise defined:

a) The term "competent authority" means:

(i) in the case of the United States of America, the Secretary of the Treasury or his delegate; and

(ii) in the case of the Netherlands Antilles, the Minister of Finance or his authorized representative;

b) The term "Contracting State" means the United States or the Kingdom of the Netherlands in respect of the Netherlands Antilles as the context requires;

c) The term "national" means:

(i) in the case of the United States, any United States citizen and any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws in force in the United States; and

(ii) in the case of the Netherlands Antilles, an individual who has Dutch nationality and who would be eligible to vote in the Netherlands Antilles if he were of age and present in the Netherlands Antilles, provided however, if an individual is not present in the Netherlands Antilles, he must have either been born in the Netherlands Antilles or have been resident thereof for at least five years;

d) The term "person" includes an individual and a partnership, corporation, trust, estate, association or other legal entity;

e) The term "tax" means any tax to which the Agreement applies;

f) The term "information" means any fact or statement, in any form whatever, that may be relevant or material to tax administration and enforcement, including (but not limited to):

(i) testimony of an individual; and

(ii) documents, records or tangible property of a person or Contracting State;

g) The terms "applicant State" and "requested State" mean, respectively, the Contracting State applying for or receiving information and the Contracting State providing or requested to provide such information;

h) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term "United States" means the United States of America, including Puerto Rico, the Virgin Islands, Guam, and any other United States possession or territory;

i) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term "Netherlands Antilles" means that part of the Kingdom of the Netherlands that is situated in the Caribbean area and consisting of the Island Territories of Bonaire, Curacao, Saba, St. Eustatius and St. Maarten (Dutch part).

2. Any term not defined in this Agreement, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 5, shall have the meaning which it has under the laws of the Contracting State relating to the taxes which are the subject of this Agreement.

Article 4
Exchange of Information

1. The competent authorities of the Contracting States shall exchange information to administer and enforce the domestic laws of the Contracting States concerning taxes covered by this Agreement, including information to effect the determination,

assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or crimes involving the contravention of tax administration.

2. The competent authority of the requested State shall provide information upon request by the competent authority of the applicant State for the purposes referred to in paragraph 1. If the information available in the tax files of the requested State is not sufficient to enable compliance with the request, that State shall take all relevant measures, including compulsory measures, to provide the applicant State with the information requested.

a) The requested State shall have the authority to:

(i) examine any books, papers, records, or other tangible property which may be relevant or material to such inquiry;

(ii) question any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry;

(iii) compel any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry to appear at a stated time and place and testify under oath and produce books, papers, records, or other tangible property;

(iv) take such testimony of any individual under oath.

b) Privileges under the laws or practices of the applicant State shall not apply in the execution of a request but shall be preserved for resolution by the applicant State.

3. The requested State shall provide information requested pursuant to the provisions of this Article regardless of whether the requested State needs such information for purposes of its own taxes. Moreover, if specifically requested by the competent authority of the applicant State, the requested State shall:

a) specify the time and place for the taking of testimony or the production of books, papers, records, and other tangible property;

b) place the individual giving testimony or producing books, papers, records and other tangible property under oath;

c) permit the presence of individuals designated by the competent authority of the applicant State as being involved in or affected by execution of the request, including an accused, counsel for the accused, individuals charged with the administration and enforcement of domestic laws of the applicant State covered by this Agreement, and a commissioner or magistrate present for the purpose of rendering evidentiary rulings or determining issues of privilege under the laws of the applicant State;

d) provide individuals permitted to be present with an opportunity to question, directly or through the executing authority, the individual giving testimony or producing books, papers, records and other tangible property;

e) secure original and unedited books, papers, and records, and other tangible property;

f) secure or produce true and correct copies of original and unedited books, papers and records;

g) determine the authenticity of books, papers, records and other tangible property produced;

h) examine the individual producing books, papers, records and other tangible property regarding the purpose for which and the manner in which the item produced is or was maintained;

i) permit the competent authority of the applicant State to provide written questions to which the individual producing books, papers, records and other tangible property is to respond regarding the item produced;

j) perform any other act not in violation of the laws or at variance with the administrative practice of the requested State;

k) certify either that procedures requested by the competent authority of the applicant State were followed or that the procedures requested could not be followed, with an explanation of the deviation and the reason therefor.

4. The provisions of the preceding paragraphs shall not be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that State or of the other Contracting State;

b) to supply particular items of information which are not obtainable under the laws or in the normal course of the administration of that State or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process;

d) to supply information, the disclosure of which would be contrary to public policy;

e) to supply information requested by the applicant State to administer or enforce a provision of the tax law of the applicant State, or any requirement connected therewith, which discriminates against a national of the requested State. A provision of tax law, or connected requirement, will be considered to be discriminatory against a national of the requested State if it is more burdensome with respect to a national of the requested State than with respect to a national of the applicant State in the same circumstances. For purposes of the preceding sentence, a national of the applicant State who is subject to tax on worldwide income is not in the same circumstances as a national of the requested State who is not subject to tax on worldwide income. The provisions of this subparagraph shall not be construed so as to prevent the exchange of information with respect to the taxes imposed by the United States on branch profits or on the premium income of nonresident insurers or foreign insurance companies or any similar such taxes imposed by the Netherlands Antilles in the future;

f) notwithstanding subparagraphs (a) though (e) of this paragraph, the requested State shall have the authority to obtain and provide, through its competent authority, information held by financial institutions, nominees, or persons acting in agency or fiduciary capacity (not including information that would reveal confidential communications between a client and an attorney, solicitor or other legal representative where the client seeks legal advice), or information respecting ownership interests in a person.

5. Except as provided in paragraph 4, the provisions of the preceding paragraphs shall be construed so as to impose on a Contracting State the obligation to use all legal means and its best efforts to execute a request. A Contracting State may, in its discretion, take measures to obtain and transmit to the other State information which, pursuant to paragraph 4, it has no obligation to transmit.

6. The competent authority of the requested State shall allow representatives of the applicant State to enter the requested State to interview individuals and examine books and records with the consent of the individuals contacted.

7. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to individuals or authorities (including judicial and administrative bodies) involved in the determination, assessment, collection, and administration of, the recovery and collection of claims derived from, the enforcement or prosecution in respect of, or the determination of appeals in respect of, the taxes which are the subject of this Agreement, or the oversight of the above. Such individuals or authorities shall use the information only for such purposes. These individuals or authorities may disclose the information in public court proceedings or in judicial decisions.

Article 5
Mutual Agreement Procedure

1. The competent authorities of the Contracting States shall agree to implement a program to carry out the purposes of this Agreement. This program may include, in addition to exchanges specified in Article 4, other measures to improve tax compliance, such as exchanges of technical know-how, development of new audit techniques, identification of new areas of non-compliance, and joint studies of non-compliance areas.

2. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. In particular, the competent authorities may agree to a common meaning of a term, and may determine when costs are extraordinary for purposes of Article 6.

3. The competent authorities of the Contracting States may communicate with each other directly for the purposes of reaching an agreement under this Article.

Article 6
Costs

Unless the competent authorities of the Contracting States otherwise agree, ordinary costs incurred in providing assistance shall be borne by the requested State and extraordinary costs incurred in providing assistance shall be borne by the applicant State.

Article 7
Implementation

A Contracting State shall enact such legislation as may be necessary to effectuate this Agreement.

Article 8
Entry Into Force

This Agreement shall enter into force upon an exchange of notes between the Contracting States confirming that each has completed the necessary internal domestic procedures to bring the Agreement into force; provided, however, that this Agreement shall not enter into force before January 1, 2004.

Article 9
Termination

This Agreement shall remain in force until terminated by one of the Contracting States. Either Contracting State may terminate the Agreement at any time after the Agreement

enters into force provided that at least three months prior notice of termination has been given through diplomatic channels.

Done at Washington, in duplicate, this 17th day of April, 2002.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS IN RESPECT OF THE NETHERLANDS ANTILLES: