

TOWARDS A LEVEL PLAYING FIELD

REGULATING CORPORATE VEHICLES IN CROSS-BORDER TRANSACTIONS

REQUEST FOR COMMENTS

The Organisation for Cooperation and Development (OECD) tabled a report entitled *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* in November 2001. The Report calls on governments and regulatory authorities to ensure they are able to obtain information on the beneficial ownership and control of “corporate vehicles” (broadly defined) in order to combat their misuse for illicit purposes.

The International Tax and Investment Organisation (ITIO) and the Society of Trust and Estate Practitioners (STEP) commissioned Stikeman Elliott to conduct a Review in order to provide constructive comments on the current process for the development of regulatory frameworks for the control and transparency of corporate vehicles.

The OECD’s report was prepared without the participation of non-OECD member states and was largely (and arguably inappropriately) focused on corporate vehicles established in such non-member states.

The ITIO/STEP Review published here in draft form considers the restrictions proposed on the flexibility of the corporate form in a more universal context, in order to provide a broader and more objective basis for policy formulation.

In order to provide a transparency not found in previously published materials, the Review undertook a unique and comprehensive benchmarking review of the regulation of corporations, trusts and limited partnerships in fifteen OECD and non-OECD countries. These are attached to the Review as appendices.

Interested parties are encouraged to express their views on this draft Review before final publication. Comments are invited by 30 August 2002. They should be sent to comments@itio.org.

DRAFT: 17 July 2002

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REGULATING CORPORATE VEHICLES IN CROSS-BORDER TRANSACTIONS

a review commissioned by the

INTERNATIONAL TAX AND INVESTMENT ORGANISATION

and the

SOCIETY OF TRUST AND ESTATE PRACTITIONERS

conducted by

STIKEMAN ELLIOTT

International Tax and Investment Organisation

The International Tax and Investment Organisation (ITIO) was established in March 2001 as a forum in which small and developing economies (SDEs) work on an equal basis and speak with a common voice. The ITIO aims to help members contribute more effectively to the ongoing debate on international tax and investment measures and to ensure that economic development implications for SDEs are taken into account in international fora.

The ITIO places SDEs' demands for a level playing field at the core of its activities.

The ITIO's objectives are to:

- strengthen international cooperation amongst SDEs in taxation and investment matters relating to both goods and services;
- assist SDEs to interface with international organisations to achieve this end;
- develop positions with respect to taxation and investment matters that affect the interests of SDEs;
- consider the development implications of international tax and investment initiatives and respond to initiatives which place SDEs at a competitive disadvantage; and
- facilitate the sharing of knowledge and best practice more effectively amongst SDEs.

Members currently comprise Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, Cook Islands, Malaysia, St Kitts & Nevis, St Lucia, Turks & Caicos Islands and Vanuatu. The Commonwealth Secretariat, Pacific Islands Forum Secretariat, CARICOM Secretariat, Caribbean Development Bank and Eastern Caribbean Development Bank have been granted formal observer status.

Society of Trust and Estate Practitioners (STEP)

The Society of Trust and Estate Practitioners (STEP) is the professional body for the trust and estate profession worldwide.

STEP Members come from the legal, accountancy, corporate trust, banking, insurance and related professions, and are involved at all levels in the planning, creation and management of, and accounting for, trusts and estates, executorship, administration and related taxes.

STEP has over 8,000 Members. STEP is well established internationally, with substantial numbers of Members based throughout the world. Members from other jurisdictions are welcome if they meet the qualification requirements.

STEP has branches in the following jurisdictions:

Anguilla	Australia	Bahamas
Barbados	Bermuda	British Virgin Islands
Canada	Cayman Islands	Cyprus
England & Wales	France	Gibraltar
Guernsey	Hong Kong	Ireland
Isle of Man	Israel	Italy
Jersey	Liechtenstein	Monaco
Scotland	Singapore	South Africa
Switzerland	Turks & Caicos Islands	

Stikeman Elliott

Stikeman Elliott is a Canadian law firm with offices in North America, Asia, Australia and Europe. Stikeman Elliott conducts a broad corporate and commercial law practice including private sector and government consultancy on international taxation, banking and securities regulation.

The Private Capital Group in the London Office specialises in cross-border estate planning and commercial aspects of international private banking. The Group has advised governments, financial institutions and private clients on the supranational initiatives arising from the OECD, FATF, IMF, FSF and EU.

Members of the Stikeman Elliott team involved in this review were:

Richard Hay, International Tax Partner and Head of the Private Capital Group, admitted to practice in Ontario, New York and England & Wales;

Jeffrey Keey, Corporate Partner, admitted to practice in England & Wales;

Leigh Nicoll, admitted to practice in New Zealand;

Robert Reymond, Associate admitted to practice in Quebec; and

Heather Tibbo, Associate admitted to practice in Jersey and in England & Wales.

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No quality financial centre- or professional firm- wants to be involved with terrorism, money laundering or serious crime. ITIO and STEP seek a broadly inclusive dialogue leading to universal application of appropriate and reasonable regulation to all international financial centres to ensure interdiction of such criminal activity. Consumers, professionals and international financial centres should accept regulation that permits reasonable transparency for law enforcement purposes, provided such regulation respects legitimate privacy and the entitlement of all jurisdictions to offer financial services on a competitive basis.

EXECUTIVE SUMMARY

The trade in services is a rapidly expanding component of global trade. Achieving fair trade in services which does not further marginalize small and developing countries requires the establishment of a level playing field in respect of the implementation of a broad range of regulations, with no special carve outs for regulatory or tax related trade rules. This in turn requires that all affected countries agree and make identical, specifically enumerated commitments to change regulations in a functionally equivalent manner, on the same timetable, and subject to the same consequences for non-performance. Otherwise trade will simply migrate to the jurisdiction with the most lax regulatory regime and perhaps out of the hands of reputable and professional practitioners.

At present jurisdictions regulate trade in services in a manner which they deem appropriate to the risks and benefits associated with this trade. By way of example, each of the ITIO and OECD Member States have developed and applied regulatory regimes within their respective financial services industries that take into consideration the competitive positions of their domestic financial services industries. These regulatory regimes are not identical nor are they even similar in many regards.

Over the past five years the Member States of the Organisation for Economic Cooperation and Development (OECD) and the dominant groupings within the OECD have shifted their focus in relation to regulation and competition in the trade in financial services. The major developed nations in the world are currently sponsoring selective reviews of the global market for financial services which are being conducted by multilateral organisations in which they are members. The object of these reviews is to shape the framework for the global regulation of financial services within the context of the rules for the cross-border trade in services.

The OECD released a report on the misuse of corporate vehicles entitled, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* on 27 November 2001 (the “MCV Report”). The MCV Report proposes increased disclosure and regulation to ensure governments have access to and are able to exchange beneficial ownership information relating to corporate vehicles. For the purposes of the MCV Report “corporate vehicles” are defined to include trusts, foundations and partnerships. While the SDEs and industry professionals concur with the objective of eliminating the misuse of corporate vehicles, they are concerned that the proposals advanced by the OECD will firstly not meet the stated objective and secondly, will have unwarranted adverse effects on many market participants.

This paper reviews concerns arising from recent OECD regulatory proposals including the potential of these proposals to encourage the creation of non-tariff barriers to the trade in international financial services.

The OECD proposes to rely on the MCV Report for its own policy formulation and notes interest in the same report by closely related organizations such as the FATF, FSF and the European Union (EU), as a foundation for their further work in regulating financial markets. The MCV Report has potentially significant implications for various initiatives affecting many jurisdictions, institutions and clients involved in cross-border financial services. If fully implemented, the MCV Report also foreshadows profound changes in norms for personal financial privacy.

The MCV Report focuses on “offshore” financial centres, none of which are members of the OECD, on the alleged bases that: (i) some “offshore” financial centres (OFCs) are perceived to provide “excessive secrecy” and “create a favourable environment” for the misuse of such vehicles; (ii) “shell” companies are established disproportionately in the offshore world; and (iii) recent improvements in some OFCs’ regimes may provide models for other OFCs.

This restricted focus is discriminatory and inconsistent with the stated objectives of the MCV Report. It is also inappropriate given the disparate regulatory regimes of OECD Member States and the fact that OECD Member Countries already control approximately 80% of the global trade in financial services provided to non-residents. Furthermore, the narrow focus meant that the OECD failed to give adequate consideration to corporate vehicles established in OECD Member Countries which are, by the OECD’s own criteria, vulnerable to misuse - e.g. Delaware limited liability companies and trusts administered in Switzerland. Accordingly, the MCV Report is unlikely to assist in achieving the level playing field that the OECD claims to seek in changing regulation of financial services.

Non-OECD jurisdictions did not participate in preparation of the MCV Report. Such less developed jurisdictions are concerned with any process in which an organisation such as the OECD which represents the interests of an elite stratum of the global community purports to be an international standard setter in matters pertaining to the regulation of international financial services in which their own member countries have a significant commercial interest. Neither has there been any dialogue between the OECD and

industry. It is difficult to think of any other industry which has faced such enormous upheaval without ever being consulted.

The goal of the Level Playing Field Review is to provide a broader and more objective basis for policy formulation and implementation by examining, using OECD criteria, a broad cross section of countries representative of the jurisdictional participants in the provision of cross-border financial services.

Empirical benchmarking conducted in the course of preparing this Review and appearing in Appendices C-E, show that the regulatory environments in OECD Member States with significant “offshore” financial sectors generally lag regulatory developments in the leading non-OECD international financial centres. The OECD’s suggestions that non-OECD “offshore centres” should be the focus of attention are seen as indicative of an unreformed process which continues to demonstrate undue deference to the political and commercial sensitivities of their own member group.

Non-OECD international financial centres (“Non-OECD IFCs”) acknowledge the importance of the principal concerns noted by the OECD, namely preventing the misuse of corporate vehicles for illicit purposes including money laundering, bribery and corruption. Non-OECD IFCs also support efforts to ensure that all countries engaged in the provision of cross-border financial services carry an obligation to adopt effective regulations to interdict financial crimes and other illicit activities.

The need to provide information to support cross-border enforcement of tax liabilities is less self-evident, however, as historically countries have not provided unilateral assistance to other jurisdictions to enforce tax liabilities. Non-OECD IFCs accept, however, that tax information exchange proposals are evolving and are willing to participate in the process of setting new standards.

Part III of the MCV Report presents a menu of possible options to facilitate tracking and sharing of beneficial ownership information. The options are: (1) up front disclosure to the authorities; (2) requiring corporate service providers to maintain beneficial ownership and control information; and (3) primary reliance on an investigative system. The OECD proposes that the option to be adopted by a particular jurisdiction would depend on the quality of the legal infrastructure in the jurisdiction concerned.

Non-OECD states are concerned that the OECD’s proposals may pave the way for prescribing different non-tariff trade rules for small and developing economies than for the OECD Member States which controlled preparation of the MCV Report. The approach suggested in the MCV Report could create non-tariff barriers to the trade in financial services, disguised as regulatory standards specific to non-OECD Member States. Discriminatory standards might effectively disable participation by small states in the global market for services, including the market for mobile and tax-neutral financial services.

Non-OECD IFCs agree that in order to effectively combat transnational crime, information on beneficial ownership and control must be available to authorities within

the jurisdiction where the corporate vehicle is established through means appropriate in the particular jurisdictional context and that this information must be available for exchange.

The design of new rules to facilitate cross-border exchange of information necessary to combat transnational crime must be created in an appropriate process. A legitimate process for creating new rules must include the following elements:

- discussion of issues in a *universal* forum;
- appropriate regard to competing considerations, such as reasonable privacy; and
- establishment of a level playing field (i.e. all countries must be subject to the same rules for any given activity, implemented on the same timetable with the same consequences for non-co-operation).

The International Tax and Investment Organisation (ITIO) is a group of 13 small and developing economies created in March 2001 to promote a more balanced debate of the international initiatives and to help form a common response to global tax and investment challenges. The Society of Trust and Estate Practitioners (STEP) is the professional body for the trust and estate profession worldwide. Stikeman Elliott is a leading Canadian law firm with offices in North America, Asia, Australia and Europe engaged in a broad practice including the provision of advice to private sector and government clients on international banking and securities regulation. ITIO and STEP decided to produce a response to the OECD Report and instructed Stikeman Elliott to research and author this Review to voice the concerns of smaller jurisdictions and the international estate planning community in the evolving consideration of the OECD's proposed changes (the "Level Playing Field Review").

INTRODUCTION

A. *Purpose of This Review*

This paper (the “Level Playing Field Review”) considers the concerns of some of the smaller and developing jurisdictions in the evolving consideration of proposed changes in global rules for financial regulation as a component in the design of rules for the conduct of international trade in services. These concerns include those of the “international trust and estate planning profession” which are based in both OECD and non-OECD Member States.

Many small and developing countries are concerned by recent proposals, originating within the OECD and the dominant groupings within that organization, relating to potential non-tariff barriers to the trade in international financial services and also the manner in which these proposals came into being. Trust and estate professionals in non-OECD states are concerned that they will be placed at a competitive disadvantage by working in a regulatory environment which is more onerous than non-OECD states. Conversely professionals in OECD states recognize the right of non-OECD citizens to work in competitive environments. They are concerned that when OECD Governments commit to the principle of a level playing field, they will not be in a position to reject the unduly onerous regulation projected onto others.

OECD membership is restricted to rich, developed nations yet it purports to be an international standard-setter in matters pertaining to the development of new standards for the regulation of global financial services. Their own member countries have a significant commercial interest in the competitive aspects of the global regulatory framework. Small and developing economies are concerned with this process for change.

This Level Playing Field Review establishes an empirical foundation for substantiating and documenting the grounds for these concerns. This review adopts the OECD’s criteria and surveys the regulation of “corporate vehicles” (broadly defined) in both OECD and non-OECD jurisdictions. (The scope of “corporate vehicles” as a collective term used to include corporations, partnerships, trusts and foundations by the OECD in the MCV Report is not agreed, but adopted throughout this Review for ease of reference, unless otherwise stated.) Using this empirical data this paper assesses the validity of the assumptions, scope and conclusions of the OECD Report entitled, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*.

The goal of this Level Playing Field Review is to provide a constructive contribution to the debate regarding both the processes used in the development of regulatory frameworks and on the regulation of corporate vehicles in the context of the current negotiations regarding the cross-border trade in services including financial services. Against this backdrop, this Review considers the regulation and restrictions proposed on the flexibility of the corporate form in order to provide a broader and more objective basis for policy formulation.

B. Background to This Review

(i) OECD Report on Using Corporate Entities for Illicit Purposes

The increasing globalization of the financial services sector has given rise to new requirements for wide-ranging agreements covering the cross-border trade in such services. The majority of multilateral processes in this regard are being conducted in international fora such as the World Trade Organization and in the context of regional trade arrangements. Other less apparent efforts to shape the global framework for the evolution in the trade in services are also in process.

The major developed nations in the world are engaged in sponsoring wide ranging reviews of the global market for financial services as a particularly important segment of the overall trade in services. These reviews involve non-inclusive multilateral organisations such as the Organisation for Economic Co-operation and Development (OECD), the Financial Action Task Force (FATF), and the Financial Stability Forum (FSF) which derive funding and membership exclusively from developed economies. The FSF, established by representatives of these same member states to look at particular aspects of the cross-border trade in financial services, is also participating as is the International Monetary Fund (IMF) at the behest of the same constituency.

The OECD authored and tabled a report entitled *Report on the Misuse of Corporate Vehicles for Illicit Purposes* in May 2001. The Report opens ways to further prevent and combat the misuse of corporate vehicles and calls on governments and other relevant authorities to ensure they are able to obtain information on the beneficial ownership and control of corporate vehicles in order to combat their misuse for illicit purposes.¹ The MCV Report, which utilized a largely anecdotal, non-introspective and non-benchmarked approach rather than any form of scholarly research methodology, was endorsed by the Finance Ministers of G-7 countries, a subset of OECD membership, in July 2001 and re-released on 27 November 2001 under the title *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (the “MCV Report”).

The OECD chose to direct attention away from its Member States and hence adopted an express focus on corporate vehicles established in a select group of competitor “offshore” jurisdictions, none of which are members of the OECD. Had the OECD chosen to utilise any recognised research methodology and had it established greater transparency, a more broad scope and sought wider input, its conclusions would no doubt have been much different.

Despite the limitations noted, the OECD proposes to rely on the MCV Report for their own policy formulation and notes interest in the report from closely related organizations such as the FATF, FSF and the European Union (EU) as a foundation for their further work in regulating financial markets. As these organisations seek to vigorously promote their interests and policies outside their memberships, the MCV Report has potentially significant implications for various initiatives affecting many jurisdictions, institutions

¹ www.oecd.org

and clients involved in cross-border financial services. If fully implemented, the MCV Report also foreshadows profound changes in norms for personal financial privacy.

(ii) *The Corporate Form In Global Commerce*

The corporation is one of the basic building blocks of the modern commercial world. In the international financial services context corporations and other vehicles assimilated to corporate vehicles by the MCV Report are used to facilitate the following legitimate objectives:

- cross-border investment by multinationals;
- the establishment and administration of mutual fund companies and trusts;
- structured debt and special purpose vehicles to support capital markets transactions;
- structures for the management of political and personal risk;
- special purpose vehicles for securitisations;
- insurance and reinsurance products;
- international employee stock option plans;
- deferred compensation and pension plans;
- international tax and estate planning; and
- shipping and aircraft financing structures.

The OECD also acknowledges there are many legitimate commercial activities undertaken by corporations in the “offshore” context including “holding intellectual property, engaging in international trading activities, legally obtaining the benefits of tax treaties, and serving as a holding company”.²

The OECD also notes that the trust – treated as a corporate vehicle for purposes of the MCV Report - is an “important, useful, and legitimate vehicle for the transfer and management of assets”.³ Trusts are used to facilitate control and management of assets given to minors and individuals who are incapacitated, for charitable purposes, for estate planning and for structuring corporate transactions.

(iii) *OECD Proposals Set Out in the MCV Report*

The MCV Report proposes that the misuse of corporate vehicles be combated through maintaining and sharing information on beneficial ownership and control through alternative mechanisms with non-uniform compliance burdens as follows:

- “upfront” disclosure to public authorities;
- the holding of information by intermediaries; or
- the use of an investigative system to obtain information when, or if, needed.

² The MCV Report at page 24.

³ The MCV Report at page 25.

The MCV Report suggests that the regulatory mechanism and thus the compliance burden considered appropriate for a particular jurisdiction should be related to a vague and highly subjective assessment of the quality of the legal infrastructure in the jurisdiction concerned, as well as a subjective assessment of the history of enforcement and co-operation.

Non-OECD Member States, while agreeing with the need to prevent the misuse of corporate vehicles are concerned that the vague and subjective approach proposed in the MCV Report is likely to be ineffective and may pave the way for prescribing different and more onerous non-tariff trade rules for small and developing economies than for the OECD Member States which controlled preparation of the MCV Report. Specifically, the subjective approach suggested in the MCV Report could be used to justify the creation of non-tariff barriers to the trade in financial services, disguised as regulatory standards specific to non-OECD Member States. Adoption of discriminatory standards could effectively disable participation by small states in the global market for services including the market for mobile and tax-neutral financial services.

This process appears to be already underway. On 30 May 2002 the FATF, an organization closely related to the OECD, released a consultation paper which imports aspects of the OECD's MCV Report analysis into the money laundering and anti-terrorism context. In addition, the OECD Steering Group on Corporate Governance plans to release a follow-up to the MCV Report in the second quarter of 2002. This follow-up aims to concretise the menu of policy options in the MCV Report by developing a subjective template that would facilitate the determination of which of the three regulatory options would apply to certain countries and how effective their implementation has been in practice.⁴

(iv) *Non-OECD IFC Recognition of the OECD's Reasonable Concerns*

Non-OECD International Financial Centres ("Non-OECD IFCs") acknowledge the importance of the substantive concerns noted by the OECD in the MCV Report. Similarly, non-OECD IFCs support efforts to ensure that all countries offering platforms for the conduct of cross-border financial services carry an obligation to adopt effective regulation to interdict financial crimes and other illicit activities including money laundering and the financing of terrorism.⁵ The need to provide information to support cross-border enforcement of tax liabilities is less self-evident, however, as there is no precedent in international law for the imposition of unilateral obligations on countries to assist other jurisdictions to enforce tax liabilities. Proposals for changing practices in the tax information exchange area are accordingly novel, and require careful consideration.

⁴ Note by the FSF Secretariat regarding "Ongoing and Recent Work Relevant to Sound Financial Systems" (25-26 March 2002 FSF Meeting).

⁵ The OECD purports to aim to combat the use of corporate vehicles for illicit purposes which includes "money laundering, bribery/corruption, hiding and shielding assets from creditors, illicit tax practices, self-dealing/defrauding assets/diversion of assets, market fraud and circumvention of disclosure requirements, and other forms of illicit behaviour" (MCV Report at page 7).

Non-OECD IFCs acknowledge that nonetheless conventional rules for information exchange for tax proposals are evolving, and small and developing countries are willing to participate in the process of setting new policy and standards.

Non-OECD IFCs agree that in order to effectively combat transnational crime, information on beneficial ownership and control must be obtainable by authorities within the jurisdiction in which corporate vehicles are established, through means appropriate within the particular jurisdictional context. Non-OECD IFCs concur that this information must be subject to exchange in agreed circumstances. However, the design of new rules to facilitate cross-border exchange of information must evolve through a consensual process including the following elements:

- discussion of issues in a universal forum which includes all jurisdictions offering facilities that may be affected by the outcome;
- appropriate regard to competing considerations, such as reasonable financial privacy; and
- establishment of a level playing field (i.e. all countries must be subject to the same rules for the same activities, implemented on the same timetable and with the same consequences for non-co-operation).

In summary, small and developing countries including non-OECD IFCs, are sympathetic to the OECD's stated goal of combating transnational crime. Discrimination is not the solution however. Fairness requires reliance on a legitimate process in determining and realising the crime prevention goal of the OECD and the non-OECD IFCs alike in this exercise.

C. Overview of International Organisations

Memberships of the relevant international organisations described below are set out in Appendix A.

(i) Organisation for Economic Co-operation and Development (OECD)

The OECD is an international organisation with 30 member countries, including all members of the G7 and EU, sharing a stated commitment to democratic government and the market economy.⁶ The OECD assists member governments to address the economic, social and governance challenges of a globalised economy.⁷ It is also an organisation designed, and operating to promote the competitive interests of its Member States.

⁶ www.oecd.org.

⁷ Historically the research units within the OECD have made significant contributions particularly in the area of economics. It appears that neither these research units nor the sound methodology which they normally adopt, were involved in the production of the MCV Report.

(ii) *Financial Action Task Force (FATF)*

The FATF, a G7 chartered agency housed in the OECD's offices in Paris, and sharing the same letterhead as the OECD, was established in 1989. The FATF has 28 member countries largely overlapping with that of the OECD.⁸ Its primary role has been to establish standards relating to money laundering laws and practices and work to implement these standards throughout the world. The FATF has assumed a broadened mandate to combat terrorism following the attacks in the U.S.

Like the OECD, the FATF has restricted membership. Regional bodies such as the Caribbean Financial Action Task Force⁹ support the work of the FATF. Although such regional bodies facilitate input from non-FATF members at a lower level, these groupings are "junior partners" in the processes undertaken by the FATF.

(iii) *Financial Stability Forum (FSF)*

The FSF is a recently formed organisation which, like the FATF, was also established pursuant to a G7 initiative. At its inaugural meeting on 14 April 1999, the FSF established a so-called "OFC" (Offshore Finance Centre) working group. The purpose of this group was to consider any potential role of financial institutions in non-OECD countries in the stability of the world's financial system.

The FSF is primarily made up of OECD states and includes in its membership Australia, Canada, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Singapore, the United Kingdom and the United States. Although the initial report of the FSF admitted great difficulty in distinguishing so-called "offshore activity" within the major developed states from that in smaller and developing states, and despite the fact that it concluded that there was no evidence that non-OECD IFCs had played any role in global financial instability¹⁰ the FSF's focus in regard to non-OECD IFCs is now being continued at the behest of the G7 by the International Monetary Fund (IMF). The IMF is now conducting assessments of non-OECD IFCs, in part using discriminatory assessment criteria in the sensitive area of corporate and trust service providers, which the IMF does not apply to assessments of OECD States. Switzerland, which is an OECD and FATF Member, has publicly and quite properly criticised the FSF process on the basis that,

"the (FSF) list was drawn up in a non-transparent manner and

⁸ For a full list of FATF member countries see Appendix A.

⁹ Members of CFATF comprise Anguilla, Antigua and Barbuda, Aruba, The Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Costa Rica, Dominican Republic, Dominica, Grenada, Jamaica, Montserrat, Netherlands, Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Turks and Caicos Islands and Venezuela.

¹⁰ FSF, *Report of the Working Group on Offshore Centres*, 5 April 2000 at page 19.

does not list several financial centres with a high proportion of international financial business (e.g. New York, London) as Offshore Financial Centres.”¹¹

(iv) International Monetary Fund (IMF)

The IMF is an international organisation of 183 countries, established to promote international monetary co-operation, exchange stability, and orderly exchange agreements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments adjustment.¹² The voting rights of the G7, OECD and other members of the IMF, which are set by economic contribution to the IMF, are set out in Appendix A.

(v) Links between Supranational Organisations

As can be seen from Appendix A there is significant commonality of membership of supranational organisations seeking to control the regulation of international financial services. Essentially, with the exception of the ITIO which is composed of, and funded by, small and developing economies, the organisations are the same developed countries operating in different forms.

The similarity of composition and the complementary interlocking programmes of these organisations are perceived by SDEs as suggesting a single agenda, that of the major developed countries. Accordingly, when one supranational body provides a recommendation or suggested course of action, endorsement from another organisation is, in substance, endorsement by the same states. It is not an impartial validation as the process may imply to those unfamiliar with the overlapping memberships between such organisations.

D. *Authors and Contributors to The Level Playing Field Review*

(i) Stikeman Elliott

Stikeman Elliott has offices in North America, Asia, Australia and Europe. Stikeman Elliott is engaged in a broad corporate and commercial law practice including private sector and government consultancy on international taxation banking and securities regulation.

The Private Capital Group in the London Office specialises in cross-border estate planning and commercial aspects of international private banking. The Group has advised governments, financial institutions and private clients on the supranational initiatives arising from the OECD, FATF, IMF, FSF and EU.

¹¹ Swiss Federal Department of Finance, *Swiss Financial Centre: A Documentation*, July 2001 at page 8.

¹² www.imf.org.

Members of the Stikeman Elliott team involved in this review were:

Richard Hay, International Tax Partner and Head of the Private Capital Group, admitted to practice in Ontario, New York and England & Wales;
Jeffrey Keey, Corporate Partner, admitted to practice in England and Wales;

Leigh Nicoll, admitted to practice in New Zealand;

Robert Reymond, an associate admitted to practice in Quebec; and

Heather Tibbo, an associate admitted to practice in Jersey and in England & Wales.

(ii) *International Tax and Investment Organisation (ITIO)*

The International Tax and Investment Organisation (ITIO) was established in March 2001 as a forum in which small and developing economies (SDEs) would work on an equal basis and speak with a common voice. The ITIO aims to help members contribute more effectively to the ongoing debate on international tax and investment measures and ensure that development implications are taken into account.

The ITIO places SDEs' demands for a level playing field at the core of its activities. The ITIO's founders were the non-OECD members of the OECD-Commonwealth Joint Working Group on Harmful Tax Competition, whose experiences convinced them of the need for a new, inclusive organisation.

The ITIO's objectives are to:

- strengthen international cooperation amongst SDEs in taxation and investment matters, including goods and services;
- assist SDEs to interface with international organisations to achieve this end;
- develop positions with respect to taxation and investment matters that affect the interests of SDEs;
- develop positions with respect to taxation, and investment and other matters that affect the interest of SDEs;
- consider the development implications of international tax and investment initiatives and respond to initiatives which place SDEs at a competitive disadvantage; and
- facilitate the sharing of knowledge and best practice more effectively amongst SDEs.

Members currently comprise Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, Cook Islands, Malaysia, St Kitts & Nevis, St Lucia, Turks & Caicos Islands and Vanuatu. The Commonwealth Secretariat, Pacific Islands Forum Secretariat, CARICOM Secretariat, Caribbean Development Bank and Eastern Caribbean Development Bank have been granted formal observer status.

(iii) *Society for Trust & Estate Practitioners (STEP)*

The Society of Trust and Estate Practitioners (STEP) is the professional body for the trust and estate profession worldwide.

STEP Members come from the legal, accountancy, corporate trust, banking, insurance and related professions, and are involved at all levels in the planning, creation and management of, and accounting for, trusts and estates, executorship, administration and related taxes.

STEP has over 8,000 Members. STEP is well established internationally, with substantial numbers of Members based throughout the world. Members from other jurisdictions are welcome if they meet the qualification requirements.

STEP has branches in the following jurisdictions:

Anguilla	Australia	Bahamas
Barbados	Bermuda	British Virgin Islands
Canada	Cayman Islands	Cyprus
England & Wales	France	Gibraltar
Guernsey	Hong Kong	Ireland
Isle of Man	Israel	Italy
Jersey	Liechtenstein	Monaco
Scotland	Singapore	South Africa
Switzerland	Turks & Caicos Islands	

E. Process for Review of Concerns with the MCV Report

The MCV Report is primarily based on anecdote rather than formal research based on benchmarking. In order to better consider the factual foundation for the OECD's proposals and the validity of the unsubstantiated assumptions set out in the MCV Report, Stikeman Elliott commenced work on this Review with an extensive benchmarking exercise conducted with reference to the OECD's stated concerns regarding the potential misuse of corporate vehicles. Benchmarking was conducted from a more universal perspective (i.e., not limited to non-OECD jurisdictions).

The present exercise attempts to examine the legislation and regulatory framework in a broad cross section of fifteen countries representative of the jurisdictional participants in the provision of cross-border financial services, including both so called “onshore” and “offshore”, civil and common law, large and small, OECD member and non-OECD Member Countries. The fifteen jurisdictions reviewed were The Bahamas, Bermuda, British Virgin Islands, Canada, Cayman Islands, Hong Kong, Ireland, Isle of Man, Jersey, Luxembourg, New Zealand, Singapore, Switzerland, the United Kingdom (or England and Wales, as appropriate) and the United States (focusing on the state of Delaware).

Although this survey seeks to cover a selection of the main players providing international financial services, it does not purport to be comprehensive or exhaustive. Further work in this regard is in progress.

This Level Playing Field Review draws upon existing analytical and statistical work on the formation and regulation of corporate vehicles, including work conducted by the European Union (EU), the United States General Accounting Office (GAO), The Bank for International Settlements (BIS), the FATF and the OECD. The authors gratefully acknowledge the contribution of leading professional firms (noted in Appendix B) from the fifteen jurisdictions examined which were consulted, to review and comment on the matrices in Appendices C-E prepared in draft by Stikeman Elliott.

F. Structure of This Level Playing Field Review

Part 1 of this Level Playing Field Review summarises the main elements of substantive concern regarding the MCV Report. It begins by examining the OECD’s focus on non-OECD IFCs in the context of the misuse of corporate vehicles, addressing the dangers inherent in this narrow focus. Thereafter Part 1 considers what the OECD seeks to achieve from this exercise and concludes by examining the implications of inappropriate and disproportionate regulation for international financial centres, including consideration of privacy issues.

Part 2 examines the process undertaken by the OECD in the preparation of the MCV Report. Issues reviewed include the validity of the apparent assumptions underlying the OECD’s focus on “offshore centres”, resulting in exclusion of OECD Member Countries from review, and whether this is appropriate in light of the goals of the exercise. Other issues include the composition of the OECD experts group and implications of the approach for a level playing field. Economic competition issues are also considered.

Part 3 contains an analysis of the results from our benchmarking survey of fifteen countries concerning regulation, access to beneficial ownership and financial information and the ability to share such information on corporations, trusts, limited partnerships and foundations in each jurisdiction are considered. This part provides examples in the form of case studies on corporate vehicles available in OECD member countries, which are perceived to be vulnerable to abuse.

Part 4 focuses on the availability of beneficial ownership information and the ability to share such information in the specific jurisdictions reviewed.

Part 5 examines the validity and implications of the three options for compliance proposed by the OECD, and considers, as an alternative, the value of consistent standards applied evenly to all jurisdictions.

Finally, Part 6 contains recommendations and conclusions based on the findings of the benchmarking research.

In order to provide transparency not found in previously published materials, matrices setting out the results of the benchmarking review of regimes for regulation of corporations, trusts and limited partnerships in the countries considered are annexed to this Review.¹³

I. PART I – SUMMARY OF CONCERNS WITH THE MCV REPORT

A. Primary Focus on Non-OECD IFCs

As noted, the OECD adopted an express focus on vehicles established in “offshore” jurisdictions which are not OECD Member States.¹⁴ This restricted view was not suggested by the FSF which requested the MCV Report. This bias limits the utility of the Report in that OECD member countries control 80% of the global trade in financial services provided to non-residents.¹⁵ The restricted focus is also troubling and arguably inappropriate particularly given previously published well-documented concerns relating to vehicles established or administered in OECD Member States.

The OECD sets out its justifications for the focus on non-OECD IFCs, as follows:

- (i) some non-OECD IFCs are perceived to provide “excessive secrecy” and “create a favourable environment” for the misuse of such vehicles;
- (ii) “shell” companies are established disproportionately in the offshore world; and

¹³ No comparison with the MCV Report was possible as the MCV Report did not provide this type of fundamental factual information.

¹⁴ The FSF defined “offshore” in their *Report of the Working Group on Offshore Centres*, 5 April 2000, as follows:

“An OFC is not easily defined. Any jurisdiction can be considered “offshore” to the extent that it is perceived as having a more favourable economic regime than another, e.g., low corporate tax rates, light regulation, special facilities for company incorporation, or highly protective secrecy laws. While OFCs are commonly perceived to be small island states, a number of advanced countries have succeeded in attracting very large concentrations of non-resident business by offering economic incentives either throughout their jurisdiction or in special economic zones.”

¹⁵ See the following article for discussion of the distribution of the provision of cross-border financial services in both OECD and non-OECD Member States: Biswas, R., “Introduction: Globalisation, Tax Competition and Economic Development” in *International Tax Competition: Globalisation and Fiscal Sovereignty 2002*.

(iii) recent improvements in some non-OECD IFC regimes may provide models for other non-OECD IFCs.¹⁶

As the material which follows shows, the first two concerns are clearly not confined to structures established in non-OECD Member States and the third rationale could also apply to non-OECD IFC regimes providing more rigorous models for some OECD IFC regimes.

This deliberately restricted perspective mars the MCV Report, undermining its objectivity and limiting the value of its conclusions. Non-OECD IFCs perceive at best mixed motives in the OECD's process and proposals.

B. Disproportionate Regulatory Burdens as a Non-Tariff Barrier to the Trade in Services

Appropriate regulation is proportionate to the risks and benefits associated with the activity regulated. Disproportionate regulation consumes resources in the form of direct financial costs and the transaction friction occasioned by satisfaction of compliance obligations with no commensurate benefit. Disproportionate and excessive regulation applied only to some market participants burdens those participants with a competitive disadvantage. In an efficient market, unevenly applied regulatory burdens shifts demand from one service provider (or jurisdiction) to another, as users search for a cost-efficient, low friction service. Regulatory limitations on services offered (i.e. financial privacy) also shift demand.

Market participants (i.e., jurisdictions and service providers in this case) resist disproportionate regulatory burdens because of the inverse correlation between the increased costs resulting from such regulation and client demand.

It is the ubiquitous practice of cartels to disadvantage market participants outside of the cartel while seeking to garner and retain benefits within the cartel. This is often done through the use of arbitrary, often disguised, trade restricting rules which the cartel seeks to apply.

In any non-transparent process aimed at modifying the international regulatory framework operating within the OECD or one of its dominant groupings, there is the potential for OECD Member States to assert their objections to particular forms of increased regulation at the design stage, behind closed doors in the opaque policy formulation process and to work out a rationale for self-exemption (or "outsider-burdening") before proposals are formally tabled. Recently adopted processes have left non-OECD jurisdictions, denied access to the closed door design process, faced with demands for disproportionate regulation they are left with no option but to complain after new proposals are put forward by the OECD. Accordingly, they are made to look uncooperative when their very reasonable objections are put forward. Non-OECD IFCs perceive that this dynamic may explain the inappropriate focus on them in the MCV

¹⁶ The MCV Report at page 7ff.

Report, despite the dominant market position of OECD IFCs and the current practices of some OECD Member States.

C. *Erosion of Privacy*

The complete record of an individual's financial transactions- now sought on a global basis - forms a revealing insight into the intimate details of one's personal life. The collection and sharing of such information, and the linkage of databases through the use of electronic tools, poses many concerns for the privacy of individuals and vehicles treated as corporate by the MCV Report.

The UN Declaration of Human Rights recognises and protects privacy as a basic human right.¹⁷ The OECD also accepts that individuals and vehicles treated as corporate by the MCV Report have legitimate expectations of privacy and business confidentiality in their affairs. The OECD notes that "corporate entities, in particular, have a valid right not to have their affairs disclosed to competitors, customers, and suppliers among other things".¹⁸

The OECD report on *Improving Access to Bank Information for Tax Purposes*, released on 24 March 2000 contains informative insights into the scope of existing financial disclosure in OECD Member States. France, for example, requires financial institutions managing stocks, bonds or cash to report to the Government on a monthly basis regarding the opening, modifications and closings of accounts of all kinds. This information is stored in a central computerised database which is used by French authorities for research, control and collection purposes. Four other OECD countries also maintain centralised databases, namely Hungary, Korea, Norway and Spain.¹⁹ The efficacy of such databases has to be called into question in the case of OECD Member States which allow anonymous passbook accounts (for example, Austria, Hungary and the US States of Montana and Colorado).

Skepticism concerning the ability of governments to resist the temptation to access information for unauthorised political, economic or other purposes is rife, particularly as there is, by definition, no opportunity to monitor unauthorized access. Affluent taxpayers in at least one major OECD Member Country also fear that tax data is routinely sold to criminal gangs seeking targets for kidnapping which is common in that state.²⁰

¹⁷ *The UN Declaration of Human Rights 1948* provides as follows in Article 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

¹⁸ The MCV Report at page 47.

¹⁹ Appendix, Section 3.1.2 of report on *Improving Access to Bank Information for Tax Purposes*.

²⁰ The US State Department warns of widespread kidnapping in Mexico in the following terms:
 "Kidnapping, including the kidnapping of non-Mexicans, continues at alarming rates. So-called "express" kidnappings, an attempt to get quick cash in exchange for the release of an individual, have occurred in almost all the large cities in Mexico and appear to target not only the wealthy, but also middle class persons."

Global sharing of information means that criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorized disclosure.²¹

The risks to personal privacy arising from the collection of financial information are disconcerting, even while apparently sophisticated governments maintain control of the information and apparatus.²² The prospect of abuse where these vast and globally converged pools of information fall into the wrong hands en masse or through ad hoc unauthorised access is truly frightening. This is particularly so for the many families with direct experience of repressive or corrupt governments.

Flaws in existing information exchange programs and those proposed show little or no concern regarding ensuring that information obtained and shared is safeguarded against possible inappropriate use for nefarious purposes such as enabling terrorism and promoting human rights violations. Also, legal systems throughout the world have different penalties for tax evasion, money laundering and other financial crimes. For example China recently sentenced an individual to death for tax evasion.²³ Information exchange programs must take such differences into account to permit countries to choose whether they will provide a jurisdiction with information that may lead to a cruel and unusual punishment.

A report by the Task Force on Information Exchange and Financial Privacy identifies a further danger that information may be provided to countries which have one or more of

DRAFT: 17 July 2002

²¹ A UN Report published in 1998 notes, alarmingly, that in a part of the former Soviet Union (not an OECD member), criminal gangs bought banks in order to determine which families had bank accounts large enough to make kidnapping worthwhile. United Nations Office for Drug Control and Crime Prevention (UNODCCP), *Financial Havens, Banking Secrecy and Money-Laundering*, Double issue 34 and 35 of the Crime Prevention and Criminal Justice Newsletter, and Issue 8 of the UNDCP Technical Services, 1998 at page 68.

²² The UK Inland Revenue internet self-assessment service was suspended in May 2002 following security breaches. Users found they could examine other people's tax data on the UK Inland Revenue website. ("Revenue Offline" *Financial Times*, 11 June 2002 and "No Date for Return at Online Revenue Service", *Financial Times*, 6 June 2002).

The US IRS has also been admonished for its failure to adequately secure access to its electronic filing systems and the electronically transmitted tax return data those systems contain. In a report dated February 2001 titled *Information Security: IRS Electronic Filing Systems* the US General Accounting Office states at page 2:

We demonstrated that unauthorised individuals, both internal and external to IRS, could have gained access to IRS' electronic filing systems and viewed and modified taxpayer data contained in those systems during the 2000 tax filing season. We were able to gain such access because the IRS at that time had not (1) effectively restricted external access to computers supporting the *e-file* program, (2) securely configured the operating systems of its electronic filing systems, (3) implemented adequate password management and user account practices, (4) sufficiently restricted access to computer files and directories containing tax return and other system data, or (5) used encryption to protect tax return on *e-file* systems. Further, these weaknesses jeopardised the security of sensitive business, financial and taxpayer data on other critical IRS systems that were connected to *e-file* computers through its servicewide network.

²³ www.amnesty.org.il/urgent/5201PRC.html, August 2001.

the following characteristics: major corruption problems; hostility to the West; or have sponsored terrorism in the past.²⁴

It is essential to ensure that the countries receiving information have safeguards in place in order to protect the innocent individual and to ensure that information is not used for purposes (e.g. political or commercial gain) other than that which the information was originally provided for.

2. PART 2 – SUITABILITY OF PROCESS FOR REACHING OECD GOALS

A. Need for Consideration of Issues in a Universal Forum

The fora most active over the past few years in developing proposals for new regulatory “standards” have memberships restricted to the world’s rich and powerful countries.²⁵ By way of example, OECD membership and consequent control of any process for change advocated or implemented solely within that group is exclusionary.

Article 1 of the OECD Convention requires the OECD to promote the interests of its own member states. In economic terms, the OECD is seen by some as a cartel with membership restricted to large and powerful countries. The OECD is funded, populated and controlled by their members.

Despite the prevailing geo-political considerations, small and developing countries continue to insist that basic equity and effective long-term implementation require that the concerns and interests of all stakeholders should be taken into consideration in the development of standards. A globally inclusive forum is essential in order to effect meaningful change through the co-operation of all parties. All countries which will be affected by the changes must be allowed a seat at the table otherwise actions will continue to be perceived as those of an economic cartel of rich countries imposing their agenda on small and developing countries by threats and coercion.

The OECD claims to seek a more inclusive forum, in principle. Jeffrey Owens, OECD Head of Fiscal Affairs, in an article in *Tax Notes International* was quoted as saying:

The important thing is that as many people as possible have a seat at the table in setting what the rules would be. I see that as a general trend in a lot of our work. We must be opening up; we must become more inclusive; we must not just be inviting the countries to come and listen to what we have to say, but we’ve got to be inviting them and saying, “You are here as partners. We’re interested in what your views are, and your views will shape things that come out of the OECD”.²⁶

²⁴ Task Force on Information Exchange and Financial Privacy, *Report on Financial Privacy, Law Enforcement and Terrorism*, 25 March 2002.

²⁵ See Appendix A for a full list of OECD member countries.

²⁶ Scott, C., “A Conversation with OECD’s Jeffrey Owens on the Environment, E-Commerce, and Falling Tax Rates”, *Tax Notes International* 28 May 2001.

The OECD's past process did not reflect this approach. Many small and developing jurisdictions, including non-OECD IFCs, perceive that the current reality also does not reflect this proposed change in direction. The exclusive use of expert representatives from OECD Member States to assess the rules of non-member states, discussed below, illustrates the concerns.²⁷

B. Report's Experts Sourced Exclusively from OECD Member Countries

In drafting the MCV Report, the OECD Steering Group on Corporate Governance established an ad hoc group consisting of persons from twelve OECD *Member Countries*. Despite this, the OECD focused their review on non-OECD jurisdictions with only cursory comments on their own member's regimes. Exclusion of experts from non-OECD IFCs from meaningful participation in preparation of a report focused on them is perceived as indicative of an unreformed process, skewed to protect the commercial sensitivities of the jurisdictions controlling preparation of the MCV Report.

The provision of cross-border financial services is a highly competitive and lucrative business. It is important to the OECD Member States and vital to the development plans of many small and developing countries which lack natural resources and other opportunities. In such a competitive environment, if OECD Member Countries are disinclined to engage in transparent comparison which carries with it the risk of exposure and potential damage to their own commercial interests then they will be open to the charge of bias due to a conflict of interest. This lack of introspection on the part of the OECD thus far would also call into question the OECD's process of standard setting by a limited group of market competitors in which the justification for change is founded on a lack of visible objectivity.

C. Level Playing Field

Fairness requires that a level playing field applies to the regulation of all jurisdictions providing facilities for mobile financial service activities. Accordingly, this is an essential prerequisite for meaningful reform. Without this goal, it will be difficult to secure the trust and co-operation of the many jurisdictions which need to work together to reform the regulation of the international financial system. The OECD has expressed a commitment to a level playing field in the context of its Harmful Tax Practices project,²⁸ though this commitment has not yet translated into a process which is likely to realise this

²⁷ For example with regards to the OECD Harmful Tax Practices initiative, the classification of jurisdictions as tax havens was effected by the OECD without reference to those targeted. Subsequently, the acceptability or otherwise of a commitment demanded by the OECD and given by any of those jurisdictions was determined exclusively by the OECD. Only after such a commitment is deemed acceptable is that jurisdiction invited to join the Global Forum which will determine the implementation plans and the form of exchange of information agreements to be utilised by all those jurisdictions going forward.

²⁸ In *Towards World Tax Cooperation*, *OECD Observer*, 27 June 2000 Jeffrey Owens, OECD Head of Fiscal Affairs reviewed the OECD's demands for transparency in the Harmful Tax Competition initiative and stated: "And let me emphasise that the same standards will apply to all [OECD] member countries and non-member countries."

goal.

In the context of the Harmful Tax Practices initiative the OECD has shown inappropriate reluctance to permit the implementation of commitments by non-OECD Member States to be conditioned on the implementation of equivalent commitments by all OECD Member States, including Switzerland and Luxembourg. The OECD's response that their reports on the initiative are already endorsed by member countries is unconvincing while Switzerland and Luxembourg continue to abstain from the 1998 Report on Harmful Tax Practices.²⁹ In the OECD 2001 Progress Report on the project, Switzerland and Luxembourg were joined in their abstentions by Portugal and Belgium.³⁰ At this point over 10% of OECD members have refrained from endorsing the OECD's latest report on this matter. Further, state governments within the US are ignoring principles in the commitment given by the US federal government.

Establishment of a level playing field requires that all affected countries make identical, specifically enumerated commitments to change regulations in a functionally equivalent manner, on the same timetable, and subject to the same consequences for non-performance. Until the OECD has effective commitments from their own Member States, it cannot reasonably seek commitments from jurisdictions excluded from both OECD membership and participation in the process of regulatory standard setting.

The OECD's choice to focus on non-OECD IFCs or non-member countries in the MCV Report undermines the confidence of objective observers that the OECD actually seeks a level playing field. For the OECD to effectively achieve their goals relating to transparency and information exchange it is essential that *all* countries, both "onshore" and "offshore", OECD Member States and non-OECD Member States are part of the process and "buy in" at the same time, and so support the project through co-operation and co-ordinated effort. Without this, small and developing countries will continue to perceive the OECD as intending to use the camouflage of a regulatory thrust to implement non-tariff barriers to the trade in services and so undermine their competitive position.

3. PART 3 – OECD CONCLUSIONS TESTED AGAINST BENCHMARKING RESEARCH

A. Corporations – Benchmarking Review

The OECD notes a corporation is the primary legal entity through which business activity is carried out in most market-based economies. Corporations are ubiquitous, accounting for a large percentage of investment and employment in OECD Member Countries.³¹

The OECD suggests that the corporation is open to misuse due to its separate legal personality and the ability to obscure the identity of the beneficial owner. International Business Companies (IBCs) and exempt companies are singled out for attack on the

²⁹ *Harmful Tax Competition: An Emerging Global Issue*, 27 April 1998.

³⁰ *OECD's Project on Harmful Tax Practices: The 2001 Progress Report*, 14 November 2001.

³¹ The MCV Report at page 22.

alleged basis that their combination of effective anonymity and little or no supervision makes them more susceptible to misuse.³² Only passing mention is given to functionally equivalent commercial vehicles in OECD Member Countries raising similar concerns. For example, the OECD notes without comment a study conducted by the Performance and Innovation Unit of the UK Cabinet Office which indicated that UK shell companies have been involved in almost all complex UK money laundering schemes.³³

Further indicia that the focus on non-OECD IFCs is biased and therefore inappropriate are evidenced by the benchmarking conducted for the Level Playing Field Review, the results of which are discussed below.

(i) *Bearer Shares*

The OECD notes that “[t]he ability to obscure identity is crucial for perpetrators desiring to commit illicit activity through the use of corporate vehicles”.³⁴ The OECD indicates that the primary instruments used to achieve anonymity are bearer shares, “corporate” directors and chains of corporate vehicles.³⁵

For the purposes of the current benchmarking exercise we examined whether bearer shares and corporate directors were permitted in the fifteen countries reviewed. In the fifteen OECD Member States and OECD non-Member States surveyed in the Level Playing Field Review bearer shares and “corporate” directors were permitted in more OECD countries than non-OECD countries studied. Bearer shares were permitted in six out of seven OECD countries but only four out of eight non-OECD countries (Hong Kong and Singapore which are FATF Members included).

Although the issuance of what are styled as “bearer shares” is technically permitted in several non-OECD IFC jurisdictions, in the Cayman Islands bearer shares are not permitted unless they are subject to custodial arrangements with a recognised international custodian or licensed Cayman Island entity. In the British Virgin Islands the government has made a public commitment to amend the *International Business Companies Act* to “immobilise” bearer shares. Such immobilised shares are not transferable by delivery and the owner is centrally tracked by the custodian. For owner identification purposes this puts such shares on the same footing as registered securities.

³² The MCV Report at page 22.

³³ United Kingdom Cabinet Office Performance and Innovation Unit, *Recovering the Proceeds of Crime*, June 2000).

³⁴ The MCV Report at page 29.

³⁵ The MCV Report at page 29 ff.

(ii) *Disclosure of Beneficial Ownership*

Disclosure of beneficial ownership information refers to those rules which are aimed at identifying the physical persons who are either entitled to the assets of the vehicle or are actually in control of the structure and its activities.

Once again, the OECD's focus on non-OECD IFCs is not appropriate in the context of the availability of information on beneficial ownership. An October 2001 report financed by the European Commission concerning transparency and money laundering in EU member states ("the Transcrime Report") identifies corporations in EU Member States as structures susceptible to being used in money laundering operations. The report notes:

The main obstacle [to anti-money laundering co-operation in EU member states] is the lack of regulation requiring full information on the real beneficial owner of a public or private limited company, especially when a legal structure is a shareholder or director, or the issuance of bearer shares is permitted. Furthermore, some problems seem to arise from the fact that, in some EU member countries, the regulation allows for nominee shareholders and directors.³⁶

Benchmarking research in the area confirms these EU concerns. While some basic shareholder information was available in most OECD Member Countries benchmarked, the wide availability of bearer shares in most of the OECD Member States surveyed made discovery of the real beneficial owner next to impossible in these states. In the Delaware context basic records of shareholders in private companies and related vehicles are not required to be kept by the state (see the discussion of Delaware, below).

(iii) *Filing/Auditing of Accounts*

Public companies, in both OECD and non-OECD Member States, are generally required to file accounts with a regulator or the companies registry and to have their accounts audited. Private companies are frequently exempt from requirements to file accounts with the corporate registry or from having accounts audited. Where a filing requirement does exist for a private company it may require the lodging of abbreviated accounts only. For example, in England and Wales both "small" and "medium sized" private companies are exempt from the requirement to file full accounts and unless a company's turnover exceeds £350,000 there is no requirement to appoint an auditor³⁷. In Ireland small private companies are required to provide an abridged balance sheet. New Zealand

³⁶ Research Centre on Transnational Crime – University of Trento, *Transparency and Money Laundering: Study of the Regulation and its Implementation in the EU Member States, that obstruct Anti-Money Laundering International Co-operation*, October 2001 at page 8.

³⁷ Section 242 of the Companies Act 1985 and Part VII of the Companies Act 1985.

companies are not required to file accounts with the corporate registry, unless they qualify as a “non exempt” company.³⁸

(iv) *Regulation of Service Providers*

One of the reasons advanced for the OECD’s focus in the MCV Report on non-OECD IFCs was that such countries allegedly have weak supervisory and regulatory regimes.³⁹ In order to test this view we examined whether service providers were regulated in each of the 15 jurisdictions surveyed.

In general, the so called “offshore centres” reviewed had a body or bodies responsible for regulating corporate service providers while the “onshore” jurisdictions surveyed (including Hong Kong and Singapore) do not generally regulate such service providers. Our results evidenced significant recent advances in the regulation of service providers in most of the non-OECD IFCs, which now have expansive regimes for such regulation. For example, the Cayman Islands Monetary Authority and the Financial Services Commission in the British Virgin Islands are responsible for the supervision of financial services and regulate and supervise banking, collective investment, insurance business, investment business and trust and company service providers, as is also the case with the Jersey Financial Services Commission.

OECD Member States have corporate vehicles which compete directly with IBCs available offshore. For example, limited liability companies are available in virtually every state within the US. Typical regimes provide for shareholder anonymity and no requirement for filing financial data. As the case study below shows, such data is also unlikely to be available on investigation. Such companies are widely used in the offshore world though the MCV Report contains only cursory references to such vehicles.

Corporate services activities are big business in the United States. By way of example, Delaware alone earns \$400 m per year from the government franchise and other fees for locally established corporations. Delaware professionals and corporate service providers earn a multiple of this amount for the provision of support services. Restrictions on the provision of such financial services are a politically sensitive issue in Delaware, as the issue would be in any state.

As noted above, the regulation of the trade in services, including financial services, should be fair, appropriate and proportionate to the risks and benefits arising from such trade. Similarly, regulatory protocols should not be used as a guise to create non-tariff barriers to the trade in services.

Powerful countries should not be in a position to design “regulatory standards” in their own interests or to resist regulation whenever they choose to do so while demanding that

³⁸ Countries which have 25% or more foreign shareholding.

³⁹ The MCV Report at page 17.

other jurisdictions comply. In situations where highly developed and generally well regulated countries have adopted regulatory protocols which they view as appropriate for the risks and benefits of a particular financial services activity, it is inappropriate for organizations which represent the interests of such highly developed countries to selectively criticize SDEs which adopt arguably higher regulatory standards in respect of that same activity.

While it has become increasingly prevalent in the past 5 years, it remains unacceptable that SDEs, excluded from the regulatory standards design processes operated by the most developed states, and subject to “review” processes not applied to more powerful states, are left to cope with the adverse competitive consequences of regulatory standards, which become (by accident or design) a non-tariff barrier to trade.

The OECD’s coercive tactics in creating (whether advertently or otherwise) non-tariff barriers have promoted unease among SDEs and the market participants with whom they trade. States within the OECD have created and then exploited this uncertainty in promoting their own anonymous tax-free facilities which compete directly with those in non-OECD “offshore centres”.

The benchmarking process reported here demonstrates that the examined financial services sectors within OECD countries are often relatively unregulated or poorly controlled when compared to those now extant in the principal non-OECD IFCs as illustrated in the case studies below.

Case Study – Delaware LLCs and Corporations

The United States of America is home to the largest financial services markets in the world. It is a well regulated jurisdiction with a long history of leadership in the regulation of financial services, and is a model for other jurisdictions. However, state governments within the US are not parties to agreements struck by the federal government with the OECD and other supranational agencies. States within the US facilitate establishment of corporate entities which do not meet regulatory standards established by these agencies.

The single member Delaware LLC competes directly with an International Business Company (IBC) and is ubiquitous in the “offshore” world. Where the LLC is established by a non-US person for non-US activity, it is free from any US tax reporting, exposures or filing requirements. No changes increasing the regulation applicable to this vehicle paralleling that proposed for IBCs are currently in prospect for Delaware corporations. Delaware law does not require the local corporate service provider to obtain beneficial ownership information on establishment of the company; only the name of the person requesting the company is required.

In many cases, the “customer” requesting the company will be a wholesaler of corporate shells located in another country.

Delaware LLCs can be formed in two hours for less than US \$100. The Delaware Government staffs its corporate registry until midnight. The anonymity conferred by a Delaware LLC is widely touted by the private sector, including to non-US clients.⁴⁰ The Secretary of State for Delaware describes the jurisdiction as *The Incorporating Capital of the World*.⁴¹

Concerns arising from the use of Delaware corporations in the offshore market were authoritatively documented by the US General Accounting Office in a report tabled in October 2000 entitled *Suspicious Banking Activities: Possible Money Laundering by U.S. Corporations Formed for Russian Entities* (the “GAO Report”).

The report was commissioned by Senator Carl Levin as background research for the US Senate Commission on Suspicious Banking Activity. That Commission published a Report on Correspondent Banking in February 2001 to focus public concern on the dangers posed by poorly regulated *offshore* companies and banks.⁴² Senator Levin’s report made no reference to the GAO Report which was prepared at his request and provided to him four months before the main Senate Report.

The GAO Report detailed the establishment of Delaware corporations for thirty to fifty Moscow-based brokers of corporate shells. The service provider, Euro-American Corporate Services Inc., sourced its business through a Russian shareholder and director. The GAO noted that this individual “had a close relationship with companies associated with members of the former Soviet Union’s intelligence agency”.⁴³ This Russian individual was also a director of a US bank, Commercial Bank of San Francisco. This US financial institution opened bank accounts for the Delaware corporations established by Euro-American without any independent due diligence.⁴⁴

The GAO documented the establishment of more than 2000 Delaware companies for Russians over the period from 1997 to 2000. The companies were formed in blocks of 10 to 20 at a time, and sold to Russian corporate brokers, who sometimes sold the shell companies to others who, according to the GAO Report, may also have sold them again.⁴⁵ (There is no way of knowing for certain).

The GAO notes that a Euro-American employee indicated that “Euro-American conducted no due diligence with respect to any company it incorporated because state

⁴⁰ www.delcorp.com/ydecorp.htm and www.delawareinc.com/llcintro.html.

⁴¹ www.state.de.us/us/sos/corp.htm. Delaware also has considerable appeal to US and other OECD based incorporators as well. Enron, for example, established 675 of its 2000 corporate vehicles in the state (see “Delaware and Enron” by Brian Naylor, National Public Radio, 7 March, 2002.) Enron’s use of non-US companies has attracted much adverse media comment, though its numerous incorporations in Delaware appear to have largely escaped notice or comment.

⁴² Minority Staff of the Permanent Subcommittee on Investigations, *Report on Correspondent Banking: A Gateway for Money Laundering*, 5 February 2001.

⁴³ GAO Report at page 10.

⁴⁴ GAO Report at page 11.

⁴⁵ GAO Report at page 6.

law does not require it”.⁴⁶ Delaware law requires no filing of financial information as a corporate matter, nor is any required for tax purposes, where companies are not subject to US tax.

Euro-American rented an office in Delaware although no one physically occupied the premises. Telephone calls and mail were forwarded to an office of Euro-American outside the state. Despite a presence in the state described by Euro-American as a mere “formality”⁴⁷, the GAO was advised by an official of Delaware’s Division of Corporations that the virtual presence complied with Euro-American’s obligations as a Delaware registered incorporation agent.⁴⁸

Two US banks opened a total of 236 bank accounts for these companies with no due diligence beyond Euro-American’s assurances that it had investigated the companies. On investigation the GAO was informed that the bank accounts were used to “move money out of Russia”.⁴⁹ The GAO tracked \$1.4 billion wire transferred to such accounts, usually from outside the US. Most of the funds were transferred out shortly after receipt to other foreign accounts. The GAO concluded that “[t]hese banking activities raise questions about whether the US banks were used to launder money”.⁵⁰

No information of any kind was obtained about the shareholders of the Delaware companies, and there was no requirement to provide financial information. There was no apparent prospect of retrieving such data by an investigative system or in any other fashion, since the chain of resellers and the ultimate user of the company would be unknown to Euro-American in its capacity as the Delaware service provider. In any event, Euro-American maintained no substantive presence in the State and was not apparently amenable to effective supervision.

The absence of any of the elements of information which the OECD insists must be available in Non-OECD IFCs is standard practice under Delaware’s current regime for incorporation.

The GAO summarised their report on the Delaware companies in question as follows:

It is relatively easy for foreign individuals or entities to hide their identities while forming shell corporations that can be used for the purpose of laundering money.⁵¹

The US Senate Commission on Suspicious Banking Activity Report on Correspondent Banking Activity tabled in February 2001 made no reference to the GAO Report, despite having requested the Report and receiving it in October 2000.

⁴⁶ GAO Report at page 7.

⁴⁷ GAO Report at page 7.

⁴⁸ GAO Report at page 7.

⁴⁹ GAO Report at page 7.

⁵⁰ GAO Report at page 2.

⁵¹ GAO Report at page 11.

Given the GAO's conclusion and that the OECD's expert group was presumably aware of the GAO Report, two alternative explanations exist for why the OECD did not choose to comment substantively on Delaware LLCs in the MCV Report. The first is that OECD judged that the risk of illegal activities using the existing regulatory regime for Delaware LLCs does not justify increasing the regulatory burden for Delaware LLC's when to do so might undermine the competitive position of Delaware LLCs as the vehicle of choice for the large market share of international business now held by Delaware. The second alternative is that multiple standards are being advanced by the OECD with non-OECD jurisdictions being expected to bear more onerous burdens in order to displace the relatively small amount of international financial services business which these jurisdictions currently provide.

Case Study – Luxembourg 1929 Holding Companies

Luxembourg is an OECD Member with a long established and very large international finance centre which competes directly with many non-OECD IFCs. Luxembourg has a corporate regime to encourage the incorporation of companies that hold and manage shareholdings in other companies. These companies are prohibited from carrying on industrial or commercial activities, establishing offices open to the public and holding real estate. As of January 1998 there were 13,700 such companies with subscribed capital of approximately EUR 31 billion.⁵² Given that this amount reflects only subscribed capital, the total value of these companies is no doubt significantly higher.

A 1929 Holding Company is exempt from all corporate taxes in Luxembourg, except for a 1% tax on subscribed share capital and an annual subscription duty of 0.2% on the par value of the company's shares. There is no withholding tax on dividends paid by the company and no tax in Luxembourg on liquidation.

Although a 1929 Holding Company must have a registered office in Luxembourg and file abridged audited financial statements (which do not contain details of the composition of the portfolios held by the company), there is limited public information available on 1929 Holding Companies. The founding shareholders are identified in the Articles of Incorporation of the company which are registered with the "Administration de l'Enregistrement" and filed with the Companies' Registrar. Nominee shareholders are permitted, as there is no obligation to file beneficial ownership information. Furthermore, a 1929 Holding Company can issue bearer shares which are freely transferable by the physical transfer of a share certificate. Thus, after incorporation it may become difficult if not impossible to identify the beneficial owner(s) of the company.

1929 Holding Companies may have nominee directors as well as corporate directors and a corporate secretary. There is no requirement for directors to be resident in Luxembourg. There is accordingly, little information readily available to the Luxembourg authorities on beneficial ownership and control of 1929 Holding Companies.

⁵² The Luxembourg "1929" Holding Company and the "Société de Participation Financière", published by KPMG Financial Engineering, Luxembourg, 2000 at page 4.

Luxembourg has fiscal and banking secrecy laws. In the international fiscal context, the Luxembourg judicial authorities can only assist foreign tax authorities on matters relating to tax fraud.

The MCV Report notes that vehicles are subject to misuse where they enable individuals to hide their identity behind corporate forms and where “the capacity of the authorities to obtain and share information on beneficial ownership and control for regulatory/supervisory and law enforcement purposes” is constrained.⁵³ The OECD’s MCV Report does not address concerns regarding the susceptibility of the Luxembourg 1929 Holding Company to misuse.

As was the case in regard to the absence of substantive comment in the MCV Report regarding the Delaware LLC, two conclusions are possible in respect of Luxembourg 1929 holding companies. The first is that the regulatory regime in Luxembourg is appropriate to the risk and benefits associated with this segment of the financial services industry and the second is that the OECD employs multiple standards in the MCV Report depending upon whether the relevant regulatory regime for a particular segment of trade in services is within an OECD Member State or in a competitor of OECD Member States.

B. Trusts

Trusts have traditionally been used by private families for estate planning purposes as well as for mitigation of taxes. The preservation of family assets through generations is key for many settlors, particularly those with experience of repressive governments.

In the private context trusts are used for the following:

- inter vivos and testamentary private trusts;
- trusts arising under wills and intestacies;
- estates under administration; and
- charitable trusts.

As the global financial environment has become more complex there has been extensive use of trusts for commercial purposes. The following types of commercial trusts are noted and described in a report prepared for The Association of Corporate Trustees (TACT) entitled *Economic and Financial Analysis of Commercial and Private Trusts in the United Kingdom, Companion Volume to the Hayton Report on Trusts and Their Commercial Counterparts in Continental Europe*:

- Pension trusts – these involve the funding of pensions for retired employees with the added security of having the fund separate from the employer;
- Unit trusts – these are collective investment vehicles in which the value of the units is directly dependent on the value of the segregated assets held

⁵³ The MCV Report at page 13.

by the trustee. This provides a direct relationship between assets held and value of a unit, with the advantages of collective investment schemes ;

- Employee benefit trusts – these are arrangements under which a company’s shares are held in a trust allocated, or ready for allocation, to certain employees. As well as providing an incentive for the employees and, in effect, a source of funding for the company, the trust provides a market for shares in the company, thereby increasing the liquidity of the company’s shares. This may be important for companies which are not listed on an exchange;
- Loan capital trusts – these are used to look after the interests of a collection of lenders where the borrower has provided security for their loan. A corporate trustee holds such security on trust for the lenders and can act as a buffer between the borrowers and lenders. Loan capital trusts are collective security trusts for holders of bonds or debenture stock, syndicated loan trusts and securitisation trusts of special purpose vehicles;
- Subordination trusts – these involve a creditor (the junior creditor) agreeing to be paid only after another creditor (the senior creditor) has been paid. The debtor pays money to the trustee who then distributes first to the senior creditor and then to the junior creditor. This avoids the rules requiring equal treatment in payment of creditors if the debtor becomes insolvent, thereby giving the senior creditor greater security. This flexibility allows the debtor to provide better incentives for a supplier or financier to become a creditor which could be beneficial for the debtor’s business, for example, with an improved cashflow;
- Securitisation trusts of special purpose vehicles – a portfolio of assets, the purchase of which is financed by a bond issue, is held in a company called a special purpose vehicle (SPV). The shares in the SPV and the portfolio are held in trust so that the SPV’s debt does not show up on the owner’s balance sheet. It also allows certain assets to be ring-fenced so that certain grade bonds (e.g. AAA) can be issued where there is a shortage in that grade of bond;
- Project financing and future income streams – cash from a particular source or the income stream of a borrower of finance is held, when received, on trust for the lender. This makes it easier for the borrower to receive money based on future income streams;
- Quistclose trusts – these are used when a creditor puts money into a trust for the purpose of benefiting another party for a specified purpose. Once the money has been paid to the other party, that party becomes a debtor. The reason for using the trust is to increase security as the creditor can retrieve money that has not been used by the other party if the other party

becomes insolvent. The use of the trust therefore aids the transaction process by increasing security to the creditor. Without this, the potential creditor may be unwilling to take part in the transaction;

- Client accounts – when a business or professional (eg a solicitor) holds clients' money in a client bank account separate from that of the business or profession, then the money is held on trust for the clients. Again, this gives security against insolvency of the business/profession;
- Building contracts: retention trusts – a percentage of a fee to a builder is held in trust until an architect's certificate of completion is given, thereby helping ensure proper completion and that the builder has protection against the insolvency of the employer;
- Sinking fund trusts – money can be paid into a trust to ensure that enough money is available in the future for a particular purpose;
- Trusts of shares to separate control from ownership of the company – shares of a company can be held in trust by responsible trustees where public interest laws do not allow those owning the economic value to have control over the company;
- Custodian trusts in the financial or securities markets – these trusts allow the custodian to hold shares on behalf of a number of clients who have a proportionate equitable co-ownership share in the pool of securities legally owned by the custodian. This enables quick and inexpensive dealings in the stocks held by the custodian as a transfer of shares to another party by a client does not require any formal signed transfer, only a computer entry indicating that the party receives a co-ownership interest in the securities of which the custodian remains the legal owner; and
- Pledges of bills of lading – holding these on trust allows the buyer to receive the documents in order to obtain goods from the shipping company. The lender is thereby deemed to possess the document so that the pledge remains valid, which otherwise would not be the case.

The Nature of a Trust

The MCV Report reviews trusts on the premise that the trust is a “corporate vehicle”. This description is no doubt adopted for convenience, though it implies confusion over the fundamental nature of the trust concept.

Trusts provide for a distinction between legal and equitable ownership. A trust has been defined as follows:

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property),

for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any of whom may enforce the obligation.”⁵⁴

An Anglo-Saxon trust is a relationship, not a contractual agreement as the OECD indicates.⁵⁵ It is not an entity or vehicle, as it is not a legal person.

The MCV Report notes the use of trusts primarily in common law jurisdictions,⁵⁶ overlooking the increasing recognition of the use of trusts in civil law jurisdictions. Whilst such countries may not have their own trust laws yet, some, such as Switzerland, actively conduct the administration of foreign law trusts.⁵⁷ Countries which undertake such administration must therefore by definition be included in any analysis and should likewise be part of the process setting the international standards.

The Hague Convention on the Law Applicable to Trusts and Their Recognition (1985) has been ratified by most jurisdictions with significant financial services sectors. Article II provides as follows:

For the purposes of this Convention, the term “trust” refers to the legal relationships created...by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:

- (a) the assets constitute a separate fund and are not part of the trustee’s own estate;
- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

The settlor’s ability to choose to retain significant rights over assets transferred to a trust is, accordingly, widely accepted. The MCV Report states that “settlors attempting to evade taxes may transfer assets into a trust and then falsely claim that they have relinquished control over the assets”⁵⁸. If a settlor retains excessive control or a trust is

⁵⁴ Underhill and Hayton’s Law of Trusts and Trustees, Fifteenth edition, p.3. As they note, these sentences were expressly approved by Romer LJ in *Green v Russell* [1959] 2 QB 226 at 241, though they have been criticised as not being exhaustive. For example, developments in trusts in recent years are such that this definition may now be seen as too narrow; it does not include, for example, non-charitable purpose trusts.

⁵⁵ The MCV Report, page 45

⁵⁶ The MCV Report, page 25.

⁵⁷ See page 39

⁵⁸ The MCV Report, at page 26.

not administered in accordance with its terms and its governing law, the trust is subject to challenge as invalid, or a sham. Trustees are aware of the risks of acting as the settlor's stooge and few will run the risk of a suit for breach of trust by disgruntled beneficiaries.

Types of Trusts

(i) Discretionary Trusts

The MCV Report appears to be directed primarily at the discretionary trust. Such a trust provides the trustees, formally, with absolute discretion in disposing of the trust property to beneficiaries. To guide the trustees in exercising their discretion, a letter of wishes is generally prepared by the settlor. Contrary to the OECD's comments,⁵⁹ such letters do not direct the trustees to accept "instructions" from the settlor or a third party; the letter is not binding on the trustees and is merely guidance to assist them when making their decisions.

Trustees of a trust established to benefit a family will require as much background information as possible on the settlor, his family, his reasons for setting up the trust and how he would like the family to benefit from the assets.

This information will generally be set out in a letter of wishes or trustee memorandum. Without such guidance, the trustees will find it difficult to carry out their duties. Although the letter of wishes is referred to in the MCV Report as a mechanism for retaining control, it is more accurately described as a means of providing a channel for input and non-binding influence. Trustees who blindly follow a letter of wishes without independent consideration of the issues do so, under general law, at their peril.

A beneficiary's interest in a discretionary trust is a mere right to be considered by the trustees from time to time as a recipient of a distribution from the trust fund. Beneficiaries of a discretionary trust do not have an absolute right to any of the trust property nor do they have any control over the same.

(ii) Purpose Trusts

Trusts are normally established for individuals, though trusts for charitable objects have long been permitted. A purpose trust is a trust which is established for a specific goal or goals. Often this will include trusts which would not otherwise be exclusively charitable (e.g. a trust to promote and maintain urban green spaces in the capital cities of the world). Such trusts may confer power on specified persons to add beneficiaries at a later time. An enforcer must generally be appointed in order to enforce the trust against the trustees, in the same way that the beneficiaries of an ordinary trust for persons would. Information on any existing beneficiaries – and persons entitled to add beneficiaries - will be available in trustee files in the same way as it would be in the case of trusts established purely for the benefit of beneficiaries.⁶⁰

⁵⁹ The MCV Report, at page 26.

⁶⁰ See pages 36 and 39.

Anomalies in the MCV Report

The MCV Report notes several characteristics of trusts which warrant clarification:

(i) *Settlement/Declaration of Trust*

Trusts may be established by way of a declaration by the trustees that they hold such property in trust for third parties. In common with any other unilateral document, this declaration bears only the name of the party executing the document (i.e. the trustee). The principal difference between a “declaration of trust” and a “settlement” is that the former is established by unilateral declaration by the trustees whereas in the latter the document is executed by both the trustees and the settlor. However, the trust relationship is the same and there is an economic settlor for every declaration of trust. Each time property is added to a trust, whether a settlement or a declaration, there is by definition a contributor of that property. The establishment of trusts by unilateral declaration is a common facility in most (if not all) common law jurisdictions – i.e. “onshore” or “offshore”.

(ii) *Fixed Terms*

Notwithstanding the emphasis on discretionary trusts, the MCV Report notes, correctly, that traditionally the terms of a trust have been fixed.⁶¹ Even in such cases trust instruments often confer power on trustees to amend the instrument.

This flexibility is similar to the conventional regimes for corporations, the memorandum and articles of which can generally be changed. Modern practice values flexibility reflecting the mobile and dynamic nature of personal and commercial circumstances. This is achieved in two principal ways: by providing the trustees with broad powers including the power to confer all of the benefit of the trust fund on a range of beneficiaries, and through provisions allowing the amendment of the trust deed. General trust law dictates that such powers must in any event be exercised in the best interests of the beneficiaries. There is substantial commercial value in the flexibility of the trust concept for settlors wishing to dispose of property. This is reflected in the commercial context and so gives rise to the array of applications noted above. Loss of this flexibility would severely prejudice and compromise the commercial value of an important format for ongoing ownership of property.

(iii) *Irrevocable/Revocable*

A settlor may be permitted to revoke a trust, and call for a return of property previously transferred to it. The choice of a revocable or an irrevocable trust is a conventional facility in trust law, wherever the trust is being established. Thus, such flexibility is conventional in both OECD and non-OECD Member States.

⁶¹ The MCV Report at page 25.

(iv) Duration of a Trust

There is considerable variation between jurisdictions in the maximum periods of permitted duration of a trust. Examples are given in the MCV Report of the Cook Islands and St Kitts and Nevis as “offshore” jurisdictions where trusts may have unlimited duration. Facilities for unlimited duration are not confined to the non-OECD world, as a number of the states in the U.S. provide no limit on trust life, as does the Province of Manitoba, in Canada. However, most non-OECD jurisdictions with IFCs such as Jersey and the Cayman Islands have restrictions on the duration of a trust for persons, which are very similar to those in OECD states which have large trust services industries.

(v) Protectors

The MCV Report notes that a trust may provide for a “protector” to ensure that the trustee acts in accordance with the trust deed and the letter of wishes.⁶² The latter assertion is incorrect; the protector is not appointed to ensure the trustee acts in accordance with the letter of wishes, for the reasons set out above. The role may vary, depending on the wishes of the parties establishing the trust. The protector is generally appointed with power to veto but not generally to initiate action, except for the replacement of trustees. Generally, a settlor will want a protector where he has yet to establish a longstanding relationship with the trustees.

The increased administration and costs incurred in the appointment of a protector of a trust mean that many settlors establish trusts without protectors. They rely instead upon the integrity of the trustees and the regulation to which they are subject in the relevant jurisdiction.

(vi) Removal of Trustees

The MCV Report states that the protector of a trust may replace the trustee for any reason and at any time and “trustees that do not adhere to the trust deed and the letter of wishes can be quickly replaced”.⁶³ The protector will only have the powers which are conferred on him under the terms of the trust deed. Where the protector is permitted to replace the trustee, a trustee concerned that it is being replaced by another to facilitate a breach of trust, should apply to the court for directions.

(vii) Flee Clauses

Flee clauses permit (or require) change in the jurisdiction of control of the trust in the event of defined emergencies, including political instability in the jurisdiction of administration. For example, common triggers are the unlawful killing of a head of state or if the jurisdiction were invaded. The OECD focuses on flee clauses which take effect upon the service of process or inquiry by the authorities.⁶⁴ Flee clauses are not as

⁶² The MCV Report, at page 26.

⁶³ The MCV Report, at page 26.

⁶⁴ The MCV Report, at page 26, 45 and 87.

popular as they once were; depending upon their terms, they can pose significant problems and simply not work. It is usual practice now to provide for the power to change the proper law and the place of administration of a trust at the discretion of the trustees. Most jurisdictions either expressly or impliedly permit such provisions. In today's global environment, flexibility and the ability for a person's assets to move is taken for granted.⁶⁵ Trusts should not be subject to discriminatory treatment in this regard.

(viii) *Power to Add/Remove Beneficiaries*

Trusts require certainty of objects, i.e. the beneficiaries. In any event, no trustee would be able to discharge its fiduciary functions without being able to identify the beneficiaries of a trust. Most discretionary trusts also provide for the addition and removal of beneficiaries. The Report proposes that jurisdictions should review the regulatory framework for trusts in order to avoid trustees being able to change beneficiaries or name new beneficiaries in a non-transparent manner.⁶⁶ It is not clear why the OECD thinks this is done in a "non-transparent manner"; in all the non-OECD countries reviewed the trustees have information about the settlor and the beneficiaries on file. If and when beneficiaries change, this information will be held by the trustees; it is they who will generally be exercising their powers to effect the changes.

(ix) *"Beneficial Ownership"*

The MCV Report confuses "beneficial ownership" as it relates to corporations, with "beneficiaries" of a trust. The Report notes that a trust may create difficulties for authorities attempting to obtain beneficial ownership information as "the beneficial owner may be able to hide behind the "cover" provided by the legal owner".⁶⁷ This implies that the true controllers of a trust are the beneficiaries who are somehow "masked" by the trustees. This is incorrect. The beneficiaries of a trust do not, by virtue of their position, control the trust. The trustees are the legal owners of trust property and the beneficiaries are just that.

(x) *Regulation of Trusts*

The MCV Report states that virtually all jurisdictions recognising trusts have purposely chosen not to regulate trusts "like other corporate vehicles" because of the private nature of trusts and the fact that a trust is essentially a contractual agreement between two private persons.⁶⁸ The characterisation of a trust as a contract is incorrect and misleading; a trust is a relationship, not a contractual agreement.⁶⁹ Contractual agreements, whether private or public are, in any event, not corporate vehicles.

⁶⁵ Note that many jurisdictions also allow re-domiciliation of companies.

⁶⁶ The MCV Report at page 87.

⁶⁷ The MCV Report at page 45.

⁶⁸ The MCV Report at page 25.

⁶⁹ Supra, at page 32.

No financial centre of any standing wants to be involved with terrorism or money laundering, or to assist others whose motivation is the commission of such offences. OECD Member Countries and non-member countries are thus aligned in achieving the same objectives of ensuring the business they are conducting falls within acceptable international standards. Whilst these objectives must remain in focus at all times, it is important in developing these international standards, to ensure that practical and workable provisions are adopted. Such standards must restrict or inhibit commercial activity in a manner proportionate to the actual harm envisaged.

As can be seen from the benchmarking review, the results of which are discussed below, all the non-OECD Member Countries already have identification procedures, including for the most part, through anti-money laundering provisions. Trustees in virtually all those jurisdictions are also licensed or regulated. This does not include Hong Kong (which although not a member of the OECD, is a member of the FATF and the FSF). Such regulation is rare in OECD Member Countries. For example, trustees are not regulated as such in the U.S., Switzerland, England and Wales, Ireland, or New Zealand. Investigation upon request should be an effective method of obtaining information about settlors and beneficiaries in non-OECD Member Countries with such identification procedures; some OECD countries would require changes in law to achieve the transparency now available in most non-OECD jurisdictions.

Benchmarking Review in respect of trusts and trust services providers

The OECD member countries generally lag regulatory developments in the non-OECD member countries reviewed:

(i) *Regulation of Service Providers*

As noted above in the review of companies,⁷⁰ one of the reasons given for the OECD's focus on Non-OECD IFCs was that such countries allegedly had weak supervisory and regulatory systems. Our findings concerning the regulation of trustees, summarized in Appendix D, indicate that this allegation is incorrect, as it was also in the corporate service provider context.

Trust Services Providers are licensed or regulated, in all of the non-OECD jurisdictions reviewed with the exception of the Isle of Man, which is due to introduce regulation of trustees shortly. By contrast, most of the OECD jurisdictions do not regulate or license their trustees. The Transcrime Report confirms this in relation to Ireland:

“There is some opacity in the management of the trust as well; there is no authority that supervises the activity of trustees.”⁷¹

⁷⁰ Supra, at page 24.

⁷¹ Transcrime Report at page 106.

OECD jurisdictions are thus for the most part unable to regulate or control the quality or fitness to practice of trustees based or operating within such states, and lack the power to impose, monitor and importantly, enforce standards of competence and probity on those trustees.

Our research indicates that the non-OECD IFCs examined have extensive legislation regulating trustees, and in some cases, such legislation has been in place for some considerable time. The non-OECD IFCs are clearly well advanced compared to the majority of OECD countries. Non-OECD IFCs note that the OECD has acknowledged that non-OECD IFC regulatory and supervisory regimes would serve as useful models for “onshore” jurisdictions seeking to improve their regulatory or supervisory regimes.

Despite this high level of regulation in non-OECD member countries, and the dominant portion of the financial services industry operated by corporate and trust service providers in OECD Member Countries - or perhaps because of these considerations - the IMF is not assessing OECD Member Countries’ regulatory regimes for corporate or trust service providers as part of their Financial Services Assessment Programme. Yet the IMF has been mandated by jurisdictions with no regulation of such providers to assess non-OECD OFCs against what it acknowledges as arbitrary criteria in the absence of international standards.

There are two explanations for this apparent anomaly. The first is that for some reason not yet articulated by the IMF the risks and rewards associated with trust and corporate service providers activities is somehow different for OECD Member States than it is for non-OECD jurisdictions. The second is that non-uniform standards are being applied for reasons distinct from regulation.

(ii) *Filing/Auditing of Accounts*

Trusts do not derive their existence from a state charter. Accordingly, trusts are historically less regulated. In none of the countries surveyed is financial information for trusts currently filed with a public agency or audited as a requirement of trust law. This is in keeping with other private arrangements, such as those concluded by contract. Although trust accounts are not filed pursuant to trust law, settlors and beneficiaries generally seek to ensure that the trustees account for the trust fund managed by them. In practice, most trustees in non-OECD IFCs do prepare financial statements for review by the settlor and the beneficiaries.

An obligation to audit the financial statements of all trusts would be both unreasonable and impractical. It is common for there to be provision within the terms of a discretionary trust to permit the trustees to have the financial statements audited. Trustees of private trusts generally do not seek an audit, particularly where the trust holds passive investments and the settlor and beneficiaries are satisfied that the trustees have been acting properly. If the

trustees have kept the settlor and beneficiaries informed as to the value of the assets in the trust fund, the costs of administering it, and the amount and value of distributions made, the settlor and beneficiaries will generally consider the preparation of accounts to be sufficient.

(iii) *Availability/Filing of Settlor and Beneficiary Information*

Generally, information on settlors and beneficiaries should be available in each jurisdiction from any trustee properly performing its fiduciary duties (i.e. it would be difficult for a service provider to properly conduct its duties without knowing the economic settlor and the beneficiaries). This applies equally to both OECD and non-OECD countries. In all the non-OECD countries reviewed, settlor and beneficiary information will be available on the trustee's file, as in most cases the recording of such information, at least in respect of the settlor, is mandatory under the provisions of the anti-money laundering legislation in those jurisdictions. Some OECD Member Countries, notably the United States in the case of Delaware and Ireland, lack such provisions.

Case Study – Trusts Administered in Switzerland

Switzerland, an OECD and FATF Member State, has a long established and highly regarded international financial services centre. It is commonly regarded as holding approximately one third of the world's private wealth held in cross-border structures, significantly greater than the wealth held in any other non-OECD IFC. Switzerland, like the US, is a significant player in the world's cross-border financial services industry.

Switzerland does not have its own trust law. However, it is common for foreign law trusts to be administered in Switzerland. The provision of such trust services competes with the provision of trustee services in other OECD and non-OECD countries. It may be argued that such trusts are not Swiss, as they are governed under foreign law. However, they are controlled by Swiss entities and there is often no other trustee (including in the jurisdiction of governing law) with responsibility for the trust or with information on the settlors or beneficiaries of the trust. Accordingly, as a practical matter Switzerland is the relevant jurisdiction for any necessary regulation of service providers for such trusts.

Certain cantonal revenue authorities permit, by way of administrative concession, the tax free administration of trusts which earn non-Swiss income of a passive nature, provided the settlor and beneficiaries of a trust do not reside in Switzerland. Thus, a trust can earn income and gains, and make distributions to non-Swiss beneficiaries, without incurring any tax in Switzerland.

Swiss trustees are not regulated in the discharge of fiduciary functions as such. Any person can incorporate a company in Switzerland and begin acting as trustee. Thus, the tax neutral platform of choice for many trustees wishing to administer a trust in a setting with no public sector regulation of fiduciary activities is also found in the OECD Member State of Switzerland. In contrast to Switzerland, most non-OECD jurisdictions with IFCs

including the Bahamas, the Cayman Islands, Bermuda, the British Virgin Islands, Jersey and Guernsey regulate trustees as such.

There are again two possible explanations for the absence of comment in the OECD's MCV Report regarding the operation of trusts in Switzerland. The first is that the lack of regulation of trust service providers in Switzerland is perceived as appropriate to the risk and benefit offered by these structures. The second is that the OECD has deferred to the commercial sensitivities of a Member State, supporting the use of differential regulatory standards where such differentials provide a competitive advantage to Member States in the trade in services.

Case Study – Delaware Trusts

As previously noted, the regulation of financial services in the United States of America serves as a model throughout the world. The trust industry in the United States of America is highly developed, highly competitive, very lucrative and widely emulated.

Trusts established in the US State of Delaware, by way of one non-unique example, compete directly with trusts established in both OECD and non-OECD jurisdictions and are regulated to a degree deemed appropriate by the relevant governmental agencies in that OECD Member State. A non-U.S. person is able to establish a trust administered in the U.S., including the State of Delaware, without any tax or reporting requirements in the U.S., provided a non-U.S. person (such as a protector) retains elements of ultimate control over the trust. Delaware law trusts have many features which an objective observer, adopting the reasoning of the OECD as set out in the MCV Report, might regard as rendering it vulnerable to misuse for illicit purposes.

The Delaware trust is promoted as a means of providing significant creditor protection and allows for “spendthrift trusts”. With such trusts the settlor is able to reclaim assets he puts into the trust, though he is still protected in significant ways from the claims of creditors. A spendthrift trust must be irrevocable but the settlor can nevertheless retain significant rights without the trust being deemed revocable, namely:

- (i) a veto right on distributions;
- (ii) a special testamentary power of appointment;
- (iii) a right to income and principal in the sole discretion of the trustee who is not the transferor nor a related or subordinate party within the meaning of Internal Revenue Code section 672(c)9; and
- (iv) a right to the income only of a trust or the income and principal of the trust on the basis of an ascertainable standard.⁷²

Delaware is promoted by some service providers as “guarding your privacy”

⁷² 12 Del. C. section 2570(9)(b).

because trusts in Delaware:

- do not have public filings or recordings;
- do not require accountings or accountings can be easily waived; and
- trustees do not need to notify future beneficiaries of their interest in the trust.⁷³

Delaware law allows a trust to have perpetual existence with the effect that a Delaware trust can conceivably run forever. Alaska, Idaho, Illinois, South Dakota and Wisconsin have also eliminated their states' "rule against perpetuities".

C. Foundations

The OECD notes in the MCV Report that foundations are found among civil law jurisdictions such as Austria, Germany, Greece, Italy, Liechtenstein, the Netherlands Antilles, Panama and Switzerland. The risks and benefits of these vehicles parallel those of other corporate vehicles and the regulatory regimes for these vehicles compete with the regulatory regimes of companies and trusts as outlined above. To the extent that these vehicles are not regulated within the OECD Member States it may be assumed that the OECD has determined that such regulation is not required or is not desirable from a competition perspective.

D. Limited Partnerships – Benchmarking Review

The OECD also identified limited and limited liability partnerships as being corporate vehicles which are vulnerable to misuse, principally for the reason they are less regulated than corporations. However, the OECD places less emphasis on partnerships than other corporate vehicles stating "[i]n general, partnerships do not appear to be misused to the same extent as other corporate vehicles"⁷⁴.

In a limited partnership at least one partner must have unlimited liability for the obligations of the partnership. Limited liability partnerships, where all the partners have limited liability, have been introduced in various jurisdictions recently including the UK and the US. For the purposes of this Level Playing Field Review we have focused on the more common limited partnership.

(i) Registration

As noted in the MCV Report, limited partnerships must generally be registered on establishment in order for the limited partners to benefit from limited liability. The results of our survey of 15 jurisdictions further revealed that generally most "onshore" and all "offshore" jurisdictions require a limited partnership to maintain a registered office in the jurisdiction in which it is established. This did not however, extend to a

⁷³ Capital Trust at www.ctcdelaware.com.

⁷⁴ The MCV report at page 28.

formal requirement for a local partner in the jurisdiction of establishment in most of the countries surveyed.

(ii) *Filing/Auditing of Accounts*

None of the countries surveyed imposed a requirement to either file or audit accounts of the limited partnership with a central authority responsible for such partnerships. However, in several of the countries surveyed individual or corporate partners are required to append the financial statements of the partnership or abridged versions of these to their individual or corporate tax return.

(iii) *Beneficial Ownership Information*

The OECD noted that “While many jurisdictions require limited and general partners of a limited partnership to be registered, other jurisdictions require the registration of general partners only”.⁷⁵ The benchmarking research has confirmed this observation in the cases of both OECD and non-OECD Member Countries.

4. *Part 4 – Ability to Exchange Information Internationally*

For the purposes of our benchmarking review, we determined whether the countries surveyed are members of the Egmont Group of Financial Intelligence Units (the “Egmont Group”) on the basis that membership of this group is a reliable indicator of whether provisions for international exchange of information exist in any particular jurisdiction.

The Egmont Group now comprises 69 member countries which maintain operational financial intelligence units (“FIU”s). An FIU is a specialised government agency which has been created as part of a country’s systems for dealing with the problem of money laundering. These entities facilitate the collation and exchange of information for the interdiction of money laundering between financial institutions and law enforcement/prosecutorial authorities within individual countries, as well as between jurisdictions.

Of the 15 jurisdictions reviewed all are members of the Egmont Group.

5. *Part 5 – Need for Consistent Standards, Evenly Applied*

Securing Input and Co-operation From All Relevant Jurisdictions

Effective regulation of the global financial system requires the co-operation of all states which offer a platform for the conduct of such services. Support and co-operation from all centres will require adoption of a process for change which is transparent and widely inclusive.

A state that has provided input is more likely to implement and maintain risk appropriate regulations which are uniformly applied, whereas a state that has not been consulted may

⁷⁵ The MCV report at page 28.

be reluctant to adopt policy determined by other jurisdictions behind closed doors without regard to that state's particular circumstances and sovereignty, particularly where the designers of the regulations refuse to implement them within their own jurisdictions.

Efforts by any sub-grouping within the universe of service providers – a cartel in economic terms - to apply uneven and disproportionate regulatory burdens exclusively to non-members in order to obtain competitive advantage in the trade in services, will be perceived as doing a disservice to the effective regulation of the global financial services system.

Co-operation between states becomes particularly important where a vehicle is administered or controlled from a jurisdiction that does not contain a legal framework for such a vehicle and so the laws of another jurisdiction are utilised. For example a trust governed under the laws of a common law jurisdiction may be administered in a civil law jurisdiction which does not recognise trusts (e.g. Switzerland). The jurisdiction in which the trust is administered may be ill-equipped to regulate trusts given that it does not recognise them. The jurisdiction that provides the governing law is also unlikely to effectively regulate such a trust as all of its affairs are conducted in another jurisdiction.

The timing of any application of new regulatory burdens is also important in regard to obviating non-tariff distortions to trade. In the case of financial services, market participants are naturally reluctant to disclose private information and increased regulation raises costs. Thus, any state which delays the imposition of new regulations while another state proceeds with regulation will tend to benefit from that delay.

Similarly, any state which is exempted from the process (particularly where that state is an OECD Member Country and so perceived to be immune from effective sanction) stands to gain the most. Co-operation between all affected states, which includes direct consultation and input, would help to foster a true level playing field which is essential for the risk appropriate regulation of financial services in both OECD and non-OECD Member States.

Triple Track Options for Compliance proposed by the OECD

The OECD suggests that in order to combat and prevent the misuse of corporate vehicles for illicit purposes all jurisdictions must enable their authorities to obtain, on a timely basis, information on the beneficial ownership and control of corporate vehicles established in the jurisdiction for the purpose of investigating illicit activities, fulfilling their regulatory/supervisory functions and sharing such information with other authorities domestically and internationally.

In order to achieve this, the OECD indicates that adherence to three fundamental objectives is required as follows:

1. beneficial ownership and control information must be obtained or be obtainable by the authorities;

2. there must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information; and
3. non-public information on beneficial ownership and control must be able to be shared with other regulators/supervisors and law enforcement authorities, both domestically and internationally, for the purpose of investigating illicit activities and fulfilling their regulatory/supervisory functions respecting each jurisdiction's own fundamental legal principles.

Part III of the MCV Report suggests a menu of possible options for obtaining and sharing beneficial ownership information, the components of which have widely varying regulatory burdens. The options are:

1. up front disclosure to the authorities;
2. requiring corporate service providers to maintain beneficial ownership and control information ("Intermediary Option"); and
3. primary reliance on an investigative system.⁷⁶

The OECD proposes that the option applicable to a specific jurisdiction will depend on vague and highly subjective notions of the quality and reliability of the legal infrastructure in the jurisdiction concerned. Those seeking a level playing field are concerned that there is a danger that the OECD will use this philosophy as the basis for prescribing different and trade distorting non-tariff rules for non-OECD jurisdictions as opposed to those adopted by OECD Member States.

The OECD plans to release a follow up report to the MCV Report in the second quarter of 2002. This report will apparently contain a "template" to facilitate the determination of which of the options outlined above would apply in specific countries.⁷⁷

There is great concern regarding the potential for such a subjective template, developed by an organisation mandated to promote the interests of its Member States, to be used as a tool in the creation of further non-tariff barriers which will threaten small and developing economies. In view of recent OECD statements confirming a willingness to seek a level playing field, it is presumed that the OECD now intends for the template to apply to all countries, irrespective of OECD membership status and that it would therefore undertake global consultation as well as a broad, fully transparent and objective benchmarking process assessing and publishing the regulatory and investigative standards applied at least within its Member States, prior to attempting to impose the template on any non-OECD jurisdiction. If this is not the case, then the development of such a template by the OECD has serious non-competitive ramifications and could derail an effective process for change.

⁷⁶ The MCV report at page 75.

⁷⁷ Note by the FSF Secretariat regarding "Ongoing and Recent Work Relevant to Sound Financial Systems" (25-26 March 2002 FSF Meeting).

In the absence of consultation, transparency, and objectivity, any such template runs the risk of being seen as simply a pretext for large and powerful countries imposing disadvantageous trading conditions on smaller economies.

6. RECOMMENDATIONS AND CONCLUSIONS

The ITIO and STEP concur with the OECD's objective of minimising the misuse of corporate vehicles on a global basis. This can best be achieved if the design and implementation of the rules for achieving this end take account of the views of all affected parties and competing considerations, including the reasonable protection of financial privacy. Simply put, the object should be a legitimate process aimed at a fair result which does not distort the trade in services away from small and developing countries. Accordingly, the Level Playing Field Review recommends the following in order to achieve legitimacy of process and effectiveness in application:

A Level Playing Field

Individual jurisdictions, as well as special interest groups and cartels made up of like jurisdictions, will naturally seek to protect and maintain their economic competitiveness when providing cross-border financial services.

Accordingly, progress must be premised on the basis that uniform rules, developed in an inclusive process are implemented by all states, on the same time frame, with the same consequences for those states which do not co-operate. This is a fundamental objective, and essential to effectively achieving an equitable result.

The imposition of more onerous "compliance requirements" on non-OECD Member Countries is not acceptable. Efforts to minimise the misuse of corporate vehicles should not be used as a guise for undermining the competitive position of those jurisdictions which have limited input into the standards' design process. To allow this misuse would be to compound the non-tariff barriers to the trade in services arising in other initiatives.

Individual sovereign jurisdictions should have the opportunity to develop their own methods to ensure the timely access to corporate ownership information and the exchange of such information which is consistent with their own legal and social environment. As long as such information is available on a timely basis and subject to exchange in terms and circumstances agreed by consensus, the means through which this is achieved should be left to the individual states concerned.

Universal Forum

Any country will be more inclined to co-operate in implementing regulations which it has had a part in developing. This is a cornerstone of any legitimate process. All jurisdictions which will be affected by a process must have genuine and substantial participation in setting the agenda which defines the concerns, participating in the design of solutions and determining the ultimate outcome of the process if obligations are to apply to them.

Balancing Competing Considerations - Privacy

It is essential that privacy considerations are also taken into account in any development of new rules and regulations. It is dangerously inappropriate to seek law enforcement objectives to the exclusion of other considerations in civil society. Privacy is a basic human right and accordingly, any implications which may concern privacy need to be seriously considered by all the countries concerned.