

**CARIBBEAN FINANCIAL ACTION TASK FORCE  
CONFERENCE ON THE INTERNATIONAL FINANCIAL SERVICES SECTOR**

**The Case for an International Protocol on Information Sharing**

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I must confess that I have good news and I have bad news for you. The good news is that I'm the last speaker of the conference AND it's less than three weeks to Christmas. The bad news is that, although this year has been tough for offshore finance centres, next year could be even tougher if we do not respond appropriately to the initiatives.

Doubtless like yourselves, I am sick and tired of having to deal with the initiatives and their acronyms, and am more than ready for my holiday!

I have to confess that the initiatives, which have occupied such a vast amount of our time over the last year, have had some good effects:

- They have helped us not just to prioritise some of the changes we were already planning, but also caused us to take action.
- They have helped to focus politicians' minds on expediting some measures which may have become a little bogged down.
- And – an often overlooked benefit – they have made the international community aware of the many excellent measures we have already put in place to combat nefarious activity.

They have also, perhaps unexpectedly, reminded us how, by the strength of our common endeavour, we achieve more than we achieve acting alone.

There can be little doubt that the Commonwealth's recent powerful rebuke to the OECD for its behaviour, combined with renewed Caricom action through CARIB have contributed to the OECD's decision to strengthen dialogue with the offshore centres, beginning with its recent Memorandum of Understanding.

The OECD now intends to participate in regional conferences on harmful tax practices, with the first discussion between the Commonwealth Secretariat and the OECD taking place in Barbados from 8-9 January 2001. We can look forward to a lively occasion!

So matters are now being addressed on a more even footing. That does not mean, however, that there has been any let-up in the international community's determination to ensure that all offshore finance centres maintain the highest international standards. Far from it.

International financial centres everywhere continue to operate under intense scrutiny and heightened pressures from the G-7 countries, the OECD, the FATF, the FSF etc. Increasingly, there is talk of the possibility of isolating those jurisdictions which fail to exercise their responsibilities to the global community in preventing or inhibiting cross border criminal activity. In this new regulatory and political environment, it cannot be business as usual for financial centres - onshore or offshore. Within the new dynamics, centres are having to re-engineer themselves and re-invent ways of doing business.

Few issues are of more concern to offshore practitioners, regulators and policy makers than preserving and enhancing the integrity of financial institutions and financial markets because of their vulnerability to money laundering and other forms of white-collar crime.

Equally, the governments of developed countries have a common interest in shoring up the effectiveness, integrity and legitimacy of national tax, regulatory and law enforcement systems through international cooperation. Throughout history, governments have relied on the use and control of information and intelligence for their own benefit – and, of course, we hope, for the benefits of their citizens! Today, governments cannot ignore the fact that some citizens can now place information beyond the recall of their own domestic information sources; nor can they ignore the ease with which citizens of other countries can abuse their regimes to the detriment of the home country.

As an important aside, it is worth recalling that, in most countries, citizens are prepared to compromise their privacy to some extent in the wider interests of government. For example, in tackling crime, particularly drug trafficking and money laundering, absolute privacy rights have been severely curtailed. Yet governments have also recognised the benefits of privacy for personal business and political reasons. It is important that, with information exchange, a clear balance between privacy and disclosure be struck. Indeed, I would argue that striking the right balance will be vital to ensuring acceptance of what is proposed.

So what should be proposed? Globalisation and modern technology have given fraudsters unprecedented opportunities to carry out their nefarious activities all across the globe. The ability to move money internationally, rapidly and easily aids the criminal who is well poised to abuse and exploit weaknesses anywhere in the global financial system. International fraud is now a global growth industry. All countries are at risk.

In today's world, the need is well recognised for regulators, law enforcement and tax authorities to have the ability to assist their counterparts in other countries with investigations, even if no breach of laws or rules within their own jurisdiction has taken place. If financial crime is to be combated effectively, it is of paramount importance that countries cooperate readily with each other.

Hence the plethora of international treaties and conventions, governing a myriad subjects, bilateral double taxation agreements, tax information agreements, MOUs and the like. Hence the growth of FIUs, with Egmont and Interpol sharing information across borders to combat transnational crime.

The solutions to the problem of international fraud must fall within a global context, not simply national horizons. This suggests a more fully coordinated and integrated international approach to tackling the challenge than at present. An approach that can be implemented on a level playing field with the same rules applying to all jurisdictions, irrespective of size.

What the current situation requires is what I have been asked to talk about today. It requires the development of a properly developed, internationally accepted protocol on “information sharing” or “exchange of information”.

The development of this protocol should build on what is in place now. A number of international standards are already in place concerning the provision of cooperation between law enforcement and regulatory authorities. These include those established by international regulatory bodies such as IOSCO, IAIS and BASEL, and set by the relevant FATF/CFATF recommendations, as well as Interpol and the Egmont Group and the ten principles for the exchange of international financial information recommended by G7 Finance Ministers in May 1998.

A central tenet of responsible regulation over recent years has also been the sharing of information between regulators in different countries, with attendant inroads into previously undisclosed information. “Gateway” clauses in financial services legislation now provide for the exchange of information between regulators for regulatory purposes only.

In the BVI, as in other responsible jurisdictions, such gateways help ensure that we can meet our obligations to the world community on the one hand, while protecting and fostering our financial services industry on the other. In many jurisdictions, however, while gateway legislation provides transparency with regard to regulated institutions, the transparency does not necessarily permeate to the underlying clients of those institutions.

Accordingly, an international consensus has now emerged from the initiatives that some accommodation will have to be made for extending the ambit of all-crimes legislation and international cooperation mechanisms to encompass the passing on of information on certain tax matters, particularly criminal tax, fraud, forgery, false accounting and the like.

Work on creating a suitable basis for international exchange of information is already being taken forward by developed countries on a number of fronts. The G7 has called for all countries to work rapidly towards a position where they can permit access to and exchange bank information for all tax administration purposes. The OECD has criticised bank secrecy laws that allow fraudsters to evade tax and called for measures to improve access to bank information for tax purposes. The EU is developing a basis for the exchange of information on savings income.

But leaving it to the G7, OECD or EU to come up with the standards with which we have to conform cannot be the right answer. Very early on in the fight to cope with the avalanche of initiatives, I came to the conclusion that the only logical outcome – the only win-win situation – had to be the establishment of an effective exchange of information mechanism that optimised the legitimate concerns of all stakeholders.

History does not favour people who do not change with the changing times. I believe that a successful future lies in recognising that some of our financial services sector programmes, policies and procedures must change. And that new standards, not only with regard to regulatory and supervisory oversight of the financial services industry, will result from the initiatives. More so, the new standards will also apply to international cooperating mechanisms – and in relation to what is not internationally acceptable as regards tax practices.

Already, developments in the Bahamas, Bermuda and the Cayman Islands suggest that they have come to this realisation and are making the requisite shift in their programmes. The Bill for the Financial Services (International Cooperation) Act 2000, presently before the BVI legislature, also encapsulates some of the compulsory investigative powers that the international community now considers as a necessary minimum for effective international cooperation.

The more that individual countries develop such legislation, the greater the need for a series of ground rules on what an effective international cooperation/exchange of information mechanism should comprise. In my view, the best way forward is the development of a truly multilateral information exchange protocol, a framework for an effective, across the board, international cooperation mechanism.

Unconventional problems require unconventional solutions. It is folly to apply old strategies when the new world order demands new strategies. Development of an international exchange of information protocol may enable OFCs to seize the moment.

Yes! It may take some time to build trust. If nothing else, I believe that building a highway may compel use and provide a good test run to see if the nations of the OECD are serious about a concerted and consistent attack on global white collar crime or whether their anti-OFC posture is merely a smokescreen for an ill-founded tax agenda.

In my view, a properly developed international protocol would establish a practical, workable, easily accessible and realistic mechanism that achieves very real results. Such a mechanism would safeguard the rights of potential objects of investigation vis-à-vis the rights of the state in cooperating in the cross border combat of crime. It would allow for certainty, the comfort and protection of persons in the private and public sectors, establish a proven system of due process, and foster respect for the rule of law and the rights of the individual.

Those of us who have already set up international cooperation/information exchange programmes know that we must also redouble our efforts to sensitise law enforcement agencies and judicial bodies to the nuances of these and how best to access the relevant information. Establishment of an internationally agreed protocol for information exchange and international cooperation will reduce the frustrations of overseas agencies, which often operate through ignorance. It will remove doubt as to what is and is not possible and impact positively on our reputation.

So what might an international information exchange protocol comprise? It should seek to provide answers and guidance to the following questions:

- What should be the means test for triggering the international cooperating mechanisms?
- What should be the scope of activities covered by the protocol?
- Should the courts be involved to ensure that individual rights are not trampled?
- Should disclosure be mandatory or discretionary?
- Should there be any limitations on disclosure?
- What about notification rights - should objects of discovery be informed about the inquiry?
- Should it be based on dual criminality?
- Should disclosure be on demand, automatic or spontaneous?
- Should there be anti-fishing expedition clauses?
- What about reciprocity?

A determination of all these issues will be critical to the protocol.

Given that it should be wide enough to encompass bilateral arrangements such as MOUs, treaties and so on, as well as multilateral arrangements, the Mutual Legal Assistance Treaty ("MLAT") system may provide a good basis for a way forward. While MLATs at present apply only to criminal matters and do not extend to pure fiscal matters, they are realistic and practical and achieve a very real result while safeguarding the rights of potential objects of investigations.

Many countries have negotiated mutual legal assistance arrangements with the United States, and a wide range of such arrangements exists among countries worldwide. A capsule view of how MLAT arrangements work may be gleaned from the Treaty between the USA and BVI which, as you will see, is identical to the MLAT between the USA and Caymans.

Under the Treaty, the US and BVI have agreed to provide mutual legal assistance within the terms of the Treaty (and only within these terms) for the investigation, prosecution and suppression of criminal offences of the nature and in the circumstances set out in the Treaty. Fishing expeditions are, therefore, not permitted and fiscal offences are specifically excluded.

Article 1 of the Treaty states that assistance shall include:

14. Taking the testimony or statement of persons
15. Providing documents, records and articles of evidence
16. Serving documents
17. Locating persons
18. Transferring persons in custody for testimony
19. Executing requests for searches and seizures
20. Immobilising criminally obtained assets
21. Assistance in proceedings related to forfeiture, restriction and collection of fines; and
22. Any other steps deemed appropriate by the BVI and US Central Authorities who are responsible for receiving and acting upon all requests for assistance under the Treaty.

Compliance with requests made under the Treaty has to be in accordance with and subject to its provisions. Where for example, the execution of a request requires the issue under BVI law of a subpoena, a search warrant or an order for seizure of any article, or where any other order is necessary from a judge or magistrate, a certificate given by the Central Authority that this is required for the purpose of a request constitutes sufficient authority for issuing or making the order without further enquiry.

The Treaty provides for the protection of persons appearing in the BVI in response to a request. Accordingly, if the appearance of a person in the BVI is requested by the US Central Authority, the BVI Central Authority may invite the person to appear before the appropriate authority in the US.

The person is under no compulsion to accept the invitation, but if he does, the law provides safe conduct in that he cannot be detained or subjected to any restriction of personal liberty by reason of any acts or convictions in either the BVI or the US which preceded his departure from the BVI.

Other important features of the Treaty are that requests made under it are confidential and that a person in respect of whom a request is made is required to keep it confidential, except for discussing it with his lawyers. It is a criminal offence punishable by fine or imprisonment for a person to fail to comply with an MLAT request or to disclose the request to a person other than his lawyer. A person can submit a claim for reimbursement of expenses incurred in complying with a request through the relevant Central Authority.

The Treaty limits the use of information or evidence obtained under it for any purposes other than the investigation, prosecution, or suppression of those criminal offences stated in the request. The information, once supplied is to be kept confidential except for its use in the particular case for which it is requested.

Interestingly, neither the BVI nor, indeed, any other UK Overseas Territory in the Caribbean has an MLAT agreement with the United Kingdom, neither is there any MLAT between Caribbean countries.

The value of an international protocol would be that an established and known regime would govern the rendering of assistance between jurisdictions. As I said earlier, this would allow for certainty, the comfort and protection of persons in the private and public sector, a proven system of due process, respect for the rule of law and the right of the individual.

I hope you will agree that the MLAT structure provides a good model, but I would welcome your comments and suggestions. These will be particularly welcome, given my firm belief that offshore centres themselves must have a role in developing this international protocol. Only a proper partnership approach can ensure a robust protocol that commands widespread respect and acceptance.

As you may know, an innovative partnership approach spearheaded by the British government underpinned the recent KPMG review of financial regulation in the British Caribbean Overseas Territories and Bermuda. The review recognised many excellent features of our financial services regimes and set out recommendations for improvement. Close involvement in the preparation of the report helped build the territories' willingness to cooperate with it.

From the onset of the initiatives, I called for regional financial centres to work together to develop an international exchange of informational protocol as a means of demonstrating to the OECD et al our willingness to cooperate internationally in the fight against transnational crime. At that time, I was merely thinking about a protocol covering criminal justice and regulatory cooperation. An emerging international consensus is now in favour of wider cross-border exchange of information, embracing tax cooperation.

But this needs to be promoted in an orderly way to ensure that new information disclosure arrangements continue to respect legitimate privacy of citizens affairs and that these do not impose unnecessary and uncompetitive burdens on financial institutions and other economic operations. An international exchange of information protocol offers the opportunity for all developed and developing countries who are committed to the principles of fair competition to work together to elaborate and promote internationally recognised standards, codes and mechanisms in this area on a level playing field basis.

We should also reflect on the importance of us getting our ideas in first. Many people in this room are experienced negotiators. They know how valuable it is that their document is the one tabled so that it, rather than the other side's version, forms the basis for discussions. In other words, if we don't come up with ideas for an international protocol, we could find others doing it for us.

I opened my remarks today by saying that next year could be even tougher if we do not respond appropriately to the initiatives. Taking positive action on exchange of information is in my view such an appropriate response.

It is still early enough in this particular game for us to have real influence on the outcome. There is little to be gained from shouting from the sidelines and much to be gained from playing with skill, ingenuity and commitment. Let us show goodwill towards the international community and a determination to take control of our own destiny by leading rather than reacting on this matter.

If we fail to devote the required resources to developing what we think an international exchange information protocol should comprise, we will not be putting our best foot forward in defence of our financial services activities.

I welcome your comments, thoughts and ideas on how we can move forward in developing the protocol together.