Chapter 5: Responses of Offshore Financial Centres

5.1 Introduction

The previous chapters have examined the directives of the supranational organisations and the four major issues which lead to the analysis in this chapter of the responses of the OFCs. Throughout this chapter, it will be demonstrated that the basis for the assertions made by the OFCs towards the OECD are balanced and supportive. The OECD 2001 *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* report was not well received by the OFCs and their displeasure was first made apparent at the January 2001 forum, at the High Level Consultations on OECD Harmful Tax Competition Initiative. The OFCs asserted that the dialogue with the OECD was not carried out on equal terms. Serious-ideological differences emerged between offshore and onshore nations on the question of tax policy and the use of offshore confidentiality in upholding such policies. But, the voices of offshore nations, most of which are SDEs, can hardly be equated with those of the OECD countries. Indeed:

there is significant inequality of negotiating power. The OECD Member countries are the most powerful countries in the world, who, through the OECD are now acting in unison. By contrast, the ‘tax haven’ countries are

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469 Gaffney, above n 125, 307.
small jurisdictions with little or no political co-ordination who are often the subject of vilification in the international media.

The evident irony is that whereas offshore investment arises out of purely voluntary conduct of individuals and businesses internationally, responding to the attractive fiscal and legal environments of offshore countries, the OECD’s challenge is ‘essentially coercive action’.470

In practice, this means applying political pressure and seeking to intervene in the international affairs of other jurisdictions, which normally calls for some form of justification or defence on the grounds of public international law.

The analysis in this chapter will show the shortcomings of the OECD arguments of harmful tax practices as presented in Chapters 2 and 3, and will highlight at least one major issue in the apparent bias of the OECD report in favour of developed countries and more developed offshore jurisdictions, in particular, those associated with developed countries such as the UK dependencies. For example, although financial centres in London or New York offer tax incentives to, or accept investments from non-residents wishing to avoid taxes in a similar manner to offshore jurisdictions, they have neither been admonished nor threatened with sanctions. It is the small developing offshore centres, particularly in the Caribbean, which have been the main target of the OECD by being named in the various ‘blacklists’, despite the fact that such countries (Cayman Islands, Bahamas, British Virgin Islands) have similar or

470 Ibid.
even identical laws and legal policies to other ‘better protected’ offshore jurisdictions and even some onshore ones.

As previously noted, the proposals required that low-tax regimes make many concessions or face penalties for being ‘non-cooperative’. Although, the same harsh standard was not recommended for OECD member states.

“They are being asked to make changes, ... but there are no specific penalties ... Similarly, the OECD is using a double standard in its campaign against privacy ... Switzerland, for instance, has refused several times to abolish financial privacy ... Luxembourg, Belgium and Greece, ... also have indicated a reluctance to phase out financial privacy. Yet none of these nations are being threatened with financial protectionism from other countries.”

Further, many OFCs complained that the OECD had not bothered to find out about the actual workings of their offshore systems. Some of the demands being made by the OECD would inevitably result in the demise of the offshore financial sector. Many offshore nations feel that this is simply too high a price to pay, particularly as their economies are being threatened by other forces of globalisation such as liberalisation and unhindered free trade. The incompatibility of the OECD initiative to such free trade policies has not been overlooked by the OFCs.

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472 A good example is the banana issue where the US challenged the preferential quota system between UK and the Windward islands in the Caribbean in the World Trade Organisation forum between 1995 and 2001.
OFCs were particularly concerned about reciprocity in the several areas in which demands for reform are being made. Whether it related to money laundering, identities of beneficial owners in companies and trusts, reporting requirements, offer of tax incentives to non-resident account holders, and similar matters, they insist that onshore financial systems also have similar demands placed upon them.473

5.2 Momentum Gathers

OECD membership, as previously noted, is seemingly dominated by wealthy, developed nations. The dominant states in that group are the principal participants in the market for cross-border financial services. At the same time, these states control the process for regulatory reform. The OECD claims to seek a level playing field for the regulation of all jurisdictions. However, it is argued by the OFCs that, the OECD is unlikely to be an impartial referee in regulating a market where its Member countries have a significant commercial interest.474 The US Government’s position, for example, is articulated in a 2002 US Treasury report on corporate inversions as follows:

Our overarching goal must be to maintain the position of the United States as the most desirable location in the world for place of incorporation, location of headquarters, and transaction of business.475

473 Antoine, above n 465, 320-2.
474 Stikeman Elliot, above n 468.
Hence any jurisdiction, quite understandably, will seek to protect its commercial interests in redrawing the rules. Hence there is unease with a process for change controlled by a subset of market participants.

5.3 Background

The non-OECD OFCs, financial services professionals, and SDEs support the OECD call for suppressing the misuse of corporate vehicles such as International Business Companies (IBCs). Non-OECD OFCs agree with the OECD 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.476

It is argued that the need to provide information to support cross-border enforcement of tax liabilities is less self-evident, even though there is no precedent in international law for the imposition of unilateral obligations on one country to assist another in its efforts to collect tax. Proposals for changing practices in the tax information exchange area are accordingly sensitive, and require careful consideration. Non-OECD OFCs acknowledge that conventional rules for information exchange for tax purposes are evolving and small and developing countries seek to participate in the process of setting new policy and standards.477

476 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”. See Organisation for Economic Co-operation and Development, above n 467, 7.

477 Stikeman Elliot, above n 474.
Non-OECD OFCs 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 OFCs 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:\(^\text{478}\)

- 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-cooperation);
- 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
- the adoption of regulations which are proportionate and risk-based so that the restrictions on legitimate commerce are appropriately balanced against the harm sought to be curtailed.

5.3.1 Methodology Adopted


\(^{478}\) Ibid.
and The Society of Trust and Estate Practitioners, it was based on a survey of the existing 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).

This “Level Playing Field” report also draws upon existing analytical and statistical work on the formation and regulation of corporate vehicles, including work conducted by the EU, the United States General Accounting Office (GAO), the US Senate and Treasury, the Bank for International Settlements (BIS), the FATF and the OECD. It was in reply to OECD’s “Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes” report (‘The OECD Report’).

5.4 Key Concerns with the OECD Report

5.4.1 Summary of Issues

The main concerns that Non-OECD OFCs have with the OECD Report are:

(i) the OECD Report focuses on Non-OECD OFCs to the exclusion of the OECD’s own members, which account for 80 per cent of the global trade in financial services;
(ii) the proposals in the OECD Report were developed in a process controlled by a subset of market participants; and (iii) the dangers of compromising individuals' privacy were not sufficiently considered.

(a) Primary Focus on Non-OECD OFCs

The OECD adopted an express focus on vehicles established in "offshore" jurisdictions which were not OECD Member States. This limits the utility of the report as OECD Member countries already control 80 per cent of the global "offshore" market – i.e., the trade by jurisdictions in financial services provided to non-residents. The restricted focus is curious, particularly as the initial report of the FSF acknowledged difficulty in distinguishing so-called "offshore activity" within the major developed states from that in smaller and developing states. There are well documented concerns relating to vehicles established or administered in OECD Member States, as discussed below;

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483 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.

Switzerland, which is an OECD and FATF Member, criticised the final outcome of the FSF process on the basis that:

the (FSF) list was drawn up in a non-transparent manner and does not list several financial centres with a high proportion of international financial business (e.g. New York, London) as Offshore Financial Centres. (*Swiss Federal Department of Finance, Swiss Financial Centre: A Documentation, July 2001 at page 8*).
The OECD justified the focus on non-OECD OFCs, as follows: 484

- some OFCs are perceived to provide “excessive secrecy” and “create a favourable environment” for the misuse of such vehicles;
- a disproportionate share of companies in the “offshore” world are shell companies; and
- recent improvements in some non-OECD OFC regimes may provide models for other non-OECD OFCs.

As the analysis 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 OFC regimes providing more rigorous models for some OECD OFC regimes.

The ITIO argues that the adoption of a perspective limited to offshore centres mars the OECD Report, undermining its objectivity and limiting the value of its conclusions. Non-OECD OFCs perceive mixed motives in the OECD’s process and proposals. 485

(b) Disproportionate Regulatory Burdens

Regulation consumes resources in the form of direct financial costs and the transaction friction occasioned by satisfaction of compliance obligations. Appropriate regulation is generally accepted to be proportionate to the risks and benefits associated with the activity being regulated. Disproportionate and excessive

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484 Organisation for Economic Cooperation and Development, above n 480, 17.
485 Stikeman Elliott, above n 481.
regulation applied selectively to particular market participants burdens those participants with a competitive disadvantage. In an efficient market, unevenly applied regulatory burdens shift 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.

States controlling the design process have the opportunity to assert their objections to particular forms of increased regulation at the design stage, in the non-transparent policy formulation process, and work out a rationale for self-exemption (or “outsider-burdening”) before proposals are formally tabled. Non-OECD jurisdictions find themselves portrayed as unco-operative by those controlling the process when excluded jurisdictions object to an opaque process.486

(c) Erosion of Privacy

The collection and sharing of the complete record of an individual’s financial transactions, 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 OECD Report.

The UN Declaration of Human Rights recognises and protects privacy as a basic human right.487 The OECD also accepts that individuals and vehicles treated as corporate by the OECD Report have legitimate expectations of privacy and business

486 Ibid.
487 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.
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”. 488

The OECD report on “Improving Access to Bank Information for Tax Purposes” 489 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. 490

The public is doubtful of the ability of governments to maintain data security 491 or to resist the temptation to access information for political, economic or other purposes, particularly as there is, by definition, no opportunity to monitor unauthorised access.

488 Organisation for Economic Cooperation and Development, above n 484, 47.
490 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).
491 Ibid. 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 service-wide network. 209
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, common in that state.\(^{492}\)

It can be argued that global sharing of information means that criminal access can occur at the weakest point of entry, multiplying the risks associated with unauthorised disclosure.\(^{493}\)

The risks to personal privacy arising from the collection of financial information are disconcerting. 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 a major concern. 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 have insufficient safeguards to ensure that information obtained and shared is safeguarded against inappropriate use, including human rights violations. A report by the US based Task Force on Information Exchange and Financial Privacy identifies the danger that information may be provided to countries which have one or more of the following:

\(^{492}\) 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.


\(^{493}\) 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.
characteristics: major corruption problems; hostility to the West; or past sponsorship of terrorism.\footnote{494 Task Force on Information Exchange and Financial Privacy, Report on Financial Privacy, Law Enforcement and Terrorism, 25 March 2002.}

According to Tanzi and Zee, information exchange agreements cannot be left self-enforcing as the national interest would seem to lie in not sharing information, so strengthening its location for investors.\footnote{495 Vito Tanzi and H H Zee, ‘Can Information Exchange be Effective in Taxing Cross-Border Income Flows?’ in K Andersson, P Mez and C Sillverberg (eds), Modern Issues in the Law of International Taxation (2001).} This is simply to secure national advantage, whether it is in terms of tax revenue, banking business, tourism or others. Even if there are agreements in place, there is under-supply of information as the incentive of national advantage and foreign investment will outweigh and defeat the purpose of the information exchange agreements.\footnote{496 In contrast, Eggert and Kolmar (2002) find that countries may voluntarily choose to share information fully, but in their context there is no particular benefit to any country, whether in terms of tax revenue or banking business from attracting inward investment, so that the basic problem essentially vanishes. W Eggert and M Kolmar, ‘Information Sharing, Multiple Nash Equilibria, and Asymmetric Capital-Tax Competition’ (EPRU Working Paper Series No 02-01 (Economic Policy Research Unit, 2002).}

It is essential to ensure that the countries receiving information have safeguards in place in order to protect human rights 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.

Legal systems throughout the world have different penalties for tax evasion, money laundering and other financial crimes. China, for example, is known to have sentenced an individual to death for tax evasion.\footnote{497 www.amnesty.org.il/urgent/5201PRC.html, August 2001.} Information exchange programmes 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.

5.4.2 Weaknesses in OECD Process

(a) Lack of Universal Forum

The ITIO argues that the 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. Whilst the OECD maintains to seek, in principle, a more inclusive forum. Jeffrey Owens, OECD Head of Fiscal Affairs puts the position as follows:498

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".

Many small and developing jurisdictions, including non-OECD OFCs, would welcome such a universally accessible process for policy formulation. However they perceive that the current reality 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 their concerns. 499

(b) Lack of Expert Advice Outside OECD

In drafting the OECD Report, the OECD Steering Group on Corporate Governance established an ad hoc group consisting of persons from twelve OECD Member countries.500 Despite this expertise, the OECD focused their attention on non-OECD jurisdictions with supposedly only cursory comments on their own members’ regimes. 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, policy formulation must be premised on transparent comparison of the regulatory systems in market participants. In the OECD Report, this was not done according to the non-OECD OFC’s.501

(c) Uneven Playing Field

Without the goal of a level playing field, it might be argued that business will simply migrate to those jurisdictions overlooked or excused from compliance with the new

499 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. 500 Organisation for Economic Cooperation and Development, above n 488, 16.
501 Ibid. The methodology used in the report did not include explicit co-operation and participation of the non-OECD OFCs.
In such circumstances, it will also be difficult to secure the trust and cooperation of the many jurisdictions which need to work together to reform the regulation of the international financial system. The OECD had expressed a commitment to a level playing field in the context of its Harmful Tax Practices project, though this commitment does not appear to have yet translated into a process which is likely to realise this goal. Some member states of the OECD have acknowledged that non-OECD jurisdictions should not be required to implement access to information processes which one or more of the OECD member states are not willing to implement.

In the context of the Harmful Tax Practices Initiative the OECD showed 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 that initiative were already endorsed by member countries was unconvincing whilst Switzerland and Luxembourg continued to abstain from the 1998 Report on Harmful Tax Practices. In the OECD 2001 Progress
Report on the project, Switzerland and Luxembourg were joined in their abstentions by Portugal and Belgium.\textsuperscript{506}

The OECD’s choice to focus on non-OECD OFCs or non-Member countries in the OECD Report undermined the confidence of objective observers that the OECD genuinely sought a level playing field. For the OECD to effectively achieve their goals relating to transparency and information exchange it was essential that all countries, both “onshore” and “offshore”, OECD Member states and non-OECD Member states were part of the process and “buy in” at the same time, and so supported the project through co-operation and co-ordinated effort. Without this, SDFs 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.

5.5 Benchmarking the OECD’s Conclusions

5.5.1 Corporations

The OECD stated 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 correctly singled out for attack on the alleged basis that their combination of effective anonymity and little or no supervision makes them more susceptible to misuse.\textsuperscript{507} Only passing mention is given to functionally equivalent commercial vehicles in OECD Member


\textsuperscript{507} Organisation for Economic Cooperation and Development, above n 501, 22.
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. 508

(a) Bearer Shares

Again, the OECD notes that "the ability to obscure identity is crucial for perpetrators desiring to commit illicit activity through the use of corporate vehicles". 509 The OECD indicates that the primary instruments used to achieve anonymity are bearer shares, "corporate" directors and chains of corporate vehicles. 510

In the fifteen OECD Member States and OECD non-Member States surveyed in the Level Playing Field report, 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). 511

Although the issuance of what are styled as "bearer shares" is technically permitted in several non-OECD OFC jurisdictions, in the Cayman Islands bearer shares are not permitted unless they are subject to custodial arrangements with a recognised

508 United Kingdom Cabinet Office Performance and Innovation Unit, Recovering the Proceeds of Crime, June 2000.
510 Ibid 29-32.
511 Stikeman Elliot, above n 485, 18.
international custodian or licensed Cayman Island entity.\footnote{Trident Trust Cayman Islands: Custody of Bearer Shares' Trident Trust \texttt{<http://www.tridenttrust.com/PDFs/Cayman_Bearer_Shares_Memo.pdf>} at 28 April 2004.} In the British Virgin Islands the government has made a public commitment to amend the \textit{International Business Companies Act} to "immobilise" bearer shares.\footnote{International Business Formation Inc, 'Changes in the British Virgin Islands Concerning Bearer Shares and Director Requirements' (2003) \texttt{<http://www.ibcf.com/news/news050503-BVI-bearer-shares.html>} at 28 April 2004.} 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 a similar footing as registered securities.

\textbf{(b) 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 OFCs was not helpful 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") identified corporations in EU Member States as structures susceptible to being used in money laundering operations. The report noted:\footnote{Researc Centre on Transnational Crime - University of Trento, \textit{Transparency and Money Laundering: Study of the Regulation and its Implementation in the EU Member States, that obstruct Anti-Money Laundering International Co-operation} (2001 Research Centre on Transnational Crime - University of Trento) 8.}
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.

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 US state of Delaware, basic records of shareholders in private companies and related vehicles are not required to be kept by the state.515

(c) 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 company 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

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to appoint an auditor. In Ireland small private companies are required to provide an abridged balance sheet. New Zealand companies are not required to file accounts with the corporate registry, unless they qualify as a “non-exempt” company.

\[(d)\text{ Regulation of Service Providers}\]

One of the reasons advanced for the focus in the OECD Report on non-OECD OFCs was that such countries allegedly have weak supervisory and regulatory regimes. In order to test this view the financial service providers were reviewed by ITIO to verify if they were regulated in each of the 15 jurisdictions surveyed.

In general, the OFCs examined 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. This was also noted by the IMF in its Progress Report on the offshore financial centre program as follows:

It should, however, be emphasised that the oversight of company service providers does not occur outside of OFCs, and there are no accepted standards on whether and, if so, how, they should be regulated.

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517 Countries which have 25% or more foreign shareholding.
519 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).
Significant recent advances are evidenced in the regulation of service providers in most of the non-OECD OFCs, which now have expansive regimes for such regulation. For example, the Cayman Islands Monetary Authority\(^ {522}\) and the Financial Services Commission in the British Virgin Islands\(^ {523}\) 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.\(^ {524}\)

The benchmarking process reported here demonstrated that the examined financial services sectors within OECD countries were often relatively unregulated or poorly controlled when compared to those now extant in the principal non-OECD OFCs.\(^ {525}\) The UK Treasury apparently shares this conclusion following recent comparisons of corporate regulation in certain offshore centres with that in the UK.\(^ {526}\)

(e) 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

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\(^{523}\) 'Financial Services Commission Holds First Board Meeting', Islands Sun Newspaper (British Virgin Islands), 7 June 2002.


\(^{525}\) Stikeman Elliott, above n 511.

\(^{526}\) The UK Treasury paper entitled Regulatory Impact Analysis Disclosure of Beneficial Ownership of Unlisted Companies, July 2002 at 3.11.9. notes as follows:

Whilst the UK regime has been praised for its business friendliness and pragmatism in attracting foreign companies to establish themselves here, it also has its critics at home and abroad. Indeed, centres once considered disreputable by UK standards now have stricter company regulation, in certain respects, than the UK (see, e.g. the Jersey and Bermudan laws on beneficial ownership). Thus the current system raises issues of how to balance the interests of the national economy and international leadership.
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 potential for non-tariff trade barriers has promoted unease among clients of financial centres established in SDEs. Some states within the OECD, including the US, 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 single member Delaware LLC competes directly with an International Business Company (IBC) and is ubiquitous in the “offshore” world. There are more than 300,000 corporations established in Delaware. 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 those now applicable and proposed for IBCs are 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”

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527 The Uniting and Strengthening America by Proving Appropriate Tools Required to Intercept and Obstruct Terrorism enacted on October 26 2001, the Money Laundering Control Act of 1986, the Bank Secrecy Act (BSA) of 1970 which covered the Currency Transaction Report, and the Suspicious Activity Report was included in the BSA in April 1996.

528 For example, in an article promoting tax-free trusts established in the US entitled “Trust US” appearing in the FT Expat the author states that: The US has considerable advantages over traditional offshore financial centres as a trust jurisdiction. Unlike traditional “tax havens” and offshore financial centres, the US is above suspicion by European tax authorities.

requesting the company will be a wholesaler of corporate shell companies located in another country so no data will be collected on the beneficial owners.

Delaware LLCs can be formed in two hours for US$500.53 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.531 The website for the Secretary of State for Delaware describes the jurisdiction as The Incorporating Capital of the World.532

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.533

532 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.
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.” 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.

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.

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 law does not require it.” 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

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\[55\] Ibid 11.

\[56\] Ibid 6.

\[57\] Ibid 7.
outside the state. Despite a presence in the state described by Euro-American as a mere “formality”\textsuperscript{538}, 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.\textsuperscript{539}

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”.\textsuperscript{540} 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 “these banking activities raise questions about whether the US banks were used to launder money”.\textsuperscript{541}

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.\textsuperscript{542} In any event, Euro-American maintained no substantive presence in the State and was not apparently amenable to effective supervision.

\textsuperscript{538} Ibid 7.
\textsuperscript{539} Ibid.
\textsuperscript{540} Ibid.
\textsuperscript{541} Ibid 2.
\textsuperscript{542} Ibid 7. “According to the president of IBC and the Euro-American employee, Euro-American conducted no due diligence with respect to any company it incorporated because state law does not require it.”
The absence of any of the elements of information which the OECD insists must be available in Non-OECD OFCs 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.\(^{543}\)


Given the GAO’s conclusion and that the OECD’s expert group was presumably aware of the GAO Report, Stikeman Elliot asserts that two alternative explanations may exist for why the OECD did not choose to comment substantively on Delaware LLCs in the OECD Report. The first is that the assumptions in the OECD Report are wrong and that therefore the OECD judged that the risk of illegal activities using standards exemplified by 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 the assumptions in the OECD Report are correct but that multiple

\(^{543}\) Ibid 11.
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.  

(f) 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. 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

544 Stikeman Elliot, above n 525.
546 Stikeman Elliot, above n 544.
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. 547

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 but not civil or administrative tax matters.

The OECD 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. 548 The OECD

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 OECD Report regarding the Delaware LLC, Stikeman Elliot again asserts that 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 generally and that therefore the assumptions in the OECD Report are wrong. The second is that the OECD employs multiple standards in the OECD 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.

5.5.2 Trusts

(a) Uses of Trusts

The OECD recognises the trust\(^{549}\) to be an “important, useful, and legitimate vehicle for the transfer and management of assets”.\(^{550}\) Trusts are used to facilitate control and management of assets held for the benefit of minors and individuals who are incapacitated, for charitable purposes, for tax and estate planning and for supporting corporate transactions. The preservation of family assets through generations is the key for many individual settlors, particularly those with experience of repressive governments.

\(^{549}\) Treated as a corporate vehicle for purposes of the OECD Report, which it is not.

In the personal context trusts are used for the following:

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

(b) The Nature of a Trust

The OECD Report examines 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.551

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.552

551 Ibid.
552 Underhill and Hayton, Law of Trusts and Trustees (15th ed., 1995) 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.
As a matter of legal principle, an Anglo-Saxon trust is a relationship, not a contractual agreement as the OECD indicates.\(^{553}\) It is not an entity or vehicle, as it is not a legal person.

The OECD Report notes the use of trusts primarily in English Common law jurisdictions,\(^{554}\) 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. Countries which undertake such administration must therefore by definition be included in any analysis and should likewise be part of the process of 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.\(^{555}\)

A trust has the following characteristics:

(a) the assets constitute a separate fund and are not part of the trustee's own estate;

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\(^{553}\) Organisation for Economic Cooperation and Development, above n 551, 45.

\(^{554}\) Ibid 25.

\(^{555}\) Hague Conference On Private International Law, Convention On The Law Applicable To Trusts And On Their Recognition (Concluded July 1st, 1985)
(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 OECD Report states that "settlers attempting to evade taxes may transfer assets into a trust and then falsely claim that they have relinquished control over the assets." If a settler retains excessive control or a trust is 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.

(c) Benchmark

One of the reasons given for the OECD's focus on Non-OECD OFCs was that such countries allegedly had weak supervisory and regulatory systems. Findings

concerning the regulation of trustees\textsuperscript{557} 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 examined 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:

\begin{quote}
There is some opacity in the management of the trust as well; there is no authority that supervises the activity of trustees.\textsuperscript{558}
\end{quote}

The "Level Playing Field" report concluded that 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.

Research by the iTIO presented in the "Level Playing Field" report indicates that the non-OECD OFCs examined have extensive legislation regulating trustees, and in some cases, such legislation has been in place for some considerable time. They argue that the non-OECD OFCs are clearly well advanced compared to the majority of OECD countries. Non-OECD OFCs note that the OECD has acknowledged that non-

\textsuperscript{557} Detailed review found under Appendix D.
\textsuperscript{558} Research Centre on Transnational Crime - University of Trento, above p 514, 106.
OECD OFC regulatory and supervisory regimes would serve as useful models for "onshore" jurisdictions seeking to improve their regulatory or supervisory regimes.559

5.5.3 Ability to Exchange Information Internationally

To benchmark the "Level Playing Field" report, it is 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.560

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 evaluated all are members of the Egmont Group.

5.6 Recommendations and Conclusions

5.6.1 Argument for a Level Playing Field
It is argued by Stikeman Elliot that for progress to 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 cooperate. This is a fundamental objective, and essential to effectively achieving an equitable result.

The imposition of more onerous “compliance requirements” exclusively on non-OECD Member countries could be seen as hypocritical. 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.

The ITIO believed that 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.561

5.6.2 Balancing Competing Considerations – Confidentiality

561 Stikeman Elliot, above n 559.
It is essential that confidentiality 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. Confidentiality is a basic human right and accordingly, any implications which may concern confidentiality need to be seriously considered by all the countries concerned.

5.6.3 Proportionate and Risk-Based Regulation

Appropriate regulation must strike a balance between law enforcement objectives and the reasonable needs of legitimate commerce. Accordingly the regulations must be proportionate to the risks and benefits associated with the activity being regulated.

A regulatory regime should focus attention and resources on those customers, accounts and transactions that are most vulnerable to money laundering and terrorist financing. An approach which does not permit a meaningful differentiation among customers, accounts and transactions will result in a misallocation of resources and reduce effective deterrence and prevention.

5.7 EU Savings Tax Directive Changes Level Playing Field

The EU came to a decision on the EU Savings Tax Directive. With the introduction of automatic exchange for some and withholding tax for others, the level playing field is perceived to have become clearly biased. The EU Savings Tax Directive effectively gives the green light for four different regimes from 1 January 2004:

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- Withholding tax on EU residents’ accounts (Switzerland, Austria, Belgium, Luxembourg, and probably Andorra, San Marino, Liechtenstein)
- Automatic exchange of information on EU resident accounts (EU and Gibraltar including probably the Crown Dependencies, Overseas Territories)
- The US (exchange of information and automatic exchange via bilateral tax treaties)
- The rest of the world, some of whom had committed to OECD (e.g. Panama, Antigua and Barbuda) and others likely to come under new pressures (e.g. Hong Kong, Singapore)\(^\text{563}\)

Nevertheless, even in the absence of the detail, it is felt that this is a very good outcome for the Swiss, as it means no timetabled commitment to automatic exchange. The pressure is now off the Swiss and they can take an even more robust line with the OECD. But more importantly this is an excellent outcome for the US, who have controversially been deemed equivalent by the EU.

The OECD denied that the EU proposal meant that the OECD was moving away from a level playing field approach in its drive to end harmful tax practices and ensure fair competition on tax matters.\(^\text{564}\)

\(^{563}\) The European Union Savings Directive (council directive 2003/48/EC) was agreed on 3 June 2003. In 2002, by promising a level playing field (non-discrimination) between members (including all EU countries) and non-members, the OECD encouraged numerous small countries, including most ITTO members, to commit to exchanging tax information on request from 2006. However, the proposed EU saving tax directive flies in the face of the OECD promise by giving four OECD members - Austria, Belgium and Luxembourg and Switzerland - a competitive advantage over non-OECD countries by allowing them to defer exchanging information until 2011 or later. See ‘Europe threatening OECD’s plans to swap tax information’ (2003) Trusts & Trustees <http://www.trusts-and-trustees.com/rrn/press_release/pr_apr01_04.html> at 28 April 2004.
The EU and the OECD projects have been and continue to be different in their scope and coverage. With regard to information exchange, the EU’s objective is the automatic exchange of information on personal savings accounts. The OECD countries are looking for exchange of information in relation to a broader range of mobile financial services, but on a case-by-case basis rather than an automatic basis.\textsuperscript{565}

5.8 Selective Offshore Responses to OECD and FATF Initiatives

5.8.1 Caribbean

(i) Cayman Islands

Money Laundering Legislation

In order to establish how the Cayman authorities have reacted to international pressure, attention is drawn to the Cayman Islands legislation as this was the first British dependency to pass “all crimes anti-money laundering” legislation.\textsuperscript{566} Similar legislation has now been passed in a number of other common law offshore jurisdictions. It has followed an evolutionary path similar to that of onshore legislation.


\textsuperscript{566} Money Laundering Regulations 2000 (Laws of the Cayman Islands)
In 1990, the Misuse of Drugs Law\textsuperscript{567} ("MODL") implemented the Vienna Convention recommendations by creating anti-money laundering provisions in respect of the proceeds of drug-related offences, reporting of the proceeds and mutual legal assistance in respect of investigations into drug-related crime.\textsuperscript{568}

These broad provisions were extended to all serious crimes in 1996, when the Cayman Islands' legislature enacted the Proceeds of Criminal Conduct Law\textsuperscript{569} ("PCCL"). These two statutes now operate alongside one another: the MDL applying to the proceeds of drug-related offences; the PCCL applying to the proceeds of all other indictable offences.

The PCCL created four offences of money laundering based upon the UK's Criminal Justice Act\textsuperscript{570} (CJA), namely, the offences of

- facilitating the retention of the proceeds of criminal conduct (s.21)
- acquiring, possessing or using the proceeds of criminal conduct (s.22)
- concealing, disguising or transferring the proceeds of criminal conduct (s.23)
- tipping off (s.24)

\textsuperscript{567} Misuse of Drugs Law 1990 rev (Laws of the Cayman Islands)
\textsuperscript{568} This fulfills the FATF Recommendations 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences; and 5: As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances.
\textsuperscript{569} Proceeds of Criminal Conduct Law 1996 (Laws of the Cayman Islands)
\textsuperscript{570} United Kingdom Criminal Justice Act 1988 (Application to Service Courts) (Evidence) Order 1996.
The above offences are committed by anyone who facilitates the retention (s.21), acquisition (s.22) or concealment (s.23) of the proceeds of criminal conduct while “knowing or suspecting” its real provenance.

In order to avoid liability under the PCCL, banks, trust companies and other financial institutions must disclose suspicious transactions to a Reporting Authority whose function is to collate and investigate such reports. Banks and other financial institutions making a disclosure report in good faith cannot be held liable to their customers in these circumstances for breach of their duty of confidentiality.571

By s.21(10) of the PCCL, the original offence that gives rise to the proceeds of criminal conduct must be an offence to which the PCCL relates, specifically

- an indictable (i.e. serious) offence committed in the geographical jurisdiction of the Cayman Islands
- conduct that would amount to an offence indictable (i.e. triable) in the Cayman Islands if that conduct has occurred in the geographical jurisdiction of the Cayman Islands.

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571 This fulfils FATF Recommendation 16: Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.
These provisions represent a statutory definition of a traditional common law principle known as the "dual criminality principle". A person is liable for laundering the proceeds of crime if (and only if) the original crime is indictable in the Cayman Islands (in 99% of cases this means it must have been committed there) or the criminal conduct would amount to an offence indictable in the Cayman Islands had that conduct occurred in the Cayman Islands. In simple terms, this means that the original offence must be a crime committed in the Cayman Islands, or that the specific conduct would amount to a crime had it been committed in the Cayman Islands.\footnote{Parkinson and Howarth, above n 304, 92-4.}

*PCCL and Tax Evasion: The Majority View*

Does the offence of facilitating the retention (s.21), acquisition (s.22) or concealment (s.23) of the proceeds of criminal conduct include retaining, acquiring or concealing the proceeds of foreign tax evasion? Is a Caymanian financial services provider obliged to disclose to the Reporting Authority his belief or suspicion that his services are being used unlawfully to evade foreign tax?

The Cayman Islands now have "all crimes money laundering" legislation that contains a simple statutory dual criminality provision. A bank, trust company or service provider will become liable if it assists in facilitating the retention, acquisition or concealment etc. of the proceeds of criminal conduct if (and only if) the criminal conduct
- is a crime indictable in the Cayman Islands, or
- would amount to an indictable crime if the conduct had occurred in the Cayman Islands

It is argued by many Caymanian commentators that as the Cayman Islands have no form of direct taxation, and therefore no laws making it a crime to evade such tax, it cannot be a crime to facilitate the retention, acquisition or concealment of the proceeds of foreign tax evasion. Furthermore, there is no requirement to make a disclosure to the Reporting Authority if an institution believes or suspects that its services are being used by a customer to evade foreign tax.

Filing a false tax return in the US is not a crime in the Cayman Islands. Besides, it is the opinion of the majority that it would not amount to a crime had the conduct occurred in the Cayman Islands. There is no income tax in the Cayman Islands and it cannot, therefore, be a crime to evade it. 573

An agreement was made between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands, for the exchange of information relating to taxes, with respect to criminal tax evasion.

573 Ibid 95-6.
for taxable periods commencing from 2004, and shall have effect with respect to all other matters for taxable periods commencing from 2006.574

The Minority View

While it is true that there are no direct taxes levied in the Cayman Islands, there is still some form of “tax” in the more general sense of the word, (such as a tourist tax, stamp duty and import duties). It is a criminal offence unlawfully to evade these types of taxes in the Cayman Islands (by, for example, dishonestly filing a false return to the appropriate government authority). It could, therefore, be argued that tax evasion in its widest sense is an indictable crime in the Islands. Accordingly, an argument could be developed that the evasion of foreign tax would be a crime if that conduct had occurred in the Cayman Islands. A service provider who facilitates the retention and conceals the source of foreign tax evasion is, therefore, guilty of money laundering contrary to the PCCL.

Even if tax evasion is not a crime in the Cayman Islands, an individual who has unlawfully evaded tax abroad may not be indicted for the crime of tax evasion. He may (in the UK for instance) be indicted for the common law offence of cheat/fraud, or for any of the “theft” offences, such as deception, false accounting or forgery. These types of offence are very much a crime in the Cayman Islands and, therefore, the dual criminality test referred to above may be met. It could, therefore, be argued that an individual perpetrating a

foreign tax fraud would, by his conduct, have committed the crimes of fraud, deception, and false accounting etc., if his conduct had occurred in the Cayman Islands. A service provider who facilitates the retention and conceals the source of foreign tax evasion is, therefore, guilty of money laundering contrary to the PCCL. 575

Summary

In summary, however, the conventional view is that the Cayman Islands anti-money laundering legislation (the PCCL) rests upon a dual criminality test. There is no crime of tax evasion in the Cayman Islands (because there are no direct taxes) and, therefore, there can be no offence of laundering the proceeds of foreign tax evasion. It remains to be seen whether the conventional view is accepted by the judiciary.

The Schedule to the PCCL of 1996 at the interpretation section in paragraph 3(1) contained a clause, which provided that:

(Criminal) conduct to which (the) Schedule applies is conduct which:576

- constitutes an offence to which (the PCCL) applies, or
- would constitute such an offence if it had occurred in the Cayman Islands, other than drug trafficking offences (covered by the MDL)

5 Parkinson and Howarth, above n 573, 96-7.
6 Proceedings of Criminal Conduct Law 1996 (Laws of the Cayman Islands) para 3(1).
The Schedule is principally concerned with the enforcement of foreign confiscation orders. The exception referred to in the interpretation section, therefore, says in effect that the Grand Court of the Cayman Islands will not enforce foreign judgment or foreign confiscation orders made in relation to tax debts, or in relation to the evasion of foreign taxes. However, the exception originally found in the PCCL of 1996 and emphasised by the italics above was removed two years later by the Proceeds of Criminal Conduct (Foreign Offences) (Amendment) Law (Law 18 of 1998).

Disregarding the political manoeuvring, if any, the exception has now been repealed, and the Cayman Islands anti-money laundering legislation rests upon a dual criminality provision. Of course, if the majority view prevails, this means that financial service providers will not become liable for money laundering if they facilitate the retention (s.21), acquisition (s.22) or concealment of the source (s.24) of the proceeds of foreign tax evasion. Nor do they have to report those customers and clients whom they suspect are unlawfully evading foreign tax.

The compelling nature of this argument rests upon the fact that the Cayman Islands do not impose any form of direct tax. It is an argument which is (or will be) adopted by other nil tax havens that have enacted “all crimes anti-money laundering” legislation. It is not an argument, however, that can be
adopted by the low tax havens of Europe, such as the Channel Islands and the Isle of Man (nor indeed by Bermuda because of its pay-roll tax) which feel that they have now been placed at a significant disadvantage as international financial centres when compared with the Caribbean nil tax centres. 577

**Mutual Legal Assistance**

Mutual legal assistance and, in particular, the sharing between states of information relating to money laundering, is another OECD recommendation. 578

The Confidential Relationships (Preservation) Law makes it a criminal offence for any person to divulge, attempt to divulge, wilfully obtain or attempt to obtain any information which is confidential. In 1986 a treaty was signed between the United States and the United Kingdom (including the Cayman Islands) on mutual legal assistance in criminal matters - The Mutual Legal Assistance Treaty.

The objects stated in the treaty are to improve the effectiveness of the law enforcement authorities of both the United States and the Cayman Islands in the investigation, prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters. The treaty provides machinery whereby the Attorney-General of the United States can request that otherwise

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577 Parkinson and Howarth, above n 575, 97-9.
578 This is the OECD Recommendation 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.
confidential information be ordered to be released by the Cayman authority (the Chief Justice of the Cayman Islands or other Grand Court Judge) when the Cayman authority is satisfied that the information is properly required in connection with the investigation, suppression or persecution of various types of criminal activity.579

The Reporting Authority established under the PCCL may share information it receives in relation to suspicious transactions with other agencies including, with the consent of the Attorney General, overseas agencies situated outside the geographical jurisdiction of the Cayman Islands.

Confiscation and forfeiture orders and restraining orders may be made in respect of the proceeds of criminal conduct that find their way into the Cayman Islands’ financial system (s.6 PCCL). Furthermore, the Grand Court of the Cayman Islands will enforce foreign confiscation and forfeiture orders when it has been established by a foreign court that funds in the Cayman Islands’ financial system represent the proceeds of criminal conduct (ss.29-36).580

Secrecy and Confidentiality

Banking confidentiality is well-established in Cayman through the common law, and is also enshrined both in the Banks and Trust Companies Law 1995 and in the Confidential Relationships (Preservation) Law 1995. Banking staff

580 Parkinson and Howarth, above n 577, 100-1.
and government officials face civil and criminal sanctions if information is disclosed without authorisation. A number of laws permit the enforcement of foreign judgements or the disclosure of information in response to a court order, but normally in the context of criminal activity and drug use or dealing.

Despite mutual assistance treaties, the Cayman Islands will not normally cooperate with fiscal investigations, and does not normally respond to requests for assistance on fiscal matters.\(^{581}\)

**Conclusion**

The provisions of modern anti-money laundering legislation oblige banks, trust companies, and other financial and corporate service providers to be exceedingly careful. Inquiries concerning the provenance of each client’s funds have to be made more prudent than at any time in the past. The clear objective of the legislation is to eradicate the laundering of the proceeds of all crime. If financial service providers do receive monies that represent the proceeds of criminal conduct, or become suspicious about their provenance, the matter ought to be reported to the appropriate authorities (namely, the authority mentioned in the applicable money laundering legislation).\(^{532}\)

The Cayman Islands which was not included in OECD’s list of tax havens, is no longer on the FATF NCCTs list, now complies with the directives of the various supranational organisations as can be seen from the above analysis.


\(^{532}\) Parkinson and Howarth, above n 580, 105-7.
Money Laundering Legislation

In 2000 Panama adopted four stringent decrees to further screen out money laundering. These measures were:

1) Legislative Assembly Law No. 41 of October 2, 2000, entitled "Capital Laundering" and amending the Penal Code by imposing harsh penalties of up to ten years imprisonment for publicly breaching the secrecy of information or carrying out unlawful transactions related to capital laundering;

2) Legislative Assembly Law No. 42 of October 2, 2000, setting down Measures for the Prevention of the Crime of Capital Laundering;


and

4) Executive Decree No. 213 of October 3, 2000, amending the 1984 Decree relating to the practice of trusts and making it compulsory for banks and certain financial institutions to render information on "suspicious transactions".

Under a Panamanian law passed in 1994 with the help of the Panamanian Bar association, money laundering is penalized with prison sentences recently raised to a maximum of 12 years, no bail for defendants, and confiscation of
assets. Bank employees are subject to criminal responsibility if found guilty of allowing any money laundering or bending the rules for extradition of offenders in drug-related cases. 583

A "Financial Analysis Unit (FAU) for the Prevention of Money Laundering Obtained from Drug Trafficking" operating under Executive Decree No. 136 of June 9, 1991 has been successful in compiling information from banks and other private and Government entities and individuals to inhibit activities linked to money laundering. In 2000, the FAU received increased authority to analyze all information compiled to detect suspicious or unusual transactions and movements of cash in the country from drug trafficking. Confidentiality of all financial and banking transactions is honoured in order to protect the respectable status of the FAU. 584

Panama and Tax Evasion

Panama has not entered into any double taxation treaties. The mutual legal assistance treaties contain limited exchange of information provisions. Information exchange is restricted to information extracted from the carrying out of prosecution procedures, not excluding tax matters. The local authorities

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583 This fulfills the FATF Recommendations 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences; 5: As provided in the Vienna Convention, the offence of money laundering should apply at least to knowing money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances; and 6: Where possible, corporations themselves - not only their employees - should be subject to criminal liability.

would not grant a request for assistance in an investigation into tax evasion. A request for co-operation would have to be made by petition. 585

Mutual Legal Assistance

In April, 1991, Panama signed an agreement for a "Treaty for the Mutual Assistance on Criminal Matters" with the United States in order to provide for more effective coordination between the two countries in dealing with investigating, prosecuting, and suppressing serious crimes, and with continuing effort to increase this effectiveness. Despite powerful opposition from Panamanian bankers, who were concerned the treaty would violate their secrecy status code, the National Legislative Assembly of the Republic of Panama approved the execution of the treaty in July 1991. This Mutual Assistance Treaty, similar to those approved with other Caribbean Basin Initiative countries, including Bahamas, British Virgin Islands and Cayman Islands, relates to drug abuse, crime and fraud, or specifically such criminal activities as illegal narcotics, theft, crime of violence, fraud, or use of fraud, or violation of a law of one of the Contracting States relating to currency or other financial transactions contributing to the crime. The provisions in the treaty do not allow for any exchange of information in matters relating to taxation. 586

In an effort to cooperate in the arrest of money launderers, the Government also signed a Mutual Legal Assistance Agreement with the United Kingdom

585 Spitz, above n 274, 623.
586 This fails to adhere to the OECD Recommendation 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.
and adopted a law tightening requirements for companies' registered agents concerning gathering information and their client references.\textsuperscript{587}

**Secrecy and Exchange of Information**

Panama has concluded mutual legal assistance treaties with the US, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Colombia. The treaties operate at the administrative level: in other words, Court procedures are not required, although there is an appeal procedure. The treaties cover serious crime, but do not include fiscal crime. The Panamanian authorities do not entertain requests for information on fiscal matters.\textsuperscript{588}

Executive Decree No. 213 of October 2, 2000, which established the Financial Intelligence Unit for the Prevention of Capital Laundering, covers disclosure of information concerning trusts obtained by the Banking Superintendency or any other Government inspectors and introduces penalties for breaches of confidentiality in all financial matters. A public official violating this provision may have to pay a fine up to $1,000,000.

Banks and other financial institutions must practice proper due diligence under Panamanian law. They are required to know their clients, monitor and report suspicious transactions of which they are aware, establish internal procedures and controls to prevent money laundering operations, train personnel properly.

\textsuperscript{587}Diamond, above n 584.  
\textsuperscript{588}Lowtax.net, *Double Taxation Treaties in Panama*  
to deter tainted transactions, and keep records of all documents and transactions for a period of five years.\textsuperscript{589}

The July 27, 1994 Law was further strengthened by Executive Decree No. 468 of September 19 of that year, and the Code of Conduct approved by the International Lawyers Association, which makes it mandatory for all attorneys to know their clients and to obtain sufficient information and references from clients before rendering any services. A high-level Presidential Commission operates with authority to use all means to prevent money laundering and a so-called "Drug czar" coordinates its efforts with other activities to promote anti-money laundering.

Presidential Decree No. 163 of October 2, 2000 amended Decree No. 136 of June 9, 1995, extending the operational capacity of the Financial Intelligence Unit by listing in detail the Unit's functions for: (1) covering collection of information from public institutions and private entities; (2) identifying suspicious or unusual transactions by studying information; (3) exchange of information with similar enterprises in other countries; and (4) providing assistance when required to the Office of the Attorney General and Banking Superintendence.\textsuperscript{590}

\textsuperscript{589} This fulfills FATF Recommendation 12: Financial institutions should maintain, for at least five years, all necessary records on transactions, both domestic or international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal behaviour. Financial institutions should keep records on customer identification (e.g. copies or records of official identification documents like passports, identity cards, driving licenses or similar documents), account files and business correspondence for at least five years after the account is closed. These documents should be available to domestic competent authorities in the context of relevant criminal prosecutions and investigations.

\textsuperscript{590} Diamond, above n 587.
The FATF on Money Laundering "Black List"

On June 26, 2000, the FATF on Money Laundering issued a "Black List" of countries considered non-cooperative jurisdictions. Panama was included in that Black List, as a Class 3 country, which meant that it was a country that did not co-operate with tax authorities of OECD countries. In June 2001, the FATF updated the list of NCCTs with the publication of its second NCCT Review. The four countries which were taken off the list were Bahamas, Cayman Islands, Liechtenstein and Panama.591

Consequences for Panama

The effect for Panama of its inclusion in this list, was that the OECD governments had threatened to impose sanctions on the listed countries, including the prohibition for their financial institutions to perform any kind of business with any institution located in a listed country.

The current government, through the High Level Presidential Commission Against Money Laundering, has the primary responsibility of analyzing the international events that are affecting the condition of Panama as a centre for international business, and in particular, the initiatives of the OECD, which

may cause a negative impact in their capability of attracting foreign investment. 592

Conclusion

All the legislative improvements are based on the intention to keep Panama's offshore system, its secrecy laws, banking centre and all its international services sectors out of the reach of criminals. Furthermore, the government wanted to send a clear message to the FATF and the OECD, that Panama was implementing serious measures to prevent the use of the country for unlawful international crimes. 593 That paid off and in June 2001, Panama was one of the four countries taken off the list of countries deemed non-cooperative in the fight against money laundering.

Panama, which was on both the FATF NCCTs list and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

(iii) British Virgin Islands (BVI)

Anti-Money Laundering Legislation

593 Parkinson and Howarth, above n 582, 15.

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The Proceeds of Criminal Conduct Act, (together with the Code of Practice / Money Laundering Regulations passed thereunder) comprise the BVI's latest and, in the commercial environment of this jurisdiction, most significant step in the area of anti-money laundering legislation. This Act came into force on 2 January 1998 and complements pre-existing legislation such as the Drug Trafficking Offences Act, the Criminal Justice (International Cooperation) Act and the Mutual Legal Assistance (USA) Act.

In December 1996, the Association of Registered Agents approved a governing Code of Conduct which extensively covers a wide range of due diligence procedures to be followed by trust companies and company formation agents in order to preserve the BVI as an offshore centre and to prevent the use of the jurisdiction for illegal and criminal purposes. It was the intention to formulate the Code of Conduct into legislation for the purpose of enhancing the regulatory measures germane to the maintenance of the BVI as a sound international financial centre.594

*Tax Information Exchange Agreement*

At the signing of a new Tax Information Exchange Agreement with the United States was the creation of a competent anti-tax evasion tool.595

595 This fulfills OECD Recommendations 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition; and 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.
In line with the agreement with the OECD, the BVI agreed with the US an effective exchange of information on request for criminal tax matters from January 1, 2004 and for civil tax matter from January 1, 2006.\footnote{Harney Westwood & Riegels, \textit{Transparency and the Obligation of Confidentiality in the British Virgin Islands} (2002) Harneys <http://www.harneys.com> at 11 November 2003.}

Speaking after the signing of the agreement, BVI Governor, Frank Savage, observed that allowing the US Internal Revenue Service to pierce banking secrecy in cases of tax evasion and money laundering, clearly demonstrated that the country had been working to increase the transparency of our systems and reduce the potential for abuse.\footnote{www.lawandtax-news.com, British Virgin Islands, International Agreements.}

US Treasury Secretary, Paul O'Neill said that the Bush administration welcomed the agreement with the BVI, explaining that: 'We have an obligation to enforce our tax laws because failing to do so, undermines the confidence of honest taxpayers of our system. One of the keys to enforcement of our tax laws is access to needed information.'\footnote{Ibid.}

\textit{Mutual Legal Assistance}

Mutual Legal Assistance (USA) Act 1990 (No. 5 of 1990) is intended to give effect to the terms of a treaty made between the Government of the United States of America and the Government of the United Kingdom dated 3rd July 1986 for improving the effectiveness of the law enforcement authorities of the
United States of America and the British Virgin Islands in the prosecution and suppression of crime through co-operation and mutual legal assistance in criminal matters and for purposes connected therewith. The Act allows the United States Central Authority, defined in the Treaty to be the Attorney General or person designated by him, to make a request of the British Virgin Islands Central Authority, the Attorney General, for assistance in obtaining information concerning a criminal offence. The provisions of the Act do not extend to any matter which relates to regulation including fiscal matters or to offences which are not punishable by a term of imprisonment of more than one year. (Paragraph 1 of Article 3 of the treaty.) The Act extends protection to allow for confidential information to be obtained. Section 9 provides that there shall be no criminal or civil sanction against a person who divulges confidential information pursuant to a request. 599

Secrecy and Confidentiality

There is no statutory duty of confidence under British Virgin Islands law. However a duty of confidence is imposed at common law. Alternatively a duty of confidence may be imposed by contract. A breach, or threatened breach, of confidence (common law or contractual) is actionable in the High Court in the British Virgin Islands. The High Court will grant an injunction to restrain any

599 Harney Westwood & Riegels, above n 596. This fulfils the FATF Recommendation 16: Financial institutions, their directors, officers and employees should be protected by legal provisions from criminal or civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the competent authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred.
threatened breach and will award damages for any actual breach. There is no criminal sanction for breach of a duty of confidence.

The extent of the common law duty of confidence depends upon the nature of the relationship between the relevant parties. A duty of confidence arises whenever confidential information comes to the knowledge of a person, in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. There is a public interest in preserving a duty of confidence which the Court will enforce. However, there are three general limiting principles on the duty of confidence. 600

The BVI Government signed a Tax Information Exchange Agreement with the UK and the USA on 3 April 2002. The BVI thus joined Antigua and Barbuda, the Bahamas and the Cayman Islands who have already executed such agreements. The agreement provided arrangements for the exchange of information about criminal tax evasion from 1 January 2004 and all other matters from 1 January 2006. 601

Notwithstanding any duty of confidence which exists at common law pursuant to a contract, there are several circumstances whereupon it may be necessary to provide information to third parties. The following comprise th

600 Ibid.
most significant exceptions which exist pursuant to statute and at common law.

1) Evidence (Proceedings in Foreign Jurisdictions) Act (Cap 24);
2) Mutual Legal Assistance (USA) Act 1990 (No. 5 of 1990);
3) Criminal Justice (International Co-operation) Act 1993 (No. 8 of 1993);
4) Proceeds of Criminal Conduct Act 1997 (No. 5 of 1997) as amended;
5) Drug Trafficking Offences Act 1992 1992 (No. 5 of 1992);
6) Banker Books Evidence Act (Cap 7);
7) Banks and Trust Companies Act 1990 (No. 9 of 1990) as amended;
8) Company Management Act 1990 (No. 8 of 1990) as amended;
9) Mutual Funds Act 1996 (No. 6 of 1996) as amended;
10) Insurance Act 1994 (No.15 of 1994) as amended;
12) Financial Services Commission Act 2001;
13) Orders for discovery and inspection of documents pursuant to Part 28 of the Civil Procedure Rules of the Supreme Court;
14) Discovery Proceedings in the British Virgin Islands (Norwich Pharmacal proceedings); and

Conclusion

592 Harney Westwood & Riegels, above n 600.
With its high quality financial services, sound regulatory framework and political stability, the British Virgin Islands (BVI) has established a reputation as one of the world’s leading international offshore centres. The BVI has earned a solid reputation as the world’s leading domicile for International Business Companies (IBCs). The 1984 IBC Act has proved to be a milestone in the development of the financial services industry. Since the adoption of this legislation, the BVI has become a high-quality international financial centre, regularly undertaking programmes to expand its financial services offering to meet the demands of international financial markets. The key to the development of the BVI has been the partnership which exists between the government and the private sector, and the commitment of both to creating a jurisdiction that is a leader in the provision and regulation of financial services.

The BVI Financial Services Commission is reviewing the existing Companies Act and the IBC Act, intending to update and amalgamate into a single corporate statute, with the aim of enforcing it in 2005. The new Companies Act will retain all the virtues of the IBC but will be enhanced to be made more attractive to clients. The new legislation will extend the same zero tax regime enjoyed by IBCs to local companies and thereby bringing BVI into line with the EU Code of Conduct on Business Taxation. This will make the BVI

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company an even better international proposition and cement their position as
the first-choice offshore incorporation destination.\textsuperscript{604}

The British Virgin Islands, which was on both the FATF NCCTs list and the
OECD's list of tax havens, now complies with the directives of the various
supranational organisations as can be seen from the above analysis.

(iv) \textit{The Bahamas}

\textit{Anti-Money Laundering Legislation}

Money Laundering (Proceeds of Crime) Act 1996

1) A person is guilty of an offence if he uses, transfers the proceeds of, sends
or delivers to any person or place, transports, transmits, alters, disposes of
or otherwise deals with, in any manner and by any means, any property or
any proceeds of any property with intent to conceal or convert that
property or those proceeds and knowing that all or a part of that property
or of those proceeds was obtained or derived directly or indirectly as a
result of:

(a) the commission in The Bahamas of any offence under the Dangerous
Drugs Act;

\textsuperscript{604} Robert Mathavious, 'Overview of the Regulatory Environment in the BVI' (Speech delivered at the
'The BVI Advantage' Seminar held by the BVI International Finance Centre, Singapore, 13 May
2004).
(b) the commission in The Bahamas of any offence which is punishable by a term of imprisonment of not less than five years;

c) an act or omission anywhere that, if it had occurred in The Bahamas would have constituted an offence under the Dangerous Drugs Act;

d) an act or omission anywhere that if it had occurred in The Bahamas would be punishable by a term of imprisonment of not less than five years.

2) A person who commits an offence under subsection (1) shall be liable -

(a) on conviction on information to imprisonment for a term not exceeding ten years; or

(b) on summary conviction to imprisonment for a term not exceeding five years.

The establishment of the Financial Intelligence Unit under the provisions of the Financial Intelligence Unit Act (No. 39 of 2000) now means that the Financial Intelligence Unit is responsible for receiving, analyzing, obtaining and disseminating information which relates to or may relate to the proceeds of crime under the provisions of the Proceeds of Crime Act, 2000 (No. 44 of 2000) namely offences under the Prevention of Bribery Act, drug trafficking.

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offences, money laundering offences, offences which may be tried on information other than drug trafficking offences and offences committed anywhere that if they occurred in The Bahamas would constitute offences in The Bahamas. The Act provides the principal legal mechanism for international cooperation with other foreign Financial Intelligence Units and law enforcement authorities. Pursuant to the Financial Intelligence Unit Act, the Unit may now provide information relating to the commission of an offence specified in the Proceeds of Crime Act, 2000 to any Foreign Financial Intelligence Unit, subject to any conditions as may be considered appropriate by the Director of the Financial Intelligence Unit of The Bahamas. Under the Act, the Unit is given power to enter into any agreement or arrangement, in writing, with a Foreign Financial Intelligence Unit which the Director considers necessary or desirable for the discharge or performance of the functions of the Financial Intelligence Unit.606

Tax Evasion

Since the Bahamas do not levy direct taxes, there are no double tax treaties between the Bahamas and other countries.

There are mutual assistance treaties with the US, Canada and the UK which include exchange of information provisions; but fiscal information is excluded. Disclosure is limited to criminal matters, and tax evasion is not a crime in the Bahamas. The Bahamian statute Reciprocal Enforcement of Judgements Act

1924 allows Commonwealth judgements to be enforced in the Bahamas, but revenue matters are excluded.607

The Mutual Legal Assistance (Criminal Matters) Act, 1988


In the absence of a Treaty and its relevant domestic enabling legislation, a foreign Court, tribunal or authority seeking evidence or the disclosure of information in connection with criminal proceedings that have been instituted, or a criminal investigation that is being carried on, must apply to the Attorney General for assistance pursuant to the provisions of the Criminal Justice (International Co-operation) Act, 2000 (No.42 of 2000).608

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607 Lowtax.net, *Double Taxation Treaties in Bahamas* <http://www.lowtax.net/lowtax/html/jbahom.html> at 10 July 2004. This fails to adhere to the OECD Recommendation 14: Assistance in recovery of tax claims - Countries should review the current rules applying to the enforcement of tax claims of other countries for the addition to tax conventions.

608 Organisation of American States, above n 606.
Secrecy and Confidentiality

Secrecy and confidentiality is preserved under the Bank and Trust Companies Regulation Act. There is no requirement for disclosure of the Beneficial Ownership to the authorities. While there is no requirement to file audited accounts with the authorities, a company is required to keep financial records.

The Bahamian Banks and Trust Companies Regulation Act 1965 stipulates stiff penalties: up to two years in jail and a fine equivalent to $15,000 for any employee who discloses confidential client information.⁶⁹⁹

The Bahamas has based its confidentiality laws on the Swiss model of bank secrecy. Banks practice due diligence and follow "Know Your Customer" rules. Access to bank records is only available to signatories on the account and to no one else. Only by proving in court that it helps in the prosecution of a criminal act, could a foreign authority, such as the IRS, be granted access to banking records in the Bahamas.⁷¹⁰

The Financial Intelligence Unit is also responsible for the receipt and analysis of suspicious transaction reports required to be made under the provisions of the new Financial Transactions Reporting Act, 2000 (No.40 of 2000). Under the Financial Transactions Reporting Act, 2000, financial institutions within the Bahamas are now required under penalty of law to verify the

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⁷¹⁰ Stephanie O'Harely, Password Please (2001) Vault Magazine
identification of customers and to report suspicious transactions which they know, suspect or have reasonable grounds to suspect involves proceeds of criminal conduct as defined in the Proceeds of Crime Act, 2000, or any offence under the Proceeds of Crime Act, 2000, or an attempt to avoid the enforcement of any provision of the Proceeds of Crime Act to the Financial Intelligence Unit. 611

Conclusion

The Bahamas has been a domicile for funds for 40 years and currently has 750 regulated funds with assets of approximately US$100 billion. Since the creation of the Securities Board, now the Securities Commission, and the passing of the Mutual Funds Act and regulations in 1995, The Bahamas has been vying for recognition as a properly regulated environment for establishing and operating funds. There are more than 50 licensed fund administrators in The Bahamas. 612

Out of all the jurisdictions blacklisted as 'harmful' tax havens by the OECD and 'uncooperative' in the global fight against money laundering by the

611 Organisation of American States, above n 608. This fulfils the FATF Recommendations 10: Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names: they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions); and 14: Financial institutions should pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose. The background and purpose of such transactions should, as far as possible, be examined, the findings established in writing, and be available to help supervisors, auditors and law enforcement agencies.

FATF\footnote{See Appendix U for a list of NCCTs.}, the Bahamas believes that it has introduced some of the most comprehensive new legislation into its financial services sector. But this is still not enough for the multilaterals, as the FATF has identified a crucial element the Bahamas government has omitted in its extensive legislative programme.

The Bahamas Journal reported (13/2/01) that the FATF has called upon the Bahamas government to correct legislative deficiencies it has discovered in the country's securities, namely the Securities Act, the Mutual Funds Act and the Insurance Act. This came as a real setback to the Bahamas, which was so close to coming off the blacklist, but if the jurisdiction refused it, could risk staying on the FATF blacklist of 15 jurisdictions.

The FATF viewed provisions in the Securities Act, the Mutual Funds Act and the Insurance Act still allowed for secrecy and need to be amended to ensure for cooperation in investigating suspected money laundering activities.

The Executive Secretary of the FATF, Patrick Moulette, is reported to have said that the FATF's policy is that anti-money laundering measures should apply not only to banks but also to non-bank financial like remittance businesses, insurance companies and securities businesses.\footnote{This is according to Recommendation 8 which states: Recommendations 10 to 29 should apply not only to banks, but also to non-bank financial institutions. Even for those non-bank financial institutions which are not subject to a formal prudential supervisory regime in all countries, for example bureaux de change, governments should ensure that these institutions are subject to the same anti-money laundering laws or regulations as all other financial institutions and that these laws or regulations are implemented effectively.}
Perversely, the FATF, in its 2001 review meeting,\(^615\), voted the Bahamas as one of seven jurisdictions most likely to be removed from the blacklist in the near future.

On 23 July 2003, the IMF concluded the Article IV consultation with The Bahamas and released its Staff Report. In the Staff Report, it recognised the country’s long track record of ‘prudent macroeconomic management and financial stability’. The Report noted that Bahamian financial regulations and supervision have continued to improve, including anti-money laundering legislation.

The Report emphasised that further progress with structural reform would help to lower costs and preserve external competitiveness. It also saw a need to reduce trade restrictions, including the very high tariff rates, and to simplify the tariff structure. It also recommended a gradual move toward a ‘more flexible and market-oriented framework for liquidity and credit management’.

The Report also cited the strengthening supervisory environment in The Bahamas.\(^616\)

In response to the Report, the Bahamas Financial Services Board (BFSB) released a statement saying that it ‘will build on the extensive work completed in 2001 where a comprehensive proposal was submitted to government and regulators based on active participation of many professional industry associations with regard to the new FATF 40 recommendations.’ The BFSB

\(^{615}\) See Financial Action Task Force, above \(n\) 591.

also stated that meetings with professional industry associations and regulators like the Securities Commission, Central Bank and the Registrar have been held. The BFSB was hopeful that significant progress would be made through the introduction of the new Investment Funds Act, Regulations and SMART Funds templates, policy directives on matters such as corporate directors and private trust companies, and other such projects.617

The Bahamas, which was on both the FATF NCCTs list and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.2 Pacific Basin

(ii) Cook Islands

Anti-Money Legislation

Prior to its August 2000 enactment of the Money Laundering Prevention Act, the Cook Islands had in place the Offshore Industry (Criminal Provisions) Act (the "OIA") and the International Trusts (Due Diligence) Regulations (the "Regs"). The OIA permitted trustee companies to report suspicious transactions to a regulatory authority. The regulatory authority could then seek directions from the Cook Islands High Court regarding the matter, including directions as to the disposition of the funds involved in the transaction. The

617 Ibid.
Regs required trustee companies to obtain certain assurances as to the origin and ownership of funds transferred to international trusts, and to obtain additional assurances as to the solvency of the settlor. However, neither the OIA nor the Regs (both of which continue in force) made money laundering a crime, nor did either establish a mutual assistance structure.  

The Money Laundering Prevention Act makes money laundering a crime under Cook Islands law. The Act defines “Money Laundering” as knowingly—

(a) engaging directly or indirectly, in a business transaction that involves property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime; or

(b) receiving, possessing, concealing, disguising, transferring, converting, disposing of, removing from or bringing into the Cook Islands any property that is the proceeds of crime, knowing or having reasonable grounds for believing the same to be the proceeds of crime.

The term “proceeds of crime” is defined as “the proceeds of unlawful activity (whether derived or obtained directly or indirectly through such activity), and includes any property that is mingled with property that is the proceeds of unlawful activity.”

618 Without classifying money laundering as a crime, it is not adhering to the FATF Recommendation 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.
The term "unlawful activity" means "any activity which -

(a) is an offence under the Crimes Act 1969 [of the Cook Islands] and carries a maximum penalty of imprisonment of not less than 5 years imprisonment or the death penalty; or

(b) under the laws of the place where the activity occurs, constitutes drug trafficking; or

(c) (i) under the laws of any place where the activity occurs constitutes an offence which carries a maximum penalty of imprisonment of not less than 5 years or the death penalty, and

(ii) would be an offence under the Crimes Act 1969 if such activity occurred within the Cook Islands and such offence carries a maximum penalty of imprisonment of not less than 5 years or the death penalty.

The Act establishes a Money Laundering Authority, to which reports of suspicious activity are to be made.\(^{619}\)


The new rules incorporate Guidance Notes for Financial Institutions based on models from New Zealand, Japan and Guernsey. Issues covered in the notes include 'Know Your Customer' rules; recognising suspicious customers or transactions; reporting of suspicion transactions; and keeping records and training. 620

The Financial Supervisory Commission (FSC) Act establishes a new statutory commission to licence and regulate all trustee companies and banks providing domestic and international services in or from the Cook Islands. Insurance companies also come within the jurisdiction of the FSC.

The Banking Act sets out a new licensing regime for domestic and international banks and introduces increased levels of regulation and supervision as well as more stringent licensing requirements. Previously, domestic and offshore banks have been licensed under separate statutory regimes. Existing banks licensed under the previous domestic and offshore banking acts are deemed to be licensed under the new act, but only for one year following the coming into force of that Act. Domestic and international licensees are required to have a physical presence in the Cook Islands and to have at least two persons resident in the Cook Islands as directors. 621

Tax Evasion


The Cook Islands have not entered into any Double Tax or Mutual Assistance treaties with other countries. The Islands have passed other laws dealing with provision of information in respect of criminal matters, but the authorities generally do not respond to requests for information regarding fiscal matters or tax evasion.\(^{622}\)

**Mutual Legal Assistance**

The Money Laundering Prevention Act 2000 makes provision for co-operation by the Authority with a foreign State, with whom the Cook Islands has entered into mutual assistance arrangements on a bilateral or multilateral basis, in the investigation or prosecution of an unlawful activity. There is also provision for mutual assistance with a foreign state, subject to the approval of the Minister of Finance, where no agreement exists but where the seriousness of the money laundering offence under investigation warrants mutual assistance.\(^{623}\)

**Secrecy and Confidentiality**

Government officials and the employees of banks, insurance companies, trust \& corporate entities are compelled to observe secrecy and failure to do so leading to an unauthorized disclosure will result in penal sanctions.

The general rule prohibiting disclosure is subject to 3 exceptions namely:

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\(^{622}\) Lowtax.net, above n 620.  
\(^{623}\) Commissioner For Offshore Financial Services, Mathilda C R Uhrle, ‘Measures Taken in the Cook Islands to Counter Money Laundering’ (Speech delivered at the Asian Development Bank 34th Annual Meeting of the Board of Governors, Honolulu, 7 May 2001)
1) Under the International Companies Act 1981 the high court on application of an interested party has power to order disclosure of corporate information in a case involving drug trafficking or money laundering. The power to order disclosure does not extend to fiscal crime. Appeal lies to the Islands' Court of Appeal and thereafter to the Privy Council in London.

2) Under the Offshore (Criminal Provisions) Act 1996 an officer or employee of a registered trust entity (which incorporates and manages companies and trusts) who has cause to suspect that a company or trust is involved in drug trafficking or that a person related to or involved with that entity has been convicted of serious criminal activity, must refer the matter to the Government regulatory body. Furthermore the registered trust entity is to provide such reasonable assistance, documentation and other information as may be required by the Government regulatory body under the law. Serious criminal activity is defined as drug trafficking or any other activity whether in the Cook Islands or elsewhere which if committed in the Islands is or would be an offence under the Crimes Act 1969 carrying a maximum penalty of 5 years or more. Information provided in these circumstances does not breach confidentiality provisions of the Cook Islands. Disclosure never extends to fiscal crime.

3) The Trustee Companies (Due Diligence) Regulations 1996 require the officers and employees of a registered trust company to take reasonable precautions to ensure that an International Trust is not being used to shelter
assets derived from drug smuggling, money laundering or other serious
crime and to report any such activity.\textsuperscript{624}

The Financial Transactions Reporting Act formally establishes customer
identification procedures for financial institutions. Financial institutions are
also required to carry out ongoing scrutiny of customer transactions and to
maintain transaction records. The Financial Transactions Report Act also
requires the reporting to the Cook Islands Financial Intelligence Unit, of cash
and international wire transfers exceeding 10,000 New Zealand dollars
(US$5,700). Suspicious transactions must also be reported to the Financial
Intelligence Unit. The confidentiality provisions in other statutes relating to
the financial services industry are overridden by this requirement.\textsuperscript{625}

\textit{FATF Blacklist}\textsuperscript{626}

In June 2000, the Cook Islands was blacklisted by the FATF as a non-
cooperative and harmful tax haven.

In September 2000, the Cook Islands parliament passed the Money
Laundering Prevention Act, which provided for the setting up of a Money
Laundering Authority, to consist of the government's financial secretary, the
commissioner for offshore financial services and the commissioner of police.

\textsuperscript{624} Lowtax.net, above n 622.
\textsuperscript{625} Offshore Red: An OFC News Update, above n 621.
\textsuperscript{626} See Appendix U for the FATF Blacklist of NCCTs as updated to July 2004.
In 2003, a series of nine new measures were introduced in the Cook Islands Parliament over the regulation of domestic and offshore financial industries after the cabinet approved the work of an Anti-Money Laundering/Counter Financing Terrorism Committee. The Committee reported it was hopeful the enactment of the legislation would finally satisfy the FATF. The bills included a Financial Transactions Reporting Act, which will require all banks to report local and international money transfers to a central financial intelligence unit.\(^{627}\)

Conclusion

The Cook Islands, which was on both the FATF NCCTs list and the OECD’s list of tax havens, remains on the FATF NCCTs list as of July 2004.

\((i)\) Vanuatu

*Anti-Money Laundering Legislation*

The primary legal framework for anti-money laundering (AML) measures in Vanuatu is based upon the Serious Offences (Confiscation of Proceeds) Act, which criminalises money laundering and provides for the confiscation of the proceeds of crime; the Mutual Assistance in Criminal Matters Act, which provides for international cooperation; and the Financial Transactions Reporting Act, which provides four major pillars, i.e., customer identification,\(^{627}\)

\(^{627}\) Lowtax.net, above n 624.
record keeping, suspicious transaction reporting and the establishment of a Financial Intelligence Unit (FIU). 628

In addition, the FIU and the Reserve Bank of Vanuatu have issued Guidelines and Practice Notes, respectively, on the anti-money laundering obligations of regulated entities.

These measures are augmented by provisions in the Financial Institutions Act that require the retention of certain documents and enhanced due diligence for suspect transactions and customers. In addition, the Act requires fit and proper tests for significant shareholders and management of domestic banks upon licensing, and the Insurance Act requires fit and proper tests for officers of domestic insurers upon licensing. The Banking Act and the Financial Institutions Act prohibit a person convicted of dishonesty from acting as an officer of a bank. 629

**Tax Evasion**

Not having any taxes other than customs duties and stamp duty, Vanuatu has not entered into any Double Tax treaties with other countries.

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628 By criminalising money laundering, the Serious Offences (Confiscation of Proceeds) Act fulfils the FATF Recommendation 4: Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalise money laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money laundering predicate offences.

However, tax evasion is not a crime in Vanuatu, since there are no tax laws, and the Vanuatu authorities are unlikely to assist an investigation into a tax matter.\(^\text{630}\)

_Mutual Legal Assistance_

The Mutual Assistance in Criminal Matters Act contains a procedure for cooperation with foreign investigators, and the Serious Offences (Confiscation of Proceeds) Act has anti-money-laundering provisions which could encompass fiscal crime.

The Mutual Assistance in Criminal Matters Act No. 52 Of 1989 is an act to make provision with respect to the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth and to facilitate its operation in the Republic of Vanuatu and to make provision concerning mutual assistance in criminal matters between the Republic of Vanuatu and countries other than Commonwealth countries.\(^\text{631}\)

_Secrecy and Confidentiality_

The International Companies Act makes it a criminal offence for any person to divulge, attempt, offer or threaten to divulge or induce or attempt to induce other persons to divulge information concerning an international company.

\(^{630}\) Lowtax.net, Double Taxation Treaties in Vanuatu

\(^{631}\) The Mutual Assistance in Criminal Matters Act 1989 (Vanuatu)
The secrecy provisions of the Companies Act, the Trust Companies Act and the International Companies Act are not unrestricted. Officers and employees of companies may be required to provide evidence about those companies if ordered by the Supreme Court of Vanuatu. However, court proceedings involving international or exempted companies are all heard in camera. The Serious Offences (Confiscation of Proceeds) Act and the Mutual Assistance in Criminal Matters Act were enacted in 1989 to, among other things, prevent the laundering of proceeds of criminal activities. 632

IMF Report

In August 2003, a team from the IMF made widespread criticism of the regulation, licensing and supervision of the offshore banking sector in Vanuatu.

In a report published in August 2003, the IMF reported that the jurisdiction was non-compliant in most of the key regulatory areas. 633

The offshore banking sector consists of 34 licensed banks, of which only three have a real physical presence in Vanuatu. The remaining are shell banks with no presence beyond either a resident nominee director or resident agent who acts mainly as a service address. All 34 are prohibited from undertaking business with Vanuatu residents, while those licensed since 1993 are also restricted, under a general condition of their license, from soliciting funds from the public in any jurisdiction. They may, however, take deposits from associated and non-associated persons provided they do not publicly advertise

for deposits. Total known assets of the 34 banks as of December 2001 were approximately US$2.4 billion, of which US$1.8 billion were recorded as market-related instruments and investments.

'The Banking Act (the primary legislation under which the Vanuatu Financial Services Commission (VFSC) exercises its powers over the offshore or exempt banks) provides a basic licensing and enforcement regime, but explicitly exempts offshore banks from capital, liquidity and other prudential standards. There is also considerable uncertainty about the extent to which the VFSC can acquire information from the banks under this Act in order to carry out its supervisory duties. Attempts to update the legislation have progressed little over a period of four to six years,' the report said.634

The VFSC clearly defines the role of the regulatory authority and provides it with appropriate objectives. However, the Banking Act lacks any real basis by which the VFSC can fulfil its objectives. This law was originally intended to cover both domestic and offshore banks, but its objective with respect to the offshore sector is apparent from the broad exemptions from any prudential requirements that it grants to offshore institutions. The VFSC is only able to exercise any authority with respect to prudential matters by the issue of directives on a general or case-by-case basis. The legal authority for this approach is uncertain.635

634 Ibid.
Offshore banks are specifically exempted from the capital and other prudential norms specified in the Act. There is provision for the VFSC to issue directives, but the Act appears to limit this power to specific circumstances, and does not explicitly permit it to be used to set general prudential rules. A 1995 amendment to the Act gives the VFSC the power to conduct examinations of the banks and to require the submission of information. However, many of the banks believe that the disclosure of customer information, in particular, is prohibited under Section 381 of the Companies Act, which provides for extensive secrecy in relation to the affairs of exempt companies, which includes the offshore banks.

This report has added further to the challenges experienced by Vanuatu. Its reputation as a non-cooperative jurisdiction has led to public skirmishes with the OECD and the FATF. In addition, the Australian National Tax Office has named Vanuatu as its number one target.636

However, the government has apparently established a high level Committee to review the report and recommend to the Minister of Finance and Economic Management what actions should be taken to give recommendations to the report. The Committee is comprised of senior officials, from the Reserve Bank of Vanuatu, Vanuatu Financial Service Commission, the State Law Office, the Office of the Prime Minister and the Ministry of Finance and Economic Management.637

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6 Ibid.
7 Ibid.
Conclusion

Vanuatu, which was on the OECD’s list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.3 Europe

(i) Jersey

Money Laundering Legislation

Jersey's anti-money laundering legislation places an "indirect" obligation on everybody in the Island to make a suspicious transaction report (STR) to the police where they have knowledge or suspicion of money laundering. Any person knowing or suspecting that they are involved in money laundering does not commit an offence where they disclose knowledge or suspicion to a police officer before the act is done (and the act is done with the consent of a police officer), or after the act is done, so long as it is on their initiative and as soon as is reasonable. For example, a solicitor who suspects that he is being asked to put funds into his client account in order to conceal their criminal origin would commit an offence if he did so without disclosing the act to a police officer and/or failed to obtain the consent of a police officer (in practice this is the Joint Financial Crimes Unit) before carrying out the transaction or, if he
did not make the disclosure before the transaction was carried out, he failed to do so as soon as it was reasonable after the transaction.

Under the Terrorism (Jersey) Law 2002, a person employed by a financial services business is also subject to an "objective" test, and it is an offence not to report where there are reasonable grounds for knowing or suspecting that another person has committed a money laundering offence involving terrorist property.

Jersey's anti-money laundering legislation allows a STR to be made either to a police officer, or where the individual works for an employer which has a money laundering reporting officer (MLRO), to the MLRO. Once a report is made to an MLRO the responsibility rests on that officer to decide whether to make a report to a police officer (in practice this is the Joint Financial Crimes Unit).

The Money Laundering (Jersey) Order 1999 also obligates financial services businesses to identify a person to whom a STR is to be made (MLRO), to assess the STR, and to make external STRs to a police officer (again, in practice the Joint Financial Crimes Unit).638

In June 2003, the Financial Services Commission (FSC) issued a consultative document on proposals to reform the approach to recording company

The new proposals, when adopted, reflect the jurisdiction’s desire to be in the forefront of modern regulatory practice. The key changes proposed are:

- The creation of a publicly available register of directors of all Jersey companies – similar to its UK counterpart;
- A requirement to inform the Companies Registrar of details of beneficial ownership and control of Jersey companies (including any changes), and of companies’ business activities; and
- The requirement of all foreign incorporated companies administered or operating in Jersey to register their details with the Commission – with a view to making this information publicly available in the future.

The consultation paper also covered a number of technical points – among them; establishing a framework for the electronic filing of documents, including the annual return; and bringing in a number of other changes, generally reflecting current changes proposed to the UK Companies Act.

**Tax Evasion**

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639 This fulfils the FATF Recommendation 10: Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names; they should be required (by law, by regulations, by agreements between supervisory authorities and financial institutions or by self-regulatory agreements among financial institutions) to identify, on the basis of an official or other reliable identifying document, and record the identity of their clients, either occasional or usual, when establishing business relations or conducting transactions (in particular opening of accounts or passbooks, entering into fiduciary transactions, renting of safe deposit boxes, performing large cash transactions).

Proceeds of criminal conduct as defined under the Proceeds of Crime (Jersey) Law 1999 includes any pecuniary advantage. In the area of fiscal crime this would include the non-payment of taxes which would give rise to a pecuniary advantage. All cases depend on their own particular facts. However, there are likely to be few circumstances in which financial institutions are able to facilitate the retention or control of a criminal's pecuniary advantage, in connection with tax evasion.

This issue has tended to arise in two distinct circumstances. The first case arises where a settlor, or account holder, transfers funds to a financial institution in circumstances where the transferor has failed to pay tax in connection with these funds. This may arise because the transferor has failed to pay gift tax arising on the transfer of the funds. Although a pecuniary advantage has arisen, it is not clear how the financial institution will have facilitated the retention or control of this pecuniary advantage.

The second case arises where account holders have failed to declare interest arising from monies held on account, or a beneficiary has failed to make a declaration of a distribution. If a financial institution assists the criminal by making a false declaration to a foreign tax authority, an offence under Article 32 may be committed. Simply holding monies in an account for a client, who is not declaring interest is unlikely to be sufficient.\textsuperscript{61}

It is worth mentioning that the only fiscal offence capable of constituting criminal conduct, as defined under the law, is fiscal fraud. The constituent elements of common law of fraud in Jersey were set down by the Court of Appeal in the case of Attorney General v. Foster (1992) JLR 6CA. For the offence to be committed there must be:

- a false reputation;
- an intention to cause by false representation actual prejudice to someone and actual benefit to someone;
- actual prejudice suffered as a result of the false representation;
- actual benefit accruing to the perpetrator of the fraud or to someone else; and
- a causal link between the falsity and the injury.

Generally speaking, individuals operating within their financial services business may be unlikely to be familiar enough with the affairs of a client to formulate knowledge or generally a suspicion that the client's conduct contains the necessary elements of fiscal fraud.642

**Mutual Legal Assistance**

In May 2002, Jersey, along with its fellow UK dependent territories Guernsey and the Isle of Man, agreed to be part of the EU's information-sharing regime whereby financial institutions would be obliged to pass details of income or

642 Ibid.
investments by nationals of EU member states to their home tax administrations. It is as yet unclear whether such a regime will come into effect pending agreement from Switzerland and the US to be part of it.

In November, 2002, Jersey signed a Memorandum of Understanding (MoU) with the Gulf state of Bahrain, designed to facilitate cooperation between the two countries on issues such as applications for licences from financial institutions, and the investigation of irregularities.643

Financial Services Commission (JFSC) director-general, Richard Pratt announced that: 'We will be providing information on request, but we would also offer information spontaneously, as a partner regulator, if for example we found out anything of value to them.644

In October 2003, the Jersey Financial Services Commission announced that Jersey had signed a Memorandum of Understanding (MoU) with the International Organisation of Securities Commissions (IOSCO). The MoU, which was initially agreed in 2002, was designed to combat securities and derivatives violations. It obliges signatories to share information about the illegal use of their securities and derivatives markets with each other. In signing up to the MoU, Jersey joined another 24 members. However, according to the JFSC, the island is one of the first offshore finance centres to

644 This fulfils the FATF Recommendation 32: Each country should make efforts to improve spontaneous or "upon request" international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.
join. "By signing this memorandum with IOSCO, Jersey reinforces its status as a leading international financial centre and gives international investors greater confidence in the island," JFSC compliance director, John Paliot explained.645

Secrecy and Confidentiality

No legislation governs bank secrecy, but it is possible to have a numbered bank account in Jersey. Professional privilege pertains between professional advisors and their clients. Such confidentiality is limited by the fact that disclosure may be compelled by court order, where there is a duty to the public to disclose suspicious transactions, or where the customer has consented. Beneficial ownership must be disclosed to the authorities and references may be required. However, absent evidence of criminal conduct is not to be disclosed.646

Future of Jersey

Britain is responsible for its external affairs including negotiations with the European Union; under the UK's accession treaty with the EU, Jersey forms part of the single market but is outside the EU fiscal area. Jersey's unique situation with regard to the EU is both a strength and a weakness. The island will remain a favoured base for holding and trading companies working into the EU, and for e-commerce activity; but it has the EU and the OECD to

645 Lowtax.net, above n 643.
contend with. After several years of 'hands-off' policy in regard to Jersey taxation, the UK government in 2002 threatened Jersey with sanctions if it did not comply with EU information-sharing rules.

Jersey signed a 'commitment' letter to the OECD in February 2002, but it contained an 'Isle of Man' level playing field clause making changes dependent on comparable changes in Switzerland and the USA. By mid-2003, however, the OECD seemed to have reached a compromise position with Jersey, and was assisting it to design a nil% corporate tax system.

In May, 2002, it became clear that Jersey, along with its fellow UK dependent territories Guernsey and the Isle of Man, was ready to sign up to the EU information-sharing regime if that became necessary; but after the EU finally reached its compromise agreement on the Savings Tax Directive in early 2003, Jersey decided, along with Guernsey and the Isle of Man, to apply a withholding tax to the returns on personal savings for EU residents when the Directive comes into force in 2005.647

Conclusion

Jersey, which was on both the FATF list of countries reviewed in 2000 and the OECD's list of tax havens, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

647 Lowtax.net, above n 645.
Money Laundering Legislative

The “Federal Act on the prevention of money laundering in the financial sector” (MLA), entered into effect on 1 April 1998 and serves as a supplement to the provisions of the criminal code. It applies equally to all financial intermediaries, i.e. any person who, on a professional basis, accepts, maintains deposit of or helps to invest or transfer assets belonging to a third party (e.g.: banks, fiduciaries, wealth managers, traders in securities, funds directorates, lawyers and notaries, the post office or the Swiss Federal Railways and change bureaus).

The act imposes on financial intermediaries new organizational duties (training personnel, internal controls) and policy duties (verify identity of the contracting partner, verify beneficial owner, even clarification of the economic background of a transaction that shows signs of laundering, retaining documents attesting to the verifications made).

In accordance with this law, all financial intermediaries were henceforth obliged to inform the Federal Reporting Office for Money Laundering when, in a business relationship, they knew or presume, on the basis of sound evidence, that money laundering was taking place. This office is attached to the Federal Office for Police.
Since the first year the Money Laundering Act has been enforced, 80% of the 210 declarations recorded were made on behalf of banks. Cantonal investigations are currently underway in 161 of the cases. In total, 423 million Swiss francs have been frozen.

**Tax Evasion**

On June 3, 2003, The European Union ECOFIN of Economic and Finance Ministers (the "ECOFIN") formally adopted the tax package of the Directive on the Taxation of Savings (the "Directive"). The Directive was to be effective from January 1, 2005, assuming each EU jurisdiction enacts the relevant provisions by January 1, 2004, and providing agreement is reached within certain third party jurisdictions to be similarly bound by the terms of the Directive. Switzerland is the most relevant of these third party jurisdictions. 648

Under the Directive, most EU jurisdictions will automatically exchange information with each other about the beneficial ownership of accounts. Where an individual, resident in the European Union, has an account in another EU jurisdiction, that EU jurisdiction will deliver the account holder information to the jurisdiction where the account holder is resident. The jurisdictions with banking secrecy will not automatically exchange

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648 Micheloud and Cie, *Measures used for the fight against money laundering*.
649 With the Directive on the Taxation of Savings, Switzerland can fulfil the OECD Recommendation 7: Access to banking information for tax purposes - Countries review their laws, regulations and practices which govern the access to banking information with the view to removing impediments to the access to such information by tax authorities.
information in this way. The jurisdictions with banking secrecy will instead impose a withholding tax on savings income.

When it is adopted, Switzerland will impose the withholding tax regime, rather than the automatic exchange of information regime. Indeed, the Swiss Federal Department of Finance released on its official website the heads of the draft agreement. Also of interest is the comment made on the willingness of Switzerland to provide administrative assistance (exchange of information), in cases of tax fraud. Surprising though it may be, it will surely rely on an act falling within the definition “tax fraud” under both the Swiss conception as well as the conception of a foreign jurisdiction. Tax fraud in Switzerland requires something more than the simple act of tax evasion. It is debatable how truly impressive Swiss banking secrecy remains, or will remain, but since it seems that the wider perception is held that it does remain, then the maintenance of banking secrecy (or the veneer of banking secrecy) cannot be understated as far as the vitality of the Swiss banking industry is concerned.

income tax treaty. The US Treasury said that the Agreement sought to facilitate “more effective tax information exchange” between the two countries.\textsuperscript{654}

Article 26 (Exchange of information) of the treaty, which was signed on October 2, 1996, and entered into force on December 19, 1997, provides that the Competent Authorities of the US and Switzerland will exchange such information as is necessary “for the prevention of tax fraud or the like in relation to the taxes which are the subject of” the treaty. Under the Agreement, the exchange of information will be in regard to both civil and criminal matters. The statute of limitations applicable under the laws of the requesting country will apply, instead of the statute of limitation of the requested country.\textsuperscript{655}

Under Swiss Law, fraud would generally only be found when forged or falsified documents were used to deceive tax authorities, or a scheme of lies was used to deceive tax authorities. In the US, however, fraud may also arise from non-filing or omission of income. At first glance, certain inconsistent subtleties between the two different legal definitions suggest practical challenges that may undermine the purpose of the information exchange.\textsuperscript{656} In the past, the Swiss authorities took the position that the examples were the only opportunities for exchange of information while the US took the view

that the examples were by way of illustration only. This new agreement confirms that the previous interpretation espoused by the US is henceforth the agreed view.\textsuperscript{657}

\textit{Mutual Legal Assistance}

Switzerland has passed its own mutual assistance law, and is also a party to a number of international mutual assistance treaties, some multilateral and some bilateral, including the following:

- The European Convention on Mutual Assistance in Criminal Matters, 1959;
- Treaty on Mutual Assistance in Criminal Matters with the USA, 1973;

The Federal Act, particularly since the 1997 amendments, enables the transmission of documents and information abroad for the purposes of criminal proceedings.\textsuperscript{658} From the point of view of banking secrecy the following can be said about the current situation:


\textsuperscript{658} Though the Federal Act allows exchange of information between countries, it is not permitted in the use of tax matters, thus defeating the intention of the OECD Recommendation 8: Exchanges of information - Countries should undertake programs to intensify exchange of information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.
- According to a recent decision of the Federal Supreme Court the transmission of such information requires the permission of the Swiss police authorities who must inform the customer about the order and give him a right to appeal;
- It is not permitted to forward information on persons who are not the subject matter of the investigation;
- Information will not be given if
  - The foreign authorities might use the information for purposes other than those for which it was requested;
  - The offence alleged is not equally punishable in Switzerland;
  - The requesting state does not offer Switzerland reciprocal treatment in these matters;
  - The offence is related to tax, politics or military matters.

The Swiss authorities now grant administrative assistance as well as judicial assistance. Administrative assistance is regulator to regulator contact as opposed to judicial assistance which takes place between judicial authorities within the scope of civil or criminal legal proceedings.659

Switzerland has ratified several other bilateral and multilateral international agreements through which it is committed to providing judicial cooperation - also referred to as mutual assistance - in criminal matters. The most significant agreement was constituted by the European Convention on Mutual Assistance

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6 Lowtax.net, *Double Taxation Treaties in Switzerland*  
in Criminal Matters on 20 April 1957. In accordance with the "Federal Act on international mutual assistance in criminal matters" (1983), Switzerland grants international judicial cooperation in criminal matters. In such procedures, capital assets can be frozen and, if need be, released to the foreign authorities. Judicial cooperation is granted when the crime under prosecution is also punishable in Switzerland and the foreign authority guarantees that it will not use the information issued from Switzerland for any purpose other than the investigation.

Switzerland played an active part in concluding the Declaration of the Basle Committee on Banking Supervision, which, in 1988, established the first international code of conduct for banks, with an aim to prevent any abuse of the banking industry for money laundering purposes.660

Secrecy and Confidentiality

Two articles of the Swiss criminal code regulate Swiss bank secrecy:

Article 162 takes punitive action against the disclosure of trade secrets or confidential business information.

"Any person who has divulged a trade secret or confidential business information that was meant to be kept by virtue of legal or contractual obligation, any person who has used this information to his or her benefit or to

660 Michelaud and Cie, Measures used to combat money laundering at an international level <switzerland.isyours.com> at 9 November 2003.
that of a third party, will be, on prosecution, punished by imprisonment or by fine."

Article 320 deals with occupational confidentiality.

1. Any person who has divulged a secret entrusted to him or her as a representative of authority or a civil servant, or who has acquired knowledge by means of his or her practice or employment, will be punished by imprisonment or by fine. The disclosure remains punishable even when the practice or employment has terminated.

2. The disclosure will not be punishable if it was made with the written consent of a superior authority.66

Exemptions are provided for under the Swiss Civil Code, debt collection and bankruptcy law, criminal law, administrative criminal law and mutual assistance cases. In such cases, against the wishes of the client banking secrecy may also be waived by order of the courts. Banking secrecy is most often waived in prosecution cases.

Switzerland cooperates fully in the investigation of international criminal activities. Swiss banks are obligated by law to provide information of any nature relating to criminal investigations if requested to do so by the judicial authorities. The banks meet their obligation to provide requested information on the basis of very strict "know your customer" rules.66

In June 2003, the OECD threatened to place Switzerland on a blacklist, due to what the organisation considers to be its tolerance of 'harmful tax practices'.

While the country's appearance on the forum's blacklist would not create any legal obligations for Switzerland, its inclusion on such a blacklist could only be detrimental to the jurisdiction's international standing.

'This is not acceptable,' finance ministry spokesman Daniel Eckman said. 'We have major difficulties understanding how after five years of discussions about what should be considered a harmful tax practice, the forum comes up with a report that considers Switzerland the only country in the whole OECD with harmful aspects in its tax legislation. We won't make concessions in this field,' Eckman said.

Money Laundering related suspicious activity reports (SAR) rose over 30% in 2002 in Switzerland, with 95% of the total SARs connected to the 11 September 2001 attacks, according to a statement from the Money Laundering Reporting Office (MROS) of the Swiss Federal Office of Police. The figures rose from 311 reports in 2001 to 417 in 2002, with the MROS forwarding 380 of these cases to law enforcement agencies.

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663 See Appendix U for the list of OECD's Tax Havens as at 2004.
The report also showed that the majority of reports were generated from non-financial institutions, such as law firms, money transfer businesses and others involved in fiduciary transactions and asset administration in Geneva, Zurich and Bern. "As a result of the attacks in US, terrorism is the crime most frequently mentioned as a prior act in the reports about suspected money laundering. Further crimes mentioned include fraud, corruption and embezzlement," the MROS said.666

**Conclusion**

As with Singapore, Switzerland which was not on the OECD list of tax havens or the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.4 **Indian Ocean**

**Mauritius**

**Money Laundering Legislation**

Mauritius has a range of legislation governing the domestic and offshore financial services industry but legislation dealing with money laundering specifically is in its infancy. In the past legislation has regulated banks and other financial institutions on a

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666 Ibid.
prudential basis. However, new legislation, namely Economic Crime and Anti-Money Laundering Act 2000 (ECAML Act) and the Dangerous Drugs Act 2000 have been introduced to combat money laundering. However, legislation relating to international co-operation needs to be reviewed to ensure compliance with FATF Recommendation 38. At the time of the visit no Extradition Act was in place and the team was told that the Vienna Convention could not be ratified until this had been done. It is noted that since the evaluation took place the Evaluation Team had been informed that the Government has deposited its instrument of ratification in respect of the Vienna Convention with the office of the United Nations Secretary General on 6th March 2001. Accordingly, the Convention was due to come into force for Mauritius on 4th June 2001.

The regulation of the finance industry is currently fragmented into banking and non-banking sectors, with responsibilities divided amongst separate regulatory bodies, namely, the Central Bank and the MOBAA, the Controller of Insurance and the Stock Exchange Commission. Recognising this factor, the Government is setting up a Financial Services Commission which will be responsible for the licensing, regulation and supervision of non-banking financial services initially and, at a later stage, to integrate the Financial Services Commission with the Bank of Mauritius, the supervisory authority of the banking sector, in a move to a single unified regulatory authority for the whole financial services in Mauritius. In the meantime, there are provisions in the ECAML Act 2000 for tackling money laundering threats and for the involvement of different regulatory bodies e.g. lodging of reports of suspicious transactions with the Central Bank. The Bank can further refer the matter to the appropriate bodies regulating the financial institutions who can take appropriate
action under their relevant legislation. (Sections 22(1) and 21(6) respectively). However, the Evaluation Team considers that strengthening and improving co-operation between different regulatory bodies should be developed in the short term.667

On 19 June 2003, the government announced further legislation to strengthen its anti-money laundering (AML) regime. Among the measures being considered were: a convention for the Suppression of Terrorism Bill, a Mutual Legal Assistance Bill and an Extraction Bill. These three measures have been drafted and will be finalised during the summer. Mauritius has made significant headway in developing its AML approach and at the end of 2002 was assessed by a team from the IMF / World Bank under a Financial Sector Assessment Programme (FSAP). This exercise was designed to help countries enhance their resilience to financial crisis, and to foster growth by promoting financial soundness and stability.668

The assessment included a review of AML/CFT (Combating the Financing of Terrorism) regime in place. The FSAP reports were presented to the IMF executive board in October 2003, and Mauritius would then seek an upgrading of its ranking by the Financial Stability Forum (FSF).

Mauritius was ranked in the third and lowest category of offshore financial centres by the FSF in April 2000 with regard to the quality of its financial supervision.669

Sushil Khushiram, minister of economic development, financial services and
corporate affairs, said the government anticipated a favourable assessment and
therefore adjustment to the country’s FSF ranking will further strengthen its
credibility in attracting new and better business in financial services.

“As part of the FSAP exercise, amendments have been proposed to the exiting
legislation to fine-tune some provisions and clear certain ambiguities. A team of two
AML/CFT experts visited Mauritius in March 2003 and submitted their final report in
April. A broad-based National Coordination AML/CFT committee was set up to
ensure proper implementation of the key points.”670

Tax Evasion

The Financial Intelligence and Anti-Money Laundering Act 2002 (FIAML Act)671

The FIAML Act makes provision for the establishment and management of a
Financial Intelligence Unit (FIU) as the central agency responsible for receiving,
requesting, analysing and disseminating to the investigatory and supervisory
authorities, disclosures of financial information:

- concerning suspected proceeds of crime and alleged money laundering offences.

Banks, financial institutions, cash dealers and relevant professionals are required
to report suspicious transactions in relation to money laundering activities to the
FIU;

680 The Financial Intelligence and Anti-Money Laundering Act 2002 (Mauritius).
required by or under any enactment in order to counter money laundering; or

- concerning the financing of any activities or transactions related to terrorism, as specified in Part III of the Prevention of Terrorism Act 2002.

This Act also makes provision for mutual assistance with overseas bodies in respect of investigation and prosecution of money laundering cases.

The FIU has already been set up and is operational.\(^\text{672}\)

**Mutual Legal Assistance**

The Mutual Assistance in Criminal and Related Matters Bill which aims at enabling the widest possible measure of international cooperation being given and received by the Republic of Mauritius promptly and to the fullest extent possible, in investigations, prosecutions or proceedings concerning serious offences and related civil matters.\(^\text{673}\)

Mauritius has, as a tax planning jurisdiction focused the development of its global business sector (formerly known as the offshore sector) on the use of its growing network of double Taxation Avoidance Treaties. The expanding network of these double taxation agreements (DTA's) reinforces the seriousness of Mauritius as a tax efficient jurisdiction for structuring investment abroad in the global business sector.

Mauritius has been used as a route for investment into emerging regions such as India, China and Pakistan.

As at 11 February 2004, Mauritius has ratified 32 treaties\(^{674}\) and is negotiating several others.\(^{675}\)

The Prevention of Terrorism Act 2002 provides for measures to combat terrorism and for related matters. Its objects are to:

(a) suppress the financing of terrorist acts;

(b) criminalise the financing of terrorist acts;

(c) freeze funds and assets of terrorists and terrorist organisations;

(d) establish terrorists acts as serious criminal offences in domestic laws and regulations; afford international assistance in investigations, prosecution of financing of terrorism;

(e) to exchange information and collaborate internationally on terrorist acts.

The new legislation enacted to combat financial crime, money laundering and terrorist financing enhances the security of the Mauritian financial services sector as well as

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\(^{674}\) See Appendix P for the list of 32 ratified treaties.

comforts the reputation of Mauritius as credible financial hub of international 
repute.  

Secrecy and Confidentiality

The Mauritius Offshore Business Activities Act 1992 (MOBA) requires that all 
information and documentation received be kept secret and confidential except on 
proof beyond reasonable doubt that the confidential information is bona fide required 
for the purpose of any enquiry relating to drug trafficking, arms dealing and money 
An imposed penalty of a fine of up to 300,000 rupees and imprisonment for a term of 
not exceeding 8 years for failure to comply.

Mauritius Strengthening its Appeal as a OFC

Mauritius adheres to the international requirements. A review of its financial sector by 
the IMF/World Bank under a financial sector assessment program was conducted in 
2003. The report was positive. The Financial Services Commission exerts the 
regulatory authority on all non-banking activities.

In 2003 Mauritius joined the Egmont Group. Its prestige is greatly enhanced by this 
membership, which is further proof of the high regard which Mauritius commands in

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the international financial arena and confirms its standing as one of today's best financial centres.\textsuperscript{679}

Conclusion

Mauritius, which was on the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.8.5 Asia

(i) Hong Kong

Money Laundering Legislation

Over the last four years approximately 3000 investigations into money laundering have resulted in a mere 49 convictions. Hong Kong must now face up to the danger of being blacklisted by the FATF if it does not tighten up its current laws that have allowed many money-launderers to get away with their criminal activities.

This warning came from Hong Kong's commissioner for narcotics, Claire Lo Ku Ka-Lee, who has reported to a Bills Committee meeting on a new money-

laundering law recently, that Hong Kong must improve its financial services
laws to avoid the threat of sanctions from the FATF and the OECD.

Lo has argued that if Hong Kong does not improve itself, there is a possibility
it could be blacklisted some time in the future. Hong Kong as an international
financial centre, needs in order to maintain its status, combat money
laundering.\footnote{Hung Kong Economic and Trade Office, ‘FATF Annual Report under Hong Kong’s Presidency
Released’ (2002) 6 The Circle 4.}

In 1999 the FATF carried out an assessment of the Hong Kong’s Special
Administrative Region which indicated that the jurisdiction’s regulations were
not quite up to par in the global fight against money laundering.\footnote{Financial Action Task Force, above n 615.}
The multilateral cited Hong Kong’s low tax system, sophisticated banking facilities
and the absence of currency and exchange controls as ‘susceptible’ to money-
laundering activities.

The report stated that, since the first evaluation in 1994, Hong Kong had taken
a number of important steps in its anti-money laundering regime. The
expansion of its anti-money laundering legislation under both the Drug
Trafficking (Recovery of Proceeds) Ordinance (DTRoP) and the Organised
and Serious Crimes Ordinance (OSCO), which include the extension of the
money laundering offence from only drug trafficking to the proceeds of
serious crimes and statutory mandatory suspicious reporting, have provided a
solid foundation for penal action.
Although the report described the legislative steps taken by Hong Kong to be ‘fundamentally sound’ it raised concerns that the reporting of suspicious transactions mandatory for both drug offences and other serious crime were inadequate. The report stated: “the number of reports received are still small, relative to the size of the Hong Kong financial markets and reporting levels in other jurisdictions... the low number of suspicious transactions reports and of convictions for money laundering, suggest that the effectiveness of the system can be further improved.”

The FATF released its thirteenth annual report on its anti-money laundering and anti-terrorist financing activities at a press conference held on June 21, 2002 at the conclusion of its plenary meeting in Paris.

“The annual report outlined the main achievements of the FATF in 2001-2002 under the presidency of Hong Kong, China, including the significant progress that has been made in combating terrorist financing and in the work on Non-Cooperative Countries and Territories (NCCTs),” said Mrs. Clarie Lo, the outgoing FATF President and Hong Kong’s Commissioner for Narcotics.

In the report, eleven FATF members, including Hong Kong, had implemented all of the twenty-eight recommendations requiring specific action.

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683 Ibid.
684 Ibid.
685 Hong Kong Economic and Trade Office, above n 680.
Hong Kong has money laundering rules which are wider than those that apply in most other countries. For example, disclosure to the authorities must be made by any person who merely "ought to have suspected" that monies received originated from criminal activities. Furthermore, this threshold is met even if the activity abroad that generated the funds was not illegal in that country but would have been illegal had it been done in Hong Kong. On the other hand, if an offence overseas would not have been an offence if it had been committed in Hong Kong, no report need to be filed. Thus, the receipt of funds from gambling activities conducted abroad must be reported, but funds received in violation of foreign exchange controls do not. 686

In the case of Robert Pang Yiu Hung v Commissioner of Police (2 December 2000), a practicing barrister was arrested for failing to disclose his suspicion that certain securities held by client were to be sold, and the proceeds transferred to the account of the client's solicitor. The relationship between the barrister and his client was professional, and the purpose for which the client was selling the shares was to pay his legal fees to his solicitor in order to defend himself in the action for which the barrister was retained. The issue that arose in this case was whether a barrister (and a solicitor) were excused from filing a money-laundering report to the authorities by claiming legal professional privilege. The court held that the privilege applied, and that no report needed to be filed. The barrister was therefore acquitted. 687

686 This is because Hong Kong criminalises gambling but does not have exchange control laws of her own.
This is an important decision which affirms the sacrosanct rule that a person should be permitted to make full disclosure to his legal advisor for the purpose of seeking legal advise without fearing that anything said by him in seeking that advise would be subject to disclosure. The court expressed reluctance to adopt the rule that would require barristers and solicitors in the discharge of their professional duty of acting for a client to essentially act as informers against their clients. The court recognised that legal professional privilege is nowadays recognised as a fundamental human right, and indeed is protected in such conventions as the International Covenant for Civil and Political Rights which is enshrined in Hong Kong’s Basic Law, which is Hong Kong’s “mini-constitution”. A disclosure requirement would be fundamentally incompatible with the constitutional guarantee of an independent profession which is implicit in the Basic Law.

During the course of the hearing, the government enacted clarifying legislation that now expressly states that nothing in the money laundering legislation requires a disclosure of any items subject to legal privilege.  

Tax Evasion

The State Council submitted the draft amendment to the Tax Administration Law in August 2000 for review by the Standing Committee of the Ninth National People’s Congress. The draft amendment included the introduction of a minimum penalty for tax evasion. According to the proposal, the penalty for

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685 Ibid.
tax evasion was to range from 50 per cent to 500 per cent of the amount of tax evaded.

A taxpayer is deemed to have committed an act of tax evasion under Article 46 of the Tax Administration Law if he "forges or alters information, conceals information or destroys account books or account vouchers without authorisation, records an excess amount of expenditure or fails to record an insufficient amount of income in account books or uses other means to falsify tax declarations and this results in non-payment or underpayment of tax."

Current Tax Administration Law labels tax evasion a criminal offence if the amount evaded is over 10 per cent of the tax payable and over RMB10,000. In July this year, a Hong Kong resident who has engaged in VAT frauds was sentenced to death, subject to a two-year suspension. While more than 70 Peoples Republic of China (PRC) citizens who committed VAT fraud have been sentenced to death, this is the first one that involves a Hong Kong resident in a PRC tax case.689

_Mutual Legal Assistance_

Hong Kong has 8 Mutual Legal Assistance in Criminal Matters Orders which have come into force with Australia, Canada, France, South Korea, New Zealand, Switzerland, United Kingdom and United States of America.690

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The judgments and awards of the Hong Kong High Court and above may be enforced in most common law jurisdictions and in consequence of international agreements and arrangements, in a number of foreign countries including France, Germany and Italy. Reciprocal arrangements exist for the enforcement in Hong Kong of the judgments of the superior courts of those countries that will enforce Hong Kong's judgments. Similarly, maintenance orders made in matrimonial proceedings can be enforced, on a reciprocal basis, in a number of overseas countries.

Extradition agreements provide for the surrender of persons who are accused or convicted of a serious criminal offence committed within the jurisdiction of one of the Parties to the agreement who are found in the territory of the other Party. The courts in Hong Kong also have jurisdiction, on request from a foreign court, to obtain evidence in Hong Kong for civil or criminal proceedings in that court. Similarly, the courts in Hong Kong can issue Letters of Request to overseas courts for the obtaining of evidence. Mutual legal assistance in the investigation and prosecution of criminal offences in Hong Kong and overseas and in the recovery of proceeds of crime is also given and obtained directly by the International Law Division of the Department of Justice, under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525). 691

Secrecy and Confidentiality

There is no legal provisions governing the collection and disclosure of commercial credit data in Hong Kong. However, under the common law principle, banks generally regard it their duty to maintain confidential information about their customers. They would not normally disclose such information unless prior consent has been obtained from the customers.\textsuperscript{692}

\textit{Hong Kong's Potential as an Offshore Financial Centre}

Chinese officials are no longer so keen on Hong Kong becoming an offshore renminbi centre. The Chinese officials apparently fear that such action could devastate the currency and give an unfair advantage to Hong Kong and its banks.\textsuperscript{693}

In early August 2003, the Central Government agreed to consider allowing banks in Hong Kong to trial run personal renminbi business, including deposits, remittance, exchange and credit-card business. The Central Government also agreed to give preference to Hong Kong to consider liberalisation in market access in respect of offshore renminbi financial business.

Such a move was thought to be of benefit to both Hong Kong's development as an international financial centre and to the growing economic integration between Hong Kong and the Mainland. The move was also thought to

\textsuperscript{692} Hong Kong Monetary Authority \textless http://www.info.gov.hk/hkma/eng\textgreater at 6 November 2003.

potentially reduce money laundering, promote domestic competition and provide more credit tools for borrowers and lenders.

However, the Central Government’s initially positive response to Hong Kong becoming an offshore centre seems to be not as strong as originally thought. The Financial Times reported that, “mainland finance industry officials, especially in Shanghai, are objecting to the plan. Shanghai has been struggling to establish itself as a renminbi finance centre and fears its role may be undermined by concessions to Hong Kong.” Hong Kong has a far superior infrastructure and skills base, which would likely make it more a favourable finance centre.

The relationship between the Chinese authorities and the financial centre in Hong Kong remains problematic. This is another example of Beijing’s unwillingness to allow the separate culture of Hong Kong to remain intact. Competition pressures from Beijing and Shanghai will add to Hong Kong’s woes. The SARS virus dealt a heavy blow to Hong Kong and its capacity to compete on a global stage is being further undermined by this latest development.694

The impact of SARS is mainly on the economy. However, it is also causing some political turbulence. After 500,000 took to the street to voice their
grievances against the ruling cabinet and the ailing economy, two ministers including the Financial Secretary resigned.\(^{695}\)

Such negative news was accompanied by an increase in tax rates from 16% to 17.5%, which is quite a controversial move to increase government revenue under a dragging recession and a historically high unemployment rate of over 8%.

On the positive front, Hong Kong has yet again been named the world’s freest economy for the seventh consecutive year by Canada’s Fraser Institute. It has also topped the Heritage Foundation/Wall Street Journal Index of Economic Freedom for the past nine years.

Moreover, to protect the lustre of this Pearl of the Orient, China signed with Hong Kong the Closer Economic Partnership Arrangements (CEPA) on 29 June 2003. This is one of the devices to boost the local economy. Under CEPA, tariffs on some 270 categories of goods manufactured in Hong Kong will be removed. Also, 17 Hong Kong service industries will get first mover access to the mainland market. These include management consultancy, accounting, legal, banking, securities and insurance.

Companies incorporated and operating in Hong Kong will be eligible for the advantage. Foreign firms without substantial operations in Hong Kong can

\(^{695}\) Ching Cheong, ‘China Warns HK; Don’t Stray Too Far’, *The Straits Times* (Singapore) 18 February 2004, 1.
take advantage of the CEPA by partnering with or acquiring eligible local companies.\textsuperscript{696}

However, Beijing's most recent comments on "capital outflows" seem to have spelt a death nail to the SRA’s sovereign risk, which for European investors, will surely see the funds move to Singapore as the more stable and attractive of the two Asian Regional Financial Centres.\textsuperscript{697}

\textit{Conclusion}

As with Singapore, Hong Kong which was not on the OECD list of tax havens or the FATF list of jurisdictions and territories for review, now complies with the directives of the various supranational organisations as can be seen from the above analysis.

5.9 Conclusion

The responses of the OFCs covered by the detailed and extensive analysis in this chapter, demonstrated the compromise positions that have been reached between the supranational directives and the regulatory amendments of the key OFCs.

The level of co-operation by the prominent OFCs is now at an unprecedented level and the depth and quality of their regulation far outstrips those nations which constantly criticise the island nations through global agencies. Switzerland, an OECD

\textsuperscript{697} Ching, above n 695.
member, still has not given up on banking secrecy and bankers in Switzerland still seem reluctant to move. Yet British chancellor Gordon Brown has said he will put renewed pressure on Jersey, Guernsey and the Isle of Man to move from their common position of a withholding tax to automatic information exchange under the terms of the European savings tax directive.698

The revision in thought among OFCs some years ago which obliged many to come to the realisation that the only way forward was to provide outstanding levels of services and to comply with the larger international community has been a force for the good. But the inevitable conclusion from this process appears to be that there will be fewer OFCs and that the less conforming states offering offshore services will eventually disappear.

Nevertheless as the number of viable OFCs falls from 65 or so to 15-20, those remaining will be robust structures, articulately managed centres and able to compete with the world’s best. Some will be full service jurisdictions and others will be excellent niche players.

It appears that the larger developed economies which benefited through the coercion of these offshore states with the name-and-shame tactics, may cease their political manoeuvrings. The OFCs have complied in full measure but the big states are perceived to have manifestly failed to achieve a level playing field. In a forthright demonstration of their intellectual creativity the offshore centres – notable Gibraltar and the Isle of Man – have managed to create a tax environment which meets the full

demands of international transparency and a competitive marketplace. It is this degree of agility of thought and action which the OFCs will need on a continuing basis if they are to stand a chance of survival in the international corridors of power.699

The following chapter now brings this thesis to the point where it is noted that having analysed the responses of the various OFCs including Switzerland in Europe and Hong Kong in Asia, and it will also be noted that the relocation of global wealth management is now being diverted from the traditional European regimes to the newly emerging Asian regional financial centre of Singapore.

Chapter 6 examines the legislative and regulatory responses of Singapore to the major supranational directives concerning harmful tax practices, money laundering, confidentiality and exchange of information. This analysis will also draw attention to the comparisons with the Swiss model in terms of secrecy 700 and bank confidentiality.701 The Wolfsberg Principles are given further attention as Singapore is positioning itself to be another alternative besides Switzerland, in the realm of private banking and global wealth management. The relevance is heavier as the origins of the Wolfsberg Principles are that of private banks who wish to have regulations in place to combat money laundering and tax evasion in line with the directives of the OECD and the FATF.

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699 ibid.
700 Swiss Civil Code, Art 398. The agent is obligated, in general, to use the same care as the employee under an employment contract. Affirmed by the Swiss Federal Tribunal in 1937: 63 Arrêts du Tribunal Fédéral Swiss II 242, 16 September 1937.
Chapter 6: Singapore as a Compliant Jurisdiction

6.1 Introduction

Switzerland currently manages approximately US$2.2 trillion of offshore assets due to its historic stable financial and political environment, which translates into a safe haven for investing money. Further, it also has long-standing expertise in multi-currency investments, with pro-investor banking secrecy laws, and discrete and well regarded personalised services. To many, Switzerland is a politically-neutral, tax-efficient and trustworthy financial centre.

But Switzerland’s position as a offshore financial centre is set to weaken with the possibility of significant fund outflows to Asia and elsewhere. Switzerland will soon lose some of its tax competitiveness which is one of the main benefits for its past success in attracting offshore funds.

In June 2003, under pressure from G8 countries, Switzerland has agreed to repatriate income taxes on accounts held by citizens of the European Union, due to start in July 2005, but which may be delayed further until 2006. The tax rate will start at 15 percent and increase to 35 percent by 2011.

Other EU’s countries have also adopted or will adopt the EU’s Savings Tax Directive, which requires financial institutions to report financial information on their non-

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resident investors. This means that account holders will have to pay taxes on their investment income to their respective governments, which previously was not done.

In light of these developments, the analysis of this chapter will demonstrate how it is likely that the wealthy may decide to place their wealth away from Switzerland, and the other wealth management centres in Europe. The wealth management industry in Asia, especially Singapore, in response to all the supranational directives, is poised to benefit from these recent developments in Europe over and above the growing amount of indigenous wealth in Asia.

Similar to Switzerland, Singapore has strong fundamentals. Firstly, it has a good record of creating and maintaining sound economic policies and is politically stable. Its financial industry is regulated to the highest international standards. Secondly, it is the world’s fourth largest foreign exchange centre with a large presence of public equity, private equity, fixed income and hedge fund managers.704

Thirdly, Singapore has an extremely favourable regulatory environment for the placement and investment of offshore funds. Its tax system allows offshore funds to compound tax free, as no taxes on interest and capital gains are imposed on non-residents. There are also no barriers to the entry and repatriation of funds.

Fourthly, the Singapore government plays an active role at increasing transparency and minimising bureaucratic practices. It also has stringent client confidentiality laws, comparable to those of Switzerland. With these advantageous factors in place,

Singapore has positioned itself to being a benefiting party to the movement of offshore funds out of Europe.\textsuperscript{705}

It can be seen that Singapore's development as an international financial centre began in the late 1960s. Since then, Singapore has implemented an economic blueprint that has encouraged inward investments of multinational corporations to Singapore. The inflows of foreign direct investment from the UK, US and Japan provided an impetus to the development of the financial sector. By the 1980s, many of the world's leading financial institutions had set up operations in Singapore.\textsuperscript{706}

Over the years, its sound economic and financial fundamentals, conducive regulatory and business environment, strategic location, skilled and educated workforce, excellent telecommunications and infrastructure, and high living standards have attracted many reputable international financial institutions to set up operations in Singapore. On the back of growing prosperity in the region and support from the authorities, Singapore has developed into a regional, and subsequently, global foreign exchange trading centre. Today, only London, New York and Tokyo record higher foreign exchange trading volumes than Singapore. The Singapore International Monetary Exchange (SIMEX)\textsuperscript{707}, the first derivative exchange in Asia, also grew in stature to become a key Asian financial hub in the global chain of leading future markets. Today, financial services account for 11% of Singapore's GDP.\textsuperscript{708}

\textsuperscript{705} Ibid.


\textsuperscript{707} SIMEX and the Stock Exchange of Singapore (SES) have since merged to become the Singapore Exchange (SGX).

\textsuperscript{708} Monetary Authority of Singapore <http://www.mas.gov.sg> at 3 November 2003.
There is a large and diversified group of local and foreign financial institutions, numbering about 700, located in Singapore and offering a wide range of financial products and services. These include trade financing, foreign exchange, derivatives products, capital market activities, loan syndication, underwriting, mergers and acquisitions, asset management, securities trading, financial advisory services, and specialised insurance services. The presence of these leading institutions has contributed to the vibrancy and sophistication of Singapore's financial industry.\textsuperscript{709}

Fund management companies in Singapore have expanded in terms of size, regional responsibility and capabilities, with 70% of funds under management sourced from the US, Europe and Asia.\textsuperscript{710}

Singapore's asset management industry has managed good growth since 1994. Assets under management (AUM) by Singapore-based financial institutions have grown steadily from S$66 billion in 1994 prior to the implementation of developmental measures to S$307 billion as at end of 2001. Singapore has evolved into a major regional asset management centre, hosting more than 200 asset management outfits, which employed 1114 professionals as at end of 2001. Almost three-quarters of discretionary AUM is sourced from overseas.\textsuperscript{711}

\textsuperscript{709} Ibid.
\textsuperscript{710} Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 706. The major Swiss and European private banks such as USB, Credit Suisse and ABN-AMRO all have regional headquarters in Singapore.
\textsuperscript{711} Ibid.
private banking is a discrete industry, but a survey of Asia/Pacific Private Banking and Wealth Management by Pricewaterhouse Coopers released in July 2003 revealed that AUM grew 11 per cent region-wide and 12 per cent in Singapore in 2002.\textsuperscript{712}

Singapore's developmental objective is to become a centre for (a) managing the Asian investment portfolios of both Asian and Western clients and (b) managing global investments of clients in Asia. Today, 43\% of assets managed in Singapore were sourced from Europe and North America, with 30\% of assets invested in Singapore, 9\% in Japan and 18\% in the rest of the Asia Pacific. However, Singapore remains a predominantly Asian mandate centre, with funds mostly invested in Asia, although the amount of investment in the US and Europe carried out from Singapore has increased in recent years.\textsuperscript{713}

The offshore-banking business is under pressure around the world. But as offshore participants (particularly the many institutions with businesses in Switzerland) review their business in light of unfavourable regulatory charges, they will find they have several options that will help them remain competitive.

One of the options is to grow beyond their home market. They can do so by building onshore presences in selected locations or by intensifying their efforts to grow in other key offshore locations such as Singapore. Thus there is the increasing need for

\textsuperscript{712} Vikram Khanna, 'Tougher Times for Private Banking' \textit{Business Times} (Singapore) 5 November 2003.

\textsuperscript{711} Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 711.
Singapore to cement in the minds of the offshore players, her position as the next best alternative.\textsuperscript{714}

After examining the OFCs legislation and responses to the directives of the supranational organisation in respect to (a) harmful tax practices, (b) money laundering, (c) confidentiality and (d) exchange of information, the following analysis of Singapore's legal and regulatory systems will demonstrate how it has responded to these issues and why in totality this regional financial centre will continue to develop ahead of the other OFCs, and in doing so, will become the new jurisdiction of choice for those seeking to use an OFC for future wealth management.

6.2 Legal Framework – Legislation Enacted by the Parliament of Singapore

Singapore, which is a republic, was a colony of the United Kingdom and briefly part of the Federation of Malaya. She has a unicameral parliament and a government patterned after the Westminster model, in which Parliament enacts laws and confers executive powers thereunder upon ministers,\textsuperscript{715} who form a cabinet headed by the Prime Minister.

The President is the constitutional Head of State. Although the President does not have executive powers, his assent is required before any legislation can have the force of law.\textsuperscript{716} Local legislation comprises acts passed by Parliament and assented to by

\textsuperscript{714} The Boston Consulting Group, above n 398.

\textsuperscript{715} The Ministers usually are empowered under their respective Acts to promulgate such subsidiary legislation as in necessary for the implementation of Acts.

\textsuperscript{716} Article 58 of the Singapore Constitution provides that “the power of Legislature to make laws shall be exercised by Bills passed by Parliament and assented to by the President.”
the President, and subsidiary legislation promulgated thereunder by ministers exercising their delegated authority.

Singapore’s judicial system comprises three tiers of courts:

(i) The Subordinate Courts, consisting of the Coroners’ Courts, the Juvenile Courts, the Magistrates’ Courts, and the Small Claims Tribunal;

(ii) The Supreme Court, which comprises the High Court, the Court of Appeal, and the Criminal Court of Appeal, and

(iii) The Judicial Committee of the Privy Council, which traditionally has been the highest court of appeal for Britain’s former colonies.

6.3 English Common Law and Statutes

The reception of English Common law in Singapore was effected by the Letters Patent issued on November 27, 1826, more commonly referred to as the Second Charter of Justice, which established the Court of Judicature of Prince of Wales Island, Singapore, and Malacca and required the court “to give and pass Judgement and Sentence according to Justice and Right”. This phrase traditionally has been interpreted to mean that the English law and equity, as it stood in England in 1826, was part of the law of the Straits Settlements.717

As a result of the foregoing, matters which have not been legislated upon by the Singapore Parliament, are governed by English Common Law, embodied in decided

717 Regina v. Williams (1858) 3 Kyshe 16; Fatmah v. Logan (1871) Kyshe 225.
cases of the English courts, with such adaptation as are required by local circumstances.\textsuperscript{718}

The Common Law enjoys continuous reception in Singapore as 'the Common Law was traditionally conceived of as having existed from time immemorial and was merely declared by the judges from time to time...'.\textsuperscript{719} According to this interpretation of the Common Law, the courts in England deciding a case today simply would be declaring the law as it has always been (and, hence, as it was at the date of the Second Charter of Justice), and applying it to the facts before them.

6.4 Harmful Tax Practices: Singapore Tax System

Taxation is a cost both to the individual and the business. The burden of personal income tax on individuals whether borne by the individual himself, his employer or partly by both is a consideration of great importance. In Singapore, as in any other country, the total burden of income tax, whether company or personal, is determined by two factors — first, the amount of income that is subject to tax and secondly, the rates of tax that apply to such income.\textsuperscript{720}

Under the current Singapore tax system, interest income derived by a Singapore resident individual from investing in Singapore interest-bearing instruments will be

\textsuperscript{718} See Walter Woon (ed), \textit{The Singapore Legal System} (1989), 119, where he states modifications to suit the customs, manners, usages and religions of the native inhabitants.” An example, he cites the relaxation, in colonial days, of the common law concept of monogamous marriage in the case of the Chinese.


taxed at the individual's highest applicable marginal tax rate. As unremitted interest income from offshore investments is not subject to Singapore tax, individuals are motivated to move savings offshore and not repatriate these funds.

The repatriation of offshore Singapore wealth will provide a substantial boost to the local wealth management industry. This will help to anchor financial institutions in Singapore. To encourage firms to source for more foreign funds for management in Singapore, there were proposals that tax exemptions be granted for: (a) domestic source investment income and foreign source income remitted to Singapore, and (b) management fee income earned by fund managers from managing funds sourced overseas. These two proposals were accepted and announced in Singapore Budget 2004.721

Tax friendly conditions are essential to creating an attractive business environment. While tax is only one factor in deciding where to locate business operations, it is often a significant factor for consideration, especially with increasing labour and capital mobility.

It has been recommended that to maintain Singapore's domestic competitiveness as a financial centre, there should be a general shift in resources from the public sector to the private sector through reduced tax collections. The use of targeted tax incentives should also be maintained, as this would give Singapore an edge in attracting expertise and higher-value added financial services.722

722 Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 713.
In 2002, Singapore’s imputation system of taxation was abolished and replaced by the one tier income tax system. Under the one tier system, foreign income will only be taxed in Singapore in so far the income is remitted, or is deemed remitted in to Singapore. The Singapore Income Tax Act contains a number of provisions on the basis of which income will be deemed to have been remitted into Singapore. For instance, repayment of debt out of income kept offshore, triggers a deeming provision resulting in the foreign income becoming taxable in Singapore. The initial conclusion was that the declaration of an interim dividend should not trigger mentioned deeming provision as the payment of an interim dividend could not be regarded as a repayment of debt.

The Inland Revenue Authority of Singapore (IRAS) has published a Supplementary Circular on the one-tier corporate tax system. This Circular confirms that foreign sourced income kept offshore out of which dividends are distributed, will not be considered to have been remitted into Singapore. Final dividends too can therefore be distributed out of such income.

Singapore has become a very interesting location for distributing foreign income to foreign shareholders. It is important to note, however, that if the Singapore company would wish to claim the treaty benefits in respect of such foreign income, Singapore tax treaties generally include a provision which stipulates that treaty benefits can only be claimed in respect of remitted foreign income.

The following favourable changes were made to the Singapore tax law.
first of all, the corporate tax rate was reduced from 24.5% to 22% and estate duty for movable assets situated in Singapore for non-domiciled individuals is exempted;

more importantly, section 44 of the Income Tax Act was replaced by a one-tier corporate tax system – tax collected from corporate profits is now final; dividends paid out of corporate profits will be exempt from tax in the hands of the shareholders and companies will no longer be required to frank their dividends under the present dividend imputation system.

Thus a company with offshore income or capital gains will be able to pay dividends out of its untaxed income or gains without having to deduct tax from the dividends declared. It is no longer necessary for trust structures to use Singapore non-resident companies. However, offshore income brought into the country by a Singapore company will still be subject to tax in Singapore as income received locally.

The Companies Act has also been relaxed. Private exempt companies with an annual turnover of less than S$5 million will be exempted from submitting audited accounts. Private companies are allowed to have a sole shareholder and director; the director must be resident in Singapore.

Like Hong Kong, Singapore has never been blacklisted in the major international reports, including those of the OECD and FATF. With the debates of EU savings tax directives and other compliance issues faced by European counterparts, these two

721 The corporate tax rate will be cut from 22% to 20% with effect from Year of Assessment (YA) 2005.
722 Income Tax Act (Chapter 134) 1948 (Singapore) s40.
723 Income Tax Act (Chapter 134) 1948 (Singapore) s44.
724 Companies Act (Chapter 50) 1967 (Singapore) s205C.
financial centres in Asia should be able to benefit in the longer term. 726 Although as noted previously, Hong Kong has a perceived sovereign risk attached to it, as a result of the recent ruling of the Standing Committee of China's National People's Congress (NPC) on 6 April 2004 that it has a veto over how Hong Kong's leader and legislature should be elected. It said that while Hong Kong can change its election laws from 2007, it first must obtain approval from Beijing. The decision rests on an interpretation of territory's mini-constitution, the Basic Law. It effectively means that China can veto any moves to give Hong Kong more democracy, such as direct elections for its chief executive. 727

On 21 May 2003, the IRAS released a Circular which contained further details on the "Tax exemption for foreign-sourced dividends, foreign branch profits and foreign-sourced service income.", as proposed in the Budget 2003. The tax exemption applies to the specified foreign sourced income received in Singapore on or after 1 June 2003; the income does not need to be earned on or after mentioned date. The exemption is, where applicable, available to Singapore based incorporations and individuals resident in Singapore. The conditions for qualifying are as follows. In the year the income is received in Singapore, the headline tax rate of the foreign jurisdiction from which the income is received is at least 15%. Furthermore, the income has been subjected to tax in the foreign jurisdiction from which these were received. 728

6.4.1 Tax Evasion

726 Fong, above n 696.
728 Loyens & Loef, Asia Newsletter, Summer 2003.
The Association of Banks in Singapore (ABS) issued its first Guidelines: “Prevention of the Misuse of the Singapore Banking System for Drug Trafficking and Money Laundering Purposes” in 1990. In 1994, after the passing of The Drug Trafficking (Confiscation of Benefits) Act (DTA), ABS revised the 1990 Guidelines. The scope of the anti-money laundering law under the DTA was significantly enlarged under The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (SCA), which replaced the DTA.

One of the most significant changes under the SCA is the extension of the Act to criminalise non-drug-related criminal offences. These offences are called ‘Serious Offences’ and ‘Foreign Serious Offences’ (collectively termed ‘Criminal Conduct’). Thus the SCA has now criminalised all Drug Trafficking Offences, Foreign Drug Offences, Serious Crimes and Foreign Serious Crimes.

There are 182 Serious Crimes listed in Schedule 2 of the SCA. These criminal offences are punishable under ten penal statutes, which include the Penal Code, Kidnapping Act, Prevention of Corruption Act and Women’s Charter.

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729 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65a) 1993 (Singapore)
731 ‘Foreign Drug Trafficking Offence’ means a drug-trafficking offence punishable under a corresponding law, s. 2.
732 ‘Foreign Serious Offence’ means an offence committed outside Singapore which constitutes a Serious Offence under the SCA, s. 2.
733 See Appendix L for the full list of 182 Serious Crimes.
734 The ten statutes specified in Schedule 2 are: (i) SCA itself; (ii) Children and Young Persons Act; (iii) Corrosive and Explosive Substances and Offensive Weapons Act; (iv) Hijacking of Aircraft and Protection of Aircraft and International Airports Act; (v) Kidnapping Act; (vi) Penal Code; (vii) Prevention of Corruption Act; (viii) Termination of Pregnancy Act; (ix) Vandalism Act; and (x) Women’s Charter.
While the enlargement of the scope of money laundering law under the SCA is very inclusive, one could say that the SCA has not gone far enough because it fails to criminalise some of the other serious crimes. For instance, tax evasion (which includes duty evasion, exchange control and capital control evasion) is omitted from Schedule 2 even though these are common activities in ASEAN. Since such criminal activities are not included in the 182 Serious Offences, they do not constitute the offence of money laundering under the SCA.

It is interesting to note that out of the 182 Serious Crimes in the Schedule, many of these criminal activities do not generate financial gains or proceeds. For instance, homicidal cases (Offences 54-58), causing hurt (Offences 63-74), wrongful confinement (Offences 81-82) are hardly associated with money laundering. Therefore, it could be argued that the SCA would be more effective if it had included more of the financial-related offences (such as tax evasion, smuggling, corporate offences) in places of these non-financial serious crimes. 735

Singapore has 46 comprehensive tax treaties that are in force. Singapore has also entered into limited tax treaties with 6 other countries (Bahrain, Chile, Oman, Saudi Arabia, United Arab Emirates, US) for reciprocal tax exemption on income derived from international shipping and/or air services. 736

In any tax planning, an extremely important consideration is whether the anti-avoidance provisions will apply. The general anti-avoidance provision in the Income

Tax Act (Section 33) confers upon the tax authorities wide powers to disregard or vary the arrangement, and to make the appropriate adjustments. This provision, however, does not apply to any arrangement carried out for bona fide commercial reasons and which does not have as one of its main purposes the avoidance or reduction of tax. 737

6.4.2 Conclusion

In conclusion, from the above analysis, it needs to be restated that Singapore was never listed in the 1998 OECD report entitled *Harmful Tax Competition: An Emerging Global Issue.* 738

In Singapore, income is taxed on a territorial basis. Section 10(1) of the Singapore Income Tax Act ("SITA"), Cap 134 provides:

Income tax shall ... be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore.

Only income which accrues in or is derived from Singapore will be subject to tax in Singapore. Where the income is accrued in or derived from outside Singapore, it has to be remitted to Singapore in order to be subject to tax in Singapore. Capital gains are generally not subject to tax in Singapore.

737 Ibid.
738 Organisation for Economic Co-operation and Development, above n 505.
6.5 Money Laundering – Singapore’s Legislation

The IMF released a report assessing Singapore’s financial system stability and revealed the following standards and codes which Singapore had in place in its banking and finance system, a summary of which follows: 739

- Basel Core Principles (BCP) for Effective Banking Supervision: Overall, the MAS has established a sound prudential and regulatory framework for effective supervision of its commercial banking sector and has achieved a high level of observance of the BCP. There are no weaknesses that raise financial stability concern.

- International Association of Insurance Supervisors (IAIS) Insurance Core Principles: Singapore has a high level of observance of the IAIS principles. Significant initiatives are currently being developed in consultation with the industry – particularly the overhaul of the capital standards to a more comprehensive and risk-based approach with new rules giving specific attention to corporate governance and internal controls. The implementation and enforcement of these initiatives, which are well advanced, will further improve observance.

- International Organization of Securities Commissions (IOSCO) Objectives and Principles of Securities Regulation: Singapore has achieved a high degree of compliance with the IOSCO principles. The framework for the oversight and

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739 International Monetary Fund, Singapore: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, Payment and Settlement Systems, Monetary and Financial Policy Transparency, and Anti-Money Laundering (2004 IMF)
regulation of securities markets, intermediaries, issuers, and collective investment schemes is well developed, sophisticated, and meets international standards. The MAS should require periodic reporting of net asset values and ensure that a Collective Investment Scheme (CIS) operator has systems in place to calculate net asset values correctly.

- **Committee on Payment and Settlement System (CPSS) Core Principles for Systemically Important Payment Systems (CPSIPS):** Singapore has a highly developed payment system. The MEPS – a systemically important payment system – is a reliable and robust real-time gross settlement system and exhibits significant observance of CPSIPS principles. The settlement risk of foreign exchange transactions in Singapore dollars has been further reduced by the inclusion of the Singapore dollar in the CLS in September 2003.

- **CPSS-IOSCO Recommendations for Securities Settlement Systems:** Neither the MAS Electronic Payment System-Singapore Government Securities (MEPS-SGS) – which clears and settles SGS on an real-time gross settlement basis—nor the Central Depository Private Limited (CDP) – which clears and settles equities and private debt securities – is subject to major vulnerabilities. While the MAS oversight objectives with respect to securities settlement systems are set out in various documents, it is recommended that the MAS publish a document on the oversight framework for securities settlement systems and its approach to its administration.
Transparency in Monetary and Financial Policies: The transparency of monetary policy framework has improved substantially in recent years. Given the exchange rate regime-based monetary policy, however, the authorities remain cautious about publishing certain information on the monetary policy framework and monetary operations. For example, neither the weights used in the trade-weighted exchange rate index nor the precise limits of the band are disclosed. Similarly, the extent of MAS interventions in the foreign exchange market is not disclosed on a predetermined or timely schedule. Greater disclosure in these areas could be considered to the extent it does not compromise the monetary policy regime. The MAS has made steady progress toward improving transparency in financial policies in recent years and now meets many of the elements of the Transparency Code. The MAS could further improve transparency through providing more detailed information on recent developments in the financial sector and its supervisory activities in its regular publications, including regarding local financial institutions’ overseas operations.

Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT): Singapore now has in place a sound and comprehensive legal, institutional, and policy and supervisory framework for AML/CFT and the authorities have demonstrated a strong commitment to its effective implementation. Though some steps have been taken with the enactment of a domestic mutual legal assistance law and ongoing negotiations for several bilateral treaties, the effectiveness of cross-border mutual legal assistance needs to be improved as it relates to compulsory assistance at international request, including the provision of bank records. The Palermo Convention is signed but yet to be ratified. Some aspects of
best practice for customer due diligence need to be specified more clearly and in
greater detail, though implementation was observed in individual institutions.

Although the regulatory systems and supervisory practices exhibit a high degree of
observance of international standards and codes, the IMF made some specific
recommendations to further enhance the risk-based regulatory and supervisory
framework, strengthen the accountability and independence on the MAS, and improve
monetary and financial policy transparency.\footnote{\textsuperscript{740}}

6.5.1 Singapore’s Guidelines on Prevention of Money Laundering

The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits)
Act (SCA)\textsuperscript{741} itself was further amended by the Mutual Assistance in Criminal
Matters Act (MACMA), passed by parliament on 22 February 2000. Owing to the
changes in the anti-money laundering law in Singapore and with the benefit of the six
years of experience in implementing the 1994 Guidelines, the ABS revised the 1994
Guidelines to keep the banks abreast with the law and to provide a more
comprehensive guideline to help banks in Singapore combat money laundering more
effectively.

ABS recommends these Guidelines for the preservation, nationally and internationally,
of the good name of the banking community in Singapore. Further ABS recognises
the need to prevent or minimise the banking system from being used for the

\footnote{\textsuperscript{740} Ibid 36.}
\footnote{\textsuperscript{741} See Appendix L for the 182 Serious Offences listed under the SCA.}

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furtherance of criminal purposes by means of money laundering activities, taking into consideration:

(i) The latest “Guidelines on prevention of Money Laundering” issued by the Monetary Authority of Singapore (MAS 626);

(ii) The Statement of Principles proposed by the Basle Committee on Banking Regulations and Supervisory Practices in December 1988;

(iii) The Financial Action Task Force’s 40 Recommendation;

(iv) The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act; and

(v) The Mutual Assistance in Criminal Matters Act 2000

These Guidelines apply to all banks and their subsidiaries in the banking sector operating in Singapore. They also apply to the foreign branches and subsidiaries of Singapore-incorporated banks. Where the laws of the foreign jurisdictions conflict with these Guidelines, the foreign branches and subsidiaries must comply with the former; provided the head office of the Singapore-incorporated bank is informed of the departure from these Guidelines. These Guidelines constitute the best practices for all banks operating in Singapore in matters relating to the prevention of money laundering in Singapore. Some of the Guideline are mentioned here to highlight the country’s stand with the OECD and the FATF.

6.5.2 Guideline 4 – Know Your Customer (KYC)

742 The Association of Banks in Singapore, above n 730.
Under Guideline 4, Singapore’s policy is in line with the FATF’s recommendations in combating money laundering and Wolfsberg Principles as analysed in Chapter 2.\(^{743}\)

All banks are to know their customers. This means that each bank must be able to establish the identity and a basic background of their customers. Each bank must establish its own KYC programme, tailored to suit the size, nature and complexity of its operation and business in Singapore.

There should be an explicit policy in every bank not to conduct any significant business with a customer (prospective or otherwise) who fails or refuses to provide basic information under this Guideline 4 necessary to establish the customer’s true identity or the background of the transaction the bank is asked to carry out. In the event a bank decides not to carry out the transaction requested by the customer on the ground that it is a suspicious transaction, the bank must nevertheless consider, depending on the circumstances of the case, its legal obligation to report under section 39(1) of the SCA.

6.5.3 Guideline 6 – Suspicious Transaction Reporting (STR)

Each bank is to clarify the economic background and purpose of transactions that are inconsistent with the customer’s transaction profile or where the economic purpose or the legality of the transactions is not immediately evident. In determining whether it is a suspicious transaction, a bank must consider the totality of the transactions put together and not each transaction (which, on its own, may be perfectly legitimate) in

\(^{743}\) Organisation for Economic Co-operation and Development, above n 738.
isolation. A transaction or a series of transactions shall be considered as "suspicious" if the transaction / transactions in question is / are inconsistent with the customer’s known transaction profile or does not make economic sense. 744

According to section 39(1) of the SCA, a bank employee has a legal duty to make a suspicious transaction report (STR) if he or she knows, or has reasonable grounds to suspect, that the transaction in question involves drug trafficking or criminal conduct (i.e. money laundering).

All banks are to report suspicious transactions to the Suspicious Transaction Reporting Office (STRO), Commercial Affairs Department (CAD), and each copy of each STR is to be forwarded to the Monetary Authority of Singapore (MAS). A bank will then fully investigate and evaluate, according to its internal procedures, an apparent potentially suspicious transaction and satisfy itself that it is a suspicious transaction before making a STR. In investigating into an apparent suspicious transaction, a bank is to give adequate opportunity to the customer (or prospective customer) to explain the concerns raised by the bank. In carrying out its due diligence, a bank must exercise due care not to unwittingly commit a tipping-off offence in contravention of section 50 of the SCA. Notwithstanding that, after its own investigation, a bank may decide not to establish a banking relationship with a prospective customer or to terminate its existing banking relationship with the customer, it should nevertheless consider its legal obligation to report under section 39(1) of the SCA. 745

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744 See Appendix M for the examples of suspicious transactions as listed in MAS 626.
745 The Association of Banks in Singapore, above n 742.
A bank owes a duty of confidentiality to a customer not to disclose confidential information relating to his account to an unauthorised third party. To facilitate the making of STRs, the law, pursuant to the SCA, allows a bank to disclose confidential information relating to a customer's account (used to conduct a suspicious transaction) to an Authorised Officer without contravening its duty of confidentiality and without being liable to the customer for damages suffered arising from the disclosure.\textsuperscript{746}

Prior to the amendment under the SCA, it was not legally mandatory for a person to report a suspicious transaction. However, under the SCA, suspicious transactions reporting (STR) is now mandatory. The legislature achieved this by substituting the discretionary language ('may') with a mandatory language ('shall') in the new s. 38(1) of the SCA.

An area which is likely to trouble compliance bankers is the reporting of suspicious transactions which may not be related to a money laundering offence as defined by SCA. To be sure, the SCA provides comprehensive statutory protection under s. 41 and s. 41A for a whistle blower against civil and criminal proceedings. However, these statutory protections can only be invoked if the information disclosed involves drug trafficking or criminal conduct. It will always be difficult (sometimes impossible) to be sure of the actual source of the criminal proceeds from the underlying suspicious transactions reported. This can pose real problems in practice for a banker.

For example, one bank was in a dilemma in deciding whether to report a customer from a neighbouring country which deposited a total sum of SGD3.5 million (partly in

\textsuperscript{746} Ibid.
cash, the remainder in third-party cheques issued by a money changer) with no satisfactory explanation. There was no doubt that this was a suspicious transaction, but the source of these funds was in doubt. There was a very strong suspicion that the funds were criminal proceeds from either corruption or capital control evasion (or both); but it was not definite. If it was corruption, the bank would be safe in reporting; however if it was solely capital control evasion, it would be unsafe to report the transaction. It is argued that a banker, in such circumstances, may nevertheless report to an Authorised Officer with impunity if he has reasonable grounds to believe that the funds are proceeds, partially or directly or indirectly, derived from corruption activities (a Criminal Conduct under s. 38(1)). This view is further fortified by subsections 41(3) and 41A(3), which merely require the disclosure of a bona fide 'suspicion' or 'belief'.

6.5.4 Guideline 8 – Training

Banks are prime targets for money laundering activities. Therefore, it has been imperative that banks train their employees, at various levels, to detect money laundering activities. This has assisted banks in Singapore to reduce (if not, to prevent) the incidences of money laundering activities that may take place in their operations. Training is also important in ensuring a bank’s legal compliance with the anti-money laundering laws in Singapore. This will help a bank and its employees to avoid prosecution for money laundering and other related offences. Each bank had to adopt

747 Tan, above n 735, 261-2.
a training programme suited to its size, nature and the complexity of its business and operation in Singapore.748

6.5.5 Characterisation of Terrorism Financing and Money Laundering in Singapore

In most jurisdictions, terrorism financing would be characterised as a money laundering offences. Where does terrorism financing fit into the anti-money laundering legal regime in Singapore? Is terrorism financing a money laundering offence in Singapore? The answer is negative for 2 reasons. First, “terrorism” or “terrorist act” is not included in the predicated offences under SCA. Secondly, the anti-money laundering regime in the SCA does not envisage a “reverse money laundering” activity. An activity criminalised as a “money laundering” offence when a person attempts to conceal the proceeds from some criminal activities (i.e. “dirty money”). In Singapore it is, strictly speaking, not a money laundering offence, if the proceeds from legitimate businesses are used to commit a crime because there is no “proceeds from” the predicated money laundering offence (i.e. not “dirty money”).749

This does not mean that there is no criminal offence committed; the person carrying out such an activity can be charged under other criminal statutes (e.g. Penal Code). For example, in the case of hijacking, it is a money laundering offence under SCA if a bank knowingly wire transfers proceeds from hijacking for its customer. However, it is not a money laundering offence under the SCA if the same bank were to wire transfer funds from a legitimate business (e.g. public donations to a religious charity.

748 The Association of Banks in Singapore, above n 746.
organisation) to a customer who used these funds to commit a hijacking offence because the source of these funds is "clean". This is "reverse money laundering". Terrorism is a classic form of "reverse money laundering". The SCA clearly does not govern "reverse money laundering" activities but such activities relating to terrorism and terrorism financing are directly "caught" under the anti-terrorism laws in Singapore.\(^5\)

6.5.6 Compliance Challenges for Financial Institutions against Terrorism Financing

The challenges facing a bank and a professional adviser or compliance officer in combating terrorism financing are numerous. First they must ensure that the customer is not a "Terrorist\(^6\) or a "Terrorist Entity\(^7\) and the account or transaction is not related to "Terrorist Property\(^8\) or to facilitate a "Terrorist Act\(^9\). The list of "Terrorist" and "Terrorist Entities" are named in the Schedules of both the UN Regulations and the MAS Regulations and they are constantly growing. Many of the individual terrorists have numerous aliases and several birthdates. This is a compliance officer's worse nightmare. It is neither practical nor administratively viable to monitor this ever growing list of terrorists manually. The only viable option is to use sophisticated computer software to track these terrorists. Besides the multiplicity of names and birthdates of individual Terrorists, compliance officers must

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\(^{5}\) Ibid.

\(^6\) A "Terrorist" is defined in Reg. 4(1), UN Regulations; Reg. 4(1) MAS Regulations and section 2, Terrorism Act to mean a person who commits, participates or facilitates a "Terrorist Act".

\(^7\) A "Terrorist Entity" is defined in s. 2, Terrorism Act to mean an entity owned or controlled by any Terrorist or a group of Terrorists.

\(^8\) This term is used to refer to a property owner or controlled by or on behalf of any Terrorist or Terrorist Entity.

\(^9\) There is a long definition of "Terrorist Act" (with the same meaning) in Reg. 4(1), UN Regulations; Reg. 4(1) MAS Regulations and s. 4(2), Terrorism Act.
be watchful for Terrorist Entities with unsuspecting commercial names such as “Al-Shur Honey Press Shop” (Yemen), “Barakat Wire Transfer”, “Benevolence International Fund” and “Global Relief Foundation”.755

Secondly, the next challenge is whistle-blowing. It is mandatory for a Singapore citizen / resident or a financial institution who / which has (a) possession, custody or control of a Terrorist Property or (b) information about any transaction relating to a Terrorist Property to report immediately to the Police Commissioner (for the public at large) or to MAS (for banks).756 But what protection does the law provide for whistle-blowers? The Terrorism Act757 and the Banking Act758 expressly immunise a whistle-blower (pursuant to the Terrorism Act and the MAS Regulations, respectively) against any criminal and civil proceedings. The UN Act759 also immunises a whistle blower (pursuant to the UN Regulations) against civil proceedings but is unclear against criminal proceedings.760

5.5.7 Supervisory Framework

In line with Singapore’s goal to become a premier global financial centre, the MAS has instituted a new supervisory framework based on the key tenets of:-

Maintaining High Prudential and Supervisory Standards

755 Tan, above n 749.
756 Reg. 10, UN Regulations, Reg. 9, MAS Regulations and s. 8, Terrorism Act.
757 Section 9(5) and section 10(3), Terrorism Act.
758 There is no safe harbour provision for whistle blowing in the MAS Regulations. It is, however, found in s. 27A(3) of the Banking Act.
759 Like the MAS Regulations, there is no express statutory protection provision in the UN Regulations.
760 To invoke the statutory protection, one has to invoke s.3(1) of the UN Act.
761 Tan Sin Liang, above n 755.
MAS continues to oversee the financial sector professionally, vigilantly and proactively. The maintenance of high standards of integrity and sound financial management does not contradict the aim to create a more dynamic, innovative and vibrant financial sector. A sound financial system serves as the foundation on which the liberalisation of the financial sector can take place.

- Shifting the Emphasis from Regulation to Supervision

MAS has shifted its emphasis in overseeing the financial sector from regulation to supervision. The supervisor’s primary responsibility is to protect the stability of, and maintain confidence in, the financial system. MAS will shift from ‘one-size-fits-all’ regulation towards a greater emphasis on supervision, which entails monitoring and examining institutions for compliance with laws and guidelines, and assessing asset quality and the adequacy of risk management systems. This enables the MAS to provide stronger institutions the flexibility to develop and innovate, while maintaining stricter controls on weaker ones.

- Implementing a Risk-Focused Approach to Bank Supervision

MAS has adopted a risk-focused, top-down approach to bank supervision, moving away from the traditional, bottom-up method. Rapid technological advancements, increased linkages between institutions and financial markets, and the consequent growth in complexity of banks’ activities, have necessitated a more holistic and risk-focused supervisory approach. The approach will enable the allocation of limited supervisory resources to major risk areas and improve the effectiveness and efficiency of the examination process.
A Risk-Based Examination Approach for Banks

MAS adopts a risk focused approach to bank examination, which focuses on the institution's management quality and processes, and its risk management and control systems. This new approach is better suited to cope with the growing complexity of banks' activities and organisational structures, increased linkages with non-bank financial institutions and institutions abroad, and technological advancements.

MAS' examination procedures focus on a top-down, risk focused approach as compared to a bottom-up, micro approach. Emphasis is placed on the process by which a bank's management itself addresses its risks, instead of reviewing the books for control deficiencies.\(^{261}\)

The MAS informs banks of upcoming examinations beforehand, allowing pre-consultations with bank management to shorten the actual examination. MAS still conducts surprise examinations when circumstances call for it.

As with the practice of supervisors in other major financial centres, MAS examinations will be more frequent and regular. This enables MAS to distinguish stronger banks, with well-developed systems of internal control, from weaker ones. On-site examination will be supplemented by off-site reviews which involves continuous tracking of institutions, the review of statistical returns and audit reports submitted by banks, and regular meetings with bank management. Full implementation of the new approach will be phased in over the next few years. In changing its approach, the MAS does not inadvertently lower its supervisory

standards. High-quality examinations and supervision form the cornerstone of a sound banking system.

- Vesting the Public with the Responsibility to Make Their Own Informed Investment Decisions

To assist investors in making informed decisions, MAS is providing greater transparency in its regulations, raising disclosure standards and fostering market discipline in the financial industry. MAS also encourages industry groups to develop and enforce standards of good practice.

- Forging a Closer Partnership Between the Government and the Financial Services Industry

MAS is building a closer partnership with the industry and promoting a more open operating environment. MAS actively seeks industry inputs to adjust its policies to rapidly changing market realities. It will also set up private sector committees to examine issues pertaining to the financial sector. Furthermore, MAS will disseminate policy thinking through associations of the finance industry.

- External/Internal Auditors

External and internal auditors play an important role in MAS' supervisory process. MAS engages in regular dialogue with the external auditors, and the internal auditors upon the completion of their audits of the Singapore operations to discuss the internal control environment of the institution and issues of mutual concern. Auditors are required to submit audit reports to MAS on the institution's internal controls, and compliance with prudential standards. In addition, external auditors
are required to confirm the adequacy of provisions, in conjunction with their statutory audit.\footnote{762}

6.5.8 Conclusion

From the above analysis, it was shown how Singapore complies with the recommendations of the FATF (40+8), OECD and in particular, very stringently to the Wolfsberg Principles.

Banks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity. Criminals and their associates use the financial system to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility. These activities have been commonly referred to as money-laundering.

In conclusion, it can be seen that the MAS has for the preservation, nationally and internationally, of the good name of the banking community in Singapore and recognising the need to prevent the banking system from being used in furtherance of money laundering activities arising from or in connection with drug trafficking or criminal conduct, has introduced the following:

(i) the provisions of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 84A) (the Act);
(ii) the Financial Action Task Force 40 Recommendations, in particular
Recommendations 9 to 20; and

(iii) the Statement of Principles proposed by the Basle Committee on Banking
Supervision and Supervising Practices in December 1988; banks in Singapore should
comply with these above guidelines. 763

6.6 Confidentiality: Secrecy and Confidentiality in Singapore

6.6.1 Banking Secrecy in Singapore

In Singapore, the duty of banking confidentiality or secrecy in respect of the client’s
affairs stems from two sources:

(i) The duty of confidentiality implied by the Common Law by virtue of the
banker-customer relationship, and

(ii) A statutory duty imposed by section 47 of the Banking Act (referred to herein
as the “section 47 duty” or “the statutory duty”). 764

The Common Law principle is imported as part of the commercial law of England and
the Banking Act is part of the legislation enacted by Singapore’s Parliament. 765

763 Monetary Authority of Singapore, Notice to Banks (2002)
764 Chapter 19 of the 1985 Revised Edition of the Singapore Statutes
6.6.2 Contractual Duty of Secrecy

The banker's duty to his customer to keep confidential information regarding the affairs of his customer (such information being referred to hereafter as "confidential information") arises out of the banker and customer relationship and is a term of their contract, implied by the Common Law.\textsuperscript{766}

It is referred to herein as "the contractual duty of confidentiality" or the "contractual duty". The customer enforces this contractual right by suing the banker for damages in the event of a breach of this duty. When he does so, the contractual duty of confidentiality, and its scope and application would, in the words of section 5 of the Civil Law Act, be 'questions or issues which arise or which have to be decided in Singapore with respect to the law ... of banks and banking'.\textsuperscript{767}

Since there is no other provision made by any law having force in Singapore imposing a contractual duty of secrecy, and since the exceptions enumerated in section 5 of the Civil Law Act do not apply, in the words of section 5, "the law with respect to those matters to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England ..." subject to modifications required to adapt the Common law to local circumstances.

6.6.3 Duty of Secrecy under Common Law

Under the Common Law, it is an implied term of the contract between a bank and its customer that the bank will not divulge information to third persons, without the express or implied consent of the customer, either:\textsuperscript{768}

(i) The state of the customer's account;
(ii) Any of his transactions with the bank, or
(iii) Any information relating to the customer acquired through the keeping of his account.

These conditions apply unless the bank is compelled to release information:

(i) By order of court;
(ii) Where circumstances give rise to a public duty of disclosure, or
(iii) Where protection of the bank's own interest requires it.\textsuperscript{769}

6.6.4 Exceptions at Common Law

Bankes, LJ in \textit{Tournier v. National Provincial and Union Bank}, identified four general exceptions to the duty which have been accepted as an accurate statement of the law:\textsuperscript{770}

(i) Where disclosure is under compulsion by law (e.g., where the bank is compelled to obey an order under the Bankers' Books Evidence Act);
(ii) Where there is a duty to the public to disclose (e.g., where danger to the state or public duty supersedes the duty of the agent to his principle);

(iii) Where the interests of the bank require disclosure (e.g., where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft), and

(iv) Where the disclosure is made by the expense or implied consent of the customer (the familiar instance is where the customer authorises a reference to his banker). 771

6.6.5 Scope of Duty Not Confined to Information Derived from Account

Both Bankes and Atkin L.J.J. thought that the duty is not confined to information derived from the customer's account. 772 In their opinion, the duty extended to information derived from sources other than the customer's account.

The information in the Tournier Case, for example, was derived from another customer's account rather than from the plaintiff's own account. Nevertheless, the Court of Appeal held that the banker's duty did extend to it. 773 Furthermore, Atkin L.J. said:

"I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers – for

771 Tournier, p. 473.
773 "... the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself...", per Bankes L.J., Tournier, p. 473, 475.
example, with a view to assisting the bank in conducting the customer’s business, or in coming to decisions as to its treatment of its customers.774

Information gained during the currency of the account remains confidential unless released under one of the four exceptions. Their Lordships in the Tournier Case were of the view that the duty to keep information confidential continues even after the customer ceases to be a customer of the bank. That is, the bank is under a duty to keep the customer’s affairs confidential:

(i) During the currency of the banker-customer relationship, and
(ii) After the banker-customer relationship has been terminated.

In the Tournier case, Bankes L.J. took the view that danger to the state may supersede the duty of confidentiality.775

6.6.6 Amendments to the Banking Act of Singapore – 6th Schedule

Under the Banking (Amendment) Act 2001, a slew of amendments were introduced to the Banking Act, including the banking secrecy provisions. As a result, section 47 (the key provision) together with section 45 and section 46 (previously 46 and 46A) have been re-enacted and a new 6th Schedule introduced (the “Amendments”). 776

774 L J Scrutton, however, felt that the duty did not extend to information derived from the account of another customer. His Lordship said (at p. 482), “It appears to me, therefore, that we cannot imply an obligation to keep secret information about a customer derived not from that customer or his account, but from the account of another customer.”
775 Tournier, p.473.
The application of some of the banking secrecy rules in the Banking Act under the previous regime has always been a challenge for the banks in Singapore. There have been “gaps” in the rule book and there were “interpretational” problems of some of the statutory banking secrecy provisions. Some banks (particularly foreign banks) have also felt that their operations have, to some extent, been hampered by the rigidity of the banking secrecy laws in sharing certain information required by their head offices, overseas branches and affiliates. This has always been (and still remains) a “sensitive” area.

The Amendments attempt to liberalise the banking secrecy regime further by introducing additional “exceptions” to the general rule of confidentiality. Some of these new “exceptions” represent the “gaps” many bankers have long waited to be filled. The growing list of “exceptions” (both old and new) are now consolidated in the form of the 6th Schedule. Undoubtedly, many of the Amendments (particularly the new exceptions) will be welcomed by the banks. The question is, however, whether they have gone far enough.

6.6.7 Section 47 of the Banking Act – Customer Information

The term “Customer Information” is new. It is defined in section 40A to mean:

(a) “any information relating to, or particular of, an account of a customer of the bank, whether the account is in respect of a loan, investment or any other type of transaction...” or

(b) “deposit information”
The concept of Customer Information is central to the law on banking secrecy in the Banking Act. If a subject matter does not come within the definition of "Customer Information", the issue of banking secrecy does not arise. For instance, if the Commercial Affairs Department (CAD) of the Singapore Police Force were to ask a bank to disclose the names of the customers who bought gold tentulas from them, is this a banking secrecy issue? Is this a disclosure of Customer Information? It is of note that the definition of "Customer Information" in section 40A does not include any "Account Information" and "Deposit Information" that is not referable to any named customer or group of named customers. So disclosure of unnamed global figures relating to customers' account is permissible. In ascertaining the scope of Customer Information, it is also useful to bear in mind the definition of a "customer". Again, if the information relates to an entity which does not come within the definition of a "customer", there is no banking secrecy issue. No "customer", no "Customer Information", hence no banking secrecy. It is worth noting that banks themselves are not considered "customers" (however, MAS and other central banks are, hence banking secrecy still apply). 777

6.6.8 Section 47 of the Banking Act – Disclosure of Information is an Offence

The "general rule" of banking secrecy is enshrined in section 47(1), which states:

“Customer information” shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other persons exempt as expressly provided in this Act.\(^{778}\)

In Singapore, in addition to the contractual duty, the bank’s employees have a statutory duty, imposed by section 47 of the Banking Act, to keep the affairs of a bank customer confidential. Section 47(3) provides for a general prohibition against disclosure. Section 47(3) reads:

Subject to subsection (4), no official of any bank and no person who by reason of his capacity or office has by any means access to the records of the bank, registers or any correspondence or material with regard to the account of any individual customer of that bank shall, while his employment in or professional relationship with the bank, as the case may be, continues or after the termination thereof, give divulge or reveal any information whatsoever regarding the money or other relevant particulars of the account of that customer.

This is followed by a number of exceptions in section 47(4), which provides that section 47(3) shall not apply:\(^{779}\)

(i) Where there is consent (which, since the 1984 amendment to section 47, must be written);

\(^{778}\) Ibid.

\(^{779}\) Ibid.
(ii) Where the customer is declared a bankrupt (or is being wound up, in the case of a company);

(iii) In Civil proceedings –
   a) between the bank and the customer or, since the 1984 amendments, between the bank and its customer’s guarantor relating to the customer’s banking transaction, or
   b) in which the bank is one of a few parties making adverse claims to money in the client’s account where the bank seeks relief by way of interpleader;

(iv) Where the officials of the bank are compelled under any written law in force in Singapore to co-operate with authorities investigating or prosecuting a crime;

(v) Where the client’s monies are attached under a garnishee order (introduced in the 1984 amendments);

(vi) Where the branch of a foreign bank forwards information required by its head office relating solely to credit facilities which it has granted the customer (introduced in the 1984 amendments), or

(vii) Where information which, since the 1984 amendments may only be of “a general nature”, is required to assess the customer’s creditworthiness in connection with a bona fide commercial transaction or a prospective transaction.

6.6.9 Consent under Section 47
It will be noticed that, whereas in England, consent can be implied from the surrounding circumstances of the case, since the 1984 amendments to the Banking Act, permission must be granted in writing under section 47.780

However, the position on banker’s references is provided in section 47(4)(g), which permits the disclosure of information required

... to assess that creditworthiness of a customer in connection with or relating to a bona fide commercial transaction or a prospective commercial transaction, so long as the information required is of a general nature and in no way related to the details of a customer’s account.

Hence, the statutory exception in relation to the whole area of consent and banker’s references may be restated as follows:

Except for information relating to a customer’s creditworthiness, it is an offence to divulge information relating to the money or relevant particulars of a customer’s account without his written consent. In relation to requests for credit references, the information required must be:

1) Required to assess the customer’s creditworthiness;

2) Required in connection with or relating to a bona fide commercial transaction which may be a prospective transaction, and

3) Of a general nature, unrelated to the details of the customer’s account.

780 This would appear, at least on one view, to still leave open the possibility of ‘implied written permission’. See Soh Kee Ban, Current Developments in International Banking and Corporate Financial Operations 298.
Of course, banks must bear in their mind that in giving such references, they have a duty towards the recipients not to be negligent in addition to their duty to the customer to exercise due care in doing so.\textsuperscript{781}

6.6.10 Compulsion by Law

It may be perceived that banking secrecy takes second place to criminal investigations in Singapore because wide powers to obtain information about bank accounts are conferred by legislation.\textsuperscript{782}

The list of such legislation is set out in section 47(8) of the Banking Act, which defines "written law" to mean Part IV of the Evidence Act, the Criminal Procedure Code, the Internal Security Act, the Income Tax Act, the Prevention of Corruption Act, the Kidnapping Act, and the companies Act. Failure to co-operate renders the party concerned liable to legal penalties under the relevant legislation.\textsuperscript{783}

However, it is interesting to note that this list of legislation appears scanty compared to the position in the United Kingdom, where the Jack Committee has identified at least 19 Acts requiring disclosure to the authorities.\textsuperscript{784} In Singapore, such investigations are also the exception rather than the norm, and the vast majority of banking transactions are protected by the general rules of secrecy at Common Law and under section 47 of the Banking Act of Singapore.

\textsuperscript{781} See Poh Chu Chai, Law of Banking (1st ed, 1989) 170.
\textsuperscript{782} Ibid.
\textsuperscript{783} Banking Act (Chapter 19) 1971 (Singapore) s47(8).
\textsuperscript{784} See the Jack Committee Report, paragraph 5.07. The legislation requiring disclosure is listed at Appendix Q to the Report.
Furthermore, wide as these powers may apparently be, it must be remembered that the officers conducting such investigations would arguably fall within the scope of persons "who by reasons of ... capacity or office has by any means" access to the bank's records, registers, correspondence, or material regarding an account.

Accordingly, they would appear to be under a duty to maintain the confidentiality of information relating to the account. The issue relating to persons prohibiting from divulging confidential information below deals with the question of whether section 47 applies to government officers. 785

6.6.11 Exceptions to Disclosure of Information under Section 47

The exceptions to the general rule of banking secrecy are now "codified" in the form of the 6th Schedule. No disclosure of Customer Information may be made to a third party outside the 6th Schedule unless it is expressly consented to by the customer.

Reliance on the 6th Schedule becomes particularly important to a bank when the "disclosure clauses" in the printed standard terms and conditions of the account opening forms ("Ts & Cs") are silent on the particular issue at hand or the express consent from the client or clients is either unlikely or the cost and effort to obtain the consent is too prohibitive. Under such circumstances, the 6th Schedule becomes critical in deciding whether a disclosure of Customer Information can be made. 786

785 Yap, above n 768.
786 Tan Sin Liang, “Banking Secrecy – Legal Implications of the Latest Banking Act Amendments for Banks in Singapore”, Ernst & Young.
6.6.12 Further or Secondary Disclosures

The 6th Schedule (which is divided into 3 columns) defines the scope and the conditions for disclosure without the customers' consent. The 1st column defines the purpose for which the Customer Information may be disclosed. The 2nd column defines the persons who may receive the Customer Information ("Disclosees"). The persons disclosing such information will be the bank employees under the Part I and Part II Disclosees. The 3rd column defines the conditions (if any) under which the Customer Information may be disclosed. Part I is where further disclosure is permitted and Part II is where further disclosure is prohibited unless allowed under the 6th Schedule.

A new concept is introduced in the 6th Schedule to limit the further disclosure of Customer Information under certain circumstances. Under the 6th Schedule, a bank is allowed to disclose Customer Information (for the purposes specified in the 1st column) to the permitted Disclosees (2nd column). This is regarded as "Primary Disclosure" here. Under Part I of the 6th Schedule, the Disclosee is allowed to further disclose to a third party. This is regarded as "Secondary Disclosure" here. Under Part II of the 6th Schedule, no Secondary Disclosure is allowed unless it is authorised under the 6th Schedule or if it is sanctioned by a court order. It is therefore, of utmost importance for Part II Disclosees not to disclose Customer Information to a third party unless it is sanctioned under either of these two conditions. As a general rule, the Customer Information flow stops at the Part II Disclosees.

\[787\] See s. 47(6).
\[788\] Tan Sin Liang, above n 786.
A new section 47(8) was introduced under the Amendments in 2001 to allow a bank and its customers to enter into an “express agreement for a higher degree of confidentiality” than that prescribed in section 47 and the 6th Schedule (“Higher Confidentiality Agreement” or HCA). This expression probably means a more restrictive disclosure than that provided in section 47(1) and the 6th Schedule. In other words, section 47(8) allows a bank and its customers to contract out of the statutory exceptions in the 6th Schedule for a more restrictive disclosure. The question is to what extent can a bank, or should a bank, contract out of the 6th Schedule? Unlike a commercial agreement between a bank and its customer, a HCA is not a laisser-faire agreement. Tan asserts that there are obvious legal constraints and “boundaries” as to how far two contracting parties can contract out of the Banking Act.

Before exercising caution and prudence in negotiating the terms and the scope of the HCA, banks should be vigilant in inquiring into the customer’s desire to operate their account under a level of secrecy which is higher than normal (i.e. 6th Schedule). Banks should be inquiring whether this could be a sign of avoiding detection of some criminal activities by the customer. In the light of the above, Tan has argued that banks are unlikely to be in a hurry to sign HCAs with their customers. It will be more costly to administer and more onerous to manage such accounts. Who are more likely to ask a bank to sign a HCA? Such customers are likely to be the bank’s “private banking” clients. Even for such clients, care and prudence must be exercised in negotiating a HCA.\textsuperscript{789}

\textsuperscript{789} Ibid.
6.6.14 Persons Prohibited from Divulging Confidential Information

The statutory duty under section 47 covers officials of any bank defined in subsection (8) to include directors and employees. The definition is not exhaustive.

The statutory duty also applies to any “person who by reason of his capacity or office has by any means access to the records of the bank, registers or any correspondence or material with regard to the account of any individual customer of the bank”. That is, apart from accountants, it apparently also applies to officials of government bodies who are authorised to look into bank accounts, as well as all others who have access to the bank’s records by virtue of their capacity or office.

One argument against the extension of section 47 to government officials is that the provision that the duty is to last “while his employment in or professional relationship with the bank, as the case may be, continues or after the termination thereof” would seem to imply that only employees or those subject to some form of contractual relationship with the bank are subject to the section 47 duty.

Against that, it could be countered that section 47 utilises the term “employment in” the bank as opposed to “employment by” the bank and also that the term “professional relationship” is defined by section 47 to include, i.e., it is not confined to, the bank’s relationship with a computer bureau. Furthermore, there is no restriction in section 47 that the persons who would thereby gain access to the bank’s records need do so as a result of their office or capacity within the bank.
Yap argues that this would have been easy enough to provide had it been the legislative intention. It would therefore appear that section 47 could not be wide enough to cover government officials.

By its Notice to Banks, MAS 614, issued pursuant to the 1984 amendments to the banking secrecy provisions, the MAS has laid down requirements aimed at ensuring that auditors of the head offices of foreign banks comply with the statutory duty of secrecy. MAS 614 spells out clearly that the prohibition under section 47 of the Banking Act ‘covers all persons regardless of whether they are residents or non-residents’.

It also provides that internal auditors or inspectors from the head offices of foreign banks are required to comply with section 47 should they gain access to the records of the accounts of individual customers in the course of the audit or inspection. Prior to such audit or inspection, they are also required to submit to the MAS statutory declarations that they are aware of the requirements of section 47 of the Banking Act and will strictly observe them. A copy of the inspection or audit report to the head office must also be submitted to the MAS.790

6.6.15 Duration and Subject Duty of Statutory Duty

A banking officer or other person who acquires information relating to an account is required, in the words of section 47(3), not to “give, divulge or reveal” it “while his

790 Yap, above n 785.
employment in or professional relationship with the bank, as the case may be, continues of after the termination thereof”. Since no mention is made of the duty lapsing after a reasonable period, it would appear to impose a perpetual vow of silence.

Section 47 prohibits those concerned from giving, divulging, or revealing “any information whatsoever regarding the money or other relevant particulars of the account of [the bank’s] customer”. It will be noticed that a moratorium is imposed on “any information whatsoever”, that related to:

1) The money in the customer’s account, or
2) Relevant particulars of the account.

It would appear that according to Yap, an omission has been made in respect of the affairs of the customer other than the money in, or relevant particulars, of the account. The situation in Tournier, for example, would apparently fall outside the wording of section 47 as the information divulged in that case was that the banks’ customer had diverted the proceeds of a cheque to his bookmaker. This neither relates to the money in his account, nor is it a particular of his account.791

6.6.16 Enhanced Protection

The statutory framework for banking secrecy is further enhanced by the fact that despite having a wide supervisory jurisdiction over banks, which empowers it to

791 Ibid.
conduct investigations of banks’ books, the MAS is required by sections 44 and 45 of the Banking Act to do so under conditions of secrecy.

Furthermore, section 47(1) of the Banking Act specifically states that the MAS is not authorised to inquire into the affairs of any individual customer of any bank. Finally, section 47(2) provides that any incidental information relating to the affairs of an individual customer obtained by the MAS shall be secret between the MAS and the bank. Doubtless, any MAS official who comes into possession of such information in the course of investigations also would be under a section 47 duty of secrecy.

The position regarding merchant banks is broadly similar. It is also found in Directives 11 and 12 of the MAS Directives to Merchant Banks. Directive 6 of the MAS Directives to Merchant Banks also provides that any information which a merchant bank is required to furnish to the MAS to enable the latter to supervise the merchant bank ‘shall be secret as between that merchant bank and the Authority’.792

6.6.17 Comparison of Common Law and Statutory Duties

A comparison between the Common Law duty and the statutory duty shows that:

1) The Banking secrecy laws of Singapore provide for contractual liability for the bank with criminal liability for the bank’s directors, employees, accountants, and other persons whose office or capacity would give them access to the bank’s records, who would not be contractually liable;

2) Until the 1984 amendments, the section 47 exceptions were almost identical to the Common Law exceptions;

3) The exceptions provided under section 47 are (since the 1984 amendments) more numerous than those available in England under the Common Law;

4) The consent exception in section 47 now requires the customer’s authorisation to be written while, under the Common Law position, consent can either be expressed or implied, and

5) The public interest exception is not included in section 47, with the result that academic opinion on its applicability in Singapore is divided.

Yap’s view is that a contractual duty of confidentiality is implied into the banker-customer contract by the Common Law applied vide section 5 of the Civil Law Act is clear as section 47 does not deal with implying a contractual duty. That a statutory duty exists on the part of its employees, directors, and others with access to confidential information and the extent of that duty is clear from section 47 of the Banking Act.793

6.6.18 Does the Public Interest Exception Apply in Singapore?

This is however a point of view that ‘it is arguable that the Common Law exception of disclosure in the public interest can be applied.’794

793 Yap, above n 791.
It also has been argued that section 47 is not exhaustive as 'such an interpretation is
too restrictive' as section 47 'does not cover certain situations where banking secrecy
will be justifiably encroached upon' such as the situation in Sunderland, where it was
in the bank's interest to make a disclosure in circumstances other than those provided
in section 47.795

According to Soh, it can be further argued against interpreting section 47 as being
exhaustive as the provision 'does not deal with situations where banking secrecy can
be violated if the bank has a public duty to disclose other than under compulsion of
law.' This view is supported by the example of legislation amended or enacted to
enable the accounts of suspected drug smugglers to be disclosed, which 'may not be
written law as defined'.796

Poh asserts that one line of reasoning supporting such views would be as follows.
Applying section 5 of the Civil Law Act, the issue or question of whether a banker is
permitted to make disclosure in the public interest would be decided in the affirmative
under English Common Law. The application of Common Law would not be ousted
by the existence of section 47, as section 5 of the Civil Law Act only provides that
English law will not apply where there is a corresponding piece of legislation enacted
by the Singapore parliament. Since section 47 imposes a statutory duty, it is not such a
piece of legislation.797

795 See Myint Soe, "Changes in the Law Relating to Banking Secrecy, The Banking (Amendment) Act
796 Ibid 390.
797 Poh, above n 782, 167.
Furthermore, besides being a Common Law duty, the banker’s duty of confidentiality is a contractual one, giving rise to civil liability, while section 47 serves a different purpose, namely that of making the persons responsible for divulging the information, who would not be contractually liable, subject to criminal liability.

The opposing view is that the issue should be characterised as what exceptions to the contractual duty operate in Singapore. Characterised in that way, the Common Law exceptions would have to be modified by section 47 because section 5(3)(a) of the Civil Law Act requires the Common Law to be applied ‘subject to such modifications and adaptations as the circumstances of Singapore may require.’

Hence, the position would be that criminal liability for disclosure is imposed by section 47 of the Banking Act while the Common Law operates concurrently to impose contractual liability, but the Common Law exceptions are modified in that they are restricted by the exceptions listed in section 47. It also may be argued that, in respect of a customer’s affairs, apart from the money in or other relevant particulars of an account, the Common Law contractual duty applies without modification.

For example, it can be argued that, since one of the cardinal principles observed by the courts in implying terms into a contract is that an implied term must not be contrary to law, the Common Law exception of public interest cannot apply in Singapore.\(^{798}\)

\(^{798}\) Ibid.
This school of thought as highlighted by Poh, would point out that there is yet another weakness in the view that the Common Law exceptions can apply if they are excluded from section 47. That is, it relies on an unnatural distinction between the bank and its employee, excusing on the part of the institution acts which it could only do through its employees and which are crimes under written law.

It is hence argued by Poh that in Singapore the contractual duty is separate and distinct from the statutory duty imposed by section 47 and that the legislation never intended section 47 to replace it. This is supported by the fact that the purposes or functions and the subject matter of the two duties differ.

The Common Law imposes a contractual duty on the bank because of the intimate knowledge that a bank acquires into its customer’s affairs, whereas section 47 imposes criminal liability on persons described therein who would not be contractually liable to the customer since they are not party to the contract between the customer and his bank.

Considering the width of investigative powers given to the authorities in Singapore, the public interest exception might not be very useful even if it were applicable in Singapore. First, most investigations would be conducted under the receptive pieces of legislation mentioned earlier. Second, the disclosure of information under the Common Law public duty exception would be subject to restrictions very similar to those outlined in the statutory provisions.
When the MAS conducts investigations, it does so under conditions of secrecy, only general information may be sought, it may not inquire into the affairs of any specific customer, and any incidental information acquired is to be kept secret. That this is very similar to the factors applicable to the public interest exception will be apparent from a later discussion.

The above analysis of the issue of bank secrecy demonstrates the rigour with which Singapore's confidentiality platform is enhanced to support the global wealth management industry.799

6.6.19 Public Interest Exception at Common Law


In this case, the High Court of England decided that the public interest in maintaining the confidentiality owed by a bank to its customers might be outweighed by some countervailing public interest in disclosure, and the latter was not limited to the public interest in detecting or preventing wrongdoing.

Hence, it ruled that Price Waterhouse (PW) could be permitted under the exception to make disclosures of certain confidential information to an enquiry set up to review BCCI's past performance of its statutory functions. PW was seeking to give evidence

799 Ibid.
voluntarily without BCCI’s consent as the enquiry, not having been convened under the Tribunals of Enquiry and Evidence Act 1921, could not compel the disclosure of confidential information.

At issue was the question whether voluntary disclosure could be made without the consent of BCCI, to whom PW owed a duty of confidentiality. The court decided that, as the United Kingdom legislature had conferred a general power of supervision upon the Bank of England, there was an important public interest in the effective regulation and supervision of authorised banking institutions and the protection of depositors. It held that this public interest ought to prevail over the interest in confidentiality. A few points from Millet J.'s decision are worth noting:

1) The scope of disclosure was limited – The interest in disclosure to the enquiry was at least as wide as the interest in disclosure to the Bank of England, “provided that dissemination of such information was no wider in the latter case than would be authorised in the former case” (the powers of the MAS and the Bank of England are similar).

2) Infrequent and less serious invasions – The enquiry would be dealing with matters more abstract and remote from the details of the underlying banking transactions than the Bank of England in its routine supervision; it was less likely that details of particular accounts would require to be identified, and the occasions when banking confidentiality was invaded were likely to be fewer and less serious.

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3) The enquiry had undertaken to respect confidentiality – it would do this where it could properly do so. The extent to which confidentiality would be invaded would depend upon the judgement of responsible persons at several different levels.\textsuperscript{802}

6.6.20 Public Interest and Compulsion by Law

In the BCCI case discussed above, the court inferred the existence of a public interest in the proper supervision of financial institutions from the fact that section 1 of the United Kingdom Banking Act 1987 imposes a duty on the Bank of England "generally to supervise the institutions authorised by it in the exercise of" its powers.

In Singapore, the MAS has a similar duty. Section 28 of the Monetary Authority of Singapore Act, Cap 186 (MAS Act), empowers the MAS to approve financial institutions and control their operations and section 27 of the Act provides that the MAS may, if it thinks necessary in the public interest, request information from and make recommendations to such financial institutions as the Authority may from time to time determine.

The MAS also may issue directions under section 27 for the purpose of securing that effect is given to such requests or recommendations.

The similarity between the approach of the Common Law "public interest exception", and the "compulsion by law" provisions of which the MAS provisions provide an

\textsuperscript{802} Yap, above n 793.
example, does not need to be belaboured. So great is the similarity between the two that the Jack Committee has described the compulsion of law exception as a codification of the public duty exception and the purpose of the latter as being "to catch those items which have not yet been codified". 803

In the United Kingdom, as noted previously, there were 19 Acts requiring disclosure to the authorities at the date of the Jack Committee's Report, and the Committee therefore recommended an exhaustive codification of all relevant legislation, requiring disclosure, with the further recommendation that all subsequent disclosure requirements should only be added by way of amending that provision. 804

6.6.21 Conclusion

In conclusion, as can be seen from the above analysis, in Singapore, the duty of banking confidentiality in respect of the client's affairs stems from two sources:

(i) The duty of confidentiality implied by the Common Law by virtue of the banker-customer relationship, and

(ii) A statutory duty imposed by section 47 of the Banking Act (referred to herein as the "section 47 duty" or "the statutory duty"). 805

The "general rule" of banking confidentiality is enshrined in section 47(1), which states:

803 See the Jack Committee Report, paragraph 5.06.
804 Yap, above n 802, 577-601.
Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other persons exempt as expressly provided in this Act.\textsuperscript{806}

And whilst exceptions are provided under section 47(4), none of the above would contradict the recommendations of the supranational organisations.

\subsection{6.7 Exchange of Information – Mutual Legal Assistance}

Following the discussion of its second mutual evaluation report at the FATF Plenary meeting in February 1999, the Singaporean delegation reported back in June 1999 on the measures that it would be introducing. In September 1999, Singapore advised that its Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1999 was passed on 6 July 1999 and came into force on 13 September 1999. The amending legislation extended the money laundering offence to a wide range of serious crimes, increased the powers to confiscate criminal assets, clarified the requirement to report suspicious transactions, and introduced several other measures to enhance the anti-money laundering regime. On the provision of mutual legal assistance, Singapore enacted the Mutual Assistance in Criminal Matters Act, which came into effect on 1 April 2000, to provide for a more comprehensive legal framework for mutual assistance in legal matters.\textsuperscript{807}

The Mutual Assistance in Criminal Matters Act 2000 came into force on 1 April 2000. The Act facilitates the provision and obtaining, by Singapore, of international

\textsuperscript{806}Ibid.
assistance in criminal matters. It provides the legislative basis for Singapore to enter into arrangements with other countries for international co-operation in criminal matters. The forms of assistance provided for by the Act include: 808

1. the obtaining of evidence and other articles;
2. the making of arrangements for persons to give evidence or assist in criminal investigations;
3. the recovery and forfeiture of, and the restraining of dealings in, proceeds and instrumentalities of crime;
4. the execution of requests for search and seizure;
5. the location and identification of persons; and
6. the service of documents.

In general, assistance under the Act may be obtained or provided in relation to any 'criminal matter', which is defined to mean a criminal investigation, criminal proceedings or an ancillary criminal matter (ie the restraining of dealing in, or the seizure, forfeiture or confiscation of, proceeds or instrumentalities of crime, or the obtaining, enforcement or satisfaction of a confiscation order).

The criminal matter must –

1. in the case of assistance sought by Singapore, relate to a Singapore offence, ie an offence in the First or Second Schedule to the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (the CDTSCA); or

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2. in the case of assistance sought by a foreign country, relate to a foreign offence, ie a drug offence or an offence that consists of or includes conduct which, if it had occurred in Singapore, would have constituted an offence under the Second Schedule to the CDTSCA. 869

Singapore Minister for Foreign Affairs and Minister for Law, Professor S Jayakumar signed a mutual legal assistance treaty with the United States Ambassador to Singapore, Mr Steven J Green on 3 November 2000. This is the first mutual legal assistance treaty signed by Singapore. Earlier that year, the Singapore Parliament passed the Mutual Assistance in Criminal Matters Act which set out the legal basis for Singapore to enter into mutual legal assistance treaties.

The treaty provided a framework for cooperation between Singapore and US authorities in the fight against drug trafficking. It strengthens the relationship between the law enforcement agencies of the two countries and increases their ability to provide assistance to each other, and also to serve as an important tool in the fight against drug trafficking offences.

Under the treaty, the law enforcement authorities of Singapore and the United States provide assistance to each other in investigations, prosecutions and related proceedings concerning drug trafficking and drug money laundering offences.

Forms of assistance available include taking testimony of witnesses, releasing documents and records, locating and identifying persons or evidence, serving

documents, executing requests for search and seizure and freezing and forfeiture of proceeds of drug trafficking.\textsuperscript{810}

This enhancement of the legislation has further strengthened Singapore’s global reputation as a compliant jurisdiction.

6.7.1 SCA’s compliance with FATF 40 Recommendations\textsuperscript{811}

The SCA has, to a large extent, provided the legal framework for Singapore to embrace the FATF’s 40 Recommendation. In particular, it has:

(i) Criminalised non-drug related serious crimes, albeit not all serious crimes (R5);

(ii) Adopted objective knowledge in establishing the offence of money laundering (R6);

(iii) Imposed penalties against corporations themselves and not just their employees (R7);

(iv) Provided confiscation or forfeiture powers (R8);

(v) Extended money-laundering law to non-bank financial institutions (R9);

(vi) Imposed a statutory requirement for the retention of financial transaction documents for more than five years (R14);

(vii) Provided statutory protection requirement for the retention of financial institutions and employees against criminal and civil proceedings in good faith reporting of suspicious transactions (R16);

(viii) Criminalising tipping-off offences (R17);


\textsuperscript{811} See Appendix O for the list of FATF’s 40 + 8 Recommendations against money laundering.
(ix) Made reporting of suspicious transaction mandatory (R18);

(x) Facilitated the issuance of anti-money-laundering guidelines through MAS (R28);

(xi) Provided the legal framework for Singapore to enter into mutual legal assistance treaties (MLAT) with other countries in relation to Production Orders, Search Warrants, Confiscation Orders for foreign offences (R37 and R38); and

(xii) Recognised money laundering as an extraditable offence (R40)

The new legal regime under the SCA has given more teeth to Singapore’s anti-money laundering laws. Hence, its law enforcement agencies are now better armed to combat money-laundering activities in Singapore and the Asia Pacific region.  

Singapore has in place a sound and comprehensive legal, institutional, policy and supervisory framework for Anti Money Laundering/Combating the Financing of Terrorism (AML/CFT). The legal system is well regarded, with a low crime rate, an intolerance for corruption, and an efficient judiciary. Singapore has taken systematic and effective steps to address many of the recommendations of the FATF mutual evaluation in 1998–1999. The Corruption, Drug Trafficking and other Serious Crimes Act criminalized money laundering for a range of serious offences beyond drug trafficking, imposed a duty on all persons to make reports of suspicious transactions, and changed the criminal intent requirement for criminal ML offences to a reasonable ground to believe standard. Singapore has in place a framework for the provision of mutual assistance through the enactment in 2000 of the Mutual Assistance in Criminal

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812 Tan, above n 747, 264.
Matters Act (MACMA). Legally-binding Notices issued by the MAS imposed sector-specific requirements and guidance in the areas of customer due diligence, internal controls, audit, and training, among others. These legislative and regulatory changes as well as institutional efforts to improve feedback to institutions, enhance supervisory oversight, and improve training resulted in a significant strengthening of Singapore's framework.

However, according to the IMF, there remain areas requiring attention. There are limitations on Singapore’s ability in practice to provide particular kinds of mutual legal assistance such as the provision of bank records, restraint of proceeds, and enforcement of confiscation orders. Customer identification measures for wire transfers need to be put in place by February 2005, as recommended by FATF Special Recommendation VII. The Palermo Convention has yet to be ratified. The authorities recognize that to comply with the revised FATF 40 Recommendations of June 2003, the current sector specific Notices should be updated during 2004. While providing valuable guidance, the principles-based Notices could be improved by making their provisions more detailed and direct, supplementing the current statements of principle with firm provisions and explicit guidance to assist financial institutions in the practical implementation of effective AML/CFT measures. Work on amendments to the sector-specific Notices has already commenced. Singapore has provided a framework for mutual legal assistance through MACMA but the lack of treaties or other relationships means that certain forms of assistance are not available to foreign authorities. Non-coercive measures (service of process and location of persons) and taking of evidence for foreign criminal proceedings are available, but assistance requiring coercion, for example, the provision of bank records, production orders,
search and seizure, pre-trial restraints, proceeds identification and tracing, and enforcement of foreign confiscation orders, may be provided only to "prescribed" countries, currently limited to the U.S. for drug trafficking matters. Singapore has also signed a mutual legal assistance treaty with Hong Kong in June 2003, which will come into operation as soon as the Parties have ratified it.\footnote{\ref{813}}

6.7.2 Conclusion

From the above analysis, it can be seen that Singapore supports the exchange of information and mutual legal assistance under the MACMA. This may be achieved or provided in relation to any 'criminal matter', which is defined to mean a criminal investigation, criminal proceedings or an ancillary criminal matter (ie the restraining of dealing in, or the seizure, forfeiture or confiscation of, proceeds or instrumentalities of crime, or the obtaining, enforcement or satisfaction of a confiscation order).

Despite the enlargement of the SCA to encompass the scope of money-laundering, tax evasion (which includes duty evasion, exchange control and capital control evasion) is not listed as a serious crime and thus Singapore is not obligated to offer mutual legal assistance in tax matters, which is now the subject of the recent June 2004 OECD report entitled *A Process for Achieving a Global Level Playing Field*.\footnote{\ref{814}}

6.8 Conclusion

\footnote{\ref{813} International Monetary Fund, above n 739. \ref{814} Organisation of Economic Co-operation and Development, above n 18.}
The above analysis of Singapore’s position in regard to harmful tax practices, money laundering, confidentiality and exchange of information, as revealed by its responses to the supranational organisations, OECD, FATF, IMF and the Wolfsberg Principles, demonstrates how the city State has been progressively positioning itself over the past five years to take advantage of the changes in global regulatory dynamics, particularly affecting European investors whose funds have been traditionally held by Swiss banks.

(i) *EU’s Directive on the Taxation of Savings*

Singapore and Hong Kong, which have long been keen to establish themselves as offshore financial centres to rival Europe’s, and which already hold an estimated US$500 billion in offshore funds,\(^{815}\) are most likely to benefit from the EU’s Directive on the Taxation of Savings. Indeed, Singapore, which displaced Luxembourg as the number two offshore banking centre of choice\(^{816}\) is especially well-placed ahead of Hong Kong.

Singapore has positioned itself as a first-class global wealth management centre. Among its advantages are a stable political environment, a good reputation as a well-run centre with transparent rules and a position close to Asia’s growing economies, but not too close to locations where political developments may still be difficult to predict.

Hong Kong, though rated alongside Singapore as one of the most sophisticated offshore centres in the world, suffers from its proximity to China and investors’ unease.

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\(^{815}\) According to the 2003 survey of Boston Consulting Group.

\(^{816}\) IBM Business Consulting Services’ 2003 survey of the European private-banking industry.
over the long-term implications of control from Beijing. But it could still benefit from the expected movement of funds from Europe in spite of recent comments from Beijing meant to put the market and the pro-democracy movement on notice.\textsuperscript{817}

Perhaps a key reason the Swiss participants are keen to expand into Asia is that even without law changes, the offshore banking system is well under review. In its annual survey of this field, published in July 2003, the Boston Consulting Group says Swiss wealth managers are entering a highly competitive phase during which they will fight for new clients and market share. This is because the overall asset base is shrinking, revenue growth is lower and there is low growth in new business. According to the report, wealth managers need to develop proactive strategies, enabling them to defend their offshore positions and develop a strong global onshore presence. Geographic diversification, is one strategic option.\textsuperscript{818}

However, as Singapore makes the regulatory changes and manages to win substantial business from Switzerland and the other traditional offshore centres, these established financial institutions are unlikely to find life any easier. Not only are the Singapore authorities keen to demonstrate the purity of their systems by introducing tougher regulations, but clients are no longer content to have their assets sit idly in their bank vaults. Offshore or onshore, the clients want their assets to work and will seek geographical and jurisdictional diversification to ensure such a situation.\textsuperscript{819}

(ii) Singapore – an alternative to Switzerland

\textsuperscript{817} Ching, above n 697.
\textsuperscript{819} Ibid.
Will Singapore replace Switzerland as the world's premier centre for private banking? Not immediately. But it is possible that in the next 5 years, a portion of the US$2.2 trillion of private money managed by banks in Switzerland (as at the end of 2002) will flow to the republic – thanks partly to catalytic tax changes within the European Union (EU) and Switzerland.

In June 2003, the EU agreement with Switzerland to claw back some tax revenue from income earned on assets of EU citizens that are held by Swiss banks, opened the gates for the capital outflow of assets under management by its private banking industry.

Under the deal, in 2005, EU-based clients of Swiss banks will face a 15 per cent tax on income and / or dividends from assets – such as bonds – purchased from their Swiss bank accounts. The taxes will be passed on directly by the Swiss banks to the governments of the clients’ home countries, without the clients’ names being revealed. The deal allows Switzerland to maintain its banking secrecy laws, while permitting the governments of EU countries to collect tax revenue that has, thus far, eluded them. Over time, the tax rates will be raised, in stages, to a maximum of 35 per cent.

After 2005, therefore, private banking clients who keep assets in Switzerland will be faced with the prospect of lower – and progressively declining – post-tax rates of return on their holdings.
Many of them have already been induced to move their money elsewhere. According to Vikram, many Swiss banks consider Singapore a better alternative, and are gearing up for the shift, since the regulatory and legal systems are in place, these global investors are starting to vote with their feet; a clear vote of confidence in Singapore’s compliance with the supranational directives.820

(iii) Singapore – Financial System Stability Assessment

Singapore has evolved into a major regional asset management centre over the past few years in response to the government’s efforts to develop this industry and now hosts more than 200 asset management firms. Total assets managed by Singapore-based financial institutions increased from S$151 billion in 1998 to S$344 billion in 2002. This increase can be attributed to transfers of regional portfolios to Singapore for management and continued expansion of management and advisory activities for the pan-Asian region in light of Singapore’s sound legal and tax environment and highly developed infrastructure. Some asset managers also centralized their regional trading and back office functions in Singapore. Of the S$183 billion of discretionary assets as of end-2002, 30 percent came from Singapore and the rest from abroad – mainly Europe and the United States.

Although the regulatory systems and supervisory practices exhibit a high degree of observance of international standards and codes, the IMF made some specific recommendations to further enhance the risk-based regulatory and supervisory

820 Vikram, above n 712.
framework, strengthen the accountability and independence on the MAS, and improve monetary and financial policy transparency.\textsuperscript{821}

In this chapter's analysis of Singapore as a compliant jurisdiction, it was seen that Singapore complies well and in particular with most of the assessable FATF (40 + 8) Recommendations. The main deficiency is revealed in the provision of mutual legal assistance. Even so, in the next and final chapter of this thesis, the argument in favour of Singapore is summarised and concluded.

\textsuperscript{821} International Monetary Fund, above n 813, 36.
Chapter 7  Conclusion

7.1  Introduction

In 1998, the Committee on Fiscal Affairs of the OECD embarked upon a major new project to eliminate what it considered harmful tax practices in both OECD member and non-member countries. It issued a lengthy discussion draft entitled *Harmful Tax Competition: An Emerging Global Issue*.822

In the guise of an effort to promote transparency and information exchanges in tax matters globally, the supranational bodies have ostensibly sought to prevent and eradicate tax havens and preferential regimes. Although theoretically aimed at tax evasion, its impact, has been to reduce tax minimisation opportunities for legitimate international business activities.

The analysis of the response to the subsequent efforts of the OECD et al, by the OFC's has been the theme of this thesis. However, the subsequent emergence of Singapore as the compliant jurisdiction of choice, is now the final conclusion of the thesis.

7.2  Money Laundering & Harmful Tax Practices

Currently, with regard to tax havens, the scope of the project has been reduced to solely promoting transparency and information exchange, a position supported by the

822 Organisation for Economic Co-operation and Development, above n 738.
international community. At this point in time, as analysed in this thesis in Chapter 5, it has been argued that the majority of the OFC’s, as selectively represented from the Caribbean, Pacific Basin, Europe, Indian Ocean and Asia, have agreed to co-operate within the OECD’s timetable.

However, to approach money laundering solely from the perspective of the legal mechanisms available directly against launderers and their impact upon human rights, is to miss important aspects of the impact of money laundering upon the legal environment. The other side of the coin is to do with financial services’ regulation and its relationship to the duties of professionals. The advent of money laundering regulation has altered the nature of the relationships many professionals have with their clients. The argument for regulation and reporting requirements is that only thus can suspicious transactions be located. The argument against regulation was that the regulatory structures are just a further unnecessary intrusion, expense, and disruption of professional relationships, which do little to apprehend launderers or to affect levels of laundering.823

The international drive against money laundering has led to pressure for homogenisation of substantive criminal laws and enforcement mechanisms as between countries. As was seen in Chapter 5, legislation was introduced or amended in these jurisdictions and territories to allow them to comply with the OECD and FATF recommendations. In so doing it has helped recast the relationships that existed between Nation-States. From the point of view of individual States, it has provided the strongest challenge to the traditional concept of criminal law as being one matter

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in respect of which the sovereignty Nation-State is still the predominant political unit. English criminal law is now unashamedly the handmaiden of international markets.\(^{824}\)

After the Human Rights claims, the imposition of duties upon professionals was seen as the most hotly contested area of Money Laundering Law. From a position of scant compliance to one of resentment the mood has shifted at least to unenthusiastic but fearful compliance. Subject to the argument from competition, client confidentiality appears to have been given up by bankers and accountants, and has been retained in the legal profession only by the making of some concessions. Alldridge asserts that nothing will concentrate professional minds better than a sentence of six months' imprisonment for a solicitor who had pleaded guilty to failing to disclose knowledge or suspicion of money laundering that was not, in the circumstances, excessive.\(^{825}\)

The period after 11 September 2001 has been a very significant one for the offshore industry. Reporting requirements have been extended, and levels of reporting have increased substantially. Privacy law is being stretched (in the case of confiscation) or ignored (in the case of forfeiture, and perhaps, civil recovery). The professions are being pulled in at least two opposing directions.\(^{826}\)

With the apparent failure of the EU tax amnesties to lead to a repatriation of the majority of the funds held in the OFCs, the individual EU countries now have to rely upon the sharing of withholding tax with Austria, Belgium, Luxembourg and Switzerland in respect of their non-compliant taxpayers. As withholding tax increases, step by step, to 35% after 1 January 2011, this will, as has been seen, lead to a flight

\(^{824}\) Alldridge, above n 382, 19.
\(^{825}\) Ibid 273.
\(^{826}\) Ibid.
of undisclosed funds from those jurisdictions with such a high withholding tax to
d jurisdictions which do not apply high rates of withholding tax of this nature, such as
Singapore.\cite{stibbard2003}

It is unlikely that there may be further pressure on Switzerland in the coming period
as a result of increased pressure from the United States, the EU and the OECD. If the
past is any guide, the Swiss, particularly following their successful negotiations with
the EU, upholding the primacy of their banking secrecy, may feel vindicated in
standing firm on this issue. Nevertheless, there must be the risk of the further
haemorrhage of funds from Switzerland back onshore, in the face of stiffer penalties
for tax evasion, increased transparency in the case of tax fraud and ongoing tax
amnesty programmes in various different jurisdictions. As a result of this, the more
forward looking private banks in Switzerland are increasingly looking to design
financial structures for onshore families which are tax compliant in jurisdictions such
as Singapore.

While prominent OFC jurisdictions like Jersey, Guernsey, the Cayman Islands, the
Bahamas, and Bermuda continue to survive, smaller jurisdictions, such as Nauru and
Niue, which have been unable to meet minimum requirements in respect of anti-
money laundering regimes, are being forced out of the industry. This conclusion is
imminent, despite the more laissez faire approach of the Bush administration, has
been in no small measure due to the dramatic change in mood in the US following the

\cite{stibbard2003} Paul Stibbard, "Thriving in a Transparent World – Understanding Clients’ Needs" Baker &
events of September 11, 2001, and the determination that bank secrecy should never again be used as a cloak to mask terrorist conspiracies.\textsuperscript{828}

Singapore now has in place a sound and comprehensive legal, institutional, and policy and supervisory framework for AML/CFT and the authorities have demonstrated a strong commitment to its effective implementation. Though some steps have been taken with the enactment of a domestic mutual legal assistance law and ongoing negotiations for several bilateral treaties, the effectiveness of cross-border mutual legal assistance needs to be improved as it relates to compulsory assistance at international request, including the provision of bank records.

It was noted that Singapore adopts international standards and best practices for regulation and supervision, including a comprehensive framework to combat money laundering and terrorism financing. A full member of the FATF, Singapore is committed to implementing the FATF recommendations.\textsuperscript{829}

Singapore’s laws, regulations and institutional arrangements provide a strong legal, institutional, policy and supervisory framework are deemed to be adhering to the FATF 40+8 Recommendations for the prevention and detection of ML/FT. Many of the suggestions for further improvements will be implemented as Singapore continues to strengthen its AML/CFT framework to comply with the revised FATF 40 Recommendations of June 2003.\textsuperscript{830}

### 7.3 Confidentiality & Exchange of Information

\textsuperscript{828} Ibid.

\textsuperscript{829} Monetary Authority of Singapore \textlt{http://www.mas.gov.sg} at 3 November 2003.

\textsuperscript{830} International Monetary Fund, above n 821.
The several challenges aimed at offshore confidentiality as a legal concept have been examined and some may be seen to be without proper basis in law and legal policy. Indeed, this thesis has analysed in detail the areas which the OFCs, and by extension the tool of offshore confidentiality, have been criticised and demonstrated the several flaws in the arguments presented. These are and include the offshore tax function, the issue of money laundering and international crime and the question of comity. The quest for privacy in commercial and personal affairs and the assertion of the privilege against self-discrimination and sovereignty are further responses to challenges to confidentiality. Justifying confidentiality in offshore finance, therefore, does involve a defence of the offshore financial sector itself. In defending the offshore sector, the legitimacy of confidentiality, one of its most important tools, is underscored.

The offshore sector is seen to be, first and foremost, an economic phenomenon created to respond to the needs of international business. Secondly, it offers safe and reliable alternatives to traditional forms of investment in onshore jurisdictions. Thirdly, the sector is supported by a legal infrastructure that derives its very legitimacy from onshore legal regimes. Offshore jurisdictions have merely adapted legal concepts and principles well known in onshore states. This factor compromises the ability of onshore jurisdictions successfully to undermine the legal foundation on which the sector is established. In many areas, such as trusts and tax, offshore practices and concepts are supported both in traditional municipal law and in international law. The offshore sector has thus created an innovative legal regime to respond to modern commercial needs. Its structure has produced a diverse and
creative jurisprudence which challenges the orthodoxy of onshore legal regimes and concepts.\textsuperscript{831}

This thesis analysed how offshore jurisdictions understand well the need for regulation, and support such regulation where it is legitimate. In matters for which there is as yet, no consensus on the acceptable reach of disclosure, such as in fiscal matters, the way forward must be through international and bilateral agreements. However, as will confidentiality in other areas of financial law and commerce, offshore confidentiality will continue to be zealously protected outside of these parameters.\textsuperscript{832} Singapore, as analysed in this thesis, has become the compliant jurisdiction of choice.

It has been demonstrated that the threats to financial confidentiality as a viable legal concept mask the real questions which are essentially economic and political. The real concern of onshore countries is the significant financial haemorrhage from onshore countries filtering off income to offshore states. In the past, OFCs were being targeted and threatened with sanctions for activities which onshore states themselves engage in. They are attacked for laws, legal policies and practices which are not unlawful or for which there are no accepted international standards.

The OECD and FATF challenges to OFCs, premised on ‘harmful tax competition’ and charges of money laundering, highlight the many inconsistencies contained in the charges against OFCs and confidentiality. These compromise the objections raised by onshore states to offshore legal policy. This perhaps best explains why the UK has

\textsuperscript{831} Antoine, above n473, 325-6.
\textsuperscript{832} Ibid 327.
been less hostile to OFCs than the US. Its dependencies derive considerable economic benefit from their own OFCs. This, in turn, reduced financial dependency on the UK government.

Offshore jurisdictions, it was seen, have been accused of unfair tax practices in an international fiscal environment which has reached no consensus with regards to ownership of taxable worldwide income and which recognises no limits on a country's right to set fiscal policy. It is also occurring in a global environment which encourages competition generally and condemns protectionism. As documented earlier, not only do onshore states offer fiscal incentives to non-residents but they also accept the well-established legal principle of the lawfulness of tax avoidance and the non-enforcement of foreign fiscal law, two principles which ground offshore fiscal policy.

The OECD's challenge to confidentiality because of its inherent value to tax planning vehicles, has been demonstrated to be misplaced. Where investors engage in tax planning, a legal activity, their use of confidentiality as an investment tool cannot seriously be questioned in law. Similarly, given the rule on non-enforcement of fiscal law, OFCs cannot appropriately be challenged for their refusal to deviate from offshore confidentiality norms by assisting onshore countries in disclosure efforts to harness fiscal revenue.

However, the OECD report entitled *A Process for Achieving a Global Level Playing Field* released in June 2004 seeks to renew the OECD's campaign in regard to the transparency and effective exchange of information for tax purposes, sought from
significant financial centres, which includes Singapore. The main point of concern is that despite the Mutual Assistance in Criminal Matters Act which provides the legislative basis for Singapore to enter into arrangements with other countries for international co-operation in criminal matters, tax evasion is not listed under the SCA. Singapore is under no obligation to co-operate with foreign countries by sharing information which facilitates tax collection.

Further, the attack on offshore confidentiality ostensibly to prevent money laundering may be questioned. Confidentiality and money laundering are often being used as scapegoats merely to obtain information on potential tax revenue of onshore states. In so doing, the OECD and its supporters have been willing to rewrite fundamental precepts of money laundering law to achieve that by encompassing even tax evasion as a predicate offence.

Such challenges also ignore the facts about money laundering in OFCs. First, as pointed out in Chapter 5, most OFCs have well regulated systems with respect to money laundering, in some cases more vigilant than onshore states. There is evidence to suggest that offshore courts are co-operative, and willing to assist in the prevention of money laundering crime in OFCs. This is well demonstrated by the many legislative improvements and treaty initiatives relating to mutual legal assistance which enhance law enforcement. Secondly, it was shown that evidence abounds that onshore financial centres, such as London and New York, are actually the true centres of money laundering proceeds.

833 Organisation for Economic Co-operation and Development, above n 814.
The most recent challenges to confidentiality, that is, terrorist financing, can be viewed along similar lines. Indeed, there is a belief that money launderers and terrorists are too sophisticated to utilise ‘red flag’ OFCs for their endeavours, as such centres attract far too much attention. However, while it is clear that terrorist funds may have been concentrated onshore, OFCs have generally welcomed the opportunity to assist in the fight against terrorism. The direction taken by OFCs have been more focused on not overprotecting financial confidentiality rather than strengthening money laundering law to fight terrorism.

Yet, even amidst fears of money laundering and terrorism, offshore confidentiality and disclosure must be approached with caution and with appropriate regard for legal principles and the rule of law. As discussed, one such principle is comity, the respect which one country must give to the law of another. Just as the confidentiality law of onshore states are accepted judicially as essential in supporting commercial secrets and other commercial concerns in the national interest, so must offshore confidentiality laws also be accepted. Indeed, financial confidentiality laws in OFCs may be seen to have even more of an instrumental role than those onshore.

Similarly, the rule of law dictates that fundamental human rights must be respected in any challenges to confidentiality. In particular, the principles on privacy, the privilege against self-incrimination and search and seizure are developing, and apply to financial confidentiality. While such rights may be surrendered in for public interest, this must be done according to recognised principles of proportionality, which accords the greatest possible measure of human rights protection to every citizen. Even US citizens are questioning the siege-induced assumption that controlling terrorism must
necessarily equate to an eclipse of human rights and civil liberties. Many now fear a diminution of their right to privacy.834

However, it is noted that in Singapore, the customer’s right to confidentiality is a cardinal principle in the Singapore banking sector, and assured by statutory provisions in the Banking Act. The Banking Act prohibits a Singapore bank and its employees from disclosing customer information without the customer’s written consent. Confidentiality provisions may only be lifted by a court order within a well-defined legal framework of safeguards and conditions.

7.4 Singapore’s Role as a Financial Centre

From the preceding chapter it was highlighted that the sophisticated banking system, the transparent regulatory and the credible English Common law system have aided Singapore's development as a pre-eminent regional financial centre in Asia which is also underpinned by the existence of an attractive business environment for financial institutions and a desirable quality of life for professionals. Effective promotion to communicate Singapore's value proposition and financial sector opportunities has attracted financial institutions and talent to Singapore. A deep pool of financial sector expertise and pro-physical infrastructure are key components of an attractive business environment. This attractive business environment has been created by focusing on the promotion of Singapore's financial centre, education and training, taxation policies and business infrastructure.835

834 Antoine, above n 832, 328-9.
835 Economic Review Committee, Sub-Committee on Services Industries, Financial Services Working Group, above n 722.
Wealth management needs are well supported by a full range of financial services. More than 500 of the world’s top financial institutions are present in Singapore, engaging in a wide range of financial activities – commercial banking, investment banking, treasury activities, insurance and reinsurance, asset management and private banking. As a global forex hub – Singapore is the world’s largest forex trading centre after London, New York and Tokyo. The SGX’s derivatives market was the first Asian exchange to offer Eurodollar futures on Japanese and Taiwanese stock indices.836

Singapore is becoming the chosen ground for many offshore investors. The regional chief executive officer of Credit Suisse, explains, “The only other true global private banking centre is Switzerland, and we think Singapore shares many of the characteristics of Switzerland. It is clearly superior to most of the traditional offshore centres, and offers all the features of a world class financial centre.”837

It has been noted that “Singapore is politically stable, it has the world’s most competitive economy, the best rated legal system and is a leader in information technology. There are stringent client confidentiality laws, no taxation for non-residents, and robust anti money laundering laws. Like Switzerland, Singapore is neutral and has an international reputation as a safe and secure environment.”838

Since Switzerland has fallen in line with the EU’s Savings Tax Directive, with an estimated $2 trillion in offshore assets held by EU citizens to be affected, it is not

837 Peter J Cooper, Interview with Regional CEO of Credit Suisse - Dr Alex Widmer, AME Info FZ LLC (Executive Interview, 3 February 2001).
838 Ibid.
surprisingly, that many of Europe's wealthy are reviewing other places to transfer their cash. The likely recipient of some of the outflow, is now confirmed, to be Singapore, which is not party to the EU directive.

"When you have to pay 15% and eventually 35% in taxes, you are going to have a natural attrition of funds to where you don't have that — like Singapore," said the head of Asian private banking for Société Générale in Singapore.

Although Singapore has long toiled to develop as an offshore banking center, it has had to date, modest success. However, as more private banking and fund management operations are relocated to Singapore as the trend has already commenced, assets under management will grow at a much faster rate.

Competition is limited. The global crackdown on terrorism financing means tax havens in the Caribbean and the South Pacific are blacklisted or otherwise seen as tainted. Singapore is among the few still passing the "sniff test". Hong Kong, as been noted, suffers "sovereignty risk" — Mainland China's increasing interference in the territory's affairs. "Thousands of people protesting in the streets in July 2003 didn't help that image," sais the head of Société Générale.839

Then to reinforce this concern, comments made by a senior Chinese official, Wen Wei Po, Beijing's mouthpiece in Hong Kong, about Hong Kong's shaky financial future:

“Given our greater economic might now and Hong Kong’s heavy dependency on China, to set up a new stove is not a problem. We are not afraid that such a move would trigger off a capital flight.”

7.5 Conclusion

This thesis has analysed the principal issues of harmful tax practices, money laundering, confidentiality and exchange of information with respect to the supranational directives in regards to OFCs.

The analysis of these directives and the responses of the major OFCs, has in conclusion demonstrated the regulatory environment of Singapore to be well-established, and supported by judicial and banking systems, which differentiate Singapore from the OFCs analysed in Chapter 5.

It has been argued that Singapore has satisfied the recommendations of the OECD, FATF, FSI and the Wolfsberg Principles in terms of harmful tax practices, money laundering, confidentiality and exchange of information.

With these basic pillars in place, the city-state has now positioned itself to emerge as a possible beneficiary of the flight of funds from Europe.

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840 Ching, above n 817.
Switzerland's decision to repatriate income taxes on accounts held by citizens of the EU from 2005 could have the citizens consider Singapore to be an alternative major private banking centre.

Switzerland, the world's largest private banking centre, with $2.2 trillion in offshore assets (assets held by EU citizens), could see some of its funds diverted to Singapore.

The EU's Savings Tax Directive rate starts at 15% but will rise to 35% by 2011. All of Europe's other tax havens, not already part of the EU have also fallen in line with the EU's Savings Tax Directive. In Singapore, the funds will be able to compound tax-free.

To date, Singapore has enjoyed only modest success as an offshore banking centre. Offshore assets are estimated at $120 billion, a tenth that of Switzerland's, and most of that is held by overseas Chinese from Southeast Asia. Assets held by EU citizens are easily under 5%.

Over the past five years, Singapore has increased its financial centre profile, with bureaucrats on official trips to Europe holding meetings with private bankers to promote the benefits of the Southeast Asian nation. There is a significant number of major banks and financial institutions which have established a presence in Singapore and the subsequent flow of funds under wealth management in Singapore.

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It has been argued that Singapore, with both its judicial and financial platforms in place, has responded to the directives of the supranational bodies and successfully positioned itself to be the compliant jurisdiction of choice for the global wealth management industry.

At the time of submission of this thesis, the OECD report entitled *A Process for Achieving a Global Level Playing Field* was released in June 2004.\(^{842}\) It would seem that this report is, as stated, a response to the OECD’s concern to prevent the migration of business to economies which do not engage in transparency and effective exchange of information for tax purposes. Whilst the subsequent responses and developments from these named “significant financial centres” are not yet available, it does appear to support this thesis, that Singapore is being identified as one of the recipients of the migration of investment funds from Europe. It has positioned itself to be the jurisdiction of choice of global wealth management. However the reason for any influx of foreign funds has yet to be proven by the OECD to be that of a lack of transparency and ineffective exchange of information for tax purposes.

\(^{842}\) Organisation for Economic Co-operation and Development, above n 833.