Demonstrable compliance and unilateral actions – a St Vincent and the Grenadines perspective

By Sharda Bollers, Executive Director,
Financial Services Authority,
St Vincent and the Grenadines

As a small jurisdiction operating an equally small IFC, St. Vincent and the Grenadines (SVG) has an especially acute appreciation of the need for the much bandied but always elusive concept of a 'level playing field' in the observance of internationally accepted global standards. This is unsurprisingly because compliance, with ever evolving international standards, comes with a particularly onerous human, capital and technological output, and so, a legitimate expectation that meeting international standards would carry with it some tangible weight in the global arena, notwithstanding one's smallness.

Sadly, in 2017, such an expectation still seems to be mostly grounded in a theoretical ideal. The fact that in 2016 a 'more' level playing field was not attained continues to disappoint and also now appears somewhat embarrassing to the efforts of multilateral organisations and bodies such as the FATF and OECD. That there still exists in 2016, an archaic fixture of black listing and negative labelling, and more recently, the severing of integral business ties based on unknown or dubious criteria, when regulation, transparency and international cooperation have clearly moved eons ahead from what they were one/two decades ago, seems quite regressive. This is especially so in the face of the commendable progress made for countries to be comprehensively assessed against certain accepted global standards. When a small country makes demonstrable efforts, within the constraints of limited resources, to comply with applicable international initiatives relevant to IFCs, is largely and relatively successful in so doing, but yet still has to tread the extra and utterly exhaustive mile to fight against unilateral arbitrary actions outside of accepted and set criteria, it nurtures an unlevel and even unruly game indeed.

A quick synopsis of the SVG factual context is useful for a better understanding of the often 'lose-lose' dilemma of international compliance faced by small countries like SVG.

The SVG IFC context

SVG is an archipelagic state in the Eastern Caribbean consisting of 32 islands and cays. Its population is only 118,000 and its economy is predominantly agricultural based. As a means of economic diversification, international financial services were introduced in the 1970s. The country however has a long history of co-operation and support of direct foreign investment, illustrated by the success story of the Mustique Company, which owns and manages the Grenadine Island of Mustique. Mustique Island is world famous for its exclusivity, where wealthy families from around the world can reside in serenity. The Mustique Company is an example of the Government's support of sound and reputable development to the country. Like its commitment to the longevity of the Mustique Company, the Government's commitment to building a well-regulated international financial services sector is indubitable.

SVG as an IFC has thus developed and defined itself to date as operating a small, exclusive but responsible and well-regulated international financial services

sector. Its legislative framework and regulatory infrastructure have been extensively revised and strengthened along the years, necessarily achieving a balance between competiveness and compliance with international standards. The governing framework for the country's regulatory authority was updated as recently as 2012, and is modern and effective. Since the early 2000s, SVG has built up a sound Anti-Money Laundering (AML) and Counter Financing of Terrorism (CFT) regime which complements its regulatory efforts. SVG's Financial Intelligence Unit (FIU) is well known as being one of the leading FIUs in the Caribbean region and is described as a centre of excellence, providing training to other FIUs in AML investigations and prosecutions.

Within the context of the many constraints facing IFCs, particularly small IFCs, SVG as an IFC has been meeting and overcoming challenges head on. This is no easy achievement however, it is one which has been attained through the joint efforts of Government, the regulatory authority and the industry. SVG's compliance status with international initiatives is creditable and worthy of separate mention.

US FATCA

SVG is well on its way to becoming FATCA compliant. The country enacted a 'Foreign Accounts Tax Compliance (United States) Implementation and Enforcement Act' in September 2015, to provide the enabling domestic framework for the legal exchange and automatic transmission of financial information of individual customers of financial institutions to the US IRS. SVG has signed the Intergovernmental Agreement (IGA) Model 1B in August 2015, for the commencement of tax information reporting to the US IRS in 2016. This model IGA facilitates the automatic exchange of information to the US IRS through the Competent Authority (SVG's Inland Revenue Department) rather than directly from the financial entities. Under this model IGA 1B, FATCA reporting must take place by 30 September of each year. Financial institutions are required to file financial information on US customers at a date ahead of the deadline, as set by the country's Competent Authority. The FATCA Competent Authority Agreement (CAA) which sets out the procedure and rules necessary to implement the IGA, was signed in May 2016.

Organisation for Economic Cooperation and Development (OECD)

SVG has committed to implementation of the OECD Global Forum's Common Reporting Standard (CRS) on Automatic Exchange of Information (AEOI) by 2018. Enabling legislation for AEOI and the CRS was scheduled to be enacted prior to year-end 2016.

SVG signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA) in October 2015, and became a member of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC) in August 2016. SVG also has 22 bilateral Tax Information Exchange Agreements (TIEAs), with all of its major trading partners except the US. SVG is standing by to enter into a TIEA with the US at its convenience.

SVG was deemed 'Largely Compliant' in 2014 by the OECD Global Forum following its two phased Peer Review, signifying that the country's legislative and administrative systems, in general, met international standards for tax transparency and accountability.

Financial Action Task Force (FATF)

SVG is an active member of the Caribbean Financial Action Task Force (CFATF), the Caribbean arm of the FATF. The last evaluation of SVG's AML/CFT regime was conducted in 2009 and since then, SVG has made considerable progress in addressing certain deficiencies in its legislative regime, enacting a new *Proceeds of Crime Act* and Regulations in 2013 and 2015 respectively, and a new *Anti-Terrorist Financing and Proliferation Act* in 2015.

International cooperation

Even prior to the present global initiatives for exchange of information, SVG had a strong history of international cooperation through its early *'Mutual Assistance in Criminal Matters Act'* of 1993, which did not exclude assistance in relation to tax offences, as did some similar legislation in other countries. The country's secrecy laws were repealed in the early 2000s and replaced by the *'Exchange of Information Act'* of 2002, which widened the gateway of international cooperation between regulatory authorities.

'The Financial Intelligence Unit Act' of 2001 has been vigorously utilised since the afore-mentioned date, to provide assistance in the investigation of 'relevant' offences. A relevant offence under AML/CFT law is not, nor has ever been, restricted to merely an AML or CFT offence, but usefully extends to any summary or indictable offence. In SVG, this constitutes any criminal offence, inclusive of tax offences. In addition, the facility of utilising diplomatic channels through a Letter *Rogatoire* or Rogatory has always existed as an option for requests to SVG for assistance and information in any investigations, be it of a criminal or civil nature. This option has been utilised by many countries, both Commonwealth and non-Commonwealth. SVG's international cooperation through the FIU and its authorities has been commended by the countries receiving assistance including the US and the UK.

Unilateral actions

Thus SVG can reasonably be described as a 'cooperative' country when it comes to international initiatives as well as general assistance to countries. In view of the foregoing, it is extremely difficult to grasp the rationale of unilateral actions taken by countries or bodies (for example, the European Commission's blacklisting in 2015, and individual EU member states' blacklistings including SVG) when a country has already travelled and is still travelling a certain path of international compliance, and when, *inter alia*, no evidence of lack of cooperation has ever been produced against the country. The need for some responsibility and accountability at an international level for unilateral actions of this nature, is paramount, if respect for international standards and processes is to be maintained.

Call for one standard/one body/one voice

SVG readily understands the need for internationally accepted standards for tax transparency and cohesive and coordinated financial regulation in the global wealth market and in the context of the transnational movement of funds. It follows that if there is an agreed and accepted global 'Standard' driven by globally recognised international standard-setters (such as the OECD and the FATF), which establishes that Standard, as well as evaluates and monitors compliance with same, then unless there is something in place to the contrary, that entity should be the authoritative body to adjudge the

adequacy of compliance of the said Standard by any constituent member of its grouping. This is particularly reinforced when that body's assessment procedures are appropriately rigorous, transparent and thorough, to equip it to make a fair and accurate assessment.

Perhaps it is the naivety of not knowing precisely how the machinations behind the scenes work, which has led to the supposition on the part of a small country like SVG, that this should be a fairly straightforward and logical approach. One fully accepts that the relevant authoritative body in question must have sufficient resources and capacity, support and autonomy to do its job. But that again, from the perspective of SVG, is a given logical premise. What is of overriding importance for SVG as a small IFC, which bears underlining, is that there must be one set of standards to be applied globally and indivisibly, one entity with the overall responsibility of evaluating or 'policing' the implementation of those standards. By so doing, that entity derives the authority to issue sanctions by reason of deficiencies or lack of compliance. Anything else becomes simply too dangerous a game to be played with small countries and minute economies such as SVG's, which have immense fallout from negative sanctioning, whether or not the sanction is removed the next day or the next few months.

The FATF, working through its regional arms, is irrefutably the relevant and responsible body for AML/CFT compliance. Its blacklists of the early 2000s are now, whether fortuitously or not, more part of the past, as the organisation has managed to innovate to ensure compliance in a less injurious way. The OECD Global Forum, notwithstanding a long road to maturity as an international body, has proven itself to be a most able and authoritative body on tax matters and transparency. If there must be blacklists, then we agree with our neighbour and colleague in Barbados, Francoise Hendy-Yarde, Attorney at law and International Tax Specialist, that the Global Forum appears to be the 'legitimate author' of any blacklist for this area. The Global Forum certainly has the support of SVG as the responsible administering body in relation to international tax transparency, cooperation and tax matters.

Quibbling over whether the OECD Global Forum is the appropriate body or not for this purpose appears unconstructive given its history and work, and too precarious from where we sit in the Eastern Caribbean. If, for whatever reason(s), a decision is taken to replace the Global Forum with another entity, e.g. a UN modelled international organisation, then this needs to be done in a seamless and efficient manner which retains the authority of the Global Forum or another clearly delineated entity, throughout any transition process, so as to preserve the fact of existence of a responsible and authoritative body.

Sovereign rights and effect on financial stability

It looks like a strange and awkward dichotomy when a country which is a member of an international organisation or a recognised grouping such as the OECD Global Forum, goes outside of what it has accepted to be the standard approach and evaluation process, to publicly sanction or place its fellow member on a blacklist without any due process, notice, known adverse incident or known criteria for so doing, - save than in the exercise of its 'Sovereign Right'. The Sovereign Right argument or entitlement is a very tough, near impossible one to refute, as a country's right to its own sovereignty is well established as sacred. One can however, much better understand a unilateral sovereign action to sanction/ blacklist being taken by a country that is not part of a prescribed membership circle. When a country has committed to a certain collaborative approach and then unilaterally replicates an assessment and finding with substantively very little or no discerning factors, it tends to invariably beg the question on the part of the recipient country of *'what is the point?'* What is the point of *'bending backwards'* to comply at such great cost when the end result is in any event a blacklist - and by a member of the organisation with which you share membership? What is the point of the international body and its work? Is it that the international standards are deficient? Or is it the evaluation process which is deficient? Has the Global Forum or international body missed something?

One fully accepts that a member country can very well have legitimate issues with another country which it needs to address bilaterally. Two issues then become relevant – firstly, if the matter is covered by an international arrangement in place, then this procedure should be explored at the first instance, and secondly, even if addressed bilaterally, this should be in a less public, less detrimental and more effective manner, than at the very outset, placing a country on its internal blacklist for being *'uncooperative'* and publishing this to the world as *'the first step'* in addressing the problem.

SVG's experience has shown that there has not been any instance cited of lack of cooperation, nor any other facts known to the country to warrant the blacklisting in 2015 by the EU Commission, as well as individual member countries, other than by the mere operation of an IFC by the country. In 2016, when there was a regime of information exchange and international cooperation which has successfully provided the kind of assistance required to investigate and prosecute tax offences and tax matters, such unilateral action of blacklisting a country seems completely avoidable. It can hardly be justified merely on the fine print of ambiguous legislative deficiency owing to provisions no more secretive or confidential than that which exists in any larger IFCs (which were not blacklisted).

To its credit, the EU Commission reviewed and updated its blacklist of 2015 in quick time, amidst the ensuing reaction and indeed, responsible action of the Global Forum to support its members' position against this list. It may now be said that this is just another blacklist which is under the bridge, however, just how devoid this action was of necessity, should not be undermined or swept aside. It was a dangerous and irresponsible action to a small country like SVG, one that should not have happened in the first place. Certain EU countries which have retained their internal blacklist must carefully consider whether larger, more powerful countries need to act more responsibly towards small countries whose economies become literally threatened by the stigma of blacklists, not merely in terms of reputational damage but also in relation to the severing of business ties by financial institutions and countries on the basis of the 'jurisdiction's status.'

At the very least by 2015, some indication of a problem with a country, should be given prior to a unilateral action being taken to sanction it for breaches in relation

to tax transparency and cooperation or AML/CFT compliance. To literally wake up one morning to a blacklist (as keeps transpiring) is euphemistically not the best method of fostering sound diplomatic or working relations and ties. By 2015, it could have readily been determined, as every indication would have already been given, that certain countries including SVG, were and are willing to comply with any investigation being carried out by any country, as per its record in relation to international cooperation.

To say that this sort of unpredictability does not augur well for the financial stability of any country, big or small, wherever located, is a huge understatement. To say that it is especially harmful to very small countries, is an unequivocal statement of fact.

De-risking: The 'new' unilateral phenomenon

Concern has now been expressed by several relevant sources including the OECD, the G20, the IMF, World Bank and the Commonwealth, as to the detrimental effect of 'de-risking' - the terminating or restricting of business relationships with clients, to avoid rather than manage AML/CFT risks.

Such concern has also now been justified through all of the comprehensive research into the problem, as such research has conclusively shown that de-risking by international banks has become a major threat to the remittance sector and Correspondent Banking Relations (CBR) in many countries, the Caribbean and Pacific being the worst affected. As a small jurisdiction which is being adversely affected by de-risking, specifically through directives from the head offices of large banks in larger countries to its branches in SVG, SVG is relieved to note this common ground of concern. What would lend some greater measure of comfort would be practical, more immediate steps to address a problem which is now well noted to be affecting the life blood of financial institutions in the Caribbean and elsewhere.

While at first it seemed virtually impracticable to interfere in the internal affairs of a large financial institution, it is becoming increasingly alarming that the seriousness of the problem is so well noted, yet no real progress has been made to address it. It seems inconsistent to recognise that maintaining and strengthening corresponding banking relationships is important for *'financial depth and stability and central bank efficacy'*, and at the same time, not act quickly amidst the extensive research, to avert a potential financial crisis. The latter is a certainty should the situation continue in certain small countries.

The IMF's Christine La Garde has aptly surmised that de-risking is *'a collective action problem that calls for a collective solution'*. This is agreed but a solution needs to be quicker in coming than it presently is, especially since the problem stems essentially from a misapplication of AML law. Solutions are not out of reach as previously thought and they indeed must be addressed collectively with contributions from relevant international and regional bodies, governments, regulators and the industry itself. Feasible solutions should be pursued, like those identified by the Commonwealth, which must be applauded for its convening of Round Table Discussions with its member States to *inter alia* solicit the views of members on this issue as well as lend its support to small IFCs in addressing challenges in the international arena.

Immediate actions to review internal processes and devise a fair and workable assessment system by a small number of large responsible banks in large countries like the USA for example, can clearly impact favourably on an entire financial system in certain countries.

Conclusion

The basic starting and ending point of abiding with internationally accepted international standards is that such adherence must be true to form and substance. The onus remains on the international organisations, with the support of the G20 countries, to drive this home equally to all its members, otherwise the concept of an internationally accepted standard and evaluation process will continue to be undermined.

In 2015, the OECD Global Forum was exemplary in its position taken on the advent of the European Commission's blacklisting, a position that was strong, courageous and also absolutely correct. When a country like SVG, a dot on the world map in relation to *inter alia,* economies of scale, makes tremendous efforts to meet international standards, and there is sufficient demonstration that it is meeting and will meet its commitment as a member of an international body, then there needs commensurately to be a body or entity acting in the interests of that country, while understandably in no way compromising its own objectives. This approach not only produces the most effective result relative to the actual observance of the international standard, but also respects the preservation of order, the concept of the rule of law and the doctrine of an agreement. It is difficult to be proud of a *status quo* that disrespects these fundamentals.

The challenges facing small IFCs are hardly expected to abate. Taller compliance ladders will no doubt continue to be erected after FATCA, CRS and AEOI, with new and innovative rungs such as the BEPS project and public registers of beneficial ownership information possibly moving from the realm of discretionary to the mandatory. The writing is on the wall that only the fittest IFCs will survive – that is, those IFCs which are able to adapt and innovate and yes, comply with internationally accepted standards and initiatives. Demonstrable compliance with international standards take on even greater significance in this context, in order for small states like SVG to properly defend themselves against unfair actions based on factors which are neither transparent nor generally accepted standards. Demonstrable international compliance should however never be rewarded by a blacklist. The main stumbling block on the trek to survival of a small IFC such as SVG, will continue to be unknown with arbitrary actions which retard and stymie the country's progress.

In view of rapidly evolving international challenges, it is a credit to the sustainability of SVG as a small IFC that it continues to be a reliable and responsible player in the world of IFCs, offering world class products and services.

Enhancing its reputational profile through legislative changes
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