



Supplementary Peer Review Report Phase 1 Legal and Regulatory Framework

BOTSWANA



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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 120 jurisdictions, which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, and in Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary as updated in 2004. The standards have also been incorporated into the UN Model Tax Convention.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 and Phase 2 – reviews. The Global Forum has also put in place a process for supplementary reports to follow-up on recommendations, as well as for the ongoing monitoring of jurisdictions following the conclusion of a review. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to www.oecd.org/tax/transparency and www.eoi-tax.org.

Executive Summary

1. This is a supplementary report on the amendments made by Botswana to its legal and regulatory framework for transparency and exchange of information. It complements the Phase 1 review report which was adopted and published by the Global Forum on Transparency and Exchange of Information for Tax Purposes in September 2010 (“the 2010 Report”).

2. The 2010 Report determined that six of the ten essential elements were either in place, or in place but certain aspects of the legal implementation of the element needed improvement. Four of the essential elements were determined to be not in place. These were access to information (element B.1); effective exchange of information mechanisms (element C.1); network of information exchange mechanisms (element C.2); and confidentiality of exchange of information (element C.3). To address the recommendations identified in the 2010 Report, Botswana has amended its legal and regulatory framework and has signed a number of Tax Information Exchange Agreements (“TIEAs”) and protocols to amend existing Double Tax Conventions (“DTCs”). In view of these amendments, Botswana asked for a supplementary peer review report pursuant to paragraph 58 of the Methodology for Peer Reviews and Non-member Reviews (2011 version).¹

3. Ownership information in Botswana is generally available for relevant entities and arrangements. The 2010 Report determined that the element was in place, but certain aspects of the legal implementation required improvement. Recommendations were made regarding the availability of information on nominee shareholdings, the settlor and beneficiaries of trusts and the members of societies.

4. Since then, the company tax return forms have been modified in 2011 to require disclosure of nominee shareholding arrangements. However, it is unclear how a company would know of nominee arrangements and whether a company could compel disclosure by a nominee or beneficial shareholder. On this basis, the 2010 recommendation has been maintained.

1. The provision for a request for a supplementary report is now contained in paragraph 60 of the revised Methodology, adopted in November 2013.

5. Changes have also been made to the trust tax return form to ensure disclosure of the trust deed and annual distributions to beneficiaries, if any. However, there is uncertainty as to whether changes in the identity of beneficiaries would be required to be disclosed and as such the 2010 recommendation is maintained.

6. Information on the members of societies should be available pursuant to information access powers of the Registrar of Societies and the accompanying sanctions for failure to comply with the Registrar's requests. However, no changes have been made to the legal framework since the 2010 Report, and the 2010 recommendation with regard to societies has accordingly been maintained. This element is determined to be in place, but certain aspects of the legal implementation need improvement.

7. Accounting records are generally available in Botswana. Recommendations were made in the 2010 Report to ensure that accounting records and underlying documentation was maintained for societies and entities such as trusts that do not carry on a business. No legal or regulatory changes have been made in this area. This element is determined to be in place, but certain aspects of the legal implementation need improvement.

8. Access to information has been significantly strengthened, following amendments to the Banking Act. The amendments modified bank secrecy laws, allowing Botswana's tax authority to access information held by banks for the purposes of exchanging information with its treaty partners. The recommendation made in the 2010 Report has been removed and the element is now in place.

9. Botswana's exchange of information mechanisms have also been improved, following amendments to the Income Tax Act that enable the entry into, and exchange of information pursuant to, TIEAs. The Income Tax Act has also been amended to impose confidentiality obligations with respect to information exchanged pursuant to a DTC or TIEA. Botswana has been pursuing new DTCs, protocols amending its existing DTCs and TIEAs in conformity with the international model agreements. These are scheduled to be considered by parliament for ratification in early 2014. The recommendations made in the 2010 Report have been removed and the element is now in place. However, Botswana is encouraged to ensure that its new agreements enter into force in a timely manner, and that it continues to broaden its network of exchange of information mechanisms.

10. Botswana has demonstrated significant commitment to implementing the international standards for transparency and exchange of information and has joined the Global Forum as a member jurisdiction. Botswana is encouraged to continue to review and update its legal and regulatory framework to address the remaining recommendations in respect of ownership and

accounting information and to continue to work toward ratification of international tax agreements.

11. In light of the actions undertaken by Botswana to address the recommendations made in the 2010 Report, Botswana is in a position to move to Phase 2. Any further developments in the legal and regulatory framework, as well as the application of the framework to EOI practice in Botswana, will be considered in detail in the Phase 2 Peer Review. It is proposed that the Phase 2 review be scheduled for first half of 2015.

Introduction

Information and methodology used for the peer review of Botswana

12. The assessment of Botswana’s legal and regulatory framework contained in this supplementary peer review report was based on the international standards for transparency and exchange of information as described in the Global Forum’s Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information For Tax Purposes (“the Terms of Reference” or “ToR”). It was prepared pursuant to paragraph 58 of the Global Forum’s Methodology² for Peer Reviews and Non-member Reviews and considers recent changes to the legal and regulatory framework of Botswana. The assessment was based on information available to the assessment team including the laws, regulations, and exchange of information arrangements in force or signed as at 7 February 2014, and information supplied by Botswana. It follows the Phase 1 Review Report on Botswana which was adopted and published by the Global Forum in September 2010.

13. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Botswana’s legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element, a determination is made that either *(i)* the element is in place, *(ii)* the element is in place but certain aspects of the legal implementation of the element need improvement, or *(iii)* the element is not in place.

14. The assessment was conducted by a team which consisted of two assessors and a representative of the Global Forum Secretariat: Ms. Yanga Mputa, South African Revenue Services, South Africa; Ms. Ann Andréasson, Swedish Tax Agency, Sweden; and Ms. Melissa Dejong from the Global

2. The provision for a request for a supplementary report is now contained in paragraph 60 of the revised Methodology, adopted in November 2013.

Forum Secretariat. The assessment team examined the legal and regulatory framework for transparency and exchange of information and relevant exchange of information mechanisms in Botswana.

15. An updated summary of determinations and factors underlying recommendations in respect of the 10 essential elements of the Terms of Reference, which takes into account the conclusions of this Supplementary Report, can be found at the end of this report.

Compliance with the Standards

A. Availability of Information

Overview

16. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If the information is not kept or it is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report assesses the adequacy of Botswana's legal and regulatory framework on availability of information.

17. In the 2010 Report, element A.1 (ownership and identity information) was determined to be "in place, but certain aspects of the legal implementation need improvement." These related to the identity of beneficial owners of shares where a nominee shareholding arrangement existed; the identity of settlors, trustees and beneficiaries of trusts; and the identity of members of societies.

- In respect of nominee shareholding arrangements, no changes have been made to the relevant legislation as at the date of this Supplementary Report, but as an interim measure the corporate tax return has been amended to require disclosure of nominee shareholding arrangements. However, it is unclear how a company would know of nominee arrangements and whether a company could compel disclosure by a nominee or beneficial shareholder. On this basis, the recommendation has been maintained.

- The trust tax return form has been amended to require disclosure of distributions made to beneficiaries and that the trust deed be provided on registration of the trust. However, there does not appear to be a requirement to provide information in the case of a change of beneficiaries and the 2010 recommendation has been maintained.
- The recommendation relating to membership of societies has not been removed as no changes to the legal framework have been made since the 2010 Report. Element A.1 is determined to remain as “in place but certain aspects of the legal implementation need improvement.”

18. Element A.2 (accounting records) was also determined to be in place, but certain aspects of the legal implementation needed improvement. In particular, it was recommended that obligations to maintain accounting records and underlying documentation extend to relevant entities that are not carrying on a business. No legislative or regulatory changes have been made in this regard and the 2010 recommendation and determination remains applicable. Element A.2 is determined to be in place but certain aspects of the legal implementation require improvement.

19. The 2010 Report found that element A.3 (bank information) was “in place” and no recommendations were made.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

Companies (ToR A.1.1)

20. The 2010 Report noted that there was no legal requirement for records to be kept identifying the beneficial owner of shares where such shares were held by a nominee.³ Botswana has advised that it is currently amending the Companies Act make it a requirement for the identity of beneficial owners of shares to be revealed in the case where shares are held by a nominee, as defined in the Companies Act. However no legislative changes had been made as at the date of this report.

21. As an interim measure, the income tax return form for companies (Form SAT ITA-22) was amended in 2011. The return now requires a company to declare the name, address and number and class of shares of each beneficial shareholder where such shares are held by a nominee. Companies

3. Section 83 Companies Act, which imposes a duty to maintain share register, refers to “shareholder.” “Shareholder” is defined in section 90 as the person on register.

are required to file the tax return in respect of their gross income (Botswana source income and deemed-Botswana source income) each year, per section 65 of the Income Tax Act.⁴ Failure to file the return attracts criminal penalties under section 122 of the Income Tax Act. Specifically, a penalty of a BWP 1 000⁵ fine and one year imprisonment applies for failure to furnish a return as required by the Income Tax Act, failure to disclose material facts required to be disclosed in a tax return, or for signing any return without reasonable grounds for believing that return to be correct.

22. The company therefore has the onus of obtaining ownership and identity information as to any of its shareholders which are acting as nominees. Given the potential for a criminal conviction for failure to do so, the disclosure requirement on the income tax return is significant in evaluating the availability of information regarding nominee shareholders. As such, information on nominee shareholders is considered to be available. However, it is unclear how a company would know of nominee arrangements and whether a company could compel disclosure by a nominee or beneficial shareholder. Although there are other instances in the Companies Act which contemplate that a company must be aware of nominee shareholding arrangements, such as disqualification of interested directors⁶, in the absence of any statutory provisions requiring a nominee to identify itself as a nominee and disclose the beneficial shareholder to the company, the recommendation of the 2010 Report has been retained.

Bearer Shares (ToR A.1.2)

23. No recommendation was made with regard to bearer shares and no relevant legislative changes have been made since the 2010 Report.

Partnerships (ToR A.1.3)

24. No recommendation was made with regard to partnerships and no relevant legislative changes have been made since the 2010 Report.

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4. Section 65(6)(b) exempts resident individuals – not companies – from the filing obligation where they have no liability to pay tax. There are two exemptions from filing obligations that are potentially applicable to companies: section 65(6)(d) applies to non-resident companies receiving only Botswana source interest, dividends and royalties that have been taxed by withholding. Section 65(6)(a) exempts any person from filing if the Commissioner has written to notify them that they are not required to file that year. Section 3 of Seventh Schedule states that a resident receiving dividends, interest, royalties etc from which tax is withheld must still file a tax return.
 5. BWP 1 000 equals approximately EUR 85.
 6. Section 133(b) Companies Act

Trusts (ToR A.1.4)

25. The 2010 Report analysed the law governing trusts, finding that trusts were not governed by explicit legislation but by common law in combination with the tax obligations imposed by the Income Tax Act. However, no detailed information as to the common law obligations on trustees to maintain identity information concerning beneficiaries and settlors was available. The 2010 Report also noted that professional trustees and company service providers are not subject to Anti-Money Laundering laws. As such, the 2010 Report concluded that no specific requirements existed to require the maintenance of information as to the identity of settlors and beneficiaries of trusts. Accordingly, it was recommended that an obligation should be established for trustees resident in Botswana to maintain such information.

26. In order to address this recommendation, Botswana amended the income tax return form for trustees (Form SAT ITA-21) to require disclosure of additional details. The tax return form requires the following information to be appended to the return:

- On registration of the trust with the tax authorities, the certified copy of the trust deed;
- For years in which any payment, benefit or property is provided to a beneficiary, an explanation of the details.

27. It is expected that the filing of the trust deed would provide the identity of the settlors and beneficiaries or the class of potential beneficiaries. The identity of the settlor should not change; however, there is no explicit requirement to enclose the updated trust deed in the event that the trust deed was amended to alter the beneficiaries. Therefore, if the beneficiaries were changed, and no distributions were made to new beneficiaries, there is no mechanism by which the tax authority would become aware of the changed identity of all beneficiaries. The penalties under section 122 of the Income Tax Act for failure to provide true returns as required and documents described above are applicable to trustees, but there is doubt as to whether this would apply in the absence of an explicit obligation to provide information when a trust deed was amended. In any case, the tax obligations themselves will not be sufficient to ensure all information is obtained as concerns non-citizen trustees resident in Botswana, which are not obligated to include foreign investment income in their Botswana gross income. Thus, given the absence of applicable case law relating to the scope of a trustee's duties to maintain information on the trust, and the absence of Anti-Money Laundering obligations applying to professional trustees to maintain information, it is concluded that the 2010 recommendation should be maintained. Officials from Botswana have advised that the income tax return form for trusts is in the process of being amended to make it mandatory for details of changes to the trust arrangement to be provided.

28. In the request for Supplementary Review submitted by Botswana, it was noted that in order to maintain information on trustees and beneficiaries of trusts, the tax return form for corporate shareholders had been amended to require a list of all trustees be attached. However, the amendment to the income tax return form for companies (Form SAT ITA-22) which requires disclosure of beneficial ownership of shares held by a nominee does not supply the identity of trust beneficiaries. Where the trustee of a trust is a company, it will be obligated to complete the company tax return in respect of its own income, and disclose shareholding in the company. However, this would not require disclosure of the beneficiaries of the trust in respect of which the company is acting as trustee.

Foundations (ToR A.1.5)

29. No recommendation was made with regard to foundations and no relevant legislative changes have been made since the 2010 Report.

Enforcement provisions to ensure availability of information (ToR A.1.6)

30. No recommendation was made with regard to enforcement provisions and no relevant legislative changes have been made since the 2010 Report.

Societies

31. The 2010 Report noted that although disclosure of the identity of society members could be compelled by the Registrar of Societies, there was no positive obligation on societies to maintain membership records. Societies are regulated by the Societies Act, and include clubs and associations of 10 people or more such as religious organisations, sporting clubs and burial societies. Societies do not include entities regulated by other legislation, such as the Companies Act, Co-operatives Act, Trade Unions and Employers' Organisations Act and Building Societies Act. Societies cannot be formed for the sole purpose of carrying on a business.⁷ The Societies Act is in the process of being amended, including for the purpose of increasing penalties for non-compliance to reflect current market values.

7. See definition of “society” in Societies Act which provides that a society does not include (among other things) a company as governed by the Companies Act, or any association of 20 persons or less formed for the sole purpose of carrying on any lawful business. Section 515 of the Companies Act prohibits an association of more than 20 persons formed for the purpose of carrying on a business from being formed unless it is registered under the Companies Act.

32. The administrative process for registering a society requires that a list of members be provided to the Registrar. Further, as noted in the 2010 Report, section 16 of the Societies Act gives the Registrar of Societies the power to require a true and complete list of members of a society at any time. Failure to provide such information may result in cancellation of registration, and is a criminal offence punishable by fine imposed on the office bearer.⁸ It can reasonably be inferred that each society would have, or be able to produce, information identifying its members, notwithstanding that this may not be found in a formal register of members. However, no changes have been made since the 2010 Report, and as such, the recommendation from 2010 has not been removed.

Determination and factors underlying recommendations

Determination	
The element is in place but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
There are no provisions made for nominee shareholders.	An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.
Societies are not required to maintain information on their members.	Societies should be required to maintain a register of members.
While trusts with resident trustees (as broadly defined under the Income Tax Act) are required to register and file returns for tax purposes, there is no specific requirement that information concerning the settlor, trustees and beneficiaries of trusts be maintained.	An obligation should be established for trustees resident in Botswana to maintain information on the settlor, trustees and beneficiaries of their trusts.

8. Section 11(1)(d), 18(2) Societies Act ; office bearer not guilty if “he establishes to the satisfaction of the court that he has exercised due diligence and has failed to comply with the order for reasons beyond his control”

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

General requirements (ToR A.2.1)

33. Obligations to maintain accounting records in Botswana are imposed by the Companies Act (in respect of companies) and by the Income Tax Act (“in respect of every person carrying on any business”). Although “business” is a defined term in the Income Tax Act,⁹ the 2010 Report identified uncertainty as to whether a trust or partnership passively holding assets would be subject to the requirement to maintain accounting records. Officials from Botswana have confirmed that passively holding assets does not of itself oblige one to file returns and pay tax, and as such the obligation to maintain accounting records imposed by the Income Tax Act would not apply in that case.

34. As at the date of this Report, no specific actions had been taken to address the recommendations concerning trusts and partnerships. Accordingly, the 2010 recommendations remain applicable.

35. The 2010 Report made a similar recommendation in respect of societies registered under the Societies Act, having regard to the fact that no positive obligation was imposed on a society to maintain accounting records. Although the 2010 Report noted that the Registrar had the power to require production of accounts, and thus it may be inferred that accounts exist, it remains unclear whether such accounts would be of sufficient detail to meet the Terms of Reference.

Underlying documentation (ToR A.2.2)

36. The 2010 Report noted that although the Companies Act imposes requirements to maintain underlying documents in respect of companies, there is no statutory regulation of partnerships and trusts in this respect. The only source of an obligation on trusts and partnerships to maintain underlying accounting documentation arises from the income tax obligations. Section 26 of the income Tax Act requires that a proper record of business transactions be maintained in respect of persons “carrying on a business.” The 2010

9. Section 2: “business” means any business, trade, adventure or concern in the nature of trade, profession or vocation and includes the letting of any property; and in a case where a person is carrying on more than one business, all amounts accrued to that person from all businesses except from farming, mining or any disposal of property under section 35 (1), shall be deemed to have accrued from one business.

Report noted that a gap exists where certain entities or arrangements, such as trusts, are not “carrying on a business” as such but may nonetheless be relevant for exchange of information purposes. The 2010 Report recommended that a requirement to keep underlying documentation be introduced for all relevant entities and arrangements.

37. As was the case in 2010, partnerships and trusts must attach copies of the trading, profit, loss and appropriation accounts, together with a balance sheet, to the income tax return. Where this income includes income from carrying on a business, section 71 of the Income Tax Act requires that the accounts be certified as correct and fair, and a statement must be made regarding the nature of the documents from which the accounts were prepared. However, there are no clarifications as to the accounting obligations of entities that are not considered to be “carrying on a business.” Although common law fiduciary duties may require partners and trustees to maintain financial records, this is not sufficient to meet the obligation to maintain underlying documentation as required by the Terms of Reference. Accordingly, the 2010 recommendation continues to be relevant.

Document retention (ToR A.2.3)

38. The Income Tax Act requires that accounting documents be retained for eight years. The Companies Act requires accounting documents to be retained for seven years. No recommendation was made with regard to retention of records and no relevant legislative changes have been made since the 2010 Report.

Determination and factors underlying recommendations

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
There is no obligation for any entity to maintain underlying documentation unless they are carrying on a business.	The requirements to maintain accounting records should include an obligation to maintain underlying documentation.
The requirements to maintain accounting records for trusts and partnerships only apply where the trust or partnership is carrying on a business in Botswana.	Trusts and partnerships required to register for tax purposes should be required to maintain accounting records to the international standards.

Determination	
The element is in place, but certain aspects of the legal implementation of the element need improvement.	
Factors underlying recommendations	Recommendations
Societies are not required to maintain accounting records.	Societies should be required to maintain accounting records to international standards.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

39. No recommendation was made with regard to availability of banking information and no relevant legislative changes have been made since the 2010 Report. The determination for A.3 was, and remains, “the element is in place.”

Determination and factors underlying recommendations

Determination
The element is in place.

B. Access to Information

Overview

40. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities.

41. The 2010 Report identified legal limitations on access to bank information, as an authorised office of the Commissioner General was required to obtain a court order in order to obtain information from a bank and such an order could only be obtained in connection with a civil or criminal proceeding in Botswana. The 2010 Report determination was that element B.1 was not in place. Further, notice of an application to court for this purpose was to be served on the account-holder and there were no exceptions to this rule.

42. The duty to keep banking information confidential no longer applies where the information is required by the Botswana Unified Revenue Service “for the purpose of responding to a valid request for information under an agreement referred to under section 53 of the Income Tax Act.” The amendment to the Banking Act commenced on 20 September 2013.

B.1. Competent Authority’s ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

Ownership and identity information (ToR B.1.1)

43. No recommendation was made with regard to ownership and identity information and no relevant legislative changes have been made since the 2010 Report.

Accounting records (ToR B.1.2)

44. No recommendation was made with regard to accounting records and no relevant legislative changes have been made since the 2010 Report.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

45. No recommendation was made with regard to domestic tax interest and no relevant legislative changes have been made since the 2010 Report.

Compulsory powers (ToR B.1.4)

46. No recommendation was made with regard to compulsory powers and no relevant legislative changes have been made since the 2010 Report.

Secrecy provisions (ToR B.1.5)

47. Section 43(1) of the Banking Act prohibits a director, principal officer, officer, employee or agent of a bank, or any other person who by virtue of his professional relationship with a bank has access to the records of the bank, from disclosing customer information without that customer’s permission. Section 43(2) provides exceptions to this duty of confidentiality.

48. As at the time of the 2010 Report, where the Commissioner General or his representative required information held by a bank, section 43(5) provided that this could only be obtained pursuant to a court order. However, a court could only grant such order if satisfied that the information was “material to any civil or criminal proceedings, whether pending or contemplated in Botswana.” Section 43(6) provided that notice of an application made to the Court for this purpose was to be provided to the account-holder and the bank concerned.

49. Amendments to section 43 of the Banking Act commenced operation from 20 September 2013. The first of these amendments, section 43(2)(h), adds a new exception to the duty of confidentiality. The duty to keep banking information confidential no longer applies where the information is required by the Botswana Unified Revenue Service “for the purpose of responding to a valid request for information under an agreement referred to under section 53 of the Income Tax Act.” Section 53 of the Income Tax Act provides for the entry into DTCs and TIEAs.

50. Section 43(5) of the Banking Act was also amended. The amendment removes the obligation on the Commissioner General or his representative to obtain a court order to obtain access to banking information. Accordingly, the Botswana Unified Revenue Service may access banking information using its information access power in section 69 of the Income Tax Act, and sections 43(1) and 43(5) of the Banking Act no longer impose any restriction on that power. Section 69(3) of the Income tax Act provides the Commissioner General of the Botswana Unified Revenue Service with the power to request any information he considers necessary to fulfil his duties under the Income Tax Act. This is enforced by section 122, which includes a penalty of 1 year imprisonment and a fine of BWP 1 000¹⁰ for failure to provide information as requested.

51. Consequently, banking information is now able to be accessed and exchanged for the purposes of the exchange of information functions performed by the Botswana Unified Revenue Service. Accordingly, the recommendation has been removed and the determination has been upgraded to “in place.”

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	Recommendations
Bank information can only be obtained with a court order in connection with a proceeding in Botswana.	Bank secrecy should be eliminated in connection with a request for information under an international agreement that provides for the exchange of information in tax matters.

¹⁰ 1,000 Botswanan Pula equals approximately EUR 85.

B.2. Notification requirements and rights and safeguards

The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

Not unduly prevent or delay exchange of information (ToR B.2.1)

52. As noted above, section 43(6) of the Banking Act formerly required that notice be provided to a person that was the subject of a section 43(5) application to court for disclosure of banking information. No exceptions to this notification requirement existed and thus potentially hampered effective exchange of information.

53. As discussed above, the amendment of section 43(5) removes the reference to the Commissioner General from the category of persons required to apply to a court for a disclosure order. Consequently, the notification requirement in section 43(6) is of no relevance, referring as it does to an application to a court made under section 43(5). There is thus no longer any notification requirement to a person whose banking information is to be accessed by the Botswana Unified Revenue Service for EOI purposes. No recommendation had been made in the 2010 Report and given the current position, no changes are required to the determination.

Determination and factors underlying recommendations

Determination
The element is in place.

C. Exchanging Information

Overview

54. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Botswana, the legal authority to exchange information derives from bilateral mechanisms as well as from domestic law. This section of the report examines whether Botswana has a network of information exchange that would allow it to achieve effective exchange of information in practice.

55. Element C.1 was determined to be not in place in the 2010 Report for two reasons: first, as a consequence of the bank secrecy provision discussed above, and second, by reason of a provision in the Income Tax Act authorising exchange of information with a foreign government only pursuant to a DTC. Amendments have been made addressing both of these issues. Botswana has 11 exchange of information mechanisms in force, the same as at the date of the 2010 Report. One DTC signed in 2009 has been ratified and a number of new agreements have been signed (two DTCs and eight TIEAs), and are scheduled for ratification in April 2014. C.1 is now determined to be in place.

56. As at publication of the 2010 Report, Botswana had 11 DTCs in force, only one of which met the international standard. Accordingly, element C.2 was determined to be not in place. Element C.2 has now been upgraded to in place on account of the amendments made regarding access to bank information and by the negotiation of additional DTCs, Protocols and TIEAs in line with the international standard.

57. Element C.3 was determined to be not in place in the 2010 Report, as information contained in EOI requests or transmissions could be disclosed other than for the purpose of administration of Botswana's tax laws. The relevant legislation has been amended to address this issue and Element C.3 is now determined to be in place.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

Foreseeably relevant standard (ToR C.1.1)

58. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow “fishing expeditions”, i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of “foreseeable relevance” which is included in Article 26(1) of the OECD Model Tax Convention.

59. As noted in the 2010 Report, 10 of 11 of Botswana’s DTCs in force provide for the exchange of information that is “necessary” for carrying out the domestic laws of the Contracting States concerning taxes covered by the agreements. The DTC with the United Kingdom uses the term “foreseeably relevant” in place of “necessary”. All of the agreements were determined to meet the “foreseeably relevant” standard, as the term “necessary” is recognised in the commentary to Article 26 (Exchange of Information) of the OECD Model Tax Convention to allow for the same scope of exchange as does the term “foreseeably relevant.”

60. All of Botswana’s agreements for the exchange of information negotiated since 2010 provide for exchange of information using the “foreseeably relevant” standard. Therefore, all signed agreements provide for exchange of information that is foreseeably relevant.

In respect of all persons (ToR C.1.2)

61. All of Botswana’s agreements for the exchange of information, including those negotiated since 2010, allow for exchange of information in respect of all persons.

Obligation to exchange all types of information (ToR C.1.3)

62. As at the date of the 2010 Report, only one of Botswana’s international tax agreements included the equivalent of Article 26(5) of the Model Tax Convention, which expressly prohibits a jurisdiction from declining to supply information solely because the information is held by a financial institution, nominee, fiduciary or agent. By virtue of the Banking Act’s confidentiality laws in place at the time of the 2010 Report, Botswana’s remaining 10 DTCs could not meet the international standard for effective exchange of all types of information.

63. Following the amendments made to bank secrecy in the Banking Act (described above in Part B.1), and in combination with the broad authority of the Commissioner General of Botswana Unified Revenue Service to exchange information pursuant to an EOI request (see “In Effect” below), there is no impediment to Botswana’s obligation to exchange banking information. As neither Botswana nor at least nine of its DTC partners have domestic law limitations on access to bank information, the presence or absence of a provision in line with Article 26(5) of the OECD Model Tax Convention does not cause those agreements to fall below the international standard for EOI. The jurisdictions with which the other two agreements are in force have not been reviewed by the Global Forum in this respect (Namibia, Zimbabwe). Furthermore, all DTCs, Protocols and TIEAs negotiated since 2010 contain the equivalent of Article 26(5) of the OECD Model Tax Convention.

Absence of domestic tax interest (ToR C.1.4)

64. As at the date of the 2010 Report, only one of Botswana’s international tax agreements included the equivalent of Article 26(4) of the Model Tax Convention, which expressly prohibits a jurisdiction from declining to supply information solely because the information is not required for domestic tax purposes. However, there are no domestic tax interest requirements in the domestic law governing exchange of information and Botswana’s agreements for the exchange of information do not impose a domestic tax interest requirement. As neither Botswana nor at least nine of its DTC partners require a domestic tax interest in order to exchange information, the presence or absence of a provision in line with Article 26(4) of the OECD Model Tax Convention does not cause those agreements to fall below the international standard for EOI. The jurisdictions with which the other two agreements are in force have not been reviewed by the Global Forum in this respect (Namibia, Zimbabwe). Since 2010 all signed DTCs, Protocols and TIEAs contain the equivalent of Article 26(4) of the OECD Model Tax Convention.

Absence of dual criminality principles (ToR C.1.5)

65. There are no dual criminality provisions in Botswana’s exchange of information agreements. All of Botswana’s agreements for the exchange of information negotiated since 2010 likewise do not contain dual criminality provisions.

***Exchange of information in both civil and criminal tax matters
(ToR C.1.6)***

66. As at the 2010 Report, all of Botswana's agreements for the exchange of information provided for exchange of information in all tax matters. All of Botswana's agreements for the exchange of information negotiated since 2010 likewise provide for exchange of information in all tax matters.

Provide information in specific form requested (ToR C.1.7)

67. No recommendation was made with regard to specific forms and no relevant changes have been made since the 2010 Report.

In force (ToR C.1.8)

68. As at the date of the 2010 Report, Botswana had 11 of 13 signed DTCs in force. The agreements with Lesotho and Swaziland had been signed but were not in force. At that time Botswana was pursuing a Protocol to these agreements before they entered force to include the most current version of Article 26 of the OECD Model Tax Convention. Since 2010, the Agreement with Swaziland has been amended but has not yet been signed. Botswana advised that it was ready to sign this agreement in August 2013, but Swaziland was not in a position to do so. No protocol has yet been signed with Lesotho and the original agreement remains signed but not in force. Protocols have been concluded and signed with South Africa, Sweden and Seychelles and Botswana has advised that arrangements are on course for them to be ratified by the February – April 2014 sitting of Parliament. In 2011, Botswana ratified the DTC with Mozambique, but it is not yet in force. There are thus 11 agreements in force, as was the case in 2010.

69. In addition, Botswana has pursued DTCs with new treaty partners, one signed in 2012, one signed in 2013 and two of which are being arranged for signing in early 2014. In 2013 Botswana also signed TIEAs with eight new partners, each following the OECD Model TIEA. Botswana has advised that arrangements are being made for the TIEAs to be ratified by Parliament at its February – April 2014 sitting.

70. Although none of these new agreements were in force as at the date of this report, Botswana's officials advised that they are scheduled to be considered for ratification by Parliament in early 2014. Botswana is encouraged to ensure that its new agreements enter into force in a timely manner.

In effect (ToR C.1.9)

71. International agreements do not have the force of law in Botswana until ratified by parliament and enacted into domestic law.¹¹ Accordingly, no exchange of information is yet permitted under the new signed agreements. Exchange of information under the 11 previously ratified DTCs is permitted under domestic law, and now extends to the exchange of banking information on account of the amendments to the Banking Act described above. These agreements are with Barbados, France, India, Mauritius, Namibia, Russian Federation, Seychelles, South Africa, Sweden, United Kingdom, and Zimbabwe.

72. The 2010 Report noted that the Income Tax Act authorised the exchange of information pursuant to agreements for the avoidance of double taxation, but did not expressly authorise exchange of information pursuant to a TIEA. Section 5(3)(f) of the Income Tax Act has been amended to authorise the exchange of information with a foreign government pursuant to an agreement for the avoidance of double taxation or an agreement for the exchange of information in tax matters. This amendment to the Income Tax Act commenced operation on 1 July 2012.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	Recommendations
Botswana has bank secrecy provisions that prevent the effective exchange of information and it is unclear whether a specific provision in a treaty requiring the exchange of bank information would take precedence.	Botswana should amend its law such that the provisions for the exchange of information in its existing treaties can be given effect, particularly as regards the exchange of bank information.
Botswana's tax law only allows exchange of information with a foreign government for the purposes of an agreement for the avoidance of double taxation.	Botswana should amend its law to allow for exchange of information pursuant to any form of information exchange arrangement.

11. Attorney-General v Dow [1992] BLR 119; Kenneth Good v The Attorney-General [2005] 1 BLR 462.

C.2. Exchange-of-information mechanisms with all relevant partners

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

73. As noted in the 2010 Report, the establishment of the Botswana International Financial Services Centre (now the Botswana Investment and Trade Centre) as an international hub for investment into Africa increases the relevance of a network of effective exchange of information mechanisms for all jurisdictions from or to which investments are directed.

74. The 2010 Report determined that only one of the 13 signed DTCs provided for effective exchange of information. This was the agreement with the United Kingdom, Botswana's most significant trading partner, which included the obligation to exchange banking information as contained in the most current version of Article 26 of the OECD Model Tax Convention. The 2010 Report further determined that of the 11 agreements in force, none of these could meet the international standard. This was on account of Botswana's domestic laws, namely the bank secrecy provisions and lack of adequate confidentiality provisions. Given the changes to domestic bank secrecy (see above) and confidentiality provisions (see below), at least nine of these agreements now meet the international standard.¹²

75. The 2010 Report recommended that Botswana pursue negotiations to enter into new DTCs that include the current version of Article 26 of the OECD Model Tax Convention. Botswana has since negotiated four new DTCs containing the current Article 26, one signed in 2012 (China), one signed in 2013 (Zambia) and two which are being arranged for signing in early 2014 (Belgium, Luxembourg). In 2011, Botswana also ratified the 2009 DTC with Mozambique.

76. In addition, Botswana has been pursuing negotiations with several of its treaty partners to amend existing DTCs to include the most current version of Article 26 of the OECD Model Tax Convention. Of these, three have been signed in 2013 (including the Protocol with South Africa, an important trading partner, Seychelles, and Sweden) and eight are being pursued.¹³

77. The 2010 Report further recommended that Botswana be prepared to exchange information pursuant to agreements other than DTCs. As noted above (at ToR C.1.9), amendments were made to the Income Tax Act and Botswana has now signed Tax Information Exchange Agreements with

12. The other two jurisdictions with which agreements are in force have not been reviewed by the Global Forum in this respect (Namibia, Zimbabwe).

13. Botswana had informed one treaty partner that it was ready to sign the protocol on 28 March 2012, but the treaty partner advised that it would wait until the deficiencies identified in the Phase 1 report of the Global Forum have been addressed.

eight new partners (Denmark, Faroe Islands, Finland, Greenland, Guernsey, Iceland, Isle of Man, Norway). Each of these follows the OECD Model Tax Information Exchange Agreement.

78. No jurisdiction has reported that Botswana has refused to negotiate a treaty when approached.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	Recommendations
Botswana has only one agreement that appears to provide for effective exchange of information.	Botswana should pursue its schedule of negotiations and ensure that new treaties include the current wording of Article 26 of the OECD Model Tax Convention, and enter into agreements with all relevant information exchange partners. Botswana should also be prepared to enter into other arrangements that provide for effective exchange of information.
	Botswana should continue to develop its EOI network to the standard with all relevant partners.

C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use, and safeguards (ToR C.3.1)

79. The 2010 Report determined that information exchanged with foreign governments was not kept sufficiently confidential. As at the 2010 Report, section 5(3) of the Income Tax Act provided that officials administering the Income Tax Act were not restricted from disclosing information obtained in the course of their duties to the Attorney-General; the Governor of the Bank of Botswana or his lawful representative; the Minister of Finance and Development Planning or others where necessary for administration of the Income Tax Act; to specified officials for the purposes of criminal investigations; to any government employee or consultant with the approval of the Minister of Finance and Development Planning; and to an officer of a

foreign government pursuant to a DTC and for the purposes of that agreement. As stated above at paragraph 69, section 5(3)(f) of the Income Tax Act was amended to add that information may also be disclosed to an officer of a foreign government pursuant to a TIEA, for the purposes of that agreement.

80. Section 5(4) of the Income Tax Act provides that information obtained by the Commissioner General of the Botswana Unified Revenue Service in performing his duties (which includes exchange of information pursuant to international agreements) could be disclosed to any public officer or used by the Commissioner General for the administration of any fiscal law administered by him or the other public officer.

81. Section 5 of the Income Tax Act has been amended. The amendment is drafted as an override of section 5(4). The override inserted in new section 5(4A) prohibits disclosure by the Commissioner General to a public officer in respect of information obtained from another government pursuant to an agreement for the avoidance of double taxation or agreement for exchange of information. Instead, such information may only be disclosed to persons or authorities concerned with the assessment, collection, enforcement, prosecution or determination of appeals in connection with taxes covered by the international agreement, and the information may only be used by the recipient for that purpose.

82. The drafting of this amendment makes the continuing operation of section 5(3) unclear. The amendment limits the use of information by the Commissioner General as otherwise allowed in section 5(4) but does not clearly apply “notwithstanding” section 5(3), which allows disclosure by all persons employed in carrying out the Income Tax Act of information to the Attorney-General, Governor of the Bank of Botswana and so on. However, construing section 5 in a way that preserves the operation of section 5(3) would render section 5(4A) ineffective.

83. There are two means by which this ambiguity is resolved. First, Botswana’s DTCs provide in their terms that information obtained pursuant to the agreement shall only be disclosed to persons or authorities concerned with the assessment, collection, enforcement, prosecution or determination of appeals in connection with taxes covered by the international agreement and only used for that purpose. In respect of the DTCs that have the force of domestic law, there is a legal obligation on the part of Botswana to comply with this restriction.

84. Secondly, Botswana’s Interpretation Act provides guidance on resolving ambiguity in statutes. Section 27 of the Interpretation Act provides that an interpretation which would render an enactment ineffective shall be disregarded in favour of an interpretation which will enable it to have effect. Furthermore, section 29(2) of the Interpretation Act provides that where there is inconsistency within an Act, and the inconsistency cannot be resolved by construing the enactment as a whole, then the provision that appears later

in the enactment shall prevail. In this case, the amendment in section 5(4A) appears later in the enactment than section 5(3) and arguably must prevail. Finally, to aid in the construction of an enactment, section 24 of the Interpretation Act provides that regard may be had to relevant international treaties, including those which are not yet in force. The Botswana Court of Appeal has held that “unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.”¹⁴

85. Accordingly, given the legal effect of ratified international agreements, and the approach mandated by the Interpretation Act in the event of ambiguity, the amendments to section 5 of the Income Tax Act should be adequate to ensure that information obtained pursuant to exchange of information mechanisms will be treated confidentially. The effectiveness of this legislation in practice will be assessed in the phase 2 peer review report.

All other information exchanged (ToR C.3.2)

86. New section 5(4A) discussed above covers information contained in a request for information as well as information received in response to a request made by Botswana.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	Recommendations
Botswana’s tax law authorises the disclosure of information obtained from another tax authority for purposes other than the administration of its tax laws.	Botswana’s tax laws should restrict the disclosure of information received from a foreign tax authority to the purposes and persons specified in the agreement, consistent with the internationally agreed standard.
Information received in connection with a request for information from Botswana’s tax authorities may be disclosed for the purposes of the administration of any fiscal law, and is not restricted to the taxes covered by its agreement with the foreign jurisdiction.	The disclosure of information received in connection with a request for information should be restricted as described above.

14. Attorney-General v Dow [1992] BLR 119 at 154; ; see also Kenneth Good v The Attorney-General [2005] 1 BLR 462.

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information (ToR C.4.1)

87. No recommendation was made with regard to exceptions and no relevant legislative changes have been made since the 2010 Report.

Determination and factors underlying recommendations

Determination
The element is in place.

C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.

88. The 2010 Report noted that there were no aspects of Botswana’s laws that appeared to impose restrictive conditions on exchange of information. No relevant legislative changes have been made since the 2010 Report.

Determination and factors underlying recommendations

Determination
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities (<i>ToR A.1</i>)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	There are no provisions made for nominee shareholders.	An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.
	Societies are not required to maintain information on their members.	Societies should be required to maintain a register of members.
	While trusts with resident trustees (as broadly defined under the Income Tax Act) are required to register and file returns for tax purposes, there is no specific requirement that information concerning the settlor, trustees and beneficiaries of trusts be maintained.	An obligation should be established for trustees resident in Botswana to maintain information on the settlor, trustees and beneficiaries of their trusts.

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements (<i>ToR A.2</i>)		
The element is in place, but certain aspects of the legal implementation of the element need improvement.	There is no obligation for any entity to maintain underlying documentation unless they are carrying on a business.	The requirements to maintain accounting records should include an obligation to maintain underlying documentation.
	The requirements to maintain accounting records for trusts and partnerships only apply where the trust or partnership is carrying on a business in Botswana.	Trusts and partnerships required to register for tax purposes should be required to maintain accounting records to the international standards.
	Societies are not required to maintain accounting records.	Societies should be required to maintain accounting records to international standards.
Banking information should be available for all account-holders (<i>ToR A.3</i>)		
The element is in place.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) (<i>ToR B.1</i>)		
The element is in place.		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information (<i>ToR B.2</i>)		
The element is in place.		
Exchange of information mechanisms should allow for effective exchange of information (<i>ToR C.1</i>)		
The element is in place.		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners (<i>ToR C.2</i>)		
The element is in place.		Botswana should continue to develop its EOI network to the standard with all relevant partners.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received (<i>ToR C.3</i>)		
The element is in place.		

Determination	Factors underlying recommendations	Recommendations
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties (<i>ToR C.4</i>)		
The element is in place.		
The jurisdiction should provide information under its network of agreements in a timely manner (<i>ToR C.5</i>)		
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.		

Annex 1: Jurisdiction’s Response to the Supplementary Report¹⁵

Botswana would like thank you for accepting our request for a Supplementary Report. We are grateful to be proceeding to Phase 2 Review, and we will do all we can to prepare for the Review. We would like to thank the Global Forum Secretariat for all the assistance they gave us to identify the provisions of our laws that needed to be amended. We would also like to thank all our treaty partners who agreed to amend our DTCs with them and hope that they are working on preparations to sign the protocols and ratify them sooner rather than later.

The 2010 Report of Botswana revealed that, apart from deficiencies found in some of the country’s laws which could hamper the country’s ability to exchange information for tax purposes, Botswana did not have an adequate number of international agreements under which information for tax purposes could be exchanged.

We have amended the Income Tax Act and the Banking Act which were some of the main pieces of legislation which had provisions that would hamper the exchange of tax information with other tax jurisdictions.

The Botswana Income Tax Act was amended to allow the Botswana Unified Revenue Service to exchange information for tax purposes. Among others, the amendment provided for the exchange of tax information in response to a request for information from a competent authority of a treaty partner. On the other hand, the amendment serves to limit disclosure of tax information to persons who deal with the assessment, enforcement or collection of tax. The Amendment Act took effect on 1st July, 2012.

The Banking Act of Botswana had strict banking secrecy provisions. We have amended the Act mainly to repeal these provisions and to allow for banking information to be provided for the purpose of exchanging

15. This Annex presents the jurisdiction’s response to the review report and shall not be deemed to represent the Global Forum’s views.

information with our treaty partners. The Amendment of Banking Act took effect in September 2013.

We then initiated amendment of DTCs which were not compliant to international standards on transparency and exchange of information for tax purposes. So far we have negotiated 8 TIEAs (and they have all been signed), 5 protocols (3 of which have been signed) and 4 DTCs using our model which has been amended to be compliant with the standards. Two of these DTCs together with the 8 TIEAs and the 3 Protocols, are in the agenda of the current session of Parliament, which started in February and will end on 18th April, 2014.

Regarding the Companies Act and the Societies Act, where we were not able to move with speed, we have, as a preliminary measure, amended tax returns to require information on shareholders and beneficiaries. This would enable the Commissioner General of the Botswana Unified Revenue Service to know who the shareholders are and also to know if any shares have changed hands. Botswana will also continue to strive to make good any deficiencies in our laws in order to be compliant with the standards.

Botswana is committed to international standards on transparency and exchange of information for tax purposes. We will continually improve all our laws to be compliant with the standards. It is a pity that the Companies Amendment Bill and the Societies Amendment Bill have not yet been approved by Parliament; but we will continue to pursue their approval and amendment of any other laws that may not be compliant with the standards.

Annex 2: Request for a Supplementary Report Received from Botswana

18th October 2013

Chair of the Peer Review Group (PRG)
Global Forum on Transparency and Exchange of Information for Tax
Purposes

Fax No: 0033 14430 6321

Dear Chair of the Peer Review Group,

RE: REQUEST FOR SUPPLEMENTARY REVIEW ON BOTSWANA'S PHASE 1 REVIEW

My letter of even Reference FDPS 7/1/66 Vol.2 DTP dated 25 September 2013 is attached for ease of reference. I had indicated that I was not in a position to request for a supplementary report on the basis that the compliant Agreements that Botswana had signed, were not yet ratified. However, your Secretariat advised that ratification of the Agreements was not a necessary requirement as having them signed was sufficient for this purpose.

Based on that advice therefore, and the update that I have already provided, which is also attached for ease of reference, I hereby now request for a supplementary review for Botswana.

Let me thank you again for all the assistance and support that Botswana continues to get from your Secretariat.

Yours Faithfully,

O.K. Matambo

MINISTER OF FINANCE AND DEVELOPMENT PLANNING

Attachment 1 to Request for Supplementary Request:

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. (ToR A.1)	There are no provisions made for nominee shareholders.	An obligation should be established for nominees to maintain relevant ownership and identity information where they act as the legal owner on behalf of any other person.	There is no provision for nominee shareholders under the Companies Act. But as an interim measure, while the Companies Act is being amended, we have amended the Tax Return Form to require that a list of all shareholders and beneficial shareholders in the case of nominee shareholders, their addresses and their shareholdings be attached when taxpayers file annual tax returns.
The element is in place, but certain aspects of the legal implementation of the element need improvement.	Societies are not required to maintain information on their members.	Societies should be required to maintain a register of members.	While the Societies Act is being amended, we do not tax societies unless if they are carrying on business. However, if the profits of the society are re-invested to the benefit of members, no tax is charged to the societies. Therefore information on members of societies is not relevant to tax authorities.
While trusts with resident trustees (as broadly defined under the <i>Income Tax Act</i>) are required to register and file returns for tax purposes, there is no specific requirement that information concerning the settlor, trustees and beneficiaries of trusts be maintained.	An obligation should be established for trustees resident in Botswana to maintain information on the settlor, trustees and beneficiaries of their trusts.	There no law governing trusts in Botswana, but in order to maintain information on trustees and other beneficiaries of trusts, we have amended the Tax Return Form for corporate shareholders to require that a list of all trustees be attached when trusts file annual tax returns.	

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
<p>Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. (ToR A.2)</p> <p>The element is in place, but certain aspects of the legal implementation of the element need improvement.</p>	<p>There is no obligation for any entity to maintain underlying documentation unless they are carrying on a business.</p> <p>The requirements to maintain accounting records for trusts and partnerships only apply where the trust or partnership is carrying on a business in Botswana.</p> <p>Societies are not required to maintain accounting records.</p>	<p>The requirements to maintain accounting records should include an obligation to maintain underlying documentation.</p> <p>Trusts and partnerships required to register for tax purposes should be required to maintain accounting records to the international standards.</p> <p>Societies should be required to maintain accounting records to international standards.</p>	<p>We have amended the Tax Return Form for corporate shareholders to require that a list of all shareholders and their shareholding be attached when taxpayers file tax returns.</p> <p>Trusts and partnerships, including those who are non-residents but doing business in Botswana, like other taxpayers, are required as per section 71 of the Income Tax Act, to keep accounts to international standards and to file returns accompanied by copies of the accounts.</p> <p>The Societies Act is being amended to ensure that societies maintain accounting records to international standards.</p>
<p>The element is in place.</p>	<p>Banking information should be available for all account-holders. (ToR A.3)</p>		

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
<p>Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). (Tor B.1.)</p>	<p>Bank information can only be obtained with a court order in connection with a proceeding in Botswana.</p>	<p>Bank secrecy should be eliminated in connection with a request for information under an international agreement that provides for the exchange of information in tax matters.</p>	<p>We have finalised amendment to the Banking Act to remove the banking secrecy provision and also to allow Botswana Unified Revenue Service to access information for the purpose of exchanging information with foreign treaty partners. The amendments are in the Banking (Amendment) Act, 2013, a copy of which is attached.</p>
<p>The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. (ToR B.2)</p>			
<p>The element is in place.</p>			
<p>Exchange of information mechanisms should allow for effective exchange of information. (ToR C.1)</p>			
<p>The element is not in place.</p>	<p>Botswana has bank secrecy provisions that prevent the effective exchange of information and it is unclear whether a specific provision in a treaty requiring the exchange of bank information would take precedence.</p>	<p>Botswana should amend its law such that the provisions for the exchange of information in its existing treaties can be given effect, particularly as regards the exchange of bank information.</p>	<p>The Income Tax Act has been amended to give powers to the Commissioner General of the Botswana Unified Revenue Service to obtain information or to give information in response to a request for information by a foreign tax jurisdiction of a country with which Botswana has entered into an international agreement to avoid double taxation or an agreement for exchange of information for tax purposes. The amendments are in the Income Tax (Amendment) Act, 2012, a copy of which is attached.</p>

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
	<p>Botswana's tax law only allows exchange of information with a foreign government for the purposes of an agreement for the avoidance of double taxation.</p>	<p>Botswana should amend its law to allow for exchange of information pursuant to any form of information exchange arrangement.</p>	<p>The Income Tax Act was amended, at section 53, to allow the Minister enter into an agreement under which the Commissioner General will have power to obtain information or to give information in response to a request for information by another tax jurisdiction under such an agreement. The amendments are in the Income Tax (Amendment) Act, 2012, a copy of which is attached.</p>
<p>The jurisdictions' network of information exchange mechanisms should cover all relevant partners. (ToR C.2)</p>			
<p>The element is not in place.</p>	<p>Botswana has only one agreement that appears to provide for effective exchange of information.</p>	<p>Botswana should pursue its schedule of negotiations and ensure that new treaties include the current wording of article 26 of the <i>OECD Model Tax Convention</i> and enter into agreements with all relevant information exchange partners. Botswana should also be prepared to enter into other arrangements that provide for effective exchange of information.</p>	<ul style="list-style-type: none"> We approached countries with which we have Double Taxation Avoidance Agreements (DTAAs) to enter into protocols to amend the treaties. These countries are Sweden, South Africa, Mauritius, France, Namibia, Seychelles, Barbados, India, Russia, Mozambique and Zimbabwe. We have concluded and initialled the protocols to amend the DTAAs with South Africa, Seychelles, France and Sweden. We have signed the protocols amending DTAAs with South Africa, Sweden and Seychelles. We are still pursuing amendment of our DTAAs with the other countries. We have finalised and are preparing to sign the Protocol with Barbados and we are arranging for its signature.

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
			<ul style="list-style-type: none"> • We have also approached countries with which we had concluded DTAAAs and we have not yet ratified them to amend the DTAAAs before they are ratified. These are Malawi, Tanzania, Zambia and Swaziland. We have amended the DTAAAs with Zambia and Swaziland to include the current wording of Article 26 of the OECD Model Convention. The amended DTAA with Zambia was signed in March 2013 while the amended DTAA with Swaziland will be signed in Namibia this during week. • We have concluded DTAAAs with China, Belgium, Luxembourg and Portugal, which have the current wording of Article 26 of the OECD Model Convention. The DTAA with China has been signed and is awaiting ratification while arrangements are being made to sign the DTAAAs with Belgium and Luxembourg. • We have concluded and initialled Tax Information Exchange Agreements (TIEAs) with Guernsey and the Isle of Man and they were signed in London, UK on 16th May 2013 and 14th June 2013 respectively. • We have concluded and initialled TIEAs with Norway, Denmark, Finland, Iceland, the Faroes and Greenland and a protocol amending our DTAA with Sweden. These were all signed on 20th February, 2013, in Paris, France. • When all the DTAAAs and TIEAs are ratified we will be having 18 Agreements that are compliant with international standards on transparency and Exchange of information for tax purposes.

Determination	Factors underlying recommendations	Recommendations	Actions taken / undertaken
<p>The jurisdiction should provide information under its network of agreements in a timely manner. (ToR C.5)</p> <p>The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.</p>			

Annex 3: List Of All Exchange-Of-Information Mechanisms In Force

	Jurisdiction	Type of arrangement	Date Signed	Date in Force
1	Barbados	DTC	23.02.05	25.08.05
2	China	DTC	11.04.12	Not yet in force
3	Denmark	TIEA	20.02.13	Not yet in force
4	Faroe Islands	TIEA	20.02.13	Not yet in force
5	Finland	TIEA	20.02.13	Not yet in force
6	France	DTC	15.04.99	14.06.03
7	Greenland	TIEA	20.02.13	Not yet in force
8	Guernsey	TIEA	10.05.13	Not yet in force
9	Iceland	TIEA	20.02.13	Not yet in force
10	India	DTC	08.12.06	30.01.08
11	Isle of Man	TIEA	14.06.13	Not yet in force
12	Lesotho	DTC	20.04.10	Not yet in force
13	Mauritius	DTC	26.09.95	16.03.96
14	Mozambique	DTC	27.2.09	Not yet in force
15	Namibia	DTC	16.06.04	01.07.05
16	Norway	TIEA	20.02.13	Not yet in force
17	Russia	DTC	08.12.03	01.10.10
18	Seychelles	DTC	26.09.04	22.01.05
		Protocol	12.03.13	Not yet in force
19	South Africa	DTC	07.08.03	20.04.04
		Protocol	21.05.13	Not yet in force
20	Swaziland	DTC	20.04.10	Not yet in force

	Jurisdiction	Type of arrangement	Date Signed	Date in Force
21	Sweden	DTC	19.10.92	18.12.92
		Protocol	20.02.13	Not yet in force
22	United Kingdom	DTC	09.09.05	04.09.06
23	Zambia	DTC	09.03.13	Not yet in force
		Protocol	09.13	Not yet in force
24	Zimbabwe	DTC	16.06.04	25.02.08

Annex 4: List of All Laws, Regulations and Other Material Received

Legislation

Banking Act Chapter 46-04
Banking (Amendment) Act, 2013 No. 9 of 2013
Companies Act Chapter 42-01
Income Tax Act Chapter 52-01
Income Tax (Amendment) Act, 2012 No. 21 of 2012
Interpretation Act Chapter 01-04
Societies Act Chapter 18-01
Societies (Amendment) Bill

Case Law

Attorney-General v Dow [1992] BLR 119
Kenneth Good v The Attorney-General [2005] 1 BLR 462

Forms

Income Tax Return: Companies (Form SAT ITA-22)
Income Tax Return: Partnerships or Trusteeship (Form ITA.21)
Income Tax Return: Individuals (Form ITA 20/96)

International Agreements

Text of new Double Tax Conventions, Protocols and Tax Information Exchange Agreements

