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Developing Country Perspectives on Automatic Exchange of Tax Information

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ABSTRACT

In 2013, the G20 made a major policy shift in international taxation by endorsing automatic exchange of information as a next global standard for tax information exchanges between states. Within a year, the OECD introduced the standard entitled "Standard for Automatic Exchange of Financial Account Information on Tax Matters". The new standard essentially requires financial institutions in the participating countries to report information on financial accounts held by non-resident individuals and entities to their local tax authorities on a regular basis. The tax authorities then securely transmit this information to these individuals and entities' countries of residence. Overall, the new regime is intended to address a long-endured problem in international taxation – offshore tax evasion – and help the states to better enforce their tax laws on the foreign-source income of their residents.

However, a closer analysis of the global standard, its adoption process, and the recent practice indicate that the initiative on automatic exchange of information are intended to establish a platform for regular flow of information mainly between tax havens and some developed countries. It, by and large, ignores the developing countries' participation in the new regime. In fact, some strict requirements of the standard would prevent most developing countries from joining the regime anytime soon.

This paper argues that the new regime still offers invaluable benefits to developing countries and encourages them to join the regime. Considering and accommodating their needs in this process, must be an integral part of the initiative, and proposals for facilitating this process are offered.

Keywords: automatic exchange of information, developing countries, competent authority agreement, common reporting standard, multilateralism, multi-bilateralism, mandatory preliminary disclosure of aggregate data

1. Introduction

In April 2013, the G20[1] made a major policy shift in international taxation by endorsing automatic exchange of information as a next global standard for tax information exchanges between states (Communiqué 2013, para.14). In September 2013, the G20 Leaders expressed their interest in working with the OECD to develop a new multilateral framework on automatic exchange of information and to present a new single standard in early 2014 (G20 Leaders' Declaration 2013, para.51). Within months, the OECD issued a report, which sets out the concrete steps to be undertaken to realize the new global standard (OECD 2013). In February 2014, the OECD introduced the standard entitled "Standard for automatic exchange of financial account information on tax matters" (OECD 2014). In the meantime, the 20 Leaders asked the Global Forum on Transparency and Exchange of Information for Tax Purposes to establish a mechanism to monitor and review the implementation of the new global standard on automatic exchange of information.

The Standard essentially requires financial institutions to take on the role of tax/information agents with respect to non-resident account-holders and in relation to these account-holders' countries of residence. The standard requires financial institutions in participating countries to report information on financial accounts held by non-resident individuals and entities to their local tax authorities on a regular basis. The tax authorities then securely transmit this information to these individuals and entities' countries of residence. Based on the information received, it is then possible for the residence country to verify whether its resident taxpayers have reported their income earned through offshore financial accounts.

The new standard will complement the earlier international tax rules on information exchange "upon request", attempting to address its many limitations (OECD 2009; OECD 2006, para.5). Overall, the new system attempts to address a long-endured problem in international taxation (i.e. offshore tax evasion) and help the states to better enforce their tax laws on the foreign-source income of their residents.

In 29 October 2014, soon after the OECD had introduced the rules of the standard, the representatives of over 51 jurisdictions came together in Berlin to sign a multilateral agreement, the Multilateral Competent Authority Agreement (MCAA), designed to implement the standard (OECD, MCAA 2014). This agreement marks one of the very few multilateral agreements that exist in the field of taxation. The signatory parties pledged to work together towards implementation of the standard by 2017, with the first international automatic exchanges to take place in 2017 (Global Forum, MCAA Signatories 2015).

Of the 140 developing countries around the world, only half a dozen have signed the MCAA (Global Forum, MCAA Signatories 2015). Surprisingly, even the BRIC countries: Brazil, China, India, and Russia, were missing in the signatory list. Further, only a small number of developing countries among another 42 jurisdictions are yet to sign the agreement, but have committed to join the regime by 2018 (Global Forum, Status of Commitments 2015).

This raises an important question: does the emerging international automatic exchange of information regime have anything to offer the developing world? This paper explores and analyses the automatic exchange of information system from the developing country perspective. It also studies the risks of not involving developing countries and the challenges and obstacles that developing countries may confront when participating in the system. Finally, it proposes some options to resolve these challenges.

1.1 Concept and purposes of automatic exchange of tax information

International automatic exchange of tax information generally involves a systematic and periodic transmission of a bulk of tax-relevant information of non-resident taxpayers by tax authorities of one country to the tax authorities of another country where these taxpayers reside (OECD 2012, p.7). The exchange is automatic and occurs on a regular basis and the scope of information to be reported has been agreed in advance, rather than being proceeded following a specific request (Global Forum 2014, p.4). The information is collected in the source country [2] routinely through reporting of third parties (e.g. financial institutions, corporations) who make or administer payments to non-residents.

The OECD Information Brief divides the basic process of automatic exchange of information into 7 separate steps (2012, p.9):

1. Payer or paying agent of host country collects information from the taxpayer and/or generates information itself. While most tax systems operate in this way, some require the taxpayer to file a refund claim directly to the tax administration. It is from such refund claims that the tax administration may obtain the information to exchange;

2. Payer or paying agent reports the information to their domestic tax authorities regarding the identity of non-resident taxpayers as well as payments made to them;
3. The tax authorities consolidate all information received and prepare separate country-by-country bundles depending on non-resident taxpayers' country of residence;
4. Information is encrypted and bundles are sent to residence country tax authorities;
5. Information is received and decrypted;
6. Residence country feeds relevant information into an automatic or manual matching process;
7. Residence country analyses the results and takes compliance action as appropriate;

Thus, for example, if a Canadian resident taxpayer holds a deposit of $100,000 in a Swiss bank and that deposit earns 5% interest income annually; the Canadian resident has a foreign-source interest income of $5,000 a year. Automatic exchange of tax information simply means that the Swiss bank reports the income to a relevant Swiss tax authority on a periodical basis (e.g. annually), which in turn transmits this information to the Canadian tax authority (i.e. the Canada Revenue Agency). The transmission generally takes place electronically and directly from the first country's exchange of information portal to the latter country's exchange of information portal. The Canadian tax authorities can then match this information with the one that it has received directly from the resident taxpayer (i.e. submitted through tax return for the period) thereby verifying the latter's accuracy.

The information to be exchanged typically includes the name of the taxpayer, tax identification number (TIN) assigned by the residence country, the taxpayer's temporary and permanent addresses, the type and the amount of income earned for the period, and the details of the payer in the source country. It may also cover other items such as information on financial assets, immovable property, value added tax refund, etc. (OECD 2012, p.7).

The automatic exchange of information system is crucial for countries that tax their residents on worldwide income or assets. The system has a deterrence effect. It encourages resident taxpayers to accurately report their foreign-source income to their countries of residence. The automatic exchange of tax information also ensures equal treatment of domestic and foreign source incomes of the resident taxpayers, thereby eliminating the opportunity for tax-distorted reallocation of economic and financial resources offshore.

1.2 The OECD Standard for automatic exchange of financial account information

The OECD Standard for automatic exchange of financial account information has two main components:

a) Common Reporting Standard (CRS), which contains the reporting and due diligence rules to be imposed on financial institutions;
b) Competent Authority Agreement (CAA), which contains the detailed rules on the exchange of the reported information between countries;

The CRS provides a framework on the financial account information to be maintained, collected, and reported by financial institutions to their local tax authorities. It also provides common due diligence procedures to be followed by the financial institutions in identifying reportable accounts and persons.

The CAA, on the other hand, specifies the details which will be exchanged between countries, and when and how such exchanges occur. It contains detailed rules on confidentiality, safeguards and the existence of the necessary infrastructure for an effective exchange system. The OECD introduced the CAA both in bilateral and multilateral versions.

The implementation process of the Standard involves four concrete steps: a) to adopt CRS into domestic law; b) to select a legal basis for the exchange of information and conclude CAA on bilateral or multilateral basis; c) to put in place the administrative and IT infrastructure to collect and exchange information under the Standard; d) to take necessary measures that ensures confidentiality protection and data safeguards for the exchanged information.

2. Implications of excluding or not including developing countries

2.1 Illicit financial outflows

There is a critical problem that almost every developing country confronts in today's world: illicit financial flows (Kar & Spanjers 2014, pp.iii-iv; Hearson 2014, pp.1-2). Generally, illicit financial flows (IFFs) are defined as capital flows that are illegal in the way they are created, transferred, or utilized (Hearson 2014, p.1). The Global Financial Integrity describes IFFs also as unrecorded money. It describes the unrecorded money as money acquired from corruption, crime such as drug trading, human trafficking, counterfeiting, contraband; and manipulative commercial dealings such as proceeds arising from import and export transactions conducted so as to manipulate customs duties, VAT taxes, income taxes, excise taxes (Global Financial Integrity 2014, p.1). The money leaves the country to hide abroad. The illicit financial flight is a catalyst for tax evasion and vice versa.

According to a recent study conducted by the Global Financial Integrity (GFI), illicit financial flows from the developing and emerging economies totalled a staggering $6.6 trillion between 2003 and 2012 (Kar & Spanjers 2014, p.1). This is almost ten times more than what these countries received in official development aid during this period. In 2012 alone, GFI estimates that these countries lost $991.2 billion in unrecorded money. The study notes that this number is steadily growing by an average of 9.4 per cent per year - roughly twice as fast as global GDP (Kar & Spanjers 2014, p.12).

The GFI study also analyses illicit financial flows from developing countries on a regional basis. Asia was the region of the developing world with the highest outflow, comprising 40.3 per cent of the world total. It is followed by Developing Europe at 21.0 per cent, the Western Hemisphere at 19.9 per cent, the Middle East and North Africa at 10.8 per cent, and Sub-Saharan Africa at 8.0 per cent (Kar & Spanjers 2014, p.8). As for country analysis, China, Russia, Mexico, India, Malaysia were reported to be the major exporters of such unreported money (Kar & Spanjers 2014, p.9).

One of the most common forms of illicit financial flow is fraudulent mis-invoicing of trade transactions, also known as trade mispricing or trade-based money laundering. Trade mis-invoicing is the intentional misreporting of the actual value, quantity, or composition of goods on customs declaration forms and invoices for tax evasion or money-laundering purposes (Global Financial Integrity, Trade Misinvoicing 2014). According to the GFI study, it accounted for nearly 78 percent of illicit flows in 2012 (Kar & Spanjers 2014, p.22). Developing countries lose over $700 billion per year due to trade mis-invoicing.

The trade mis-invoicing normally occurs in two forms: over-invoicing and under-invoicing. Resident taxpayers often use trade over-invoicing to siphon their profits from developing countries. This can be achieved by inflating and over-invoicing the actual cost of imported inputs or equipment, so that the taxpayer can report lower taxable income in the source country. The taxpayer may also use a reverse strategy. A person exporting goods from a developing country can deliberately undervalue what is being exported, so that profits are once again shifted abroad. Once the money is shifted abroad, it is diverted to an offshore bank account owned directly or indirectly by the taxpayer.

Overall, the GFI study makes a comprehensive observation of the illicit financial flows from developing countries. What the study does not explain is where these assets are flowing to? Where are their favorite destinations? Why are they flowing there? In fact, answers to these questions are fairly obvious given that there are only two major symbolic "poles" in the world – developing and developed; and even within the developed world, there is only a few jurisdictions where such money can find safe and tax-free haven (Palan, Murphy & Chavagneux 2010, pp. 46-57). In these jurisdictions, the money generally does not have to disclose its true source, purpose, or even its owner (Gravelle 2009, p.20). Once the money arrives there, it rarely returns to the country of its origin.

These alarming statistics may indicate that the developing world has greater reasons to engage in automatic exchange of information. They would benefit greatly from being able to receive information from developed countries, particularly from secrecy jurisdictions.

3. Challenges for developing countries

A pertinent question is concerned with why the developing countries are holding back from automatic exchange of information; or more precisely, what is holding them back.

3.1 Hidden multi-bilateralism within the promised multilateralism

The MCAA is an administrative agreement that has been concluded based on the Convention on Mutual Administrative Assistance in Tax Matters ("Multilateral Convention") (OECD 2014, p.13). The Multilateral Convention was the result of a joint-initiative carried out by the Council of Europe and the OECD. It was originally introduced in 1988 and entered into force on 1 April 1995 (OECD Multilateral Convention 2010, para.39). In April 2010 the Multilateral Convention was amended by a protocol to align it with the internationally agreed standards on transparency and exchange of information and to open it up to states outside of the OECD or of the Council of Europe. Since then the G20 has consistently encouraged all countries to sign the Multilateral Convention including most recently at the meeting of the G20 Leaders Summit in September 2013 (G20 Leaders' Declaration, para.51). Any state wishing to accede to the Convention may tailor the extent of its obligations, by virtue of a detailed system of reservations expressly provided for. Until now more than 60 jurisdictions, including all G20 countries, have signed the Multilateral Convention and 10 more countries have committed to do so (Chart of Participating Jurisdictions 2015).

The objective of the Multilateral Convention is to enable its signatory parties to combat international tax evasion and to better enforce its national tax laws through international administrative cooperation, while respecting the fundamental rights of taxpayers. The Multilateral Convention provides all possible forms of administrative co-operation between member states in the assessment and collection of taxes. It also contains provisions concerning exchange of information.

However, signing the Multilateral Convention does not by itself mean that the member state may receive and send information automatically. This form of exchange under the Multilateral Convention is possible only through an additional agreement between the competent authorities of the member states that establishes the modalities and procedures for automatically exchanging information. Such a competent authority agreement then activates automatic exchanges between the participants. Without such an agreement, the member states have no obligation to engage in automatic exchange of information. The commentary to the Multilateral Convention stipulates that such agreement may be concluded by two or more parties with actual exchanges always taking place on a bilateral basis (Commentaries to the Multilateral Convention 2010, para.64-65).

In October 2014, such multilateral agreement has become a reality by virtue of the MCAA. 51 jurisdictions around the world came together in Berlin and signed the MCAA. This event marks these countries' the first-ever formal commitment to collect and automatically exchange information with each other under the Multilateral Convention. The signatories to the agreement include all major European Union member states, a few developing countries, and even Liechtenstein, British Virgin Island, the Cayman Islands, Luxembourg, and Switzerland, which systematically opposed such an international framework until very recently (Signatories of the MCAA 2014). However, there are two problems in this multilateral approach.

First, paradoxically, some major developed countries such as the United States, Canada, and Japan did not sign the agreement. In relation to the United States, the OECD stated that there is a considerable overlap between the purpose and mechanisms under the MCAA and the FATCA intergovernmental agreements (IGAs) that the United States was already in the process of concluding with other countries. This means that the U.S. has no plans to join the MCAA.

At the end of the day, any country that intends to engage in automatic exchange of information with these major countries has to discuss it in a bilateral context. There are a number of compelling challenges for developing countries in such bilateral approaches.

It is very important to note that bilateral agreements often involve power relationship. Generally, large and politically powerful countries do not easily agree to enter into such agreements with small and less powerful countries (Christians 2005, pp.3-5). For example, Mexico has repeatedly requested the United States to enter into an agreement on automatic exchange of information concerning interest paid by U.S. banks to the residents of Mexico and vice versa since 2009. Mexico noted that such information sharing would help the Mexican government to identify and prevent tax evasion, money laundering, drug trafficking, and organized crime by its residents (Preslan 2010, p.204).

This was essentially the same information that the United States demanded and received from Switzerland after the UBS scandal (Busch 2010, p.204). Yet, the United States systematically ignored the Mexico's request fearing of possible capital flight from its banking sector (Preslan 2010, p.204) until very recently when the country finally decided to agree on such information exchanges with Mexico in response to its own demand for information under FATCA (Agreement between Mexico and the US on FATCA 2012). Ironically, the United States has had a law in place to exchange similar type of information with a developed country, Canada, on a regular basis since 1997 (Preslan 2010, p.204).

Let's assume that such requests have been accepted. This may not yet mean success. The powerful countries may use such requests as a leverage to demand something more (Christian Aid 2013, p.4). The countries often have other agendas. In March 2007, Argentina made a request to the United States to conclude an agreement on tax information exchange agreement (TIEA). However, the U.S. government conditioned the negotiation on TIEA on Argentina's willingness to enter into a broader bilateral income tax treaty with the country. There was nothing wrong with this condition except the fact that Argentina essentially would have to accept all that what the U.S. would require in its proposed bilateral income tax treaty giving up much of its taxing rights (Hearson 2013, p.), if the country wants to receive tax information from the United States. The United States has its own model income tax convention since 1976 (Vogel 1986, p.12).

Finally, concluding a bilateral agreement is a time and resource consuming process. It involves significant costs. The cost is incurred not only in terms of money, but also in terms of time and efforts. These monetary and non-monetary costs may relate to initiation, planning, negotiation, conclusion, and finally obtaining parliamentary approval (Reese 1987). Even though this is an indispensable part of every international agreement, engaging in negotiations for bilateral agreements on the same matter with multiple jurisdictions have prohibitive cost and time implications for countries with scarce budget and resources. It remains unclear how long would it take for developing countries to enter into bilateral agreements on automatic exchange of information with all tax havens and secrecy jurisdictions. Definitely, it would take long, if not forever, as the former countries have neither significant power, nor abundant resources.

Given these considerations, it is very unlikely that developing countries would have sufficient leverage to strike a reasonable and timely agreement on automatic exchange of information with major developed countries, if this is not to be achieved in a multilateral context.

Second, it is worrying to think that there may be room for discretion and unilateralism even under the Multilateral Competent Authority Agreement (MCCA). In its press release on 19 November 2014 on Switzerland's joining the MCCA, the Swiss government announced that "the question regarding the countries with which Switzerland should introduce this exchange of data is not affected by the signing of the multilateral agreement… the bilateral activation of the automatic exchange of information will be submitted to the Federal Assembly separately for approval" (Swiss State Secretariat for International Financial Matters 2014). In its meeting on 8 October 2014, the Swiss Federal Council also noted that the country contributed actively in the design of the Standard on automatic exchange of information and stated that "in an initial phase, consideration will be given to countries with which there are close economic and political ties and which, if appropriate, provide their taxpayers with sufficient scope for regularization" (Swiss Federal Council 2014). These imply that signing the MCAA and its approval cannot not, by itself, oblige Switzerland to begin automatic exchange of information with the signatory parties. The country may still choose the states among the signatory parties with which it wants to exchange information automatically.

The provisions of the MCAA provide that when signing the MCAA, all signatory parties multilaterally commit to automatic exchange information with all other signatory parties after they have put all the necessary rules in place to implement the agreement (MCAA 2014, Subsection 7(1)). Most of these "precondition" rules relate to the availability of domestic legislation on due diligence and data collection by financial institutions, on taxpayer confidentiality, data safeguards, and the proper use requirements for sending and receiving information. Specifically, the MCCA stipulates that a signatory party must provide, at the time of signature of the agreement or as soon as possible after its jurisdiction has the necessary laws (e.g. to implement the OECD's CRS, to ensure confidentiality and data protection safeguards) in place to implement the OECD' Common Reporting Standard, a notification to the Coordinating Body's Secretariat (MCAA 2014, Section 7). However, the MCAA also allows the signatory parties make a list of the member states with respect to which they intend to have automatic exchange in effect (MCAA 2014, Paragraph 7(1)(f)). Section 2.1 of the MCAA (2014) states that the agreement will come into effect between two competent authorities on the later of the following dates: (i) the date on which the second of the two competent authorities has provided notification to the Coordinating Body Secretariat, including listing the other competent authority's jurisdiction, and, if applicable, (ii) the date on which the MCAA has entered into force and is in effect for both jurisdictions.

These provisions raise some critical questions: what is the value placed on the Multilateral Competent Authority Agreement, if its signatory countries would still have the discretion to unilaterally choose the states among the signatory parties with which they want to exchange information? What is the value of the multilateral agreement for those signatory parties, which cannot find themselves on the selection lists of the signatory parties? Do the signatory parties still confront arbitrary selection and still need to fight for information even after signing so many layers of multilateral agreements? Finally, what would be the next selection criteria for the signatory parties to decide with which signatory parties they want to exchange information?

In fact, there are sufficient numbers of the signatory parties, which are still looking for every possible opportunity to resist information exchange even under the MCAA. A recent article on Bahamas' position on the MCAA quotes the country's minister of financial services reporting that the country "got everything it wanted out of the MCAA" (Hartnell 2014).

After all, there is a hidden and dangerous bilateralism within the promised multilateralism under the Multilateral Convention and the MCAA. The potential victims of this bilateralism are very likely developing countries. They are vulnerable particularly in such arrangements. However, the Multilateral Convention and the Multilateral Competent Authority Agreement still appear to be the best possible venue for developing countries to move forward to automatic exchange of information practice.

3.2 Issues in the Standard on automatic exchange of information

The Tax Justice Network (TJN) is one of the few independent international groups, which has evaluated the Standard from developed country perspective at its early stages of development (Tax Justice Network 2014). It outlines some specific concerns over the new Standard:

Reciprocity. In its current form, the Standard requires reciprocity. This means that if a state receives information automatically, it will need to do same favor to the state from which it receives information. To put differently, the states is not required to supply information to its partner if the latter is not be able to obtain and supply similar information in return under its laws and administration. This appears a fair deal. However, this principle may also prevent most developing countries to participate in the automatic exchange of information system. For example, Singapore has recently declared that it can accept the Standard, with some other conditions, only if there is reciprocity with its partners in terms of information exchanged (Singapore Ministry of Finance 2014). This requires most developing countries to undergo a massive and swift reprioritization of effort towards putting in place a necessary system that enable them to supply information automatically to its treaty partner in order to meet the Standard's reciprocity condition. At the moment, this is beyond the capacity of most developing countries due to their limited financial, administrative, and technological constraints (Bird & Zolt 2008, p.42).

One possible solution suggested by TJN is the "staged reciprocity". It calls for the waiver of the reciprocity requirement for developing countries at the initial stage (Tax Justice Network 2014, p.5). That is, the Standard would initially focus on information transfer, not the information exchange with developing countries. According to this proposal, developing countries would be granted a specified grace period to build their capacity to meet the reciprocity requirement eventually.

Confidentiality. TJN (Tax Justice Network 2014, p.7) also notes that developing countries may confront a similar obstacle by virtue of strict confidentiality requirements of the Standard. Section 5 of the OECD Model CAA allows the information providing signatory party to impose its own domestic confidentiality law requirements on the receiving signatory party if the former's domestic confidentiality requirements are stricter than those of the receiving country. Section 7 of the Model CAA allows the parties to suspend the agreement if these confidentiality requirements are not complied with. Problem is that developing countries may not have administrative capacities to provide the exact same mechanism of confidentiality as provided, for example, in secrecy jurisdictions. TJN argues that while the confidentiality provisions could help overcome constitutional problems for exchanging data in some cases, it opens the way for potential abuse by tax havens to use these requirements as pretext for generally not to share information with lower income countries (Tax Justice Network 2014, pp.7-8).

3.3 Democracy deficit in the design and discussion of the Standard

The preceding section indicates that the new Standard on automatic exchange of financial account information, in its current form, may not necessarily reflect the capacities and constraints of developing countries to participate in the automatic exchange of information system. These concerns raise one seemingly important question: why this is so?

The Standard was initiated by the G20 and developed by the OECD modelling it closely after the United States' Act on Foreign Account Tax Compliance (FATCA). The OECD is essentially a club of 34 influential and wealthy countries. The organization provides a platform for its members to exchange policy experiences, seeking answers to common problems, identify good practices, and coordinate domestic and international policies. The organization's mandate covers economic, financial, environmental, and social issues.

Lately, the organization has also taken the de-facto role of drafting international tax rules and standards (Cockfield 2005, pp.186-187). It provides recommendations, model conventions, standards, and guides to best practices (Porter & Webb, 2008, pp.43-59). The states other than the OECD member states may have observer status in this process. They can observe the discussions, deliberations, and development process of the OECD tax rules and standards. Nevertheless, the experience has shown that the non-OECD states would ultimately be expected to comply with these rules and standards at a later date, often under peer pressure that involves the combination of formal recommendations, public scrutiny, black-listing, or other forms of influence (OECD, Peer pressure: related concept 2015). The Standard on automatic exchange of financial account information has been a result of such typical process. Yet, particularity of this Standard is that it was obvious from its very beginning that it is intended to apply within and beyond the OECD states.

The TJN argues that ideally the design and creation of such international tax rules must have been delegated to another international body, namely, the UN, particularly its Committee of Experts on International Cooperation in Tax Matters (the UN Committee on Taxation), which has legitimacy to do this mandate. It argues that this committee must be upgraded to a more influential, intergovernmental committee (Tax Justice Network 2014, pp.5-6). However, there are some practical difficulties to realize this proposal for the following reasons:

The UN Committee on Taxation is comprised of 25 members: 10 from developed and 15 from developing countries. The Committee members convene annually. The Committee's work program is carried out by its working parties that operate throughout the year. The Committee's mandate is broad covering all forms of international tax policy making (UN Financing for Development Office 2011).[3] However, despite its broad mandate, the Committee has had relatively low proven record in addressing international tax issues. This is largely due to its understaffing, scarce resources, and funding. The most of the Committee's work has been centered on the UN Model Tax Convention and its periodical reviews and updates. Even these review and updates often replicate the corresponding updates in the OECD Model Tax Convention.

The OECD Committee on Fiscal Affaires (the OECD Tax Committee), on the other hand, is increasingly active international body. The OECD Tax Committee is well resourced and funded. It sets the OECD's working program in the tax area and provides a forum for the member states to exchange views on international tax policy and administration issues (OECD's Current Tax Agenda 2012, pp.14-15).[4] The OECD Tax Committee is comprised of a permanent secretariat and a rotating cast of mid-level national tax officials working in various sub-committees and working groups. The Committee also has the Centre for Tax Policy and Administration (CTP), a body that offers the Committee technical expertise on domestic, international tax policy and tax administration issues. It has a staff of approximately 100 people. The CTP holds 80 events annually on the full range of OECD's tax work, bringing together also almost 100 non-OECD economies (Secretary-General's Report to Ministers 2014, pp.17-18). In the past few years alone, the Committee initiated and led a number of high profile projects on harmful tax competition, transparency, and bank secrecy issues. As a result, it designed and diffused corresponding international frameworks.

In 2011, the UN Secretary General asked the UN member states to submit their views on the question of upgrading and strengthening the UN Committee on Taxation and improving its funding capacity (Abebe et al. 2012, p.8). All developing countries, namely the Group of 77 and China voted in support of strengthening the Committee (Abebe et al. 2012, p.9).[5] Notably, all OECD member states (except Chile and Mexico) voted against the upgrading. Among the objections given to the possible reform of the Committee were that the upgrade would distract the Committee from its valuable work on the UN Model Convention; a cost and benefit analysis are necessary; there is no guarantee of a representative body; upgrading would duplicate the OECD's work and could lead to the establishment of multiple and mutually-inconsistent international standards in international taxation; there is a risk of redundancy, i.e. the OECD has already made sufficient progress in the area of tax taxation and tax cooperation (Abebe et al. 2012, pp.10-11, 8). At the end of the day, despite their numerical majority, the balance of power was not in the developing countries' favor. Thus, the debate over the Committee's upgrading is still hanging in the UN agenda.

This raises an important question: Can the OECD then provide a space for an in-house representation for developing countries, at least, in its global tax policy making discussions?

One commentator argues that when the OECD expands its membership, it becomes a low-common-denominator organization (Rosenbloom 2013). He notes that the work cannot be left to the UN for the same reason (Rosenbloom 2013). There is a concern that the bigger the group, the harder it would become to come to a real consensus on any issue. However, there is also another legitimate concern that without sufficient representation and democratic process, any international tax policy discussion or standard may very likely be biased and directed to the benefit of those who were present and speak around the "discussion table".

Given these competing considerations, at the moment, it appears not viable to reverse course as much as the TJN suggests. If so, what are the possible options for developing countries to have their voices heard and to have their concerns addressed, at least, as far as the Standard on automatic exchange of information is concerned? Is there a pragmatic solution to the problem? Is it still possible for developing countries to have their interests on the "discussion table" even though there are no "chairs" for them around that table? And finally, is it possible to make the Standard work for all countries, or at least, for most of them? These are hard questions. In the next section, I will analyze the OECD's approach to address these problems.

4. OECD's approach to address the issues

During their meeting in Saint Petersburg in September 2013, the G20 leaders called on the OECD Development Working Group to work with the Global Forum and other international organizations to develop a roadmap showing how developing countries can participate in the emerging Standard (G20 Leaders' Declaration 2013, para. 52). The Development Working Group invited the Global

Forum Secretariat to lead the project. On 22 September 2014, the Global Forum finally released a report on "Automatic exchange of information: a roadmap for developing country participation" (Roadmap) (Global Forum 2014). The Roadmap evaluates developing countries' current state of readiness for the new Standard and identifies the benefits, costs and the fundamental building blocks that developing countries need in order to meet the new standard.

4.1 Evaluation of benefits and costs for developing countries

The Roadmap lists four key benefits of automatic exchange of information for developing countries: a) detection of tax evasion and offshore wealth; b) deterrence from future non-compliance; c) supporting domestic synergies; d) enhancing reputation (Global Forum 2014, pp.9-10).

The Global Forum recognizes that the percentage of the offshore wealth belonging to developing countries is more than the world average. Automatic exchange of information can help tax administrators to achieve efficiencies in information gathering and applying taxes on these assets (Global Forum 2014, p.10). It also notes that the implementation of automatic exchange of information may provide an opportunity for tax administrations to strengthen and enhance overall tax administration in developing countries, i.e. rendering "spill-over" effect. Finally, the Global Forum notes that the developing countries' adherence to the Standard demonstrates their commitment to transparency and improvement in tax compliance thereby enhancing their reputation.

The Global Forum also recognizes that automatic exchange of information has substantial cost implications. The most costly aspects of the regime are expected to be information technology investments and human resources (Global Forum 2014, p.12).

4.2 Evaluation of developing countries' state of readiness

The Global Forum undertook a survey among developing countries on the state of their readiness for the automatic exchange of information. The Forum has received responses from 100 jurisdictions. The survey results have revealed that many developing countries are not currently in a position to benefit from automatic exchange of information (Global Forum 2014, p.12). The Roadmap notes that currently only 3 developing countries are sending information automatically, compared to 50 developed countries. 17 developing countries had received information automatically in the past but could not effectively use it due to their limited capacity to match the information. 48% of the survey participants indicated their willingness to engage in automatic exchange but did not known when they would be able to do it, while 14% of them indicated that they had no such plan any time soon (Global Forum 2014, p.12). They indicated their main challenges to be information technology infrastructure, staff training, organizational structure, liaising with banks, legal changes (Global Forum 2014, p.12).

4.3 Global Forum's proposed solutions for the problems

The Global Forum proposed a number of key principles in approaching these problems. The proposed principles are: a tailor-made approach for each country; the participation in the Standard must be considered as part of a process that is complementary to a developing country's long-term resource mobilization and capacity building efforts; developing countries must be allowed to have sufficient time and appropriate support; and capacity building in developing countries which are also financial centers should be undertaken as priority (Global Forum 2014, p.14).

The Global Forum proposes specific steps to be taken by **three key stakeholders** in this process: a) developing countries; b) the Global Forum, with support from international organizations such as the World Bank Group; c) the G20 and other developed countries (Global Forum 2014, p.14).

Steps for developing countries:

The first proposed step for developing countries is to become a Global Forum member (Global Forum 2014, p.15). In so doing, developing countries are expected to ensure effective implementation of the 2009 standard of exchange of information "upon request" and participate in its peer review processes. They are also expected to build exchange of information network, including the Multilateral Convention (Global Forum 2014, p.17).

Second, developing countries are expected to build a high level of political support to make the required changes. The Global Forum recognizes that without this it will be difficult for the necessary changes to be made in an efficient manner (Global Forum 2014, p.15).

Third, all developing countries that are Global Forum members are invited to volunteer to participate in a pilot project on the implementation of the standard. The pilot project is intended to assess how implementation of the standard could be achieved in a given developing country in an efficient manner. It would occur in the following steps: (1) selection of participants; (2) initial feasibility study; (3) preparation of action plan; (4) implementation of action plan; (5) feedback. (Global Forum 2014, p.15). Each step would build on the experience gained and feedback received from the prior steps.

Fourth, developing countries are expected to build capacity for the Standard in ways that are consistent with their domestic revenue mobilization needs and other tax administration reforms. This is referred to as “developing building blocks”. It is consisted of a series progressive steps that a developing country chooses to commence the implementation process: a) understanding the Standard; b) consultation with the financial industry and other relevant private sector stakeholders; c) having legislation and internal agreements; d) technology and training (Global Forum 2014, pp.16-19).

Fifth, following successful completion of testing procedure, developing countries are expected to commence automatic exchange of information with their treaty partners. The Global Forum has been tasked with developing a mechanism for monitoring and reviewing this implementation process (Global Forum 2014, p.19).

Steps for the Global Forum:

The Roadmap also sets out the following three main tasks for the Global Forum to be performed in partnership with other international and regional organizations such as the World Bank Group (Global Forum 2014, pp.19-21):

Building awareness. The Global Forum tasks its AEOI Group to increase awareness of the new Standard and its benefits for developing countries. This includes encouraging more developing countries to participate in the AEOI Group, and holding annual Competent Authority meetings to create an opportunity for sharing experience and training between tax officials.

Producing and disseminating resource materials. The Global Forum also undertakes creating resource and training materials, and to hold training events. It can also provide advisory services, to advise on draft legislation and best practices.

Administering and conducting pilot projects. The Global Forum is also expected to administer and conduct the pilot projects in consultation with the World Bank Group and other interested partners, and the G20 Development Working Group. It essentially matches two partnering countries in implementing the Standard in order to test the actual exchange mechanisms, possibly on a temporary non-reciprocal basis.

Steps for the G20 and other developed countries:

The Roadmap finally makes a number of recommendations also for the G20 and other developed countries. It suggests the G20 and other developing countries to support developing countries in implementing the Standard (Global Forum 2014, pp.21-23). The support includes encouraging all jurisdictions to join the Global Forum and the Multilateral Convention; creating awareness by holding regional forums; encouraging regional developing countries to engage with the Global Forum. Moreover, the G20 countries may consider the possibility of deploying resources, technology packages and temporarily sending staff to a developing country tax administration that is implementing the Standard. The G20 and other developed countries are also expected to volunteer for the pilot projects. They should also support and contribute to related capacity building efforts, including broader tax administration modernization reforms and improvements in tax compliance management (Global Forum 2014, p.23).

The Global Forum's Roadmap appears a good start to consider developing countries' integration into the system. However, in its current form, the Roadmap makes fairly demanding and resource-intensive recommendations for developing countries, while prescribing very cautious, discretionary, and minimalistic commitments for the G20 and the developed countries in the process. None of these recommendations, however, address the real concerns raised by developing countries and international NGOs concerning the standard (i.e. reciprocity, confidentiality, involvement in the policy-making process (*see* Sections 3.2 and 3.3)).

5. A proposed solution: mandatory preliminary disclosure of aggregate data

There is no question that the automatic exchange of information system greatly helps developing countries to maintain the integrity of their tax systems. However, the biggest noted challenges of implementing the Standard in developing countries are their limited administrative, financial, and technological capacities. Even if they can overcome these obstacles, there may be another obstacle:

a reluctance mainly at the level of political elite to join the system the reasons of which are fairly clear for most people. Thus, the problem is multifaceted and requires thorough consideration.

However, there is one possible solution that may mitigate and resolve most of these problems. It involves neither providing direct financial support, nor immediate technical assistance, but providing a genuine motivation and confidence for developing countries to take part in the emerging automatic information exchange regime.

When discussing the steps for the G20 and other developed countries, the Global Forum recommends them to consider participation in a pilot project where they spontaneous share aggregate data with a specific developing country (Global Forum 2014, pp.22-23). This essentially means that a developed country would agree to inform a partnering developing country on the aggregate value of accounts held in its financial institutions by the residents of the latter. The Global Forum indicates that such spontaneous transfer of aggregate data would be voluntary and occurs to the extent that the recipient country would adhere to the standards requirements on confidentiality and data protection (Global Forum 2014, p.22). The Global Forum notes that the purpose of this project is a) to demonstrate the partnering developing country the potential revenue benefits of joining into automatic exchange of information; and c) to elicit political commitment for the cooperation from the developing country (Global Forum 2014, p.22).

Even though such cooperation would be extremely beneficial for any participating country, one may wonder if developed countries have sufficient incentive to participate voluntarily in such pilot projects. It is naïve to believe that a country would voluntarily disclose or share with another country an aggregate value or number of accounts held in its financial institutions by the latter's residents. In practice, such spontaneous transfer of massive information occurred only when the information in question related to accounts held in third countries (Dougherty & Landler 2008; Saunders & Sidel 2008; Hesse 2013).[6] Thus, the data transferring countries were in a relatively neutral position with respect to the information and the implications of the transfer.

Overall, it is highly unlikely that a country will initiate such aggregate data transfer voluntarily when the information concerns non-resident accounts held in its own financial institutions in its own territory. However, such self-disclosure is essential. In fact, this is exactly what the whole automatic exchange of information system is about. The automatic exchange of information system requires the states to obtain certain tax-relevant information of non-residents from financial institutions in their territories and disclose them to these non-residents' countries of residence on a reciprocal basis. Actually, the automatic exchange of information system goes one step further from the aggregate data transfer by requiring the states to disclose its treaty partner the detailed information on a regular basis.

Since most developing countries may not be yet ready for such full automatic information exchanges, the disclosure of aggregate data is an appropriate venue to begin the transition and integration of developing countries into the new system. In other words, countries must begin to make preliminary public disclose of aggregate value of accounts held in their financial institutions by the residents of other countries. Such disclosure of aggregate data must be required at least from all countries labeled as "tax havens" and "secrecy" jurisdictions, and at least, in relation to developing countries (this is because most developed countries have already entered or would soon enter into automatic exchange of information agreements with most of these tax havens. This may eliminate the need for such disclosures with respect to developed countries). The aggregate data disclosure must be public and mandatory whether a particular developing country requests it or not.

This sounds an overwhelming and unreasonable demand on tax havens and secrecy jurisdictions. However, when we consider this proposal in comparison with the new Standard and its requirements, this proposal appears more, or at least equally reasonable for the following reasons:

First, the Standard requires countries to collect detailed information about accounts held by non-residents in financial institutions in their territory and transfer the information to the account holders' countries of residence. However, the public disclosure of aggregate data does not involve such detailed information, nor it does involve its actual transfer. What it simply involves is the preliminary disclosure of the overall value of potentially reportable accounts to relevant jurisdictions. Consequently, it entails neither confidentiality, nor privacy implications at this stage.

Second, most tax havens have or will soon have access to such information by virtue of the new Standard, especially by its Common Standard on Reporting and Due Diligence for Financial Account Information (CRS) that they have consented to implement. The CRS requires the participating states to have necessary legislative and administrative mechanisms in place to ensure availability of relevant information and government's access to such information.

Finally, the policy of such preliminary disclosure of aggregate data is also consistent with the G8 countries' declaration to developing countries made in their 2013 Lough Erne Summit. Then, the G8 countries declared, "developing countries should have the information and capacity to collect the taxes owed them – and other countries have a duty to help them" (G8 Lough Erne Declaration 2013, para.4).

Most importantly, the preliminary public disclosure would provide the developed world an opportunity to demonstrate that it genuinely cares about developing world, resolving much distrust and skepticism, and bringing international cooperation to a new level.

6. Concluding remarks

The current studies indicate that developing countries suffer significantly from illicit capital flight and offshore tax evasion. The emerging automatic exchange of information regime has a great potential to address these problems. However, there is a legitimate concern that in their current capacities most developing countries may not be able to participate in the new regime due to their budgetary, administrative, and technological constraints. Some rigid eligibility requirements in the new Standard and persistent bilateralism within and beyond the Multilateral Competent Authority Agreement contribute to these obstacles. These certainly lead to the marginalization of more than 140 countries from the new international tax regime. Thus, there is a risk that what is intended to become a global standard may not become really so. Overall, there is a possibility that not only might the original offshore tax evasion problem remain unresolved but also the countries, which have initiated the regime, might themselves become the victims of the initiative due to potential transfer of the assets to non-participating jurisdictions.

There is one possible venue to effectively integrate the developing world in the emerging regime. The G20 and the OECD must convince all secrecy jurisdictions to make a public disclosure of the aggregate value of potentially reportable accounts held by the residents of developing countries in their financial institutions. Such preliminary disclosure is made ideally for each developing country, or at least, for some of them determined based on some legitimate criteria (e.g. Global Forum membership).

The implications of such disclosure would be immense for the developing world: it gives them an unparalleled motivation and necessary confidence to join the emerging system and to begin automatic exchange of information. It also resolves the lack of political will in some developing countries to engage in automatic exchange of information. The preliminary public disclosure would expose such governments to immense pressure from their general public and from international community to respond to the disclosure. Overall, it would provide a faster and more inclusive venue to achieve automatic exchange of information system and transparency on a global scale.

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[1]* This Article has benefited greatly from suggestions and comments offered by my academic supervisor, Allison Christians, H. Heward Stikeman Chair in Tax Law, McGill University, Faculty of Law.

[1] The G-20 (founded in 1999) is an international forum for the governments and central bank governors from 20 major economies of the world. The members include 19 countries and the European Union. Collectively, the G-20 economies account for around 85% of the gross world product, 80% of world trade, and two-thirds of the world population.

[2] When countries export and import capital, services, goods to each other, each acts as a source country to investors, service providers, and goods from the other.

[3] The mandate of the UN Committee on Taxation constitutes: 1) to keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries; 2) to provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities; 3) to consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations; 4) to make recommendations on capacity - building and the provision of technical assistance to developing countries and countries with economies in transition; and 5) to give special attention to developing countries and countries with economies in transition in dealing with all the above issues. See UN Financing for Development Office (2011), *Committee of Experts on International Cooperation in Tax Matters: Mandate*. US, New York: UN Financing for Development Office. Available at: <http://www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html>.

[4] The mandate of the OECD Tax Committee constitutes: 1) to facilitate the negotiation of bilateral tax treaties and the design and administration of related domestic legislation; 2) to promote communication between countries and the adoption of appropriate policies to prevent international double taxation and to counteract tax avoidance and evasion; 3) to encourage the elimination of tax measures which distort international trade and investment flows; 4) to promote a climate that encourages mutual assistance between countries and establish procedures whereby potentially conflicting tax policies and administrative practices can be discussed and resolved; 5) to support domestic tax policy design through the development of high quality economic analysis of tax policy issues, comparative statistics and comparisons of country experiences in the design of tax systems; 6) to improve the efficiency and effectiveness of tax administrations, both in terms of taxpayer services and enforcement; 7) to support the integration of non-OECD economies into the international economy by strengthening policy dialogue with them to increase their awareness of and contribution to the committee's standards, guidelines and best practices. See OECD (2012), *OECD's Current Tax Agenda*. France, Paris: Organization for Economic Cooperation and Development. pp. 14-15. Available at: <http://www.oecd.org/tax/OECDCurrentTaxAgenda2012.pdf>.

[5] The Group of 77 at the United Nations is a loose coalition of developing nations, designed to promote its members' collective economic interests and create an enhanced joint negotiating capacity in the United Nations.

[6] In the summer of 2007, a computer technician of a Lichtenstein bank, LGT, sold the German tax authorities CDs with customer data stolen from the bank. The CDs contained confidential information on thousands of German and non-German residents suspected of holding millions of euros in undeclared accounts with the bank. Germany paid the informant roughly €4.2 million in remuneration and shared the information spontaneously with the tax authorities of other countries such as Belgium, Denmark, Greece, Ireland, Italy, Norway, and Sweden. This has broken open one of the massive tax evasion investigations across the globe. See Dougherty, C. & Landler, M. (2008) 'Tax Scandal in Germany Fans Complaints of Inequity', *New York Times* 18 February.

Another similar event was the UBS case, commonly known as "UBS scandal". In April 2007, Brad Birkenfeld, a former U.S. employee of a Swiss bank, UBS, delivered the US Internal Revenue Service (IRS) a stolen bank data from the bank in Switzerland. The US government shared some of the data with relevant foreign governments. See Saunders, L. & Sidel, R. (2012) 'Whistleblower Gets $104 Million', *The Wall Street Journal* 11 September.

Lastly, in 2008, a former employee of the Geneva office of HSBC, Hervé Falciani, offered the French government confidential bank data concerning about 130,000 customers of HSBC. Acquiring the information, France's finance minister, Christine Lagarde, shared the list with other countries including Germany, Greece, Italy, and the US. This list was often referred to as the "Lagarde list". On the strength of the information provided, HBSC was forced to pay a $1.9 billion settlement fee to the US government. See Hesse, M. (2013), 'Swiss Bank Leaker: 'Money Is Easy to Hide', *Spiegel International* 16 July.

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