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Exchange of Information: Indian Experience, Developing Country Implications*

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I. INTRODUCTION

Cross border tax evasion scandals and illicit financial flows have dominated public discourse since 2008 with whistle-blower leaks contributing to the drama in the discussion. Aggressive tax planning is the vehicle of multinational enterprises (MNEs) for artificially shifting corporate profits to low/no tax jurisdictions and avoid paying taxes in countries where their businesses are located and value is created. High net worth individuals (HNWIs) use secrecy jurisdictions to park their illegal assets and income to avoid detection and tax payment in their countries of residence. Together, these MNEs and HNWIs deplete the legitimate tax revenue of nations. While tax losses have been significant for developed countries[1], offshore tax evasion impacts developing and emerging economies disproportionately. Compared to just 2% of US household wealth managed offshore, the estimate for Latin America is more than one quarter and for all Middle Eastern and African countries it is one third (The Boston Consulting Group, 2013).

Numerous studies have documented such disproportionate sufferance of developing countries from tax bleeds. A 2015 International Monetary Fund (IMF) study of 173 countries over 33 years found that Corporate Income Tax (CIT) revenue loss due to profit shifting and base erosion of MNEs are three times larger in developing countries than in Member Countries of the Organisation for Economic Co-operation and Development (OECD) (Crivelli et al., 2015, p.20). Developing countries are estimated to lose $100 billion annually, being one third of their total CIT base, due to aggressive tax avoidance using tax havens (UNCTAD, 2015, p.200), with revenue loss from corporate tax machinations being higher than the Official Development Assistance (ODA) received (Christian Aid, 2008). Illicit financial flows, growing over the years (Kar & Spanjers, 2014), are perpetuated by opacity in the global financial system. Since corporate taxes represent a larger share of total tax revenue in developing countries compared to their developed counterparts (IMF, 2014) the cost of tax dodging by MNEs is roughly 30% higher in developing countries than in OECD countries (Action Aid, 2015).

The challenges of tax administration in a fluid and

Abstract

Exchange of tax-related information between countries is a critical tool for addressing information asymmetries between governments and taxpayers that facilitate tax evasion/avoidance. However, the existing system of information exchange has been essentially designed and implemented by the OECD, without the participation of developing countries. This policy brief thus discusses India's experience with implementing information exchange for tax and other purposes, with lessons being drawn for other developing countries grappling with base erosion and profit shifting.

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L'échange d'informations fiscales entre les pays est un moyen essentiel de corriger les asymétries d'information entre les gouvernements et les contribuables qui favorisent l'évasion et la fraude fiscales. Or, le système d'échange d'information qui est en vigueur a principalement été conçu et mis en œuvre par l'Organisation de coopération et de développement économiques (OCDE), sans la participation des pays en développement. C'est pourquoi, le présent rapport examine l'expérience de l'Inde en matière d'échange d'informations à des fins fiscales et d'autres fins et les enseignements qui peuvent s'en dégager et s'appliquer à d'autres pays en développement aux prises avec l'érosion de la base d'imposition et le transfert de bénéfices.

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El intercambio de información tributaria entre los países es una herramienta fundamental para hacer frente a las asimetrías de información entre los Gobiernos y los contribuyentes, que contribuyen a la evasión y la elusión de impuestos. Sin embargo, el sistema de intercambio de información vigente ha sido concebido y puesto en práctica principalmente por la Organización de Cooperación y Desarrollo Económicos (OCDE), sin la participación de los países en desarrollo. Así pues, en este Informe sobre políticas se analizan la experiencia de la India al poner en práctica el intercambio de información a efectos tributarios y de otro tipo, y las lecciones que pueden extraerse para otros países en desarrollo que hacen frente a la erosión de la base imponible y al traslado de beneficios.

* The views contained in the policy brief are personal to the author and do not represent the institutional views of the South Centre or its Member States.

opaque global financial environment include, amongst others, meaningful access to tax related information through relationships of exchange between governments. Such exchanges of information (EOI) are of 3 kinds – 'spontaneous', 'upon request' and 'automatic' (OECD, 2006). This paper looks at India's experience with EOI over the years, having been a front ranker, both individually and as a Group of Twenty (G-20) member, in the pursuit of international cooperation in this regard.

India's experience with 'spontaneous' exchange of information has been limited, with the HSBC accounts of Indian taxpayers shared by the French authorities being the best known example since the matter went before the higher judiciary. The effectiveness of this mechanism depends upon the initiative of the tax officials in the information sending country. Hence, strategies for its promotion through means such as annual reporting of numbers are still untested for efficacy. This paper, therefore, has concentrated on the "request" and "automatic" modes of exchanges respectively in the next two sections. India's capacity in domestic and international tax administration is acknowledged, as is its influence as a fast growing emerging economy. Hence, its experience with EOI has important lessons for other developing countries, apart from lessons in leadership, fairness and equity.

II. EXCHANGE OF INFORMATION UPON REQUEST (EOIR) IN INDIA

a. Legal foundation & administrative set up

A large network of bilateral Double Taxation Avoidance Agreements (DTAA), 134 at last count[2], are at the foundation of India's long association with international EOI. The DTAAs contain elements from the 'OECD Model Convention with Respect to Taxes on Income and on Capital' (OECD Model Convention) and the 'United Nations Model Double Taxation Convention between Developed and Developing Countries' (UN Model Convention). India is the first country outside the membership of the OECD and the Council of Europe to sign and ratify the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Multilateral Convention) in 2012[3].

It has also signed 18 Tax Information Exchange Agreements (TIEAs), following the model developed by the OECD led Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).

The above legal instruments, underpinning both 'spontaneous' and 'upon request' sharing of information, specify the duty to exchange information under Article 26 of the DTAAs, in both the OECD as well as in the UN Model Convention. The information must be "foreseeably relevant" for carrying out the provisions of the treaty or for administration of the domestic tax laws of the requesting country, thereby ruling out 'fishing expeditions'. All information, including from banks and fiduciaries, is included in the scope of 'request' without linking it to a domestic tax interest of the requested jurisdiction or the application of standards of dual criminality. A corresponding legal obligation is cast on the requesting jurisdiction to protect the confidentiality of tax payer information.

The TIEAs, also utilized for exchange of information 'upon request' for both civil and criminal matters, can be either bilateral or multilateral. India has bilateral TIEAs with many secrecy jurisdictions - Bermuda, Cayman Islands, Jersey, British Virgin Islands, Bahamas etc. - where DTAAS are not relevant, absent the risk of double taxation. Unlike the DTAAs the TIEAs are applicable only in respect of the taxes listed in the agreement and not taxes of every kind. Along with bilateral agreements for EOI several regional agreements have also been signed by India, such as with the South Asian Association for Regional Cooperation (SAARC) for avoidance of double taxation and mutual administrative assistance in tax matters.

EOIR had been promoted by the OECD as the "internationally agreed standard" on transparency and exchange of information. Through a peer review process the "restructured OECD monitors that its members fully implement the standard of transparency and exchange of information that they have committed to implement"[4]. What is left unsaid is that the EOIR framework, including the scope of Article 26 and the TIEAs, were substantially finalized by the OECD and its Global Forum much prior to the latter's restructuring in 2009. There was, therefore, no participation of the developing countries in norm setting for transparency which they had committed to implement and be reviewed for. India, which has membership of the Global Forum but 'observer' status in OECD, has been covered in the peer reviews Phase 1 and 2 with a rating of "compliant". It is currently engaged in the second round of reviews based on the 2016 Terms of Reference which include additional details of beneficial ownership.

A well manned Directorate of Foreign Tax and Tax Research (FT&TR) in the Government of India, consisting of two Joint Secretary rank officers with an active EOI cell (since 2012), is tasked with implementation of the treaty obligations for EOI. No information on EOI is shared in the public domain, not even on non-confidential aspects such as the number of requests received from and sent out to other countries. Such organizational maturity and confidence in supporting transparency, besides assisting academic and research efforts in this area, is expected to develop very slowly. Apart from a Manual on Exchange of Information for the assistance of tax officers who send out requests for information[5] no other material/data is placed in the public domain by FT&TR. They are, however, submitted to the Global Forum for peer review and are finally available through the public reports of such review. This author was unable to access recent statistics on the number of queries sent out by FT&TR and the volume of such queries received.

From India's Phase 2 peer review report (OECD Global Forum, 2013) and the author's domain conversations it is known that the Indian Competent Authority sends out a much larger volume of queries than it receives. From 29 outbound requests in 2008 the number has risen to 884 in 2013 and 1600 in 2014 (OECD Global Forum, 2015; CBGA, 2016). The information for the period thereafter is not available. By contrast, the number of annual requests received up to 2013 has averaged 34 (OECD Global Forum, 2015, p. 96); the increase in later years is not known to be significant.

b. Study on end user experience with EOIR

Given the absence of public data, this author conducted a survey of a sample of tax officers in the field to understand how the operation of the EOIR instruments, conducted through the Competent Authority, has benefited the ultimate user of the requested information. The existing system of qualitative feedback from tax officers, required by FT&TR on receipt of the information, neither shares them publicly nor maintains them as a data base. It is understood that the lack of anonymity mostly produces "safe"/ non-committal responses even when the requested information was not received or was not useful.

In the present study, a questionnaire was administered to the tax officers who had identified foreign transactions for further investigation during an audit of the resident taxpayer or the one engaged in a 'source' transaction in the country. Identification of this universe for selecting a sample involved a certain "purposive" effort using peer information since there is no data-base maintained of such foreign transactions or the tax officers who have handled their audit. The "Assessing officers" were randomly selected from different parts of the country and the responses were taken anonymously. 65 responses, representing about 15% of the 'universe', were finally analyzed. Most of the officers had sent out multiple requests for information, contributing to the large numbers reported in the peer review. Anonymity was a critical requirement since the closed bureaucratic hierarchy of the organization precludes openness in communication, sharing of ideas and suggestions under normal channels of formal/ informal communication. Several in-depth focus group discussions were additionally done to identify hidden drivers, meanings and motivations which, combined with the author's domain experience, were used for data interpretation.

The result of the above exercise, albeit limited in scope, revealed a widespread sense of frustration with the outcome of the "request" efforts initiated by the tax officers. Under the prevailing procedure, the form containing the request, along with background data explaining its context, starts its journey from the officer who has identified the foreign transaction of the taxpayer under audit. However, he/she does not sign the request. The form wends its way to the immediate supervisory authority i.e. the Joint/Additional Commissioner and, thence, to the Principal Commissioner who formally signs the request form addressed to the Competent Authority. The latter, after a prima facie confirmation that the information sought has "foreseeable relevance" to the matter and the taxpayer being investigated, sends it to the Competent Authority in the foreign jurisdiction. Queries and clarifications sought by the foreign authorities travel this path in reverse until they reach the auditing tax officer.

The study indicated that the practice of seeking information from foreign jurisdictions is fairly well known to tax officers (95%) but the relevance of the information received was suspect. 49% of the respondents who had received replies answered in the negative to the question "Was the reply/information provided by the foreign country relevant to your query?"

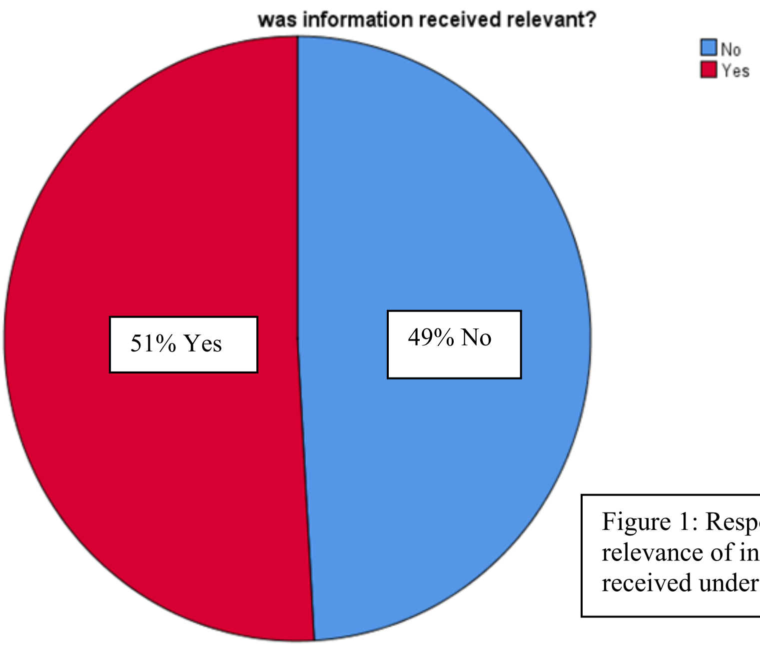

Figure 1: Responses on relevance of information received under EOIR

The problems in the information received ranged from "vague/misleading reply" (32%), "no information sent stating link to Indian taxpayer not clear" (18%) to "other reasons" (29%) which included delayed, partial, incomplete, rhetorical and haphazard replies. One common complaint was that these replies often skirted the issues of round tripping of funds and related tax evasion that are targeted in the audits. Even apparently simple information such as copies of accounts of the Indian taxpayer in the books of the foreign entity were not sent. When the Indian taxpayer is a large multinational claiming exempt income, the suspicion of deliberate stalling by the foreign jurisdiction in sharing information is often not unfounded. Repeated clarifications are sought by the foreign jurisdictions even when a detailed background note explaining the context, connection and reason for the query accompanies the EOI request. As one of the tax officers commented – "the stance seems to be to avoid information giving."

The Income Tax Act of 1961 allows an extension of the limitation period for audit by keeping the process on halt, up to a year, while the query to the foreign Competent Authority awaits an answer. Senior officials in the FT&TR attribute the limited success of the EOIR mechanism to its cynical use by tax officers only to "buy extra time". Strong views have also been expressed in the FT&TR about the quality of drafting of the information queried by the tax officers initiating the EOIR process, attributing the limited success of the provisions to this quality deficit.

Backed by anonymity, 75% of the respondents surveyed admitted to having used the provisions for seeking extra time but it was emphasized that this was only one amongst multiple reasons behind the request made through FT&TR. In a hierarchy bound organizational culture beset with closed communication (Akhtar, 2012) the response on the overall experience with the FT&TR and the EOIR process required anonymity to remove the bias of political correctness. About 30% reported a negative experience while 10% were neutral (Fig. 2). The focus group discussions were particularly stinging on this aspect.

In the focus group discussions, the tax officers bemoaned the lack of value addition in drafting from the Principal Commissioners who signed the request form or the FT&TR Directorate which finally sent it abroad. Most of the officers seemed convinced that the tax haven jurisdictions, as also many developed countries, were simply not interested in sharing the requested information and the delay, prevarication and multiple clarifications sought were merely a way of communicating this aversion to sharing. Many of the surveyed tax officers rued entering the "labyrinth" of EOIR in the first place.

The phenomenon of illicit financial flows into tax havens and developed jurisdictions co-exists with round tripping of funds, especially when the recipient market is strong and investment opportunities attractive, as in India. Enforcement actions by the Income Tax Department through searches and seizures frequently unearth this. However, the reluctance of the relevant foreign jurisdictions for sharing details, including bank information, to verify the claims of available funds for investment, ren-

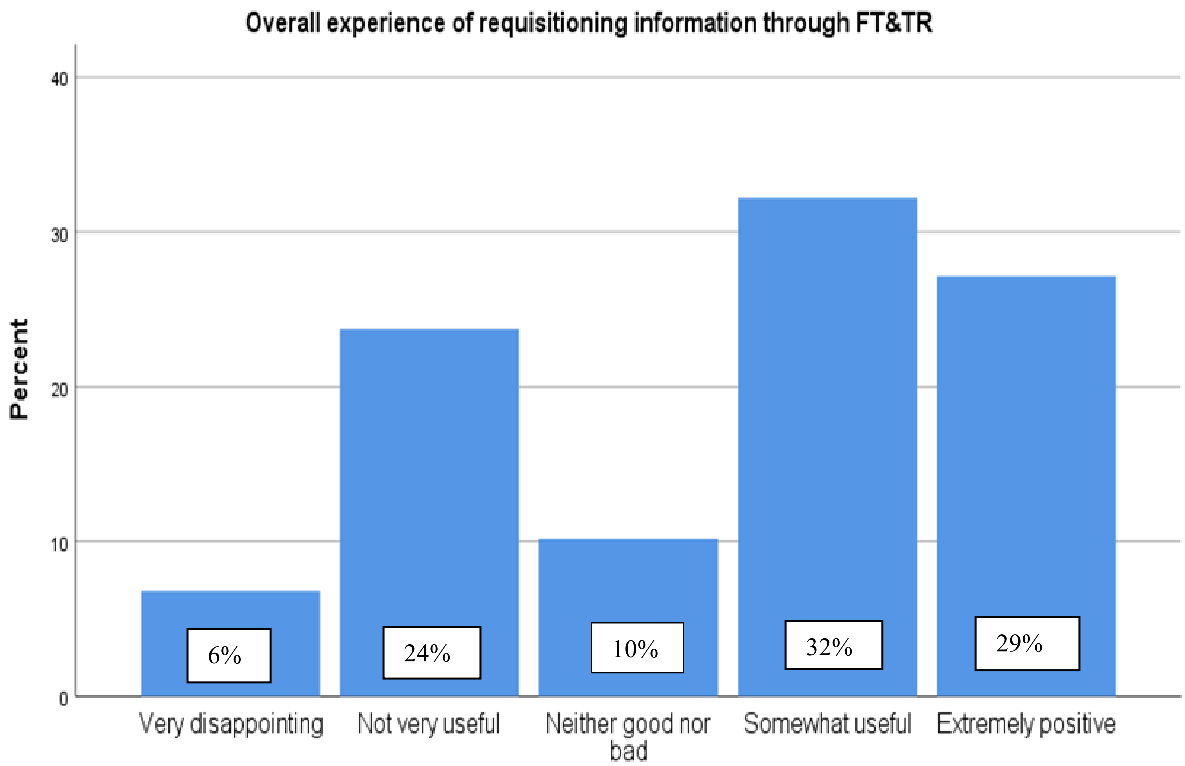

Figure 2: Overall experience of requisitioning information through FT&TR

ders the entire exercise form-based and futile. As one of the respondents lamented - "Information was not useful since round tripping angle and layering was not covered in the information sent. Information only confirmed what was already known, like giving a certificate to the assessee" (taxpayer).

As far as responding to requests of foreign Competent Authorities is concerned the Global Forum peer review Phase 2 has lauded the completeness and meticulousness with which information is obtained in India and shared with the requesting government. Not a single request has been turned down for any reason.

III. AUTOMATIC EXCHANGE OF INFORMATION (AEOI) IN INDIA

Automatic Exchange of Information (AEOI) is crucial for jurisdictions that tax their residents on their global income. Its effect is principally deterrent, although it also ensures equal treatment of the domestic and foreign source income of the resident taxpayer and removes tax distortions in allocation of financial resources offshore (Urinov, 2015). AEOI is not included in either the OECD or the UN Tax Model although their commentaries refer to its possibility. The Multilateral Convention, however, can accommodate its practice through specific terms of agreement between signatories. Today AEOI is understood in terms of routine collection of tax relevant information about non-resident taxpayers in the source country and its periodic transmission to the tax authorities of the country of residence of those taxpayers (OECD Global Forum, 2014). The three modes of AEOI currently in place in India are discussed below.

a. FATCA through IGA

Information on overseas accounts held by US taxpayers is obtained by the Internal Revenue Service (IRS) through the 2010 US Foreign Account Tax Compliance Act (FATCA) with a provision for 30% withholding on Foreign Financial Institutions (FFIs) which do not agree for such reporting. India signed the Inter-Governmental Agreement (IGA) for implementing FATCA based on the reciprocal Model1A in July 2015.

Full reciprocity is not available under the IGA since the US IRS is empowered to receive information about US citizens and residents as well as non US entities with one or more US controlling persons, but US domestic law does not permit collection of "beneficial owner" information. Not surprisingly, this is the information that countries suffering a leaching of their tax base are most concerned about. India sends out account information with more details than it receives. The need for reciprocity has been endorsed by the US in Article 6 of the IGA with India but the legislation for this purpose is still awaited[6]. The lack of reciprocity and asymmetry in the due diligence requirement have been issues of concern for financial institutions and market regulators in India[7].

Absent any public consultation before introducing FATCA it is not known whether the Indian policy makers were aware that the FATCA, as passed by the US Congress within the Hiring Incentives to Restore Employment Act (HIRE Act)[8], has no mention of reciprocity although it was promised by the executive branch of the US government. In fact, some consider the IGAs "constitutionally suspect", because of the lack of statutory authority given by the Congress to the US IRS in this regard (Christians, 2014). The hearings, since April 2017, before the Oversight and Government Reform Committee of the US Congress on the unintended consequences of FATCA[9] have highlighted such nebulous issues.

FATCA's introduction was facilitated in India in 2014 by amending section 285BA of the Income Tax Act 1961 and bringing three new rules into the Income Tax Rules, 1962 – Rules 114F to 114H. Thereby, the banking secrecy laws were legally circumvented and legal underpinnings were provided to Reporting Financial Institutions (RFIs) for reporting on the "Reportable Accounts". Unlike many other countries, India has employed the same primary and secondary legislation to implement both FATCA and the Common Reporting Standards (CRS) on AEOI, with the information available under both to be used solely for tax purposes. A detailed guidance note has also been issued[10]. Penalties have been provided under sections 271FA and 271FAA for defaults in reporting. Admittedly, however, the enforcement strength of such discretionary penalties is weaker than the threat of 30% withholding tax that the IGA brandishes under FATCA.

From a public international law perspective, the unabashedly extra territorial nature of FATCA's design, with threat of 30% withholding, has often been critiqued (Mukadi, 2012), to the extent of considering it "imperialist"[11]. Even though the IGA resolves the problem of incompatibility with national laws and bank confidentiality rules it is, at best, a technical solution which leaves unresolved the overreaching US dominance in the arrangement. India, it would appear, is far from a just and "win-win" scenario in this "exchange" when lack of full reciprocity makes the FATCA one sided in protecting only the US tax base. Since the US used the FATCA rationale for staying out of the OECD led CRS it diluted the "global" identity of the latter too (Holm, 2014).

FATCA's implementation necessitates high compliance costs for financial institutions in enhancing processes and computer systems, educating potential investors on new disclosure norms and upgrading their centralized customer data bases. Even in the US the estimates of additional revenue raised is far lower than the cost of implementing FATCA. In fact, the US Treasury Department's estimate of annual extra revenue of only $800 million[12] from FATCA seems like a sledgehammer taken to a nut. When the capacity of the US IRS to use the gigantic information it receives under FATCA has itself been questioned (National Taxpayer Advocate, 2016) the benefit to India, purely from information exchange, remains anybody's guess.

b. Common Reporting Standards (CRS) for AEOI

In carrying out the Group of 20 (G20)'s mandate "for all jurisdictions to move towards exchanging information automatically with their treaty partners, as appropriate"[13] the OECD proposed the Common Reporting Standards (CRS), a framework containing reporting requirements and due diligence rules for financial institutions, and a Model Competent Authority Agreement (MCAA)[14] that states could sign for implementing automatic exchange with a treaty partner. Together they constitute the 'AEOI Standard'. The implementing procedure involves amending the domestic law to incorporate CRS, concluding Competent Authority Agreements on bilateral or multilateral basis, creating the (information technology) IT and administrative infrastructure for AEOI and ensuring confidentiality and data safeguards for the exchanged information. A Common Transmission System (CTS) developed by the Global Forum claims to use the best industry standards of encryption for exchanging information between jurisdictions.

The MCAA for CRS is the legal instrument linked to Article 6 of the Multilateral Convention where the possibility of AEOI has been envisioned. India was amongst the "early adopters" of the AEOI Standards and it signed the MCAA in June 2015 committing to the first exchange in September 2017. As of May 2017 45 exchange relationships "from" India and 55 "to" India had been established[15]. As of June 2017 93 jurisdictions had signed the MCAA with commitments to start AEOI from September 2017 or 2018[16].

The multilateralism on which MCAA is premised is limited by the discretion of individual country signatories to choose the jurisdictions that they wish to exchange information with. This "hidden and dangerous bilateralism within the promised multilateralism" (Urinov, 2015, p.12) can further marginalize developing countries unable to meet rigid eligibility conditions (Ring, 2014; Ring, 2017). Switzerland, for instance, has only chosen jurisdictions with which it has close economic and market interests. In June 2017 the Swiss Federal Council ratified AEOI with India and 40 other jurisdictions where data exchanges will start from 2019. The question of the value of MCAA for those signatory countries which are not selected by some /all of the other signatory parties remains unanswered.

While the benefits from automatic exchange through CRS can be evaluated only after data has flown for a reasonable period, India's experience, as a large emerging economy, in the design of the framework carries lessons for its developing country peers. A point of concern for this author has been the G-20's selection of OECD as their default organization of choice for the initiatives of tax transparency and anti-profit shifting. For all its claims of restructured and wider membership to represent developing country interests, the Global Forum, in the ultimate analysis, remains anchored in the OECD (Abebe et al, 2012) and has been accused of lack of rigour in ensuring the representation of developing country voices. Its tokenism in consulting developing countries was well recorded when survey questions were framed with a developed country focus (Knobel and Meinzer, 2014) and its recommendations published even before close of the survey date.

The overwhelming shadow of the agenda of OECD member states could have been anticipated by the developing countries within G20 and balanced through a multi institutional forum tasked with developing the new global standards for automatic exchange. The more representative UN Tax Committee of Experts and the Geneva based South Centre, along with the Global Forum, might have increased the legitimacy quotient of the exercise. India's weight was expected to be cast in this direction instead of quietly endorsing the choice of the developed countries in the G20.

The CRS design, incorporating full reciprocity (Section 7 of MCAA) is seen as leaving poorly resourced countries out of exchange benefits. The only possibility for non-reciprocal participation in the MCAA is provided for countries which do "not need to be reciprocal", mainly because one of the jurisdiction does not have an income tax. Under these arrangements the AEOI effectively becomes exchange <u>from</u> tax havens, although the desirable model should have been non-reciprocal <u>to</u> a developing country. The "complexity and incoherence of the regulatory framework" of the CRS has been noted by analysts (Gadzo and Klemencic, 2017) who find it too ambitious when juxtaposed against the EOI systems still prevalent. The constraints of budgetary, administrative and technological capacity of developing countries is likely to keep them out of MCAA to receive information even though the likelihood of their taxpayers having parked their assets in developed jurisdictions is much higher than the opposite scenario. The intermediate solutions of "staged reciprocity" (Tax Justice Network, 2014, p. 5) in which the initial focus is on information transfer to, instead of exchange with, developing countries for a specified grace period, however, has not found acceptance. Unlike the FATCA regime, the sanctions to be applied to non-participants are also non-existent, posing problems in getting tax havens to sign up bilaterally with developing countries.

c. Country by Country reporting (CbCr)

The Base Erosion and Profit Shifting (BEPS) project of OECD, in its Action Item 13 report (Transfer Pricing Documentation and Country-by-Country-Reporting), contains the most recent disclosure and transparency effort in international taxation. In being ranked "high" in relevance to developing countries (OECD, 2014) it raised expectations that the information asymmetry between tax authorities and tax payers in these countries would be finally addressed. This asymmetry was especially problematic when tax authorities had no access to systematic and comprehensive data on the activity structures, operations and intra group transactions for evaluating the global value chains of MNEs.

The CbC reporting template requires MNEs to provide all relevant jurisdictions where they do business with needed information on their global allocation of income, economic activity and taxes paid among countries, along with certain indicators of the location of economic activity. The CbC report is to be filed in the jurisdiction of the tax residence of the 'Ultimate Parent Entity' and shared between other concerned jurisdictions through automatic exchange of information. The OECD has developed a Multilateral Competent Authority Agreement on the Exchange of CbC reports (CbC MCAA)[17], which can be exchanged either under DTAAs or TIEAs.

In 2016, India introduced section 286 in its Income Tax Act 1961 to implement CbCr in respect of an international group by its constituent or parent entity. The rules were notified after examining the recommendations of the Committee set up for this purpose and taking suggestions from various stakeholders. The first round of CbC reports, with group threshold of turnover exceeding Euro 750 million in the immediately preceding year, have been filed with the Indian authorities by 31st March 2018. This has been acknowledged as a very high threshold, with even the OECD estimating that it excludes 85-90% of all transnational corporations (TNCs) from reporting (OECD, 2015). For developing countries, where smaller MNEs may be the largest foreign direct investors, the threshold is especially questionable. Stiff penalties have been prescribed for failures and inaccuracies in filing and for non-maintenance of transfer pricing documentation.

The underlying principle of CbCr - transparency and disclosure to arrest base erosion and profit shifting - can be meaningful only if implemented in the spirit of access instead of denial. Using CbCr tax authorities can cost effectively assess the risk that the constituent members of MNEs operating in their jurisdiction are avoiding tax. It is also important to address MNE apprehensions that a tool of risk assessment could, in low capacity countries, become a "backstop" method for tax adjustment (Ring, 2017, p. 1816).

The multi factor CbC report has the potential to be used as a formulary apportionment approach which OECD has so far been loath to endorse - "this approach implicitly accepts the principle behind unitary taxation even if the system is not then used to assess the resulting profits. This point is important: using a unitary taxation approach to tax risk assessment does not require using unitary taxation to assess the resulting dues" (Murphy, 2016, p. 105). India's skilled Transfer Pricing Officers could be trained for such 'smart' usage of the CbCr.

CbCr has faced strong opposition "from big business and their advisers….Global companies fear being held to account locally" (Murphy, 2016, p. 109). However, the strongest critique by developing countries is around the confidentiality of CbCr when public reporting would benefit those jurisdictions that lack present capacity to join the multilateral framework. In the European Union large financial institutions and large corporations, including those from the extractive industry, are required to do so on various parameters, under the conviction that "public transparency on tax is also an important part of companies' corporate social responsibility"[18]. In recent months, however, there have been attempts to dilute such transparency directives. The USA has repealed the relevant section 1504 of the Dodd Frank Act[19] implemented by the Securities Exchange Commission in respect of oil and gas companies while the European Parliament has accepted amendments in a draft Directive which allow nations to exempt public reporting on aspects related to "commercial confidentiality"[20].

In countries with weak administrative capacity such public information can be used by additional stakeholders to flag indicators of enhanced risk to the tax authorities. Civil society assessments indicate that the costs associated with making CbCr public is "negligible" (Financial Transparency, 2016) whereas the benefits from equity through level playing fields between multinationals and domestic enterprise are very significant. In fact, the Trade Union Advisory Committee of the OECD itself has reported that "the advantages of public C-b-C far surpass any potential disadvantages" (TUAC for OECD, 2016, p. 2).

Against the above background of existing practices, the OECD's model of confidentiality imposed on signing countries is clearly balanced in favour of MNE interests.

IV. REFLECTIONS AND LESSONS FOR DEVELOPING COUNTRIES

Developing countries require additional funds to achieve the Sustainable Development Goals (SDGs) - estimates vary from a conservative additional $2.5 trillion a year (UNCTAD, 2014) to a realistic $ 3.5 to $5 trillion annually[21] (Deen, 2015). As international aid out-flows have fallen, with Official Development Assistance far behind commitment (UN DESA, 2013) and illicit financial flows undermining financial sovereignty (Mbeki Panel, 2015), the emphasis on taxes as the most certain, legitimate and democratic source of Domestic Resource Mobilization has gained international traction in the development discourse and policy forums. Access to information by developing countries on the complete global transactions of taxpayers is central to the correct levy and collection of tax in a world of mobile capital and opaque financial institutions. The criticality of 'Exchange of Information' for optimal tax administration, therefore, cannot be over stressed.

The implications of India's experience with Exchange of Information for other developing countries are discussed below.

a. Political will

The decision to participate in information exchange arrangements with the intent to prevent tax evasion and base shifting is disproportionately driven by political factors and will. India suffers the burden of a large "black money" sector (Kumar, 2017). A substantial part of this tax evaded money, including those with dubious and illegal sources of origin, is believed to be parked outside the country. The Swiss government had refused to share details (under treaty requested EOI) of the 1195 HSBC accounts of Indians revealed by a whistleblower, citing the "stolen" nature of the data. A shrill political rhetoric around illicit financial flows in the 2009 Indian Parliamentary election fueled the demand for investigation into the HSBC accounts. A Special Investigation Team (SIT) headed by a retired Judge of the Supreme Court was set up to investigate the unaccounted money kept outside the country, including in HSBC and Liechtenstein accounts, and take steps for its return. It is notable that although the Supreme Court direction had come in 2011 the SIT was constituted only in 2014, marking the importance of political will in addressing issues of illicit financial flows.

After renegotiating the DTAA with Switzerland through a Protocol in 2011, to align it with Article 26, the HSBC account information on 700 accounts, shared by the French Government with India under spontaneous exchange that year, was considered covered under the amended treaty terms. However, since the information to be requested could only be for 2011 and later years, the value of the new treaty terms on exchange of information was, at best, limited. Indian money in Swiss banks, however, has nearly halved by 2016, slipping to 88th place from 37th in 2004[22], having either moved to other locations or "round tripped" home.

The Indian experience with Swiss banks and their secrecy norms bears comparison with the ability of the US IRS in 2009 to obtain 4450 names of US clients, along with a hefty penalty from UBS, for aiding tax evasion by US taxpayers. The power of controlling access to a US domiciled dollar correspondence bank could have been used to hurt UBS terminally. Developing countries lack such muscularity on their own, but their attractiveness as investment destinations for MNEs can provide the requisite strength to negotiate higher transparency with secrecy jurisdictions. It is debatable whether India could have linked its operating licenses for Swiss banks, or inward foreign direct investment (FDI) and market access requests from Swiss companies, to tax cooperation by the Swiss financial industry. But it is undisputed that sanctions, combined with prioritization of country interest, determines the ferocity of negotiations as well as the strength of country groupings that engage with secrecy jurisdictions. Political will is central to propelling this process.

b. Sharing cost-benefit information

For a resource strapped developing country the decision to induct an information exchange apparatus in its tax administration is a difficult one, especially if its political elite is corrupt and endorses or benefits from illicit financial flows out of the country. Civil society pressures would be vastly buttressed in such a country if publicly shared information from peer countries is available to evaluate the costs with benefits. India has so far been modest, nay shy, of information sharing in this matter, even when confidential information is not involved. For instance, details of budgetary allocation for implementation of technology, training and manpower for EOI, revenue gains from use of exchanged data in audits and investigations, the perceptions and experience of tax officials highlighting gaps between the form and substance of EOI is currently not available in the public sphere. In fact, groups like Brazil, Russia, India, China and South Africa (BRICS) and SAARC could generate such information from their member countries in a standardized format and share it widely as their public goods contribution.

In respect of FATCA, where the cost generating obligations are very substantial, India would do well to share information in the public domain on public and private funds invested to actualize this process, along with detailed a cost-benefit analysis of its own efforts. Civil society and other jurisdictions could critically evaluate these dimensions for their own learning. This is particularly important considering that a proper cost-benefit analysis does not seem to have been done even for the US by the appropriate Committee of Ways and Means of the US Congress prior to passage of this legislation[23]. The cost to other developed countries has also been very high - New Zealand's cost to Government 20,600,000 NZD and to FIs 100 million NZD[24], Australia's cost A$255 million and annual maintenance A$22.7 million[25], UK's cost 1.1 billion pounds to 2 billion pounds in first 5 years[26]. In this background, developing country cooperation in sharing cost-benefit information will be crucial for the implementation process beyond the ramrod of US' global clout and 30% withholding leverage.

c. Multilateral should remain multilateral

Developing countries suffer from rampant illicit capital hemorrhage when offshore financial centres function under the cloak of secrecy laws. Not much appears to be changing under a multilateral arrangement for automatic exchange when countries have the choice of selecting treaty partners, i.e. imposing bilateralism, even after signing the multilateral instrument. They can end up veering away from developing countries that most desperately need the information in the first place. The stated ground i.e. individual country's satisfaction with confidentiality levels of partners it wishes to exchange information with, can often become specious and self-serving. If the Global Forum and OECD were indeed concerned with developing country interest beyond lip service, their evaluation of the level of data security infrastructure could have been considered adequate instead of imposing a second level of evaluation by individual countries.

Additionally, the leeway for countries to sign non-reciprocal treaties under automatic exchange, or for sharing CbCr, makes the underlying multilateral instrument facile. The 'global' spirit of multilateralism demands that domestic laws of secrecy jurisdictions that are patently against international public good be identified and their removal sought. This includes, for example, the fetish of the Swiss government against use of "stolen" or whistleblower information when there is almost no other way for such information to see the light of day. The secrecy requirement, which would automatically be sidestepped if the data pertained to national security, should be similarly ignored for data on illicit financial flows which often has malignant links with money laundering, tax evasion and national security threats.

d. Transparency standards unmatched to development levels

When global standards of cooperation for information exchange are set at levels which exclude its benefits for the bottom of the pyramid, the quiet acquiescence by powerful emerging economies, including India, sends out signals that poor and developing countries have no one to speak for their exclusion. India's signing into the multilateral framework for CbCr with high thresholds, reciprocity and secrecy, instead of negotiating lower thresholds more meaningful to the size of its economy and the MNEs active in its jurisdiction, indicates the power of the OECD's siren songs. This is especially discouraging when international organizations have used the example of India's longstanding practice of corporate disclosure on subsidiary by subsidiary basis to debunk MNE arguments of loss of competitiveness through public CbCr (Transparency International, 2016). India alone, as well as in alliance with its BRICS partners, commands the influence to modify OECD advisory models of transparency to align it with developing country interests. There is a need to call the bluff of MNEs who cite higher costs and protection of trade secrets to stymie tax transparency.

As an emerging economy with deep concerns for an efficient market mechanism it is in India's interest to demand public CbCr so that MNEs do not get their competitive advantage from complex and opaque tax structures instead of innovation driven efficiency and productivity. This is an important axis for alliance of developing countries, where support from civil society would be indispensable.

e. Information use beyond tax purpose

Information received through the automatic exchange mode of CRS and CbCr cannot be shared for purposes other than tax. This is a worrying prohibition considering that various financial crimes like money laundering, corruption and terror financing are found to have complex interlinkages with tax evasion and avoidance. Together, they threaten the strategic, economic and political integrity of countries, with disproportionate impact on fragile economies. A "whole of government" approach has been advocated for meeting these challenges through heightened cooperation between tax authorities and those dealing with other financial crimes, including money laundering (OECD, 2015A). The reluctance of OECD to frame its CRS and CbCr norms with such a "whole of government" approach enabling sharing across other government agencies, therefore, is inexplicable, if not hypocritical. Sustained pressure from developing country alliances as well as civil society seems to be the only way to build in such information sharing norms and expose the double speak of OECD.

f. All together for financing SDGs

The G20 directions for creation of a new global standard for exchange of information through automatic exchange has seen the light of day, all shortcomings notwithstanding. The responsibility for its effective implementation and robust functioning through international cooperation, however, still needs to be monitored. This acquires significance in the light of the G20 aligning itself with the 2030 Agenda and the Sustainable Development Goals (SDGs) for which demands for additional funds are at an all-time high. The Hamburg Update[27] at the July 2017 summit of the G20 outlines collective goals across policy areas that promise to "further align" the group with the SDGs. The update refers to the Addis Ababa Action Agenda on Financing for Development which has recognized the centrality of taxes in the efforts of countries for financing development through Domestic Resource Mobilization.

Congruent with the above formal position, the G20 platform should be used to get all data on offshore assets of citizens/ residents of developing countries. Since there is universal consensus around the SDG goals the emerging economies in the G20 can leverage their membership to ensure that all secrecy jurisdictions, as well as all G20 countries, including affiliated jurisdictions such as the British Virgin Islands, should make disclosure of aggregate value of potentially reportable accounts held by residents of developing countries in their financial sectors. The Bank for International Settlements (BIS) holds a large part of this data but access to disaggregated country level data is not allowed. Such a disclosure would dilute the political opposition in many developing countries to tax reforms linked to greater efficiency through transparency.

V. CONCLUSION

Transparency and disclosure through exchange of information, to enable countries to get their legitimate share of taxes, has undeniably moved up in the agenda of international tax cooperation. Whether bright sunlight now shines on dark secrecy jurisdictions, however, is still debatable. Rudolph Elmer, the whistle blower employee in the Swiss bank Julius Baer, who exposed the innards of the Swiss system used by ultra-high net worth individuals and multinational conglomerates to hide their income and evade taxes, believes that with the exchange of information networks not much has changed - "actually, the business of secrecy has become even more lucrative"[28].

This paper has discussed the lack of capacity of developing countries to individually challenge the complex and untouchable financial structures created for purposes of tax evasion. Strength through alliance remains the way out for them from the quagmire of an iniquitous and secrecy shrouded global financial architecture. The litmus test for stronger nations like India, or the BRICS grouping, will be their continuance of the struggle for an equitable international tax order even after they have been invited into the circle of the elite.

In the final analysis, however, only the inclusion of developing countries as equal partners in norm setting for international taxation, including sharing of information, can ensure equity and fairness in getting their share of tax. OECD's "inclusive framework" for implementation of BEPS Action Plans[29], introduced in the face of criticisms about its unrepresentative character, has faced reluctance from many developing countries "as they were not part of the actual decision-making process during the BEPS project" (Johnston, 2016, p. 33). The proposal for up-gradation of the UN to an intergovernmental body with adequate resources has been persistently resisted by the OECD members, recently at the UN's 2015 Financing for Development (FfD) conference in Addis Ababa and later at the 14th session of the United Nations Conference on Trade and Development (UNCTAD) in Nairobi in July 2016. India has been a front ranking advocate for such upgradation[30]. This resonated in its official response[31] to the Note Verbale 10/340 dated 1st December 2010 following the ECOSOC resolution 2010/33[32], and was emphasized when it became the first country recently to make a voluntary contribution to the UN Tax Trust Fund that supports the Tax Committee[33]. Ecuador's persistent push to the agenda, as the current Chair of the Group of 77 and China (G-77), in various bold initiatives has kept the flame lit for this issue[34] and represents the way forward for developing countries seeking equity and just tax rules through the UN.

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