TAX JUSTICE BRIEFING – MARCH 2012

The Creeping Futility of the Global Forum's Peer Reviews - Prepared by Markus Meinzer[1], TJN-IS

Contents

[1] Thanks to Mark Herkenrath, Martin Hearson, Nick Mathiason, and Sol Picciotto for their valuable contributions. All remaining errors are mine.

SUMMARY OF FINDINGS FOR AND AGAINST

For: What progress has been made through the Global Forum peer review process?

Rampant and notorious tax haven abuse has been highlighted and some legal changes have been implemented. This allows tax investigators better access to evidence of **known cases.**

The information provided by peer reviews has been **deepened** and is factually **more accurate** than the 2006-2010 Level Playing Field reports prepared by the Global Forum.

Some new information about **sanctions** and enforcement in relation to **ownership registration** is included in the peer review reports. It allows easier identification of bogus registration requirements where the legal requirement is not adequately backup up by sanction for non-compliance.

Against: What are the major weaknesses of the Global Forum peer review process and what should be done to remedy these weaknesses?

Some members of the Global Forum (e.g. developing countries) are denied tax information exchange agreements (TIEAs) with tax havens, and are instead pushed to sign Double Tax Agreements (DTA) which include significantly unfavourable provisions. This results in a fiscal loss for developing countries through lower withholding tax rates on dividend, interest and royalty payments. While the Global Forum claims to support members signing TIEAs, the reality is that membership of the Global Forum does not guarantee that TIEAS can be concluded rather than the more costly DTA.

There is a **lack of transparency** on who is assessed in a combined phase 1 + 2 review and why, and a lack of transparency about the criteria to determine when a jurisdiction may move to phase 2.

The **basic assumption** behind OECD-standards underlying the peer reviews appears to suggest: "There are only a few bad apples, no widespread international tax evasion". This is flawed. As a consequence, the "upon request" information exchange is deemed sufficient to deal with the problem. But US research shows that when there is little or no routine information reporting on taxable income, over 56% of the income is not reported (IRS 2012[2]). The problem is therefore systemic in nature, and stronger solutions are required.

The **fundamental problem** of the peer reviews is that only the "upon request" information exchange standard is being assessed. This means that relevant information can be held by lawyers, notaries, accountants, etc., acting on behalf of their (tax evading) clients, and there is no requirement to register this information and make it publicly available. This opens the door for notification requirements prior to the information exchange and also gives non-tax payers right of appeal against information exchange.

Cumulatively, these barriers can delay and frustrate exchange of information and act as a deterrent against making requests. The result of these flaws is an absence of effective deterrence against tax evasion (see new research by Johannesen/Zucman 2012[3], and contrast with automatic information exchange under EUSTD, Rixen/Schwarzer 2012).

[2] http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf; 24.1.2012.
[3] http://www.parisschoolofeconomics.eu/docs/zucman-gabriel/sub_jan31.pdf; 9.2.2012.

Without provision of a 'smoking gun' to trigger new investigations, there is no curbing of vast illicit financial flows and little or no impact on global portfolio investment patterns. The peer reviews are therefore setting the bar way, way too low to serve any useful purpose.

The OECD-standard is satisfied if **legal ownership** of foreign companies is recorded, but there is no requirement to record ultimate beneficial ownership for such companies.

No comprehensive statistics are provided about the volumes or types of information being exchanged. It is impossible to assess whether or not the whole exercise is anything more than window-dressing.

In contrast to World Bank, IMF or UN processes, **civil society** has no involvement in the Global Forum peer review process, which looks to outsiders as an exercise of "chaps talking with chaps".

The Global Forum promotes and carries out **peer reviews instead of expert reviews**. The process is likely to be more effective if outside experts without conflicts of interest were involved in all stages of reviews.

The Global Forum allows its members to **charge money for information.** In some cases money is demanded in return for information exchange, and the GF-peer review does nothing to prevent this. This adds further to the costs of countries seeking to curtail tax evasion.

Participation in the Global Forum brings **costs but unclear benefits** for developing countries. There is a risk of diversion of resources because as a member, a developing country will need to undergo peer review of OECD-standards. These standards only look at non-residents investing in a (developing) country, and whether this country can access information about foreign investors to hand over to foreign tax authorities: how many Europeans or North Americans evade tax through bank accounts in developing countries? Therefore, a developing country undergoing peer review poses a highly hypothetical scenario which is hardly of priority for strengthening its tax system or combating poverty.

The Global Forum secretariat staff and the peer review process **depend on the OECD.** The process is biased towards standards that align with the interests of OECD member states, some of which are secrecy jurisdictions or have dependencies that are secrecy jurisdictions.

There is little or no information on **sanctions and enforcement** relating to **accounting records.**

The **information** contained in the peer review reports is **narrowly focused** and largely relates to the OECD's (flawed) information exchange standard. There is no systematic analysis of routine reporting, public registries, etc. There are no comparative tables except for narrow standards based on a flawed assumption.

1. Introduction

1. In May 2009, TJN published a briefing paper analysing the shortcomings of the OECD's TIEAs[4]. These are bilateral treaties for exchanging tax-relevant information upon request. Weeks earlier, in April 2009, the OECD and G20 had declared that 12 of these bilateral treaties would provide the threshold separating tolerable international financial centres from pariah tax havens. Jurisdictions above the threshold would join the OECD White List, signifying the OECD's approval, while those below would be categorised as Black or Grey, depending on whether they indicated a willingness to cooperate with the OECD.

Box 1: What is the Global Forum?

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the continuation of a forum created in the early 2000s in the context of OECD work on tax havens. Its task is to promote cooperation and information exchange among tax administration along the lines of the tax standards it developed in the early 2000s. Since 2010, it is open to new members and currently has over 100 member jurisdictions. The Global Forum is part of the OECD.

2. Since then, we have seen a new drive for signing these treaties. TJN recently reaffirmed its assessment in an article in the *Financial Times*, arguing that TIEAs fall far short of the claims made for them[5]. While OECD and its Global Forum division claim that its standard deters tax evaders, there is scant evidence of any deterrent effect on tax evaders stemming from TIEAs or the peer reviews. On the contrary, an increasing number of lawyers share our view that TIEAs fail to exert pressure to declare assets that were formerly undeclared[6].

3. Implicitly, this view is further corroborated by the recent FATCA-initiative of the USA[7] and subsequent efforts by the European Commission to coordinate with the US on implementing automatic information exchange[8]. Further evidence of the shortcomings of the OECD project is provided by India's Finance Ministry stating in February 2011: "There is need to develop an effective multilateral platform for automatic, spontaneous and requested exchange of information"[9]. India's prime minister Singh called for multilateral automatic information exchange on bank accounts at the G20 summit in November 2011.

4. If, in past years, there was even a degree of nervousness among tax cheats, it was because of the determined actions of the tax administrations, law enforcement and intelligence agencies in a few countries, e.g. the USA, Australia, Germany, India, Argentina and others following suit[10]. More recently, civil society action has directly triggered tax investigations in five African countries[11]. In all of these situations, the TIEAs or OECD-standards merely helped with obtaining proof

[4] http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf ; 13.5.2011.

[5] http://www.ft.com/cms/s/0/0f687dee-5eea-11e0-a2d7-00144feab49a.html#axzz1LSwXvlcT; 13.5.2011.

[6] http://taxjustice.blogspot.com/2011/04/death-of-information-exchange.html; 13.5.2011.

[7] http://taxjustice.blogspot.com/2010/05/fatca-new-automatic-info-exchange-tool.html; 13.5.2011.

[8] http://taxjustice.blogspot.com/2011/04/links-apr-8.html; 13.5.2011.

[9] http://m.thehindu.com/business/Economy/article1464807.ece/; 13.5.2011.

[10] The four examples can be found here: http://taxjustice.blogspot.com/2009/06/is-united-states-at-war-with.html; http://taxjustice.blogspot.com/2008/02/liechtenstein-emerging-scandal.html; http://taxjustice.blogspot.com/2010/11/indian-tax-push-stop-whining-vodafone.html; http://tiempo.elargentino.com/notas/corporacion-rural-le-salio-al-cruce-cristina-y-justifico-evasion-fiscal; 13.5.2011.

[11] http://www.actionaid.org.uk/102872/sabmiller_to_face_tax_audit_in_five_african_countries_following_actionaid_report.html; 13.5.2011.

of misconduct, but not in revealing the misconduct in the first place.

5. The main mechanism for reviewing the operation of TIEAs and improving tax cooperation agreed by the OECD and its Global Forum is the peer review process. It was decided in 2009 by the G20 and OECD that peer reviews will be carried out to check a country's implementation of the OECD-tax standard. The GF reviews have been underway since 2010 and as of January 2012, 59 peer reviews have been published[12]. It is clearly important for both policy makers and members of the public that the effectiveness of TIEAs and the GF peer review process can be properly evaluated.

6. This is the context in which this paper has been prepared. The questions the paper will address in particular are: what value do peer reviews add for developing countries? What other value might they add? Where and why do the peer reviews fail? What risks do they carry and for whom?

7. Broadly, the paper argues that the peer review process adds limited value in terms of increasing transparency, while no value added is discernible for developing countries. Rather the review process imposes costs. On the other hand, there is a significant risk that the international momentum to improve tax and financial transparency will be captured and neutralized by the peer review process, without addressing the core problem of massive illicit financial flows from southern to northern countries[13].

8. The latest in a series of groundbreaking statistical analyses into this issue published by Global Financial Integrity (GFI) and the UNDP puts the loss through illicit financial flows for least developed countries alone at US$197 billion for the period of 1990-2008[14]. The total volume of illicit financial outflows from developing countries is reported to have been US$8.44 trillion for the period 2000 till 2009[15]. Importantly, the main destinations or recipient countries of illicit financial flows have been identified as major international financial centres in OECD countries. As GFI observes:

> "Our work demonstrates that developed countries are the largest absorbers of cash coming out of developing countries. Developed country banks absorb between 56 percent and 76 percent of such flows, considerably more than offshore financial centers. Thus, the problem of absorption of illicit financial flows is one that rests primarily with Europe and North America, rather more so than with tax havens and secrecy jurisdictions. " (Kar/Cartwrigth-Smith 2010[16]: iii).

9. While influential international organisations such as the World Bank and the IMF remain largely passive on this matter, the OECD through the Global Forum peer review process appears to have created a mechanism that serves more as a fig-leaf than a genuine systemic solution. It is the intention of this paper to explain and describe why the Global Forum's standards and peer review process are not effective solutions to the related problems of illicit financial flows, tax evasion and avoidance.

10. The structure of this paper is as follows. In section two, some historical background to the Global Forum, the transparency standard

[12] http://www.oecd.org/document/23/0,3746,en_21571361_43854757_46969623_1_1_1_1,00.html; 13.5.2011.

[13] http://www.taxjustice.net/cms/upload/pdf/AIE_100926_TJN-Briefing-2.pdf; 13.5.2011.

[14] http://content.undp.org/go/cms-service/download/publication/?version=live&id=3273649; 13.5.2011.

[15] http://www.gfintegrity.org/storage/gfip/documents/reports/IFFDec2011/illicit_financial_flows_from_developing_countries_over_the_decade_ending_2009.pdf; 9.2.2012.

[16] http://www.gfintegrity.org/storage/gfip/economist%20-%20final%20version%201-2-09.pdfM 9.2.2012.

and the peer review process will be given. In the third section, the legal status of the Global Forum vis-à-vis the OECD is explored in some detail and it is shown that the Global Forum in many respects is not independent from the OECD. The fourth section analyses in detail the peer review process and output, as well as the underlying standard and terms of reference. Section five provides additional insights from a perspective of developing countries, while section six explains the limited value added by the peer reviews. This is followed by conclusions.

2. Historical Background

11. The recent story of attempts by the OECD to create an international standard for tax information exchange begins in 2000/2001. In the aftermath of its harmful tax competition project, which was effectively blocked by tax havens and their political allies, the OECD invited six tax havens which had committed to improve on transparency to participate in shaping a standard. The initial six were Bermuda, Cayman Islands, Cyprus, Malta, Mauritius and San Marino. Soon, this group became the Global Forum Working Group on Effective Exchange of Information, and expanded its membership to include, in addition to OECD countries, the following jurisdictions: Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino[17]. Thus, the overall balance in the group working on the standards was tipped overwhelmingly in favour of secrecy jurisdictions[18].

12. What precisely did this group do? Mainly, they developed the 2002 Model TIEA, which was and remains the basis for all of the OECD's future work to counter tax havens and offshore tax evasion. As the introductory text to the 2002 Model TIEA makes clear, the standard was not initially labelled the "internationally agreed tax standard", but rather made more modest claims:

> "The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices."[19]

It was only later that the standard was labelled (initially by the OECD, and subsequently by G20) as the "internationally agreed tax standard". Needless to say, tax havens are delighted with this standard, and proudly boast about being compliant with OECD requirements.

13. Since 2002, the Global Forum has expanded, and from 2006 has developed basic policy monitoring, which has been published in an annual "Tax Co-operation" report, which looks in a comparative fashion at countries' laws and regulations on corporate vehicles and structures, as well as on banking secrecy. This is the only publicly available source of comparative data and analysis, and while the data is interpreted in a somewhat uncritical fashion, they are nonetheless a useful reference for researchers. Unfortunately the OECD ceased publishing these tax cooperation reports in 2010, leaving researchers without a source of comparative data.

3. The status of the Global Forum, its relation to the OECD and some implications

14. The next round of the secrecy jurisdictions' influencing of rule-setting took place in November 2009 at the Global Forum meeting in Mexico. In response to the G20 call to ending banking secrecy, two important changes were made to the Global Forum.

15. The first related to membership. The OECD henceforth would no longer decide

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[17] Page 2, Para. 2, in: http://www.oecd.org/dataoecd/15/43/2082215.pdf; 13.5.2011.
[18] http://www.secrecyjurisdictions.com/; 13.5.2011.
[19] Page 2, Para. 3, in: http://www.oecd.org/dataoecd/15/43/2082215.pdf; 13.5.2011.

alone on who was to be part of the process, and what was to happen in the Global Forum. It was decided a) to expand membership of the Global Forum to jurisdictions previously monitored by the aforementioned Tax Co-operation report; b) to take the G20 as a whole on board; and c) to open membership of the Global Forum to any interested jurisdiction prepared to abide by the standards and pay the fees.

16. The second big change was that peer reviews were introduced to assess each country's compliance with the standard as embodied primarily in the 2002-Model TIEA. This was apparently intended to increase pressure on jurisdictions to comply with the standard. Superficially, both changes appear to be steps forward. Sadly, however, reality doesn't meet up to the good intentions.

17. Regarding the first aspect, it is now claimed that the Global Forum is politically and legally independent of the OECD, and that the only reason for it being located in the OECD's tax department CTPA is because of the latter's technical expertise. This explanation is dubious for two reasons. The first relates to the way the OECD Council decision of 25 September 2009 is drafted[20].

18. This decision establishes the Global Forum as a so-called "part II" programme within OECD. This detaches it from OECD's core budget, and determines that the GF's budget is paid through contributions by member states, according to a formula taking into account the country's GNP (ibid., page 2-3). It further clarifies that the plenary of the Global Forum, with all members on an equal footing, is the main decision making body of the Global Forum[21]. It is further said that the Global Forum is to be served by a "dedicated, self-standing secretariat" based in the tax department of the OECD (CTPA):

> "The Global Forum will be served by a dedicated self-standing secretariat based in the Organisation's Centre for Tax Policy and Administration so as to benefit from the Organisation's experience in this area. Notwithstanding the provisions of Staff regulation 7 b) and the related instruction 107/1, the Secretary-General of the OECD shall be authorised to appoint, as OECD officials, nationals from any member of the Global Forum as long as they are located in the secretariat serving the Global Forum." (ibid.: page 3, point 10).

19. The term "dedicated self-standing" is often cited by OECD/GF to support the notion that GF's secretariat is independent from OECD. However, the paragraph above contains important ambiguities. In the first sentence, "dedicated self-standing secretariat" on the one hand suggests an independence from OECD Council and CTPA, but on the other hand, the secretariat is based "in the CTPA". Now, it seems clear that the terms "dedicated self-standing" do not have a legal meaning or precedent at OECD, while clearly the location of a secretariat as a division within a directorate of the OECD does have a legal meaning, as we shall see below. Indeed, CTPA represents the Global Forum as one of its divisions in its activity report of 2011[22].

20. More specifically, the second sentence explicitly repeals an existing OECD instruction and regulation on staff issues in order to allow staff from non-OECD countries to be hired. This is allowed **notwithstanding** existing regulations by explicitly overruling staff regulation 7 b) in order to allow appointment of staff from non-OECD countries. In contrast, the alleged independence of Global Forum's secretariat from CTPA is **not** explicitly granted **notwithstanding** existing regulations, reporting lines or practice within OECD's secretariat.

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[20] http://www.oecd.org/dataoecd/29/57/43917665.pdf; 13.5.2011.

[21] Point 6, in: http://www.oecd.org/dataoecd/29/57/43917665.pdf; 13.5.2011.

[22] Page 120, in: www.oecd.org/dataoecd/38/17/1909369.pdf; 13.5.2011.

21. What are the applicable regulations detailing reporting lines and lines of accountability? Regulation two of the same OECD staff regulations contains the following language[23]:

a) "[…] Officials are subject to the authority of the Secretary General, and are responsible to him for the discharge of their duties.
b) Officials shall carry out their duties and regulate their conduct always bearing in mind the interests of the Organisation and the international character of their duties."

22. This makes it clear that the officials employed by the Global Forum as a division of the OECD's tax department, CTPA, remain accountable to the OECD's Secretary General, and are bound to defend the interests of the OECD. Seen in that light, "self-standing" may merely refer to funding sources, but not to ultimate reporting lines. This casts doubt on the legal and practical value of the "self-standing" nature of the GF-secretariat.

23. The second reason why GF's claim to be independent from OECD looks dubious relates to the power of the OECD Council to take decisions on the continuation or ending of the Global Forum beyond 2012, when the current mandate ends (OECD Council decision, point 16). As a consequence, any changes of standards, procedures, and structure will require an OECD Council decision.

24. Therefore, any failure to conform to OECD's interests on the part of the Global Forum Plenary, as well as the Global Forum's secretariat, risks withdrawal of the mandate. This casts a veil of anticipatory obedience over GF-secretariat staff and plenary members and serves to bias the secretariat's decisions in favour of OECD-countries' views. Effectively, this provision gives OECD member states a veto power over any activity undertaken within the Global Forum. At best this is a very restricted type of independence, more akin to house arrest than genuine freedom of thought and action.

25. This general view of the ambiguous nature of the relationship between the Global Forum and the OECD has been confirmed by the Swiss Finance Minister Widmer-Schlumpf who said in a parliamentary hearing on 6 December 2010 that "It [the Global Forum] has its own secretariat, but is under the influence of the OECD"[24].

26. As relates to the overall interests of the OECD, and despite much rhetoric to the contrary, it is import ant to bear in mind that the OECD is not a neutral think tank or policy making body whose main goal is to serve the interests of all countries. To support this claim, three documents can be referred to. First of all, OECD's foundational Convention of 1960[25] mentions the following goals (Art. 1):

> "The aims of the Organisation for Economic Co-operation and Development (hereinafter called the "Organisation") shall be to promote policies designed:
>
> (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

[23] http://www.oecd.org/dataoecd/30/11/47834682.pdf; 13.5.2011. Regulation one, in turn, specifies that "official" means generally anybody employed by the OECD: "These Regulations shall apply to all persons employed by the Organisation whose letter of appointment states that they are officials of the Organisation (hereinafter 'officials')."

[24] http://www.parlament.ch/ab/frameset/d/n/4816/340317/d_n_4816_340317_340349.htmI; 12.5.2011; translation [and note] MM.

[25] http://www.oecd.org/document/7/0,3746,en_2649_201185_1915847_1_1_1_1,00.html; 9.2.2012.

> (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
>
> (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations." (Article 1, OECD Convention 1960).

27. Part a) of this Convention clarifies that rising living standards of member countries are OECD's primary concern. Part b) seems somewhat to soften this clear focus on members as it mentions the economic development of "non-member countries" after mentioning economic expansion in OECD members. However, the economic expansion of the member countries is not limited in this passage, and in relation to non-members it speaks rather of the "process of economic development" than about economic expansion.

28. This denotes a potential limit on the regard for non-member economies, as OECD's concern for non-members appears to stop once there may no more be a "process of economic development". Based on this language, middle income countries may not expect to be of any interest to OECD members.

29. Furthermore, it seems to be obvious that an organization will, if in doubt and conflict, prioritize the interests of its members over the interests of non-members. This is reflected more fully, and in direct relation to international tax issues, in a joint publication by OECD, IMF and World Bank of 2002. It says:

> "Although it [Committee on Fiscal Affairs] has extensive contacts with non-OECD countries and considerable awareness of developing country issues through its non-member programs, the OECD does not represent the views of developing countries." (OECD 2002: 2[26]).

30. One observable result of this lack of true voice of developing countries in OECD's decision-making in tax issues is the fact that there are two different models of double taxation avoidance conventions, one issued by the UN and the other by the OECD. These conventions differ in important aspects. Most notably, the taxation of investment income such as interest and dividend payments as well as the definition of a permanent establishment differs significantly between the two models[27].

31. Another document reveals how the OECD is attempting to increase its sphere of power and influence. In 2003, Peter Nicholson, a Special Adviser to the Secretary-General of the OECD, submitted the so-called Nicholson-Report entitled "Maximising the Impact of the OECD". This document is a "strategic roadmap to lead the OECD to the position of influence that is warranted by its capabilities and potential. Its objective is to maximise the impact of OECD work on policy-making in capitals." (Nicholson 2003: 6).

32. In the report, the performance of the CTPA has been highlighted among all other areas of the OECD as being particularly successful in achieving this goal:

> "The officially separate identity of the OECD's flagship tax work would enhance the work's visibility and status and thus add to that of the Organisation as a whole [...] In addition, raising the visibility of taxation may assist in generating voluntary contributions for the tax programme and may in the longer

[26] www.oecd.org/dataoecd/47/18/2074194.pdf ; 9.2.2012.
[27] For more details read here: http://taxjustice.blogspot.com/2008/11/source-and-residence-un-and-oecd.html; 9.2.2012.

> term help consolidate partnership programmes with non-Member countries.[…] This family [Committee on Fiscal Affairs; …] is functioning extremely well thanks to the topicality and focus of its subject; the seniority of the committee; the proactivity of the bureau; the commitment of the chair; and the entrepreneurial attitude of the Directorate. Fiscal Affairs is currently, in our view, the most effective family in the OECD." (Nicholson 2003: 55-56;[note MM]).

33. It is clear that the OECD has an overarching ambition to promote and expand its influence on policy-making. Claims to have "capabilities and potential" to influence policy making around the world are being used to justify power-grabbing across diverse policy arenas. This agenda and objective heightens our concerns about the necessary preconditions for independent and neutral research and policy advice.

34. The clearest indication of such favouritism is found in the process of the peer reviews. The reviews are separated into two phases. In phase one, the legal and administrative rules are analysed for compliance with the standard. The Global Forum claims that "where a jurisdiction is found to have too many elements not in place during the phase 1 review, the report will indicate that the jurisdiction cannot move to a phase 2 review." (FAQs, page 25). However, nowhere is it spelt out what exactly "too many elements not in place" means in practice[28]. In addition, without any other reason being given, the same FAQ note: "Some jurisdictions have been selected to do a combined Phase 1 and Phase 2 review." (FAQs, pages 21-22).

35. So far, 17 countries "have been selected" to undergo a combined phase 1 and phase 2 review without apparent justification. These countries are[29]:

- Australia
- Canada
- Denmark
- France
- Germany
- Ireland
- Isle of Man
- Italy
- Japan
- Jersey
- Mauritius (supplementary report)
- Netherlands
- New Zealand
- Norway
- Spain
- United Kingdom
- United States

36. Interestingly, all but one of these countries, (Mauritius being the exception) are OECD members or dependent territories (Jersey, Isle of Man). Five of those countries are ranked among the top 20 on TJN's Financial Secrecy Index 2011[30]. By allowing these countries to be reviewed in a combined review, the Global Forum effectively foregoes the possibility of exerting political pressure on these countries to amend their laws. Many of these countries fail to meet the GF's standards. For instance, in its report on the USA, the GF confirms the absence of ownership information for limited liability companies, but grades it as a minor issue[31].

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[28] Neither in the FAQs, nor in the major Report on Progress published in November 2011 is there any explicit guidance on this. See, for instance, in the latter publication pages 31-37, http://www.oecd.org/dataoecd/52/35/48981620.pdf; 20.2.2012.

[29] http://www.oecd.org/document/23/0,3746,en_21571361_43854757_46969623_1_1_1_1,00.html; 20.2.2012.

[30] http://www.financialsecrecyindex.com/2011results.html; 27.2.2012.

[31] See page 93, in: http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-united-states-2011_9789264115064-en; 20.2.2012.

Furthermore, the UK falls short on access to ownership information[32].

37. This list of countries of combined phase one and two reviews contrasts with the 11 countries whose phase one assessments barred them from moving to phase two in November 2011[33]. These countries[34] were:

- Antigua and Barbuda
- Barbados
- Belgium
- Botswana
- Brunei
- Liechtenstein
- Panama
- Seychelles
- Switzerland
- Trinidad and Tobago
- Uruguay
- Vanuatu

Of these countries, only Belgium and Switzerland are OECD members.

4. The underlying standards and the peer reviews

4.1 Overview

38. The first peer reviews were announced in March 2010[35], and the Global Forum published its handbook for reviewers in July 2010[36]. The main point of reference for the handbook is the 2002 Model TIEA (taking the OECD Model DTA Art. 26 and minor issues from sub-bodies of the Global Forum on board as well). They claim to analyse a) whether information is available and accessible for information exchange purposes, and b) whether it is exchangeable according to the Model TIEA.

39. The introduction of peer reviews was inspired by other OECD-related initiatives, above all the Financial Action Task Force which started its work on standards to counter money laundering in 1989. The FATF first issued its 40 Recommendations in 1990, with compliance monitored by the FATF itself. The FATF published its findings in regular reports, backed up by `naming and shaming' of deficient jurisdictions. Only much later, after the standards were revised several times especially in 2003, did the FATF resort to `peer review' systematically to monitor the implementation of the standards, under pressure from and in conjunction with the IMF and together with regional sub-bodies of the FATF.

40. The Global Forum applied this peer review idea in 2009 to measure adherence to the OECD-standard. This decision tacitly assumes that a) the FATF-peer reviews were successful, b) like the FATF's recommendations, the OECD's standard on tax information exchange is effective in addressing the problems posed by secrecy jurisdictions, and c) some jurisdictions which are committed to implementing it will need to introduce substantial changes to achieve successful ratings. Of the three assumptions, only the third has a basis in reality, and assumption two is simply erroneous.

41. While a full discussion of the first assumption is out of the scope of this briefing, it is at least questionable whether FATF-peer reviews have been effective in bringing about relevant change, and therefore if peer reviews as such are an effective means to promote policy change[37].

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[32] See page 96, in: http://www.eoi-tax.org/jurisdictions/GB#peerreview; 20.2.2012.
[33] See page 36 here: http://www.oecd.org/dataoecd/52/35/48981620.pdf; 20.2.2012.
[34] Page 36, here: http://www.oecd.org/dataoecd/52/35/48981620.pdf; 20.2.2012.
[35] http://www.oecd.org/document/4/0,3746,en_21571361_43854757_44855876_1_1_1_1,00.html; 13.5.2011.
[36] http://www.oecd.org/document/40/0,3746,en_21571361_43854757_45653800_1_1_1_1,00.html; 13.5.2011.
[37] For an overview of the subject read Reuter/Truman 2004 and Johnson 2008 and a recent FSA report, here:

42. One of the problems encountered with peer reviews more generally is that as long as only peers are reviewing peers, there is a danger that "groupthink" may lead to situations of collective blindness, and may even lead to situations in which mutual favours are exchanged among reviewers by not reviewing too harshly. This is a particular risk when one secrecy jurisdiction is reviewing another. Unhappily, no independent experts from universities and civil society have had a role in the peer review processes. As can be observed in the International Panel on Climate Change, participation of civil society and independent experts helps to overcome both the reality and perception of biased outcomes. To be blunt, the current process lacks the necessary element of objectivity, which significantly undermines its credibility.

43. As regards the second assumption on the appropriateness of the standard, a first important difference between FATF and GF process is the timeline. The FATF took 12-13 years to refine its standards before they were deemed ready for warrant peer-review. The Global Forum, by contrast, took two years to prepare its standard, starting in 2000 and ending in March 2002 with the approval of the 2002 Model TIEA.

44. Second, Tax Justice Network published in May 2009 a briefing paper[38] that analysed OECD's TIEAs. The main problem in the OECD TIEAs is that you effectively have to already know what you are looking for before you can ask for it. The OECD model TIEA's Article 5, Para. 5, states that the information sought from a treaty partner must be "foreseeably relevant"; and sub-paragraphs a, b, c, d, and e of the TIEA impose daunting obligations on the requesting state (they have to provide the identity of a particular person, to make a statement on the information sought, to describe the particular tax purpose, to state the grounds for believing that the information is in possession of requested state, and to provide the name and address of a person in possession of the information).

45. These requirements place major obstacles in the way of making requests. In effect, the OECD apparently assumes that the problem of offshore tax evasion is one of a few bad apples, and not a systematic problem which deprives democratically elected governments of hundreds of billions of dollars of revenue every year. What is clear from the Johanessen and Zucman research cited below, is that the OECD TIEA standards have no substantial deterrent effect on tax evaders.

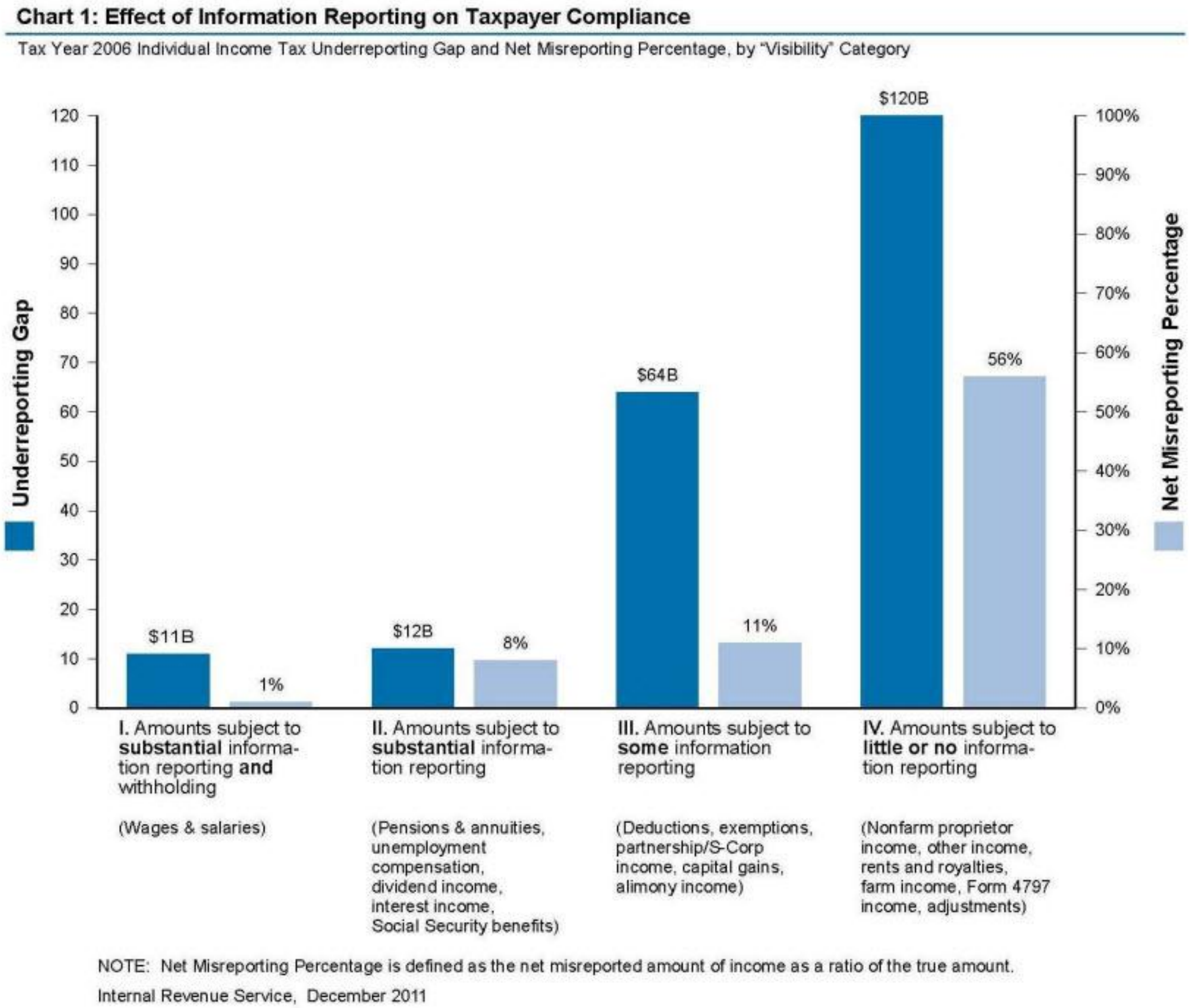
46. The inadequacies of the OECD approach are also revealed by a study published in January 2012 by the US Internal Revenue Service. In this study, the IRS[39] calculated the total tax gap for the USA (the total amount of tax lost annually because of misreporting of income) to have stood at US$385bn in 2006. That is more than TJN estimated in November 2011 for the USA in its study "The Cost of Tax Abuse"[40]. More importantly, the IRS study contains the following graph:

www.fsa.gov.uk/pubs/other/aml_final_report.pdf; 9.2.2012.

[38] http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf ; 13.5.2011.

[39] http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf; 9.2.2012.

[40] http://www.tackletaxhavens.com/Cost_of_Tax_Abuse_TJN_Research_23rd_Nov_2011.pdf ; 9.2.2012.



47. Chart 1 allocates the amounts lost due to misreporting of income into categories of income sorted by "visibility" category. The results are striking: when income is subject to substantial information reporting (or high visibility or transparency), only between 1% and 8% of the amounts is misreported. However, if the income is subject to little or no information reporting (or little or no transparency), 56% of the income is misreported. This latter case is, of course, the context of international business and taxation. There is no system for routine reporting across borders, and neither is such a system introduced by the OECD standards or the peer reviews. Hence, we can assume that the problem of cross-border tax evasion is massive, but the OECD persists in treating it as a problem of just a few bad apples.

48. The ineffectiveness of the standard and the peer reviews has also been confirmed through an econometric analysis by Johannesen and Zucman (2012[41]) that used restricted data on bank deposits by the Bank for International Settlements. They conclude:

> "Our results suggest that most tax evaders did not respond to the treaties

[41] http://www.parisschoolofeconomics.eu/docs/zucman-gabriel/sub_jan31.pdf; 9.2.2012.

> but that a minority responded by transferring their deposits to havens not covered by a treaty. Overall, the G20 tax haven crackdown caused a modest relocation of deposits between havens but no significant repatriation of funds: the era of bank secrecy is not yet over." (Johannesen/Zucman 2012).

Further factors lie behind the weak deterrent effect of the OECD/GF process. Some of these are highlighted in sections 4.2 to 4.9 below.

4.2 Disclosure of beneficial ownership is not required and its meaning is blurred

49. The `beneficial ownership' concept originates in the AML-context where it denotes the "natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted". The Global Forum has undermined this concept by allowing corporate shareholders, partnerships, trusts and foundations to be labelled owners or even beneficial owners. For example, the commentary to the 2002 Model TIEA says:

> "In connection with companies and partnerships, the legal and beneficial owner of the shares or partnership assets will usually be the same person." (Commentary, Para. 51).

50. This assertion, made without any base in evidence, provides a tacit ground for neglecting the distinction, with the consequence that beneficial ownership goes completely without mention in the terms of reference for the peer reviews. In contrast, in the tax co-operation reports published by OECD's Global Forum since 2006, the distinction is made and included in the analytical tables.

51. The root of this neglect becomes clearer in another passage of the commentary to the 2002 Model TIEA:

> "[…] a requested Party must have the authority to obtain and provide ownership information for all persons in an ownership chain provided, as is set out in Article 2, the information is held by the authorities of the requested State or is in the possession or control of persons who are **within the territorial jurisdiction of the requested Party**." (Commentary, Para. 55, TJN-emphasis).

52. What this means is that if Company A registered in one jurisdiction is owned by Company B in another jurisdiction, the jurisdiction of Company A does not need to have at its disposal information on who are the natural persons controlling Company B. This fundamental deficiency creates a gigantic breach in the OECD's fiscal transparency standard.

53. The inadequacy of the Global Forum's approach to requiring disclosure of the ultimate beneficial owners of legal entities can be seen in the case of the peer review of Ireland, which was deemed compliant in this respect despite the fact that some categories of companies incorporated in Ireland face no requirement to disclose beneficial ownership information to the Irish authorities (see Box 1 below).

54. There are examples of laws proposing the disclosure of corporate beneficial ownership, such as the Incorporation Transparency and Law Enforcement Assistance Act that has been introduced in 2011 into the US-Senate[42].

[42] http://www.levin.senate.gov/newsroom/press/release/levin-grassley-introduce-bill-to-combat-us-corporations-with-hidden-owners; 10.2.2012.

Box 2: Case Study Ireland: The misleading nature of peer reviews

The Global Forum assesses the availability of company ownership information with criterion A1.1. In the report on Ireland, the Global Forum writes:

> "Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. [...]
>
> Phase 1 determination: The element is in place." (page 61).

Therefore, Irelands is rated as compliant with regard to the ownership criterion. The entire section with the analysis leading to this conclusion can be found on pages 17-23. The following argumentation is intended to exemplify to the reader both the gaps in GF-analysis and the misleading nature of the GF-reports.

1. In paragraph 35, page 18 it is written that almost 90% of all companies registered in Ireland are private companies limited by shares (implying 90% of all incorporations under Irish Companies Act).

2. On page 21, paragraph 47, it is claimed that over 85% of companies registered with Irish Revenue are close companies, meaning that they are controlled by 5 or fewer participators. And close companies account for virtually all of the companies that are subject to exchange-of-information requests (ibid.). These companies must include in their tax return information on the beneficial owners (ibid.). This gives the impression that for this type of companies, BO-information is available to Irish Revenue.

3. However, in paragraph 46, page 21, it is written that only companies resident in Ireland (or non-residents with business in Ireland) are subject to corporation tax; that a tax return must be filed only for companies subject to corporation tax; and that residency for tax purposes means that "they are centrally managed and controlled in Ireland.".

4. Furthermore, in paragraph 43, page 20, it is said that "where a company is incorporated in Ireland but is not regarded as resident in Ireland because of the terms of a double taxation agreement the following details must be included on form 11f CRO [...] the name and address of the individuals who are the ultimate beneficial owners of the company"

5. However, no further specification is made here what happens absent a double tax treaty if a company is not regarded as resident in Ireland because of management or control of the company being elsewhere than in Ireland.

6. Hence, concluding the findings of the four previous paragraphs, it seems likely that in a situation in which an Irish incorporated company is not resident for tax purposes (if managed and controlled abroad, and unrelated to a DTA), no beneficial ownership information is available either to Irish Revenue, or to Company Registry.

7. Therefore, the information provided in the peer review on the various ratios of companies (point 1 and 2 above) are of no relevance to the question of beneficial ownership information. Relevant for the availability of beneficial ownership information would be to know a) what share of **all** close companies, or of **all** private companies limited by shares incorporated in Ireland, are non-resident for tax purposes, and b) how many of those are unrelated to a double taxation agreement. If this share is a significant share, then the peer-review painted a distorted picture of widespread availability of beneficial ownership, and the assessment by the Global Forum is misleading.

4.3 Lack of legal means to counter the refusal or delay of information

55. There are a large number of reasons an information request can be refused[43]. If a jurisdiction wants to object to a refusal of an information request, there is no recourse available for dispute settlement or legal review. The only way recourse lies with a c complaint to the Global Forum. This is inherently different from a legal recourse, because it is a political process and therefore more costly and constrained than administrative or legal action. In contrast, under double taxation agreements, a taxpayer claiming to have been subjected to tax impositions contrary to the treaty can complain. This triggers a dispute settlement by mutual agreement procedure with the ultimate possibility that arbitration is provided for in the treaty. No similar provision exists for tax authorities in TIEAs.

56. Furthermore, the TIEA allows the jurisdiction from which information is requested (i.e. the secrecy jurisdiction) to notify the person concerned. Sometimes, this is coupled with additional rights to appeal against compliance with the request. Such tipping off or notification provisions are provided for by many jurisdictions, for example Germany, Ireland, and Liechtenstein[44]. They clearly entail the possibility not only of significant delays and of deterring requests, but also of frustration since the assets in question can easily be transferred elsewhere.

57. An Austrian bank brags about the different means by which a bank customer can delay or appeal against a request for information[45]. When answering a request for information the competent authority has to inform the person about whom the request is made, and wait 2 weeks before it can answer the request[46]. In these two weeks, the customer may apply for a decree by the Austrian Ministry of Finance that explains to him under what conditions banking secrecy can be lifted. Within another six weeks, the customer may file a complaint with the court and file with the Ministry of Finance a request that the information is not to be handed over until a judgement by the court.

58. The only criticism made by the Global Forum about these provisions was that the law does not allow exceptions to the notification requirement[47]. While the general provision for tipping off the taxpayer and allowing appeals even before the information is handed to the tax authority is sanctioned by the OECD-standard, it acknowledges the possibility that their use might defeat the request. Therefore, the assessment handbook requires an exception to the notification requirement:

> "The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. B.2.1. Rights and safeguards should not unduly

[43] http://taxjustice.blogspot.com/2011/04/death-of-information-exchange.html; 13.5.2011.

[44] Germany: "Before providing information to the requesting party, Germany must inform the taxpayer that it will do so." (GF 2011 on Germany, page 8). Ireland: „[...] Irish Revenue is conscious of the sensitivities that such requests may involve and ensure that their exchange of information partners are aware that where Irish Revenue does not have the information sought on its files or the information is not publicly available the person concerned will have to be contacted directly to obtain the information." (GF 2011 on Ireland, page 47). For Liechtenstein see http://steuergerechtigkeit.blogspot.com/2009/07/liechtenstein-und-der.html.

[45] http://www.hypo-kleinwalsertal.de/019/hpathypv.nsf/0/92B5F63A61FEBA86C12576D60058E497/$File/0909_Banking_Secrecy_in_Austria.pdf; 10.2.2012.

[46] ADG 2009: §4, Para. 2, in: http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_102/BGBLA_2009_I_102.pdf; 13.5.2011.

[47] Page 53, here: http://www.eoi-tax.org/jurisdictions/AT#peerreview; 10.2.2012.

> prevent or delay effective exchange of information. For instance, notification rules should permit exceptions from prior notification (*e.g.*, in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting jurisdiction)." (page 28, point B.2).

59. This requirement for an exception seems to be a good thing. In practice, however, even if such a legal provision for exceptions is in place, as is the case in Germany (see GF report on Germany[48], page 84), it is not clear how to determine whether they are of a "very urgent nature" or entail the risk of undermining an investigation which would allow for this exception to apply. The overall result is legal uncertainty, as shown in Germany's example, where this exception to the rule of prior notification has never been used in practice.

4.4 Timeliness of information exchange when chains of ownership stretch over multiple jurisdictions

60. This issue is linked to both of the aforementioned points: assume that there is a chain of ownership stretching over five or six jurisdictions. If the first jurisdiction gets a request and has tipping off and appealing provisions, and does not use exceptions on grounds of urgency, the final answer to the request may be given after appeals - at best and if at all - within a number of years. If the tax authority has to repeat this through five jurisdictions, how long can we reasonably expect tax authorities to follow-up on investigations? In practice this is an unworkable situation that will discourage tax administrators from starting enquiries and prevent them from working effectively. Worse, it will totally fail in the task of pursuing tax evaders.

61. Once beneficial owners become aware of investigations, they may start selling their company shares to new layers of corporate owners, thus disappearing from the records as beneficial owners, and extending the chain of ownership. This opens up the possibility for endlessly frustrating investigations. Furthermore, the ultimate beneficial ownership information may have been deleted from the records by a trustee or private banker, if they consider the penalties for doing so to be lower than the potential fees from their clients.

4.5 Cashing in on requests

62. A particularly devious means of achieving non-cooperation while complying formally with the standard is to ask for cash in exchange of information. Bermuda is an example where this is noted by the Global Forum, but condoned[49]:

> "The competent authority may decline a request where: i) Section 4(1): the requesting party does not agree to pay the costs of providing the assistance, whether incurred by the Minister or any other person; [...]" (Bermuda's peer review 2010, page 52).

63. While the Global Forum, in its handbook, encourages some cost-sharing agreements to be included in a TIEA, it allows such case-by-case invoices for the provision of information:

> "For example, a determination of which Party will bear the costs could be agreed to on a case by case base. Alternatively, the competent authorities may wish to establish a scale of fees for the processing of requests that would take into account the amount of work involved in responding to a request." (Assessment Handbook, page 138, Article 9, para. 109).

64. The line between public authority, and private profit-seeking agents, becomes

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[48] http://www.eoi-tax.org/jurisdictions/DE#peerreview; 10.2.2012.

[49] http://taxjustice.blogspot.com/2010/10/oecd-peer-reviews-and-pitfalls.html; 13.5.2011.

blurred when jurisdictions are allowed to ask for fees for providing services when discharging public administrative functions for increasing transparency. Will the governments allow their lawyers, notaries and company service providers in turn to ask for fees for carrying out the customer due diligence? Justice appears to be for sale. Will there be special offers? Detect two, get one free?

4.6 "Availability" of information is a very broadly defined term that relies on private agents, not public registries

65. Another fundamental weakness of the Global Forum standards is that they do not clearly require government authorities to hold company ownership information (be it beneficial or legal ownership information) and related information. It is in the jurisdiction's complete discretion whether this information is held in the vault of a private company service provider (e.g. a trust and company administration firm), or if it is recorded in a registry or tax department, or if it is on public record available online for everybody to inspect.

66. The OECD report of 2001 "Behind the Corporate Veil – Using Corporate Entities for Illicit Purposes[50]" appears to have been forgotten. While it established the general notion that relevant information could be held by private agents only, this was made conditional upon a functioning and independent judiciary and law enforcement capability as well as a strong compliance culture. Upfront disclosure of beneficial ownership instead has been explicitly recommended in an environment of offshore financial services:

> "Primary reliance on an up front disclosure system would be appropriate in jurisdictions with 1) a generally weak investigative system; 2) high proportion of non-resident ownership of corporate vehicles (particularly those owned by individuals or by shell corporations); 3) high proportion of shell companies or asset holding companies and; 4) anonymity-enhancing instruments." (Page 9-10).

67. At least three of these conditions need to be taken as fulfilled in most of the jurisdictions present when the 2002 standard was formulated. One therefore wonders why this insight has not been heeded. It is a recommendation completely absent in the current Global Forum standard setting and peer reviews. The peer reviews devote a lot of effort to test access to information held by private agents, but do not question the suitability of the approach.

68. Even if law enforcement works satisfactorily overall, to outsource state functions by allowing private agents to take over registrar functions causes two problems in an environment of fierce regulatory and tax competition. First, it helps to tilt the balance of power within a country, but also in the world economy, towards private sector interests and allows governments to deny responsibility for the kind of business that is conducted in their jurisdictions.

69. This imposes a cost on societies at large by outsourcing the work of administrations to more expensive private agents and law enforcement agencies. Instead of maintaining an ordinary, orderly registry by a couple of IT- and administrative staff, a vast group of highly paid and privileged private agents (e.g. client confidentiality provisions of lawyers) need to be policed. Layers upon layers of companies and trustees are involved, causing huge costs to law enforcement, multinational companies, and society at large.

70. If information is sought from private agents, the members of a stretched law enforcement and judiciary system risk being drawn into a tiresome cat-and-mouse game over interpretation of the "foreseeably relevant" criterion, or client confidentiality and tipping off provisions enshrined in national regulations and laws. At the same time, governments can "plausibly deny" responsibility for misconduct occurring within

[50] www.oecd.org/dataoecd/0/3/43703185.pdf; 13.5.2011.

their jurisdiction so long as companies have conformed to the existing standards.

71. This relevance of this problem has been recently highlighted by a study of the World Bank on the misuse of corporate vehicles for grand corruption[51]. They summarise their cases as follows:

> "In the vast majority of them, a corporate vehicle was misused to hide the money trail;• the corporate vehicle in question was a company or corporation;• the proceeds and instruments of corruption consisted of funds in a bank account; • and in cases where the ownership information was available, the corporate vehicle in question was established or managed by a professional intermediary."

72. Not only tax evaders, but also criminals and corrupt public and private figures are relying on professional intermediaries. Their ability to endlessly delay investigations is a core part of their utility as intermediaries. There are plenty of examples for this. The Global Forum assessment of Ireland notes:

> "Irish Revenue estimates that about 40 per cent of cases are of a complex nature and/or have some element for which information must be obtained from an external party, and thus a more time-consuming process is involved." (GF 2011 on Ireland, page 56-57, para. 157).

73. This problem is echoed in the assessment report of Mauritius:

> "The most important factor impacting on the timeliness of the response is essentially whether the MRA [Mauritius Revenue Authority] already has the requested information in its files or not. When the information is in the MRA files, it is sent within 90 days most of the time. […] When the information is not in the MRA files, the MRA seeks the information from the person concerned by the request or a third party." (GF 2011 on Mauritius, page 78-79; [TJN-note]).

This indicates that when information is sought from an "external party" such as a company service provider, lawyer or notary, additional delay is unavoidable.

74. If, as we argue above, the Global Forum's standards are not very strict in the quality of information required to be held (e.g. not requiring information on beneficial ownership), it begs the question why the kind of data the Global Forum is checking is not required to be available online to speed up investigations. To find out with a few clicks about the ownership of any corporate vehicle would enable rapid tracing of those hiding behind a corporate veil.

4.7 The preconditions for effective information exchange are not checked

75. As mentioned earlier, the Global Forum peer reviews are entirely focussed on the OECD's 'upon request' model for information exchange. But this model is rapidly being displaced by spontaneous or automatic information exchange models, which are widely recognised as being more effective as tools for tackling tax evasion. While "upon request" information exchange has a supporting role to play, without broad spontaneous and automatic information exchange, global financial imbalances cannot be tackled[52]. Focusing solely on the 'upon request' model of exchange, drastically reduces the relevance and effectiveness of the GF's peer reviews.

76. The importance of this issue is highlighted by the GF-assessment of Germany. In 2008/2009 Germany provided spontaneous

[51] Page 2, http://www1.worldbank.org/finance/star_site/documents/Puppet%20Masters%20Report.pdf ; 10.2.2012.

[52] http://taxjustice.blogspot.com/2011/01/economics-is-art-of-reading-tea-leaves.html; 13.5.2011.

exchange on more than 25,000 occasions, and exchanged automatic data more than 100,000 times a year. This was in addition to exchanging more than 400,000 pieces of data under the EUSTD (page 65). This can be contrasted with the number of requests received over three years totalling 5,008 (ibid.: 55). Similarly, Australia reports that it provided "2 million records to DTA partners on interest, dividends, royalties and non-resident withholding payments" in 2009 for tax year 2008 (GF 2011 on Australia, 58). Interestingly, the number of requests received and answered has not been provided in the GF 2011 assessment of Australia. Why not?

77. However, as the current standards are firmly limited to "upon request" information exchange, they do nothing to check whether the preconditions for effective automatic and spontaneous information exchange are in place, such as registries of beneficial ownership and/or beneficiaries, comprehensive taxpayer identification numbers or mandatory reporting of income payments.

78. Worse, there are signs that the OECD is no longer monitoring some of the preconditions necessary for more sophisticated information exchange. The 2011-edition of CTPA's Comparative Information Series on tax administration, left out table 37b, which in earlier years had displayed the kind of information reporting on income payments to non-residents, for instance of dividends, royalties, and interest[53]. It is exactly this kind of regulation which the US administration is currently seeking to introduce to become fit for information exchange[54]. At this point in time, the OECD is no longer providing crucial comparative information on this matter[55].

4.8 Meaningful statistics on information exchange are not being produced

79. Statistics relating to numbers of requests and timeliness of responses were envisaged in the peer review handbook (GF 2010: 34). While the peer-review process is relatively young, the few published combined phase one and phase two reports do not show signs of serious effort to statistically capture and display the practice of information exchange in a comprehensive manner. They dispense with any systematic tables on the number of requests, the proportion which has been answered in what time, where they came from, what taxes they related to, and the amounts involved.

80. Most importantly, they lack any measure to compare the number of and amounts involved in the requests with the importance of the economic ties with the countries for which information exchange has taken place. In addition, no comprehensive statistics are published about on-site inspections of supervisors, or fines and penalties imposed as a consequence of misconduct by trustees or company service providers. Without such data, meaningful comparative analyses of the scope, depths and effects of the OECD-standard and information exchange is not possible.

81. Australia, Denmark and Ireland, for instance, have dispensed with any information on the numbers of requests (GF 2011 on Ireland, pages 49-60, on Australia page 73, on Denmark page 81,), while Germany gives some loose figures, claiming that over the last 3 years 5,008 requests were received, from which 227 were declined (GF on Germany 2011: 8, 55). Similarly, Mauritius mentions that it received 200 requests over a period of 5 years (GF on Mauritius 2011, page 80)

[53] The 2009 report is here: http://www.oecd.org/dataoecd/57/23/42012907.pdf; the 2011 version here: www.oecd.org/dataoecd/2/46/42419552.pdf; 13.5.2011.

[54] http://taxjustice.blogspot.com/2011/04/spin-and-distortion-attempts-to-block.html; 13.5.2011.

[55] However, the OECD's CTPA announced to publish a study on the practice of AIE by June 2012, which may remedy this particular lack of monitoring.

without giving a ratio on the fulfilled requests. Last but not least, Norway provides a total number of requests over three years (2007-2009) of 587 (GF 2011 on Norway, page 76), implying that no request has been turned down (ibid.).

82. This information is little more than a fig leaf when the question of adequacy of the current practice of information exchange is concerned. As we have noted above, research by Johannesen and Zucman bears witness to a lack of effectiveness of the standard, which may become more evident and nuanced, and could be remedied more quickly if detailed breakdown statistics were made available in the peer reviews.

83. We suggest the following information should be collated and published in the peer reviews:

a) the number of received requests, and the number of those that could be answered in a 1 week, 4 weeks, and 3 months timeframe, broken down by requesting country;
b) the number of sent requests and the number of those that has been fulfilled satisfactorily, broken down by requested country;
c) the types of taxes the requests related to, and the underlying amounts of misreported taxable income or payments, broken down by requesting country;
d) the value of outward and inward investments for the country's top 50 origin and destination countries of investments, broken down by type of investments (FDI, portfolio; what kind of portfolio investments);
e) the value of inward and outward payments for the country's top 50 origin and recipient countries of payments, broken down by type of payment (commercial, interest, dividend, royalty, etc).

4.9 The Global Forum charges its readers and has discontinued the annual "Level Playing Field" reports

84. While it is laudable that an online read-only version is available for free, the GF no longer makes available pdf-copies of the peer reviews. In the beginning, the GF published pdfs which did not allow for copy-pasting[56]. Now, it has created an online reading tool for the reports that prevents printing and copy-pasting, making the reports more time-consuming to handle. For a public body that is funded out of taxpayer's money, and which seeks to contribute to a vital public good such as financial transparency, it does not seem coherent to reduce accessibility of evaluation reports.

85. Another factor which makes it harder to use the information produced by the Global Forum is the decision taken in 2011 by the OECD / GF to stop publishing its level playing field reports which were published annually from 2006 to 2010. While the peer review reports undoubtedly provide much more in-depth information on many subjects, and are more detailed and accurate in their findings, it is nonetheless more difficult now to compare jurisdictions with each other. This is the case whenever observers want to compare different jurisdictions beyond the 11 criteria established by the Global Forum to check for the availability, access and exchange of information.

5. The questionable benefit to developing countries

86. The OECD has been encouraging developing countries to become members of the Global Forum which would imply that they must create the legal and administrative environment to comply with the standard and that they must undergo peer reviews. While it is stressed by those encouraging developing countries to join that developing countries would be given one or two years before a review takes place, this timeline is likely to be short enough to require from developing countries an important shift of emphasis and resources towards complying with the standard.

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[56] http://taxjustice.blogspot.com/2010/10/oecd-peer-reviews-and-pitfalls.html; 13.5.2011.

87. It is far from clear what benefit a developing country receives from being a member of the Global Forum, while it clearly carries a cost in terms of budgetary contributions and personnel to attend meetings and carry out processes. More importantly, however, the peer review process and the standards impose an obligation on the developing country to prioritise policies designed for a hypothetical situation in which a non-resident (say, a German investor) is using the developing country's bank account for evading German taxes.

88. This is a highly hypothetical scenario which may be of very little practical relevance. Yet by participating in the Global Forum, the developing country must give this theoretical problem a priority. This risks diverting valuable resources away from more pressing tax related policy issues and furthermore does not help build domestic tax systems which, in contrast to the Global Forum processes, rely far more often on registries and on routine or automatic reporting requirements than on "upon request" information access.

89. As we argued at length above, the standards underlying the peer reviews, and the peer reviews themselves, are not effective in promoting either transparency or efficiency in tax systems. The Global Forum approach ignores that the kind of information and systems used in a domestic tax context are broader and often differ from the standards the Global Forum promotes for international cooperation. Much more information is usually required on an automatic reporting basis, in which the Global Forum does not provide expertise.

90. A second reason why the Global Forum's peer reviews do not seem to add value is related to the illicit financial flows from developing countries into western economies. The GF-standard and peer reviews do little to curtail these illicit financial flows, and they distract from the nature of this problem when peer reviewing a developing country's capabilities for collecting information for the purposes of exchange upon request. Interested developing countries should be given substantial time and asymmetric benefits such as bulk tax information delivery (under some human rights conditions) before reciprocity is required by developed countries. The peer reviews and the standards do the opposite: they test for reciprocity within the context of a process that is ineffective in helping developing countries to address the huge illicit financial flows.

6. The limited value added of peer reviews

91. This paper has shown that the standards underlying the peer reviews are not sufficiently robust to warrant peer review. However, there are also countries which are actively seeking to apply even weaker standards. In these instances, the Global Forum process may have shown some success.

92. One positive outcome of the peer review process has been a deepening of some of the relevant information for the jurisdictions reviewed. For example, benefits are observable in the additional information on the sanctions regime in relation to ownership recording that is made available in the peer reviews. However, the information on sanctions doesn't always extend to sanctions for non-compliance with obligations on keeping accounting records or producing financial statements. In addition to information on the sanctions regime, brief, though non-systematic summaries of tax systems sometimes provide a useful overview. Similarly, some interesting statistics about the financial sector are sometimes included, but not systematically in all reviews.

93. One specific example of positive change arising from the peer review process relates to Switzerland's implementation of the new information exchange provisions[57]. As a Swiss newspaper reported, the initial draft language to be inserted in the revised double taxation

[57] A good overview can be read here: http://www.efd.admin.ch/aktuell/medieninformation/00462/index.html?lang=en&msg-id=37645; 23.2.2012.

agreements was dropped after criticism by the Global Forum that this law would not pass the peer-review process[58]. Apparently, the Swiss interpreted the TIEAs so as to explicitly require by law that any information request must, in addition to the catalogue of the other requirements included in the Model-TIEA, provide the name of the suspected tax evader, plus full address details of the bank branch office where the funds are allegedly held. After an informal warning by the Global Forum, an intervention by the government triggered Swiss legislators to change the wording accordingly[59].

94. However, other claimed success stories of the Global Forum are less obvious. For example, Uruguay and Panama are quoted by the OECD as examples of progress effectuated by the peer review process.

95. Uruguay has acted as a regional tax haven for decades, predominantly for Argentinean elites who invested in Uruguay property and so-called SAFIs. For a long time, Uruguay refused to sign a tax information exchange agreement with Argentina. Under Global Forum's pressure to sign tax information exchange arrangements with countries with significant economic ties and with those who request so, Uruguay recently conceded to start negotiations with Argentina[60]. However, this agreement is not going to be a TIEA, but a full double tax avoidance convention, with significant fiscal costs and risks to Argentina. In view of Uruguay operating a territorial tax system, and therefore double taxation of income is unlikely to occur given the widespread practice of unilateral relief from double taxation, the information exchange clause with Uruguay seems to come at a high cost.

[58] http://www.nzz.ch/nachrichten/wirtschaft/aktuell/eiertanz_um_die_amtshilfe_1.9402044.html; 13.5.2011.
[59] http://www.parlament.ch/d/mm/2011/seiten/mm-wak-n-2011-03-22.aspx; 12.5.2011.
[60] http://www.buenosairesherald.com/article/90375/uruguay-says-moving-forward-in-tax-accord-with-argentina; 14.2.2012.

96. Another example quoted by the OECD for success of the peer reviews is the signing of a TIEA between Panama and the USA. Panama also operates a territorial tax system and thus is unlikely to be heavily hit by double taxation since unilateral double taxation relief by most investor countries prevents double taxation. While Panama agreed to sign a TIEA with the US and no DTA, all the rest of Panama's current total of 13[61] exchange of information agreements are DTAs. Therefore, once again, the inclusion of upon request information exchange appears to come at a high cost for every country except for the USA.

97. While on the surface this suggests an apparent success for the peer review process, it is questionable to what extent these changes were brought about because of the peer reviews. In addition, developing countries may benefit in practice from this trickle of change only to a marginal extent and may be required to pay a very high cost in return, by being asked to reduce source taxation on dividends, interest and royalties in return for information exchange during negotiations for DTAs. Furthermore, indirect costs arise because of increased opportunities for treaty shopping by multinational corporations.

98. Recent Swiss statements to this effect underline the problem. In a document laying down the so-called clean-money strategy, the Swiss Finance Department explained its opposition to the Council of Europe / OECD-Convention on Mutual Administrative Assistance in Tax Matters[62] by claiming that by signing, Switzerland "would forego a significant trump vis-à-vis certain states in negotiations for double taxation agreements. This would be the case for instance with Brazil, with whom DTA-negotiations have not yet led to a result, with Argentina, that has still not ratified the DTA signed in 1997

[61] http://www.eoi-tax.org/jurisdictions/PA; 14.2.2012.
[62] http://taxjustice.blogspot.com/2012/02/council-of-europeoecd-convention-new.html; 23.2.2012.

[…][63]".Historically, Argentina and Brazil have resisted setting low withholding tax rates on dividends, interests and royalties.

99. Indirectly, it can be inferred from this statement that the Swiss government intends to use the information exchange as a carrot in bilateral negotiations to pressure for low withholding tax rates in double tax agreements. The alleged determination by the Global Forum to require all member states to sign agreements for information exchange if asked to do so without strings attached is seriously called into question by this manoeuvre. The freedom for a secrecy jurisdiction to insist on a DTA instead of a TIEA thus can be seen as another important step in the process of undermining the OECD/GF transparency agenda.

100. Our concerns about the degrading of the OECD's transparency and information exchange agenda are heightened by statements from the OECD itself. In early 2012, Pascal Saint-Amans, the new head of OECD's tax department CTPA, defined his priorities in an interview given to the International Tax Review[64]:

> "Despite his central role in transparency and information exchange at the OECD over the past couple of years, Saint-Amans does not see this as being one of the central themes of his leadership.
>
> 'Transparency of course is key, and we do have an agenda there," he says. "But for me, the core business of the OECD is tax treaties, transfer pricing, and the elimination of double taxation. We should be back to our core business, I'm not sure we've left it, but we could strengthen that to make sure we have the right and implementable principles.'"

[63]http://www.news.admin.ch/NSBSubscriber/message/attachments/25989.pdf; 23.2.2012; page 22, free translation MM,.
[64]http://www.internationaltaxreview.com/Article/2967128/Pascal-Saint-Amans-finds-his-stride-in-Owenss-shoes.html; 5.3.2012.

7. Conclusions and Solutions

101. This paper has shown that GF peer reviews have had limited success in terms of pressure on a few notorious pariahs in tax transparency. They fall far short of claims that they represent "the" new international standard on tax transparency which will bring about fundamental change in tax justice, tax transparency and international economic relations. This is hardly surprising, given the Global Forum's dependency on OECD members and other secrecy jurisdictions. The OECD has the mandate to defend its members' interests[65], and to shape international policies in order to avoid risks for its members' economies, and among its members are the most important recipients of illicit financial flows. Furthermore, the OECD is very strategic about maximizing its influence, as revealed by the Nicholson-Report in 2003 entitled "Maximizing the Impact of the OECD".

102. The current standard of transparency and its peer reviews promoted by the Global Forum is not fit to solve the fundamental international tax issues concerning developing countries and developed countries: it will not curtail illicit financial flows and widespread tax evasion, and the macroeconomic distortions arising from these flows will continue to undermine economic stability.

103. The notion that the current standard and its TIEAs act as an effective deterrent is

[65] For instance, this can be read in the foundational document of the OECD (http://www.oecd.org/document/7/0,3746,en_2649_201185_1915847_1_1_1_1,00.html; 11.5.2011). In Article 2 it is written: "In the pursuit of these aims, the Members agree that they will, both individually and jointly: […] (c) pursue policies designed to […] avoid developments which might endanger their economies or those of other countries;[…]." (Convention on the OECD, Art. 2).

nothing more than wishful thinking[66]. An effective deterrent standard for information exchange would need to have a significant impact on the pattern of portfolio investment, because a) global patterns of portfolio investments are largely determined by their after-tax-returns, and b) it is reasonable to assume that yields on 80-90% of foreign held assets by developing country residents are not taxed[67]. The available evidence as at March 2012 shows that tax evaders are not being deterred[68].

104. Thus, the current standard and peer review process appears little more than window-dressing and a rules-exporting machine with few palpable benefit to non-OECD countries. Why else would the US and some EU-member states conclude additional cooperation for more effective information exchange[69], and why would the US devise FATCA[70] and India[71] call upon G20 to implement automatic information exchange on banking information? These initiatives are likely to be far more effective in curtailing illicit financial flows, so it is a matter of grave concern that the OECD/GF continue to promote their far weaker standard to other countries while their own members pursue more effective alternatives. It is hard to avoid concluding that the Global Forum peer reviews are an exercise in creeping futility.

Literature

Johnson, Jackie 2008: Is the global financial system AML/CFT prepared?, in: Journal of Financial Crime 15: 1, 7-21.

Kar, Dev/Cartwright-Smith, Devon 2008: Illicit Financial Flows from Developing Countries: 2002-2006 (Global Financial Integrity), Washington DC.

Nicholson, Peter 2003: Maximising the Impact of the OECD. Report on Reorganising the Committee Structure and Related Matters (Report by Special Advisor to Secretary-General of the OECD), Paris.

Rixen, Thomas/Schwarzer…2012

Reuter, Peter/Truman, Edwin M. 2004: Chasing Dirty Money: The Fight Against Money Laundering, Washington, DC.

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66 http://taxjustice.blogspot.com/2011/04/death-of-information-exchange.html; 13.5.2011.

67 See here: http://taxjustice.blogspot.com/2010/02/new-study-swiss-hoard-500-bn-euros-of.html; and page 5, page 10 http://www.taxjustice.net/cms/upload/pdf/AIE_100926_TJN-Briefing-2.pdf; 13.5.2011.

68 http://www.parisschoolofeconomics.eu/docs/zucman-gabriel/sub_jan31.pdf; 9.2.2012.

69 http://taxjustice.blogspot.com/2012/02/big-news-on-fatca-multilateral.html; 14.2.2012.

70 http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1969123_code789716.pdf?abstractid=1969123&mirid=1; 14.2.2012.

71 http://taxjustice.blogspot.com/2011/11/india-demands-automatic-information.html; 14.2.2012.