



# Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption

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## Executive Summary

Automatic Information Exchange (AIE) is a vital transparency tool that could help developing countries tackle illicit financial flows worth trillions of dollars that end up hidden in the financial centres of many OECD countries and other tax havens. These flows include money from corruption and crime and especially tax dodging money, which deprives developing countries of resources needed to achieve economic development and ensure their citizens' basic human rights.

While the G20 has endorsed AIE as the new global standard for exchange of tax information and rhetorically committed to extending its benefits to developing countries, the latter have *de facto* been excluded from the design of the implementing framework developed by the OECD, a club of rich countries.

The OECD / Global Forum's Working Group on AIE conducted a survey to find out about, among other things, what countries need in order to implement the new framework, called the "Common Reporting Standard", or CRS. Yet this survey came far too late to be relevant for the design of the standard, was biased towards uncritically endorsing the OECD's plans, and its findings have not been published – despite **comments by OECD and Global Forum officials suggesting that developing countries are either unaware, uninterested**

**or incapable of implementing AIE.** As OECD tax boss Pascal Saint-Amans put it: "Most (developing countries) are not yet ready and most of them don't want it."<sup>1</sup>.

We find this remarkable for several reasons. Designing a set of standards that does not consider the most important customers' needs is one thing; but instigating a 'marketing campaign' to discredit and discourage their participation begs the question of whether the G20 and OECD, whose member states include many major secrecy jurisdictions, had the intention of seriously including developing countries in the benefits of transparency.

It is also worth noting that developing country governments are not the only interest groups to consider here: it is their ordinary citizens who are the real victims of state looting and illicit financial flows. Many of their leaders and their cronies are personally implicated in the problems, and are consequently reluctant to ask for AIE. If the OECD and G20 were to push this transparency standard for developing countries assertively, this could have tremendous positive impacts on governance and accountability in some of the poorest and most vulnerable countries on the planet. OECD nations have struggled for years to figure out ways to help improve governance in developing countries, but they generally lack leverage, local understanding and legitimacy to push for change. Here is one of those rare opportunities to provide a boost for good governance, with genuine and legitimate leverage – yet the OECD seems curiously reluctant to embrace it.

What is more, the OECD itself has noted elsewhere that a number of developing countries including China, Chile, Colombia, Costa Rica, India, Indonesia, Malaysia, Mexico, Saudi Arabia, and South Africa have signed a declaration firmly endorsing AIE<sup>2</sup>.

In order to check these assertions by the OECD, TJN has conducted two surveys of its own. A first survey aimed at finding out the views on AIE from developing countries: Argentina, China, Costa Rica, Honduras, Liberia, Morocco, Pakistan and Uganda participated. The second targeted countries where AIE is already up and running, and sought views on contested provisions such as non-reciprocity. We received answers from Argentina, Australia, Austria, Denmark, Finland, Germany, Gibraltar, Hungary, Lithuania, Netherlands, Romania and Slovakia.

Though we got answers from only eight developing countries and from 11 countries that are already engaging in AIE, there was a high degree of consistency among the answers. It seems that many developing countries are aware of and interested in AIE, acknowledge its potential benefits, and express clear preferences for its design and capacity building needs. These clear counterexamples prove the OECD flat wrong.

<sup>1</sup> <http://www.trust.org/item/20140526065643-2fhq7/?source=quickview>; 16.6.2014; and TJN discussions with Global Forum officials at a meeting in Paris, May 20, 2014.

<sup>2</sup> [Declaration on automatic exchange of information in tax matters](#), Meeting of the OECD Council at Ministerial Level, Paris, 6-7 May 2014.

For instance, the most cited reasons for wanting AIE are revenue collection and deterring tax evasion. All agreed that AIE would complement the old "Upon Request" (UR) standard<sup>3</sup>. While it has been asserted by some that developing countries need to get proficient in UR before embarking on AIE, 88% of the surveyed developing countries consider that they could be implemented at the same time, though in some cases they would want to apply conditions, such as non-reciprocity.

All of the responding developing countries believe a sanction or incentive scheme is necessary to encourage tax havens and major financial centres to participate, and all would prefer a multilateral – instead of bilateral – "Competent Authority Agreement" to operationalise AIE, suggesting that the current route proposed by OECD and pushed by Switzerland will not deliver what those countries want.

Most arguments that developing countries raised against implementing AIE concern a lack of capacity. The three most important were:

- a) having to set up systems to collect information locally to allow fully reciprocal information exchange (27%);
- b) analysing information received (28%)
- c) information technology difficulties (26%)

These concerns could be addressed by clear commitments of funds; by training and technology; and with non-reciprocity provisions to let developing countries at first merely obtain the information they need from tax havens and other foreign jurisdictions, before having to set up the systems to reciprocate with information.

The other side of the equation in our survey – those countries sending the relevant information – match this preference: most jurisdictions that responded that are already engaging in AIE are already sending (or would be willing to send) information, regardless of whether or not they are getting reciprocity in return.

Even though the CRS contemplates a limited material scope of information to be exchanged - only some financial account information - developing countries showed a clear interest in obtaining more information automatically: for example ownership of fixed assets such as real estate; directors' fees; or company shareholdings.

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<sup>3</sup> Upon Request is explained in Section 3.2.1 While AIE provides a deterrent effect and new information leading to new requests, UR offers specific in-depth information. Indeed, AIE could save developing countries time and resources on preparing specific requests to foreign jurisdictions under the UR standard: time and resources that they could then invest in analysing the received information to increase revenues and fight money laundering, corruption and so on.

OECD officials have also claimed that widening the scope of the current CRS would be complicated. However, countries already engaging in AIE prove that there is a wide scope for information that is already being exchanged automatically: interests, dividends, royalties, salaries, pensions, capital gains, business profits, income from independent personal services, income from immovable property, directors’ fees, income to artists, sportsmen and students, shareholdings and participation in companies. One developing country is already sending some information that goes beyond the CRS’ scope.

Beyond the survey results, this report is also aimed at civil society and the interested general public, and offers a basic explanation of the mechanisms that enable illicit financial flows to occur: namely how secrecy is achieved, and how it may be tackled.

The report ends with policy recommendations aimed at developing countries: to draw attention to loopholes in the CRS, and to highlight the strategies used by tax havens and other OECD countries to exclude developing countries from joining and benefiting from AIE.

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## 1. Introduction

Illicit financial flows (IFFs) from developing countries are estimated in the trillions of US dollars (Kar/LeBlanc 2013; Henry 2012)<sup>4</sup>. This money drain is a multiple of what they receive in official development assistance. Decades of illicit financial outflows mean that many developing countries are in fact net creditors to the rest of the world, with more assets stashed abroad than they owe to foreign creditors (Henry 2012, Ndikumana/Boyce 2011). This helps explain the dire conditions of many communities in the developing world, whose members are unable to enjoy basic human rights such as housing, education, sanitation or health, among other.

The most important element that enables these illicit financial flows is secrecy, shielding illegal activities from tax authorities, creditors, journalists and society.

A globalised network of financial institutions and legal entities is in place that allows and indeed helps anyone to hide their identities and business activities. To counter this, it is necessary to collect the relevant information and make it available to the widest audience that is appropriate: some information belongs to the general public (such as country by country information, or identities of the real owners of companies, real estate or trusts), while more sensitive personal information could be shared only among authorities, such as tax returns for individuals or bank account information.

AIE would not solve all secrecy problems, but it is an essential step to tackle tax evasion, corruption and money laundering. It complements, and fixes many flaws of, the dominant global “upon request” standard, creating a strong synergy towards better transparency. This would translate into better tax compliance and enforcement, better respect for the law, and would increase revenues for developing countries.

AIE could also help free scarce resources in tax administrations. Costly and tricky individual information requests would in many cases become obsolete: the information – and much more – would already be available automatically.

Opening up tax havens (or secrecy jurisdictions) to AIE would benefit developing countries, which currently can obtain little useful information on their taxpayers’ offshore holdings. For these reasons, the Tax Justice Network and many other civil society organizations have been demanding AIE as a key tool to fight illicit financial flows.

Most of the illicit flows from developing countries end up stashed in nations of the OECD, which has many tax haven members such as Switzerland. So it may

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<sup>4</sup> Global Financial Integrity calculated USD 5.9 tn of IFFs from developing countries between 2002 and 2011 (Kar/LeBlanc 2013); TJN’s “The Price of Offshore Revisited” estimated that at least \$21 trillion of unreported private financial wealth was held offshore in conditions of secrecy at the end of 2010 (Henry 2012).

be not be such a surprise that the OECD has been trying to argue that developing countries do not need AIE: either that they are unaware of it, or not interested in it, or incapable of implementing it.

This report suggests that this view is quite wrong.

Developing countries do understand the benefits of AIE. For example, G20 members such as Argentina<sup>5</sup> and India<sup>6</sup> decided not to wait until the new multilateral AIE standard is in force, but have already signed treaties with tax havens (Curacao and Mauritius respectively) to engage in AIE.

Some developing countries do need capacity building, and their common voice is needed, to turn the shallow declarations by the G20 into actual commitments by developed countries to assist those countries that so request it. The role of the OECD and the Global Forum should be cautiously assessed by any interested developing country, which should also consider what assistance the United Nations Tax Committee might provide instead.

This report aims to alert developing country officials, civil society organisations and the public about the schemes and loopholes used by some developed countries and the private sector to prevent the new AIE system from becoming truly effective, or to exclude developing countries from it. We offer policy recommendations to tackle these issues.

Ultimately, we seek to contribute to improving governments' accountability to their societies, to tackle impunity and restore a sense of fairness in societies around the globe, to help rebalance the global economy, and to counter deep wealth and income inequalities.

The next section provides some context around illicit financial flows and secrecy. Chapter Three then describes exchange of information processes and methods; Chapter Four summarizes current developments and the exclusion of developing countries in designing new tax information exchange systems. Chapter Five summarises survey and its results, and Chapter Six contains conclusions.

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<sup>5</sup> <http://www.lanacion.com.ar/1690012-la-afip-intercambiara-datos-con-holanda-para-combatir-la-evasion>; 13.05.2014

<sup>6</sup> [http://articles.economictimes.indiatimes.com/2014-05-27/news/50122462\\_1\\_mauritius-ramgoolam-tax-treaty](http://articles.economictimes.indiatimes.com/2014-05-27/news/50122462_1_mauritius-ramgoolam-tax-treaty); 27.05.2014

## **2. Context: Illicit Financial Flows and Secrecy**

### **2.1 Illicit Financial Flows: lifeblood of secrecy jurisdictions, bane of developing countries**

1. The current global financial system contains an interconnected net of financial institutions that provide financial services to individuals and entities such as companies, corporations, trusts, and foundations. This network helps capital flow freely from country to country, enabling countless transactions in international trade, donations, money transfers and other economic activities.

2. The ease with which money rapidly and safely “travels” from one place to the other has supported the expansion of trade in goods and services, benefitting individuals, companies and countries alike. However, as with any technology, there are always abuses. The globalisation of financial and economic ties has not been matched by the necessary transparency. Tax authorities, regulators and law enforcement officials have not kept pace with the proliferation of dodgy and criminal enterprises that have flourished alongside legitimate businesses in the secrecy-suffused international financial system.

#### **2.1.1 Consequences of Illicit Financial Flows**

3. Illicit financial flows (IFFs) consist of cross-border transfers of money that are “illegally earned, transferred, or utilized. If it breaks laws in its origin, movement, or use it merits the label.” (Kar/Cartwright-Smith 2008: vi). Those flows originate or result in corruption, bribes, money laundering, trafficking financing of terrorism and tax evasion.

4. IFFs facilitate and involve international crime, allow unfair competition, undermine the rule of law, impede countries from guaranteeing basic human rights such as health, education or housing; from protecting the environment, and from building infrastructure for economic development, everywhere.

5. IFFs also change economic incentives: instead of investing in research and developing new or better products and services, they make it easier and more profitable for rich individuals and big companies to engage in dubious and unproductive practices: extracting wealth from societies, rather than creating wealth for them. Similarly, paying bribes or illegal logging may profit a company and its owners, but this rewards harmful behaviour and distorts the economy. Those activities enlarge a tiny group’s slice of the pie while leaving everyone else worse off.

### **2.1.2 Harming Developing Countries**

6. IFFs hurt all countries, but they harm developing countries the most: their tax authorities and regulators usually have fewer staff, training or technology to fight IFFs, not to mention tougher political climates in which to tackle corruption and élite looting. The most skilled and equipped investigators have enough difficulty challenging secrecy schemes that typically involve complex networks of legal entities or arrangements in different countries. Even if they do track down specific information, they face huge difficulties in extracting the required legal cooperation from the secrecy jurisdictions. These kinds of secrecy-busting skills are very scarce or absent in developing country administrations.

7. The drain on foreign exchange reserves through illicit financial flows can destabilise their currencies. Weak or unstable currencies hinder the formation of domestic capital stock, and put the investment climate at risk, damaging economic development.

8. IFFs resulting from corruption or tax evasion weaken the economy and state budgets. Developing country governments must either cut schools and hospitals and other forms of public spending, ask for foreign aid, borrow more, or levy more taxes on those who cannot escape: that is, ordinary workers and consumers. Consumption taxes hit poorer and more vulnerable members of society hardest, because they have to spend most of their income for their basic needs, paying taxes on every purchase. All this promotes a sense of unfairness and corrodes the legitimacy of the political, tax and economic system.

9. By increasing developing countries' dependence on foreign aid, IFFs make politicians more accountable to foreign governments and international organisations than to their own citizens. This further undermines democracy and exposes the economy to greater external risks, including forced trade and tariff concessions. Aid or foreign debt inflows typically fuel further rounds of capital flight, with the fresh money rotated offshore again and stashed in secrecy jurisdictions.

10. Globally, IFFs are a one-way flow from poor to rich countries. Corruption proceeds from Nigeria may end up in Swiss banks, but a corrupt Swiss official is unlikely to stash her ill-gotten gains in a Nigerian bank. While both developing and developed countries both suffer from illicit financial outflows, it is developing countries that are overwhelmingly the victims.

### **2.1.3 Lifeblood of secrecy jurisdictions?**

11. Receiving capital and investment, or managing a share of the world's assets, is seen by conventional wisdom as beneficial for any country. But it is not always clear that ordinary citizens in secrecy jurisdictions actually benefit or suffer as a result (Shaxson/Christensen 2013). Especially in smaller secrecy jurisdictions, the private financial sector has effectively captured the political and

legislative apparatus. Where such capture has occurred, the political system will be unlikely to halt the flow of illegally-sourced funds.

12. The above point suggests that while developed countries do want to prevent their own citizens from evading taxes, they have far weaker incentives to counter evasion from developing countries, especially if they themselves become the depositaries (and beneficiaries) of those illicit funds.

## 2.2. Enabling Illicit Financial Flows: Secrecy

13. Various mechanisms enable IFFs, but the chief one is secrecy. Investing and laundering money with illegal background is possible because criminals can easily conceal their identities behind banking secrecy, or a veil of nominees, sham entities and arrangements such as companies, trusts, foundations often networked across many different secrecy jurisdictions. The absence of public accounts of legal entities, for instance, facilitates tax evasion.

14. Transparency depends partly on the legal framework for disclosure in each jurisdiction. But often, when only authorities have access to relevant information such ownership or annual accounts, they may be either unable to make use of it (if they lack the

### Box 1: Secrecy, Confidentiality and Privacy

In the Offshore World, the words "secrecy", "confidentiality" and "privacy" are often used synonymously. The word "secrecy" is increasingly being replaced by the other two, because "secrecy" has fallen in disrepute. Some critics have argued that anti-secrecy campaigners would be putting at risk millions of people including "Jews in France, or homosexuals in Saudi Arabia" by threatening their privacy. However, we are not aware of a single transparency campaigner, street protestor, anti-corruption campaigner, trade union official, investigative journalist, or dissident of any kind who has been protected from oppression by virtue of having a secret bank account or offshore trust. On the contrary, we can name any number of their oppressors – Augusto Pinochet, Obiang Nguema or Sani Abacha come to mind here – who use and have used secrecy jurisdictions extensively to preserve their power and wealth at the expense of their millions of victims.

While we would never advocate for bank account details to be placed on public record, we acknowledge that there is a need for tax authorities to receive this kind of data on a routine basis, just as they routinely receive reports from employers on wages paid out to employees. Other information, in contrast, such as ownership of real estate and companies, which enjoy the privilege of limited liability, or parties to trusts and foundations, which often act as tax exempt mechanisms for wealth accumulation, should be accessible for the general public.

Source: <http://www.taxjustice.net/2014/05/29/non-perils-information-exchange/>; 17.6.2014.

sufficient staff, training or technology) or they may be unwilling to check or supervise the information in order to protect corrupt officials or businesses or the local offshore financial sector.

15. In contrast, if such information is placed on public record, easily and freely accessible via the internet, it allows journalists, civil society organizations and anyone with a special interest or knowledge to access, cross-check and scrutinize the information, benefitting democratic institutions and society and revealing abuses more quickly.

16. Secrecy is achieved in three main ways. First, by a lack of information (no collection/holding of any information); second, opaqueness (hiding the real identity behind a non-transparent legal entity); and third, by a lack of access to this identity information by the relevant parties (e.g. authorities, regulators). In the international context, obtaining the relevant information held abroad depends on countries exchanging information with each other.

**2.2.1 Achieving Secrecy: No Information Collection**

17. The easiest and crudest way to ensure secrecy is by not collecting relevant information. For instance, for some Limited Liability Companies (LLCs) in some states such as Delaware in the USA, where the owners’ identities are not submitted to any authority<sup>7</sup>. In some situations where LLCs have no tax filing obligations, company service providers do not have to keep ownership inside the USA<sup>8</sup>.

18. A similar way to achieve a lack of information is by not requesting that ownership information is updated, either regularly or when there is a change. This makes it easy for shares to be transferred without record, making it nearly impossible to find out the real owners. Companies with unregistered bearer shares are an example: whoever physically holds the shares is the company’s beneficial owner. In this way,

**Box 2: Taxation at Entity Level**

It is true that if taxation only occurs at entity level, legal ownership information would be enough for that purpose. However, beneficial ownership would still be necessary for personal income tax and/or personal wealth tax. In any case, even if a country has no personal taxes, beneficial ownership information would still be extremely relevant for non-tax issues, including money laundering, corruption, bribes, etc. In this case, knowing who the real owner of a bank account or real estate property is, would be relevant for law enforcement agencies to find out whether that owner (e.g. a public official) could justify the origins of those funds and assets, and otherwise start an investigation.

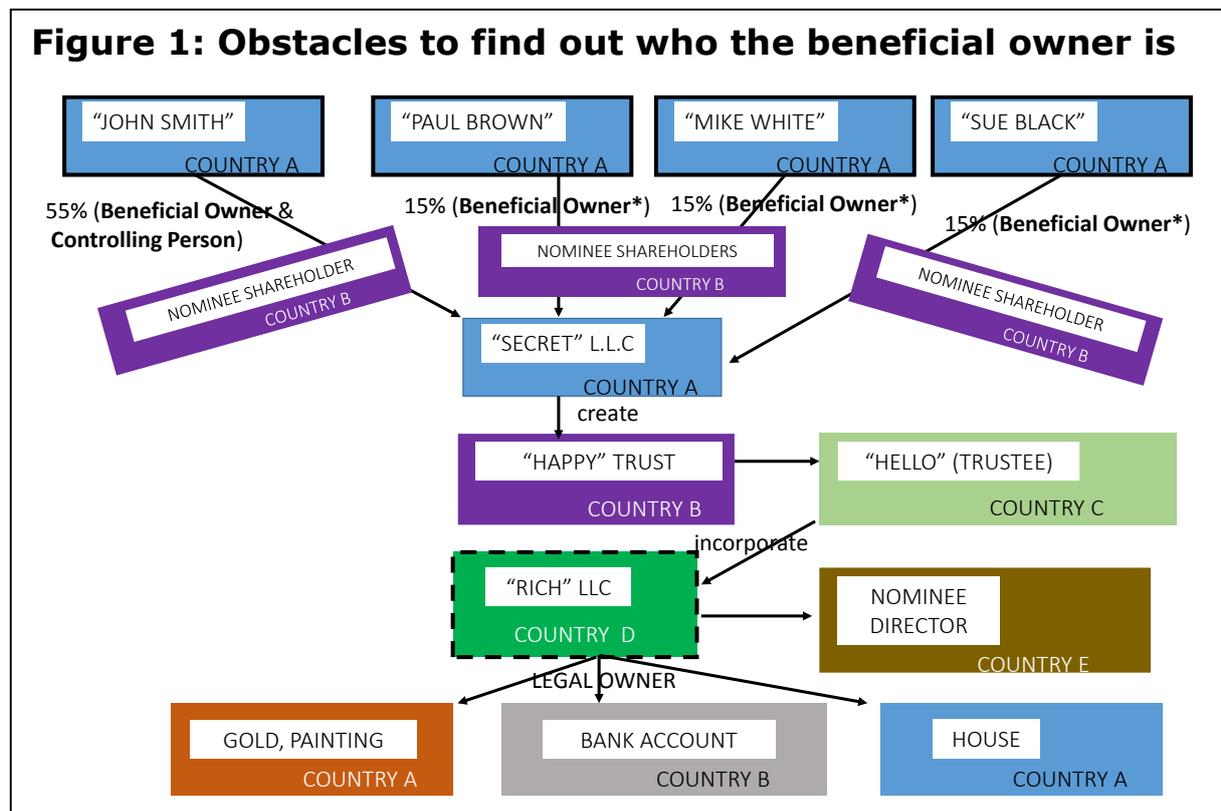
<sup>7</sup> See Company Section (number 128) of the Financial Secrecy Index Report on the US: <http://www.financialsecrecyindex.com/database/USA.xml#b124>; 16.6.2014.

<sup>8</sup> The Global Forum writes: “Accordingly, where a single member LLC has no tax nexus with the United States there may be no information available in the United States regarding the owners of that LLC” (GF 2011a: 38)

ownership can change within seconds without anyone noticing.

### 2.2.2 Achieving Secrecy: Opaque Shields

19. Information collection may be problematic when not enough information is collected. For example, supplying a person’s name is obviously very important, but it may not be enough for several reasons. There might be many people with the same name<sup>9</sup>; the name may be written in different ways according to its phonetics (for example writing a Chinese or Arabic name in English). So more information is required, including residence/nationality, birthdate and -place, address, identification number (e.g. passport number) and ideally a tax information number.



<sup>9</sup> For instance, the 2011 Global Forum Peer Review on Spain (GF 2011b: 40) expressed: “When the supposed account holder is an individual, Spain has on some occasions been unable to locate the person with the few identification elements provided, especially because many persons in Spain have the same names and surnames”.

## **Figure 1 (continued):**

### **Legal ownership and “upon request” exchange of information: securing secrecy from authorities**

These are the consequences of the current situation in all countries, where only “legal ownership” information is registered, instead of “beneficial owner” (the real natural person, in this case “John Smith”, “Paul Brown”, etc.): tax authorities from country A may be interested to know who owns the house in Country A, to find out if such owner has evaded taxes or to investigate whether he/she could justify the origin of the funds needed to buy such a house, in order to fight corruption. However, authorities of Country A would only be able to find out that the house is owned by a limited liability company named “Rich”. To find out who the owner of “Rich” LLC is, they would need an Exchange of Information agreement with Country D, request for the information and hope that it had been collected. In the best case scenario, authorities of Country D would check with their Commercial Registry who the owners of “Rich” LLC are. If information had to be registered and was updated, they would inform that “Happy Trust” (created in Country B) is the owner of Rich LLC.

If ownership information did not have to be registered or updated, then authorities would need to contact its nominee director (or secretary) in Country E to find out who the owners are. Maybe the nominee director only knows that “Rich LLC” was incorporated by a Trustee in Country C. Provided that there is also an exchange of information agreement and that the trustee has the information and is obliged to cooperate, he would say that “Happy Trust” was created by a company (“Secret LLC”) incorporated in Country A. However, the trustee may be bound by a “flee clause” to migrate the trust to a different jurisdiction whenever a request of information arrives, rendering the whole process useless. Supposing that authorities managed to arrive up to “Secret LLC” in Country A, they would only find out who the nominee shareholders are. Only if they knew that these are nominees (and not the beneficial owners) would they require these nominees to tell who the beneficial owners are. To understand how complicated - or even impossible - discovering who the beneficial owner is, consider that each exchange of information requires - at the very least - a treaty in force between jurisdictions, that information has actually been collected and updated in every step of the chain, and that cooperation takes place in practice. Even in this case, each exchange of information could take at least 3 months to be responded while the involved taxpayer may be notified about the investigation and even appeal against it. Given all these reasons, even if all the exchanges of information would eventually lead to the beneficial owner, any criminal would have more than enough time to erase all trace and take his illegal money somewhere else.

\* The current FATF standards are weak in that respect too, as they suggest that only someone with shareholdings of above 25% of the total shares should be considered a beneficial owner (see footnotes 30 and 38 in FATF 2012). This threshold seems arbitrary and easy to abuse. Instead, anyone with a stake in a company should be considered a beneficial owner.\*

20. While information collection is important, there are many pitfalls. Using a fictitious name is an obvious one. In terms of ownership, only information which permits the identification of the actual individual who owns or controls a legal entity or bank account is relevant. Collection of “beneficial ownership”

information means identifying the natural (real) warm-blooded person who owns and/or controls an account, real estate property, company, etc.

21. “Beneficial Ownership” is different from “legal ownership”. The legal owner of a shell company, for instance, may be a nominee owner, nominee director, or a company, trust, foundation or any entity that may be registered as the legal owner – but these are not the genuine beneficial owners and controllers of the assets. Legal ownership is largely irrelevant for personal income taxation and crime fighting, because it so often serves as a ‘front’ behind which lie multiple layers of entities, incorporated in different jurisdictions, making it extremely burdensome, costly and difficult to identify the real owner.

**Box 3: Beneficial Ownership Registration**

As of June 2014, no country in the world has beneficial ownership registries for all kinds of legal entities - in most cases, no beneficial ownership registration whatsoever for any type of legal entity. The Fourth European Money Laundering Directive may prescribe registration of beneficial ownership registration for some kind of entities. In 2014 Germany is leading the opposition against public registries of company ownership, while the United Kingdom has opposed it with respect to trusts. Both vehicles are the most widely used mechanisms to shield the real owner’s identity and facilitates crooks to defraud creditors, employees, former spouses, and also to evade taxes and commit crimes including money laundering.

**2.2.3 Achieving Secrecy:  
No Access to Information**

22. If relevant identity information (ideally beneficial ownership information, or at the very least legal ownership information) has been collected, the first important secrecy barriers may have been overcome. Yet if relevant authorities cannot access it, secrecy prevails.

23. Access to information (e.g. banking information) depends on domestic rules or laws allowing relevant authorities (e.g. tax authorities, law enforcement, etc.) to access specific information. However, this right to access information, which is mostly possible today except in few recalcitrant secrecy jurisdictions, can be hindered by many obstacles, including requirements to obtain a court order before the information is accessed, or to notify the person being investigated, allowing him or her to flee elsewhere, erase all traces, or appeal and delay the process.

24. In other cases, authorities may access information only if a specific bilateral treaty allows it, or a country’s laws may allow information to be accessed only if that information could also be useful for domestic purposes, such as to audit payment of domestic taxes - but not if it only helps foreign tax authorities. Sometimes identity information is not filed with a relevant local authority (e.g. commercial registry, or tax authority) but is instead required to be held only by a company, by its nominee owner or director, or by its service

provider – the relevant authorities may still be able to access this information from the relevant entity. Yet this is burdensome and risky, because upon receiving a request for the information, the entity could advise the beneficial owner who would have sufficient time to erase traces and disappear. Or the information may be held in a different country, and would have to be requested. Finally, compliance is a huge issue, particularly where there are no severe sanctions or good enforcement: those intermediaries (nominee, service providers, etc.) may not collect the relevant information, even if the law requires them to do so.

25. As well as submitting ownership information to official central registries, this information should be made publicly available online, at no cost and in machine-readable format. If registries keep data confidentially, only for authorities to see, there would be exposed to similar risks and temptations as banks or private company service providers are at the moment. Registries keen to generate fees may allow incorporation despite the doubts around the true owners. Making this information publicly available, however, would dramatically increase the incentive to file correct information. Anti-corruption offices from anywhere in the world, NGOs, investigative journalists, or companies’ trading partners could use and verify this data. Financial institutions could use this data for due diligence and “know your customer” policies they are required to undertake for combatting money laundering and terrorist financing.

26. Publicly available online registries also help in the fight against corruption. If only authorities have access to information (as is usually the case), then it is impossible for journalists and civil society organizations to investigate cases where public authorities themselves or their protégés are involved in crimes.

<p><b>Box 4: Improve Global Forum Terms of Reference for Phase 3</b></p> <p>The current international standard on exchange of information monitored by the Global Forum, as regards availability and access to information, considers it enough if <u>legal ownership information is held by a company</u> and may be accessed by authorities upon request. However, this should be improved to ensure that <u>beneficial ownership is registered</u>. In addition, identity information should always be <u>filed to a government central registry</u> to guarantee that the information will be available, in a timely manner, at no additional cost and under no risk that the relevant taxpayer escape or moves the funds or entity somewhere else. If ownership information had not been collected or kept up-to-date by the company, by the time the authorities request the information, it will likely be too late. <u>Public online availability</u> of that data would entail the lowest compliance risks and supervisory costs. In contrast, if data continued to be held decentralised, the supervision (regular on-site checks and reviews of thousands of company records) would be utterly inefficient and costly.</p>
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### 3. Breaking Secrecy: Exchange of Information (EOI)

27. Where people may hold assets in many jurisdictions, their resident countries’ authorities need to access information about these foreign holdings.

28. If public online (free) beneficial ownership registries were available for all kinds of information, there would be less need for “exchange of information”, since authorities could access the data directly. Yet this may not be desirable for all kinds of data, such as bank account information or tax returns of individuals.

29. Information may be exchanged by different processes: either “upon request”, spontaneously, or automatically. We will refer to each case after introducing the legal basis for these methods of exchange of information.

#### 3.1 Legal Basis for EOI

30. Information exchange treaties include Tax Information Exchange Agreements (TIEAs) and Double Tax Agreements (DTAs). TIEAs are only concerned with issues of information exchange. DTAs are much broader and cover a range of tax provisions, but often contain information-exchange provisions within them. A third vehicle for information exchange is the Council of Europe / OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, discussed below.

**Table 1: Legal basis and methods of EOI**

LEGAL BASIS	EXCHANGE OF INFORMATION METHOD		
	UPON REQUEST (UR)	SPONTANEOUS	AUTOMATIC (AIE)
UN/OECD MODEL DTA (BILATERAL)	YES	POSSIBLE	POSSIBLE
CIAT MODEL TIEA (BILATERAL)	YES	YES	YES
OECD MODEL TIEA (BILATERAL)	YES	NO	NO

CoE/OECD MULTILATERAL TAX CONVENTION	YES	YES	YES, but requieres a specific M.O.U. to operationalise it
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### 3.1.1 Double Tax Agreements (DTAs)

31. The most common legal basis for exchange of information are bilateral double tax agreements (DTAs) which contain provisions to avoid double taxation and in many cases include clauses to exchange information. On several occasions, when developing countries have tried to obtain information exchange provisions from developed countries, they have been forced to sign this kind of agreement, often yielding major tax concessions in favour of the developed country, directly depriving themselves of much needed revenue<sup>10</sup>. Even then, the information exchange tools have been too weak to be of much use. It is generally inappropriate to sign DTAs with tax havens, since they do not have well developed tax systems and the risk is that they will merely serve as tax-free conduits for profits out of developing countries. Nevertheless some developing countries, for reasons best known to themselves, have signed these agreements.

32. In the vast majority of cases, DTAs are based on the OECD Model Agreement, which contains many pro developed-country tax provisions<sup>11</sup>. Armed with this already unbalanced model, developed countries also use their bargaining power to reduce withholding taxes that the developing country may levy on passive income (dividends, interests and royalties) which take place whenever a multinational

company with activities in the developing country “pays” (transfers money) to its related companies abroad. Lastly, multinational companies may use tax

#### Box 5: Base Erosion Profit Shifting (BEPS)

Multinational companies combine various tax avoidance techniques with the incorporation of entities in tax havens and “treaty shopping”. Through the abuse of the network of DTAs they are often able not only to avoid double-taxation, but to avoid taxation altogether (double-non-taxation). Some of these techniques, which also include hybrid entities and transactions which not only avoid taxation but may even generate tax credits, are being analysed by the OECD’s BEPS process in an attempt to tackle them. More information can be found at the BEPS Monitoring Group, [here](#) or [here](#): <http://www.taxjustice.net/wp-content/uploads/2013/04/TJN-Briefing-BEPS-for-Developing-Countries-Feb-2014-v2.pdf>

<sup>10</sup> Such as favouring a residence-principle of taxation instead of a source-principle <http://www.taxjustice.net/2014/01/21/swiss-double-tax-agreements-disadvantage-poorer-countries/>; 17.6.2014.

<sup>11</sup> See more about residence and source principles here: [http://www.taxjustice.net/cms/upload/pdf/Source\\_and\\_residence\\_taxation\\_-\\_SEP-2005.pdf](http://www.taxjustice.net/cms/upload/pdf/Source_and_residence_taxation_-_SEP-2005.pdf); see more on OECD Model compared to the UN Model here: [http://www.taxjustice.net/cms/upload/pdf/Lennard\\_0902\\_UN\\_Vs\\_OECD.pdf](http://www.taxjustice.net/cms/upload/pdf/Lennard_0902_UN_Vs_OECD.pdf); 17.6.2014.

avoidance techniques to pay very little tax, if at all, to the developing country by claiming that little or no income was generated by their “permanent establishments” in the developing country, or that they had no “permanent establishments” there.

33. In other words, developing countries lose tax revenues because: (i) multinational companies use tax avoidance schemes to reduce the income generated (by their permanent establishment conducting activities) in the developing country; (ii) a narrow definition of a permanent establishment (as entailed in the OECD model DTA) results in business activity and profits of multinational companies in developing countries being outside the scope of tax there; and (iii) developing countries concede very low (if any) withholding taxes whenever multinational companies transfer money abroad to “pay” royalties, interests and dividends to their related companies (outright fraud and tax evasion by multinationals, of course, make matters worse).

34. Yet the problem with DTAs is not only the loss of tax revenues. Many do not even meet current international standards of information exchange.<sup>12</sup> Moreover, even if the treaty text is up to the standard, the domestic legal framework of the jurisdiction which should provide the relevant information may not guarantee that the information is accessible or collected. Finally, in the case of the “upon request” standard (see section 3.2.1), information exchange may be (and in practice, frequently is) blocked if the jurisdiction that is supposed to provide information rejects the “requests” of information based on arbitrary arguments or by demanding more conditions than those set by the international standard.

### **3.1.2 Tax Information Exchange Agreements (TIEAs)**

35. The other type of bilateral agreement is a Tax Information Exchange Agreement (TIEA<sup>13</sup>) which only contains exchange of tax information provisions, but does not refer to other tax issues such as prevention of double taxation. This way, there is less risk that a developed country will use its bargaining power to extort tax or other concessions from developing countries. However, the OECD Model TIEA (used as basis for most TIEAs) has an important flaw: it does not stipulate automatic exchange of information. Therefore, TIEAs do not serve as a legal basis for AIE.

### **3.1.3 Council of Europe / OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters**

36. A third legal basis for information exchange is the joint Council of Europe / OECD Multilateral Convention on Mutual Assistance in Tax Matters, (the

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<sup>12</sup> The Global Forum on Exchange of Information monitors the compliance with the standard of exchange of information by conducting peer reviews of each jurisdiction’s legal framework. See here: <http://eoi-tax.org/#default>

<sup>13</sup> See more about TIEAs here:

[http://www.taxjustice.net/cms/upload/pdf/Tax\\_Information\\_Exchange\\_Arrangements.pdf](http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf); 17.6.2014.

“Multilateral Convention.”) The most important aspect of this treaty, as the name indicates, is that – unlike DTAs and TIEAs - it is multilateral; this aspect reduces the costs and risks of having to negotiate a bilateral treaty with each jurisdiction separately.

37. However, the Multilateral Convention requires a separate and specific memorandum of understanding (MOU) – also called Competent Authority Agreement (CAA) - before automatic exchange of information becomes operational. In respect to AIE, unless a Multilateral MOU or CAA is involved, the Multilateral Convention would – in practice - lose its “multilateral condition”, and retain all the costs and risks of having to negotiate, sign and ratify each bilateral agreement with every other jurisdiction.

38. The original Multilateral Convention of 1988 was amended by a Protocol opened for signature in 2010. Jurisdictions party to the original Convention could sign and ratify the Amending Protocol. Jurisdictions which were not party to the original Convention may directly sign and ratify the Amended Convention. TJN has published a briefing paper analysing the reformed Convention, [here](#)<sup>14</sup>.

39. As of May 23, 2014<sup>15</sup>, there are 52 jurisdictions party to the Amended Convention. In addition, 25 jurisdictions have signed the Multilateral Convention and should ratify it soon, including financial centres and tax havens such as Austria, Germany, Liechtenstein, Luxembourg, Singapore, Switzerland and the United States. Many important tax havens are part to it, such as the UK and some of its Overseas Territories and Crown Dependencies including Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey; or the Netherlands, Aruba and Curacao. However, this is not the case for most developing countries, who therefore may not benefit from this multilateral legal basis for different kinds of information exchange.

## **3.2 Methods of EOI**

### **3.2.1 Upon Request**

40. The “Upon Request” (UR) standard has been the dominant global standard for exchange of information between countries for many years. It requires authorities in country A to formulate a request of information and send it to the authorities of country B. If the latter considers that the request meets all the conditions, they will attempt to obtain the requested information (e.g. bank account information, tax returns, etc.) and send it to the requesting authorities of country A.

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<sup>14</sup> <http://www.taxjustice.net/cms/upload/CoE-OECD-Convention-TJN-Briefing.pdf>; 17.6.2014.

<sup>15</sup> See updated list of signatories: [http://www.oecd.org/ctp/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/Status_of_convention.pdf)

41. This standard is described by the OECD Model Tax Convention (OECD Model DTA) in its article 26. It was updated<sup>16</sup> in 2005 and 2012 to include provisions stating that jurisdictions may not reject a request to send information based on local bank secrecy laws or on a lack of domestic tax interest (that is, if the request is only relevant for foreign taxes owed to other tax authorities, but not relevant for the tax authorities in the jurisdiction which received the request). The latest updates also allow information to be shared with other authorities not related to tax issues, such as law enforcement or money laundering agency, provided that the jurisdiction supplying the information allows this.

42. The updated standard was also amended to allow requests based on information “foreseeably” relevant for the requesting jurisdiction. Nevertheless, obtaining information pursuant to the UR standard has proven costly and ineffective especially for the still-current prohibition of “fishing expeditions”, whereby a jurisdiction is prevented from requesting another one to send information on any bank account that a specific taxpayer could have, or simply on the bank accounts held by all of its residents.

43. Both the ‘foreseeably relevant’ condition and the prohibition of fishing expeditions render UR extremely time-consuming costly to tax authorities to operate, especially in developing countries. This is because they need to collect, obtain and present - by themselves- a great deal of information just to prepare a request for information: that is, they need already to find out the name of the involved tax payer, the bank where he or she may have an account, the bank account number, the intermediaries, to describe the case, etc.) – before they ask for confirmation of that information. So the UR standard usually helps to confirm information already investigated by authorities, but rarely brings new information which could lead to further investigations.

44. This is especially problematic in cases of corruption and IFFs when information, let alone valid evidence, is very hard to obtain. In these cases, it is only in special circumstances that facts and figures come to light, for example if a bank employee turned whistleblower provides internal information to authorities, as was the case for instance with Herve Falciani<sup>17</sup>. Yet some secrecy jurisdictions like Switzerland fall short of the international standard<sup>18</sup> and reject

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<sup>16</sup> [http://www.oecd.org/ctp/exchange-of-tax-information/120718\\_Article%2026-ENG\\_no%20cover%20\(2\).pdf](http://www.oecd.org/ctp/exchange-of-tax-information/120718_Article%2026-ENG_no%20cover%20(2).pdf)

<sup>17</sup> <http://www.spiegel.de/international/business/interview-hsbc-swiss-bank-whistleblower-herve-falciani-on-tax-evasion-a-911279.html>

<sup>18</sup> The Global Forum Peer Review on Switzerland (page 58) wrote: “In respect of Article 5(2)(c), that requests based on information obtained through acts which would be illegal under Swiss law (the ‘illegally obtained’ exception), will not be met by Switzerland. Switzerland has advised that this provision was included in the OACDI to cover situations where requests are based on illegally obtained bank information. If the AFC suspects that Article 5(2)(c) is applicable, it may seek further information from the EOI partner about the information on which the request is grounded, but the starting point for such enquiries will be that the requests of an EOI partner are properly founded. 183. Overall, to the extent that Article 5(2)(c) of the OACDI may go beyond the

requests of information that are based on whistleblower data (what they call “stolen data”).)

45. While the text of the agreement between jurisdictions (serving as the legal basis for UR) may meet the standard, this still may not be the case for the legal framework of the jurisdiction which received the request. Supposing that collection of legal ownership information takes place and that authorities may access this information, the actual exchange of information may be hindered or impeded by an obligation, with no exceptions, to notify the relevant taxpayer first. This requirement gives recalcitrant taxpayers enough time to erase evidence or traces of illegal activities and transfer their money, entities and service providers elsewhere. The taxpayer may also have appeal rights<sup>19</sup>, giving the opportunities to delay or eventually foil the exchange of information.

46. Even if the agreement between jurisdictions (serving as the legal basis for UR) is in force and meets the standard, and the recipient jurisdiction’s legal framework also meets the standard, even then the UR standard could prove ineffective because it could take too long before it actually happens<sup>20</sup>. There may be, for instance, too many pre-requisites to fulfil before the information can be accessed: internal authorisations, or requirements for a court order). The recipient authorities may also lack the sufficient staff to answer requests within a reasonable time, such as three months.

47. Notwithstanding all the potential obstacles in the requested jurisdiction, UR may also be ineffective for reasons stemming from the requesting jurisdiction. Authorities may be influenced or pressed by the government or local elites to protect certain corrupt officials or connected local business companies. No information will be requested, and corruption cases will not be tackled.

### **3.2.2 Spontaneous**

48. Spontaneous exchange of information is a method which consists of irregular exchanges, whenever jurisdictions come across information that may be relevant for another jurisdiction. While the information sent may be useful, given the irregularity and unaccountability of this method, it is not effective by itself to tackle illicit financial flows, although it has a role to play and should continue to

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concept of ‘ordre public’ or ‘good faith’, Article 5(2) may create an additional threshold which is not consistent with the standard” [emphasis added].

<sup>19</sup> Here is an example in Bermuda where Bunge appealed and won a case against an EOI request from Argentina:

[http://www.gov.bm/portal/erver.pt/gateway/PTARGS\\_0\\_2\\_10809\\_204\\_226633\\_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/non\\_ministerial/judiciary/appeal\\_judgements\\_2013/minister\\_of\\_finance\\_v\\_bunge\\_ltd\\_evans\\_18\\_nov\\_13.pdf](http://www.gov.bm/portal/erver.pt/gateway/PTARGS_0_2_10809_204_226633_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/non_ministerial/judiciary/appeal_judgements_2013/minister_of_finance_v_bunge_ltd_evans_18_nov_13.pdf);17.6.2014.

<sup>20</sup> The Global Forum Peer Review on the United Kingdom of 2011, page 62, expressed: “According to one of the UK’s peers this minimum response time has not been met in any of the cases where they have requested information. Peers also reported up to 18 months response time for bank information and in some cases more than two years. The UK acknowledges that for bank information it takes an average of 12 months to respond to a request” [emphasis added].

be used. Developed countries and secrecy jurisdictions in particular should enact national legislation to oblige their (tax) officials to send on relevant information to foreign counterparts.

### **3.2.3 Automatic Exchange of Information**

49. Automatic exchange of information (AIE) has been endorsed by the G20 and the OECD as the new global standard on exchange of information. It will not replace but run in parallel to the other methods of exchange of information, especially UR: complementing them and fixing existing flaws.

50. Under AIE, authorities in country A collect information (for example from their local financial institutions or entities) related to individuals or entities resident in country B. This information (e.g. interest income or dividends or bank account balance) is then sent to the competent authorities of country B on a regular basis (e.g. annually).

51. Among the benefits of AIE, it fixes many of UR's flaws. AIE tackles the "fishing expedition" prohibition and the 'foreseeably relevant' condition, since information on all taxpayers will be sent automatically, without individual requests or under preconditions. This way, authorities may use their limited resources to analyse and process the received information, to find out for instance if their resident taxpayers have misreported their tax returns.

52. AIE also complement UR because when processing the information automatically received,

#### **Box 7: EUSTD and FATCA**

The material, territorial and temporal scope of AIE will depend on the treaty that serves as its legal basis. For example, the European Savings Tax Directive (EUSTD) prescribed the multilateral automatic exchange of information on interests earned by individuals. However, entities and other types of income were excluded. In addition, some jurisdictions were allowed to levy withholding taxes instead of exchanging information automatically. This option has been used by Luxembourg and Austria to preserve secrecy and protect tax dodgers. These two countries have also been blocking for many years an amending protocol to update the Directive.

The U.S. Foreign Account Tax Compliance Act (FATCA) was originally envisioned as a one-way street: automatic exchange of information on US residents and citizens, whereby each foreign financial institution would be obliged to send the required information to the US tax authorities (the Internal Revenue Service, IRS). Given the interest of some countries in obtaining information reciprocally, and other countries' banking secrecy concerns, two model FATCA agreements were created (Model IGA I and II), prescribing automatic exchange of information either among competent authorities or directly from foreign financial institutions to the IRS, respectively. Unlike Model IGA II, Model IGA I contains some reciprocity provisions, but is still heavily balanced in favour of the United States.

authorities may obtain relevant facts on a particular taxpayer leading to a new investigation, which they can deepen through more specific and pointed UR requests than what AIE would provide.

53. By receiving information on all taxpayers, AIE also can overcome the obstacles posed by a corrupt administrations or government officials who would otherwise never allow the information to be requested. Incriminating evidence will become available to a wider circle in the tax administration, increasing the likelihood that corruption may be exposed. Even if the current authorities cannot or will not process the information effectively, new technology or a change of government could allow that information to be used.

54. AIE also provides a strong deterrent against tax evasion: if taxpayers know their information is being sent to the relevant authorities, they will be less inclined to evade tax. Even if authorities lack the technology, staff or resources to process all the information effectively, they may still analyse representative samples, or soon find themselves able to analyse all the information. This would provide a major deterrent. For instance an OECD (2012) report informed that, based on information received automatically, Denmark and Norway (in 2009) engaged in auditing projects, observing close to 40% of non-compliance rates, resulting then in an increase of revenues. If these are the compliance rates of Nordic countries which known for their respect for the law, the consequences AIE could have for developing countries would likely be much more dramatic. By the same token, this OECD report, based on findings about the European Savings Directive (EUSTD), commented that in the absence of reporting obligations, "over 75% of taxpayers may not have complied with their residence country tax obligations" (ibid.: 18).

55. The revenue-boosting deterrent effect is augmented by prosecution and penalties against tax dodgers who were found underreporting their income. This will lead to a virtuous cycle where evasion is reduced while tax returns become more accurate to avoid prosecution. For instance, in Argentina, as a consequence of exchange of information (including AIE and specific requests), more than 1700 tax returns were voluntarily rectified, increasing the taxable base by USD 640 million<sup>21</sup> in 2013. Another example is Australia, where "the total liabilities raised (primarily as a result of our compliance investigations) that can be attributed to exchange of information activity in 2012–13 was around \$473 million"<sup>22</sup>. Lastly, as TJN's previous AIE Report (Meinzer 2012b) described regarding Belgium, "as a result of the analysis of 6,510 cases identified through the EUSTD, the tax base for the tax year 2006 increased by 74,998,251 €".

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<sup>21</sup> Email-communication with AFIP on 20 March 2014.

<sup>22</sup> See Commissioner of Taxation Annual Report 2012-2013, available at: <http://annualreport.ato.gov.au/Features/International-collaboration/>

56. For AIE to be effective, many conditions have to be met. First, as mentioned, relevant information – above all, updated beneficial ownership information – has to be collected and sent to authorities.

57. The second obstacle is the scope, geographically and materially. AIE will be most effective if it is implemented worldwide, especially if information is shared with developing countries, and if it covers both individual and entity taxpayers (including companies, trusts, foundations, partnerships, etc.). The wider the material scope, the more useful it will be. Ideally, AIE should cover all kinds of income (interest, dividends, capital gains, sales of immovable property, management and directors' fees, etc.). It should also provide information on all holdings (a bank account's comprehensive account balance information – which includes account balance, highest balance account and annual average balance, as well as information on holdings in safe deposit boxes; gold and art properties in warehouses in free-ports and other free economic zones with little supervision by authorities; ownership of real estate and luxury assets including cars, yachts and planes). Lastly, until public registries of beneficial ownership become widespread, information on shareholdings and participations in all kinds of entities (companies, partnerships, trusts, foundations) should also be exchanged to help crosscheck the information.

58. The main impediment to analyse the received information is the matching process. If information cannot be matched to taxpayers' domestic tax returns, then the data is hard to use, and authorities cannot find out whether individuals and companies are misreporting their income or under-declaring their assets. The easiest way to match information is to use numbered identification, such as Taxpayer Identification Numbers and birthdates. However, if jurisdictions fail to collect this data for their residents and non-residents alike, then it is impossible to send this information in the first place.

**Box 8: FEEDBACK**

Feedback sent by recipient jurisdictions to the supplying ones is very important to improve the whole system. Once TINs (or other similar means to track taxpayers) become available to match 100% of the received information, recipient jurisdictions may identify taxpayers who are not actually residents there (and whose information should therefore be sent somewhere else). This way, possible cases of avoidance schemes may be detected, whereby a taxpayer pretends to be a resident of another jurisdiction to have his information sent to another jurisdiction than the one where he is a tax resident. Feedback may then include notifications on the inaccurate residency on specific taxpayers' information to fight avoidance schemes.

## 4. Current Developments

### 4.1 The new global standard on AIE: OECD's Common Reporting Standard (CRS)

59. In 2013 the G20 Finance Ministers and Central Bank Governors endorsed automatic exchange (AIE) as the new global standard for exchange of information and called the OECD to develop the legal framework for the standard. In February 2014 the OECD published<sup>23</sup> the new global standard on AIE which was adapted from the U.S. Foreign Account Tax Compliance Act (FATCA), another transparency scheme. The OECD framework has two components. The first component is the Common Reporting Standard ("CRS") which provides common rules about due diligence to be performed by financial institutions in order to collect the required information, and the actual standard (its scope, procedures, etc.) for automatic exchange of information. The second is a model bilateral Competent Authority Agreement ("CAA") to be signed by jurisdictions willing to implement the new global AIE standard, which operationalises the CRS. Even this 'operational' agreement, however, still requires a formal legal basis to get it properly up and running, and the most efficient legal basis that is to be used is the existing OECD Multilateral Convention in Tax Assistance, as described above. TJN has published extensive analysis of the new OECD AIE standard, [here](#)<sup>24</sup> and [here](#)<sup>25</sup>.

60. The CRS' general process of AIE consists of financial institutions (banks, some trusts, some insurance companies, etc.) located in participating jurisdictions (e.g. country A) to collect information related to persons who are resident in other participating jurisdictions (e.g. countries B, C and D). Financial institutions need to send this information to their own competent authorities (in country A), who will then exchange the information with the corresponding authorities (of countries B, C and D). In case of reciprocity (the default option so far), financial institutions located in countries B, C and D would also collect information on residents of countries A, B, C and D and send it to their own competent authorities so that they exchange it with the corresponding authorities.

61. As regards individuals, the CRS covers individuals, entities and the controlling persons of passive non-financial entities (passive NFEs such as trusts not professionally managed or companies with mostly passive income). While the standard is supposed to cover trusts and foundations (which are widely used for

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<sup>23</sup> <http://www.oecd.org/tax/exchange-of-tax-information/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm>

<sup>24</sup> <http://www.taxjustice.net/2014/02/13/press-release-tjn-responds-new-oecd-report-automatic-information-exchange/>; 17.6.2014.

<sup>25</sup> [http://www.internationaltaxreview.com/pdfs/TJN2014\\_OECD-AIE-Report.pdf](http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf); 17.6.2014.

their secrecy provisions to evade taxes and other illegal activities), the language is actually quite weak and ambiguous and provisions are especially scarce in respect of foundations. Moreover, provisions to "look through" passive NFEs to their beneficial owners are meant to counteract avoidance schemes (such as inserting entities to hide the real owners). However, they refer to their "controlling persons" instead of to their "beneficial owners". The term "controlling person" is ambiguous, whereas the term "beneficial owner" is widely used and defined by the Financial Action Task Force (FATF) Recommendations on money laundering. Unlike the term "controlling person", "beneficial owner" should encompass also the owners who are not necessarily "in control", for instance for having only a 15% interest in a company as Figure 1 shows. However, the current FATF standards are weak in that respect too, as they suggest that only someone with shareholdings of above 25% of the total shares should be considered a beneficial owner (see footnotes 30 and 38 in FATF 2012). This threshold seems arbitrary and easy to abuse. Therefore, anyone with a stake in a company should be considered a beneficial owner.

62. The CRS' material scope covers financial account information, including different kinds of income, such as those stemming from interests, dividends or some sales. It also prescribes reporting of account balances. However, it can be easy to avoid giving an accurate figure, such as by transferring or withdrawing funds before the account balance reported date. So the standards should include the annual average account balance and the highest account balance, to reflect the accounts' real activity. The material scope falls also short in exchanging other valuable information, as described above: sales of immovable property, management and directors' fees, holdings in safe deposit boxes; gold and art properties in warehouses in freeports and other free economic zones; beneficial ownership of real estate and other luxury assets including cars, yachts and planes, and beneficial ownership of entities (companies, partnerships, trusts, foundations, etc.) regardless of their income.

63. While there have been claims that extending the material scope would be too costly and complicated, the surveys conducted by TJN (see Appendix I, below) demonstrate that under bilateral and regional AIE a lot of this is already reality. A great deal of information is exchanged automatically beyond the limited financial account information prescribed by the CRS, including information on: salaries, pensions, capital gains, business profits, income from independent personal services, income from immovable property, director fees, income to artists, sportsmen and students, shareholdings and participation in companies. In fact, if a developing country is already exchanging some of this data automatically, most developed countries and tax havens would be in a perfect position to follow suit.

64. The CRS' territorial scope covers - from an "active" reporting perspective - only financial institutions located in jurisdictions which are participating in AIE. Financial institutions located in non-participating jurisdictions do not need to

collect and report financial account information. By offering financial institutions places to operate, non-participating secrecy jurisdictions could therefore provide hideouts for tax dodgers and criminals and may attract illicit financial flows which migrate from participating jurisdictions. So a multilateral sanction scheme is needed to encourage effective participation of financial centres, not just those located in OECD countries such as Luxembourg, the UK, the US, and Switzerland, but also those located in notorious tax havens (British Crown Dependencies and Overseas Territories, Bahamas, Curacao, Aruba, Singapore, Hong Kong, Panama etc.).

65. From a “passive” reporting perspective, the CRS’ territorial scope covers reportable persons (individuals, entities or controlling persons of passive NFEs) who are resident in a participating jurisdiction. It is already easy for any entity to incorporate itself in a non-participating jurisdiction to avoid reporting. However, this evasion may increasingly be attainable by “passport shopping” by individuals facilitated by secrecy jurisdictions such as Antigua and Barbuda, Anguilla, Cyprus, Malta, Montserrat, St. Kitts, USA and the UK,<sup>26</sup> which offering varieties of “residence certificates” in exchange for investments or real estate purchases. So a South African individual, say, could pretend to be a St. Kitts resident for the purpose of financial account reporting; instead of reporting to South Africa where he genuinely owes taxes, he is wrongly identified as being from St Kitts, where he is unlikely to face a tax bill. So anti-avoidance schemes are essential, to prevent abuses of this kind.

66. As regards the due diligence that financial institutions in participating jurisdictions need to undertake to identify the reportable persons (again: individuals, entities and controlling persons of passive NFEs who are resident in a reportable jurisdiction), procedures are different according to the account holder and the time of opening of the account. Due diligence rules depend on whether the account holder is an individual or an entity. For both cases, provisions are different for existing accounts or for new accounts. In the latter, more information is requested, supposing that it is easier to obtain the information.

67. Due diligence procedures and the CRS in general are filled with loopholes and exceptions that should be fixed and eliminated. These include thresholds on balance account under which no reporting is required; accounts from certain insurance companies or related to court orders which are excluded from reporting, and no collection of either Taxpayer Identification Numbers or birthdates - though this data is indispensable for matching purposes. There are many other provisions that would allow reporting to be avoided: a full list of loopholes<sup>27</sup> and their suggested fixes may be found [here](#)<sup>28</sup>.

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<sup>26</sup> Cayman Financial Review, Issue No. 35, page 22-25.

<sup>27</sup> See here for even more loopholes: <http://www.taxjustice.net/2014/06/11/insurance-sector-seeking-trick-oecd-giant-secrecy-loophole/>

<sup>28</sup> [http://www.internationaltaxreview.com/pdfs/TJN2014\\_OECD-AIE-Report.pdf](http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf); 17.6.2014.

## 4.2 Developing countries' exclusion in the design of the CRS

68. One of the main problems of the CRS' legitimacy is the undemocratic process by which it has been designed and defined by the OECD, a club of developed countries. Developing countries were not involved or consulted in the design stage. It would have made more sense to have a truly international and more representative institution like the United Nations Tax Committee to do this.

69. The Global Forum, an organization encompassing both developed and developing countries which is in charge of monitoring exchange of information, is dependent on and essentially controlled by the OECD (Meinzer 2012: 6-11). The Global Forum was asked to monitor and help develop the new global standard on AIE. It formed a specific working group and in February 2014 it carried out a survey among member and non-member countries. However, while the survey deadline was February 26, 2014, the OECD had already published its standard on 13 February, almost two weeks earlier. This clearly demonstrates a lack of serious interest in consultation.

70. Even this brief and tardy consultation failed to ask developing countries their views, concerns and interests about the forthcoming standard and its scope or technical standards: instead it seemed to want to find out merely how and if developing countries would be able or willing to implement the OECD standards. The questions were directed primarily at either developed countries or framed so as to merely enquire about issues such as costs or capacity building needs, all tacitly endorsing and taken as granted that the new standard is set in stone. For instance, they did not ask what information developing countries would have been interested in exchanging. Questions about interest in a non-reciprocal component was only asked in a biased manner, exclusively from the perspective of developed countries<sup>29</sup>.

71. Lastly, the OECD and Global Forum officers have been claiming that developing countries are unaware and uninterested in joining the new AIE global standard – a claim that could if true be partly explained by the lack of participation the OECD offers to developing countries. The OECD has not produced evidence for this claim, and has failed to use its technical and research capabilities to conduct complex studies on the benefits of AIE, such as on its

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<sup>29</sup> The only question on non-reciprocity included in the survey was: "Would you be willing to exchange information automatically with jurisdictions which are not able (yet) to send similar information in return, e.g. developing countries?". This question leaves unaddressed the crucial question if developing countries would be willing to receive and analyse such data if they were not required (for a transitional period) to fully reciprocate the data. This clearly demonstrates that the survey and AIE agenda is currently driven by the interests of OECD member states.

deterrence effects and revenue potential, which could have been be useful in stimulating interest.

72. Given this lack of inclusion in the design process and claims by senior OECD officials of developing country unawareness and lack of interest; and considering that the UN Tax Committee has not been active over the last years with respect to information exchange (although it would have been in the best position to take into account a developing country perspective); and given the enormous potential AIE has for combating poverty, crime, and tax flight when studying the amounts of wealth held offshore (Henry 2012), TJN carried out a survey with developing countries to find out their views on what the ideal AIE standard would look like. The next section presents the findings and underlying methodology.

## **5. TJN-Survey on AIE**

### **5.1 Methodology**

The following findings are from a survey emailed to the competent authorities and or relevant persons of developing countries in February 2014.

The survey (see Appendix II) contained 16 multiple choice questions to find out views about arguments in favour and against implementing AIE; non-reciprocity; confidentiality' bilateral versus multilateral Competent Authority Agreements; relationship between AIE and upon request information exchange; usefulness and costs of exchange of information; type of information needed; and sanctions or incentives to encourage implementation of AIE.

The survey was sent in English or Spanish to 37 developing countries on all continents, either to the tax authorities or to relevant contacts who are or were involved in these countries' tax authorities or ministries of finance.

We received responses from 8 jurisdictions: 3 from Africa, 3 from Latin America and 2 from Asia. Follow up emails were sent in case of unanswered questions or requests for clarifications. Not all countries replied to all of the questions or answered our follow up emails, though most did, replying more than twice when necessary.

Respondents from three countries advised that they were replying (at least on some questions) on a personal level. While it would have been ideal to count on the "official" policy or view, it is likely that formal discussions and positioning have not been concluded in many countries. We considered that the views of public officials working in the field are valid proxies for the official view.

A complicating factor was that the OECD Global Forum apparently discouraged at least one jurisdiction from answering our survey, according to that jurisdiction (which did not participate). We were told that the OECD had advised that our survey could create 'confusion' given that the OECD was carrying out its own survey. It is possible that others were similarly discouraged<sup>30</sup>.

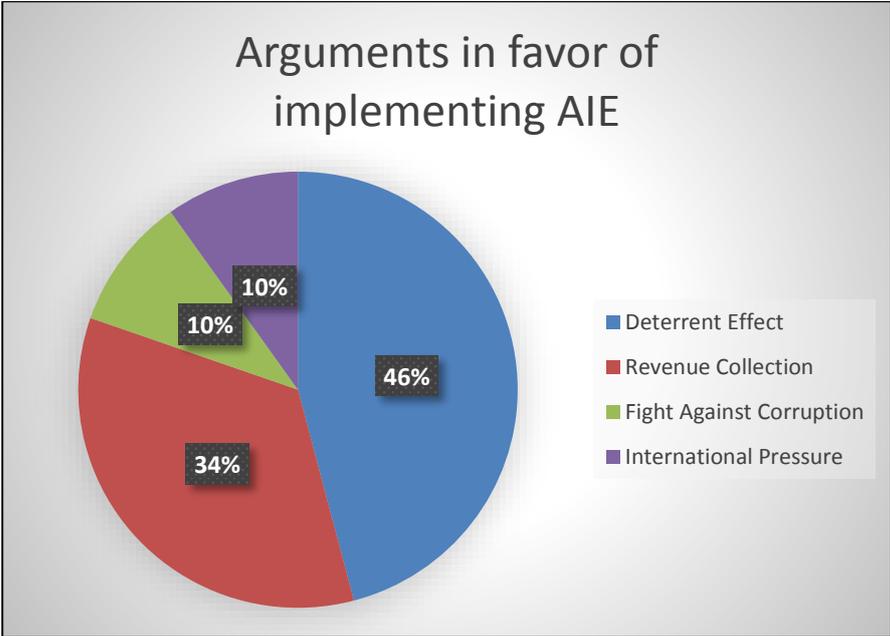
## 5.2 Findings

### 5.2.1 Arguments in favour of implementing AIE

**QUESTION:** We asked jurisdictions to choose the main arguments in favour of implementing AIE, out of four answers (plus the option to suggest "another"). In case more than one option was selected, we asked jurisdictions to prioritise them on an ordinal scale.

**OBSERVATION:** This question was answered by all respondents. No one chose the "other" option. If countries only chose one answer, it was assigned the highest priority score.

**RESULTS:**



<sup>30</sup> As has been explained above, the Global Forum established a Working Group on Automatic Information Exchange which is composed of 54 jurisdictions and 3 International Organisations, (full list here: <http://www.oecd.org/tax/transparency/AEOI%20Group%20Membership.pdf> ) chaired by Italy while Colombia, India, Jersey and the Netherlands serve as Vice-Chairs. After sending our surveys, we were advised that the AEI Working Group had also circulated a survey of their own. After discussing the TJN survey with the Working Group Chair and the Global Forum Secretariat, it was decided that it would generate "confusion" if the Global Forum suggested that members participate in TJN's survey. We were also advised that "it is quite possible that if OECD members and those jurisdictions making up the membership of the Global Forum AEOI Working Group have been included in your survey they will decline to participate" [underline added]

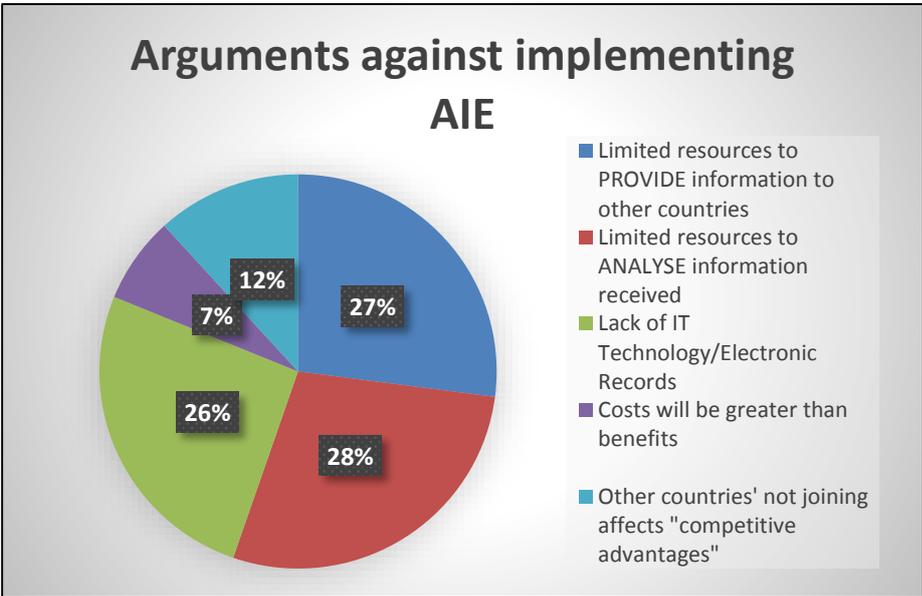
**CONCLUSION:** The deterrent effect of AIE seems to be well understood by the reviewed countries. All countries assigned the deterrent effect as a top or second priority, and the "deterrent effect" was seen to be the most important argument in favour of AIE, collecting 47% of the preference scores. Of the three other possible answers, "revenue collection" came second with 33%, and both of the remaining answers -- the "fight against corruption" and "international pressure" - - attracted 10% each. An important outlier was a Central American country's answer that placed international pressure as the most important reason for adopting AIE, suggesting this country had different internal priorities and/or a lack of ownership of the AIE policies.

**5.2.2 Arguments against implementing AIE**

**QUESTION:** We asked jurisdictions to choose the main arguments against implementing AIE among five answers (plus "other"). If more than one option was selected, we asked jurisdictions to prioritise them, on an ordinal scale.

**OBSERVATION:** One jurisdiction did not answer this question because they have already committed to - or are already - exchanging information automatically. No one chose the "other" option. If countries only chose one answer, it was assigned the highest priority score.

**RESULTS:**



**CONCLUSION:** A lack of capacity seems to be the key matter that could prevent developing countries from usefully implementing AIE. These are exemplified by the top three priorities: limited resources to analyse information (28%), followed by limited resources to send information (27%) and the lack of IT technology or electronic records (26%). Difficulties in providing information to other countries was a relevant argument, suggesting that non-reciprocity provisions would help reduce the barriers to developing countries' participation in AIE. The fourth chosen argument was that "other countries not joining affects our jurisdiction's

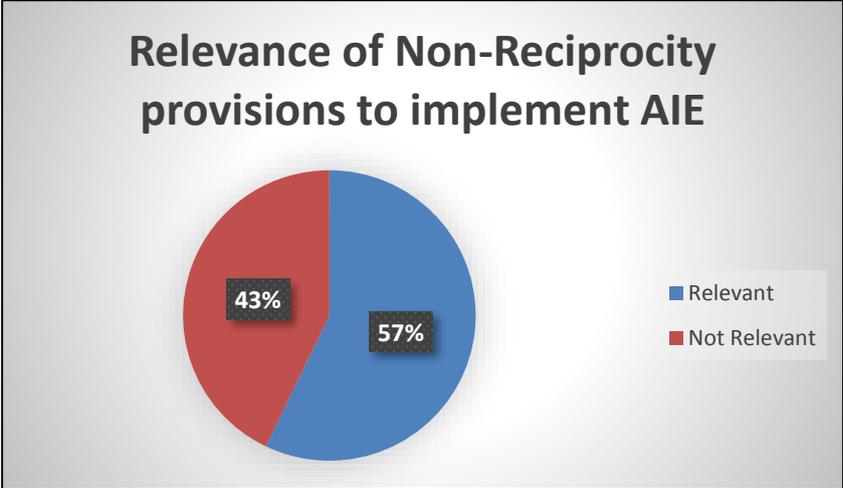
competitive advantage” (12%), indicating the virulent logic of “tax wars,” otherwise known as harmful tax competition<sup>31</sup>. The last option, that “costs will be greater than benefits” (7%), was only chosen by two jurisdictions. This suggests that most countries are convinced that AIE’s benefits are greater than its costs. The sceptics show that there is a need for more and better studies, including quantitative estimates about the potential revenue and investment benefits. Staged reciprocity provisions could also contribute to reduce costs and help change these perceptions.

**5.2.3 Relevance of Non-Reciprocity**

QUESTION: We asked jurisdictions if they consider non-reciprocity provisions to be important for promoting the implementation of AIE, understood as the opportunity to only receive information in a first stage, while the obligation to provide information to other jurisdictions would begin only at a later moment in time (binary scale).

OBSERVATION: One jurisdiction did not answer this question. Additionally, one jurisdiction which did answer is already engaging in “inverted” non-reciprocal AIE: it is already providing information to other jurisdictions without receiving it yet, as a strategy to promote future full-reciprocity (to also obtain information from others).

RESULTS:



CONCLUSION: Over half of respondents answered that non-reciprocity provisions would be useful. We understand that this number should be even higher, however, for the following reasons. In the first place, as already mentioned above, one jurisdiction is already implementing AIE and even in “inverted” non-reciprocal AIE, providing information without receiving it. Second, one jurisdiction’s answer to this question seems to contradict its overall responses. Not only have they identified the limitations to provide information and the lack of IT technology or electronic records as the top and only reasons against

<sup>31</sup> <http://www.taxjustice.net/topics/race-to-the-bottom/tax-wars/>; 17.6.2014.

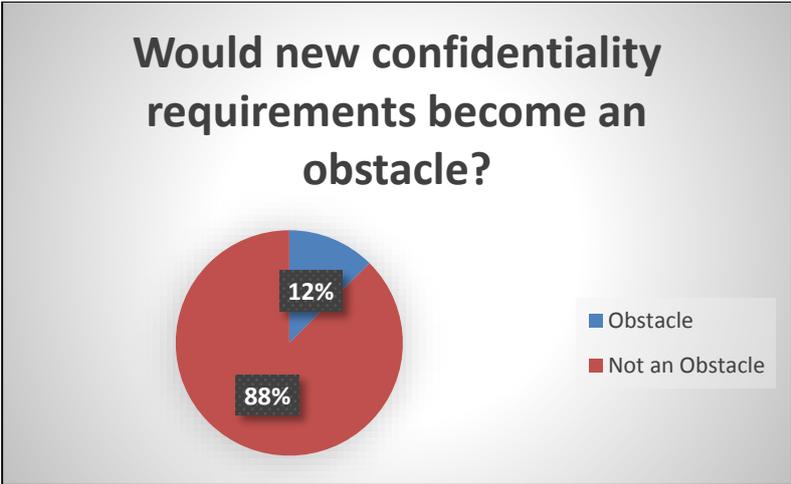
implementing AIE, but they have not even sent information yet pursuant to the “upon request” standard. Given this, it seems likely that the costs of collecting and providing information (full reciprocity from the beginning) would be relevant to them. We tried in vain to clarify this with a follow-up email. The last respondent who considered non-reciprocity as not relevant explained to us that on a personal level he felt that AIE is so beneficial that even under full-reciprocity conditions they should still participate in it. While we presented here the actual replies that we obtained, if we corrected the values according to the explanations expressed here, then **non-reciprocity would be relevant in 83% of the cases.**

**5.2.4 Relevance of New Confidentiality Requirements**

QUESTION: This question asked jurisdictions whether new confidentiality requirements would be an obstacle to engage in AIE (binary scale).

OBSERVATION: This question was answered by all jurisdictions.

RESULTS:



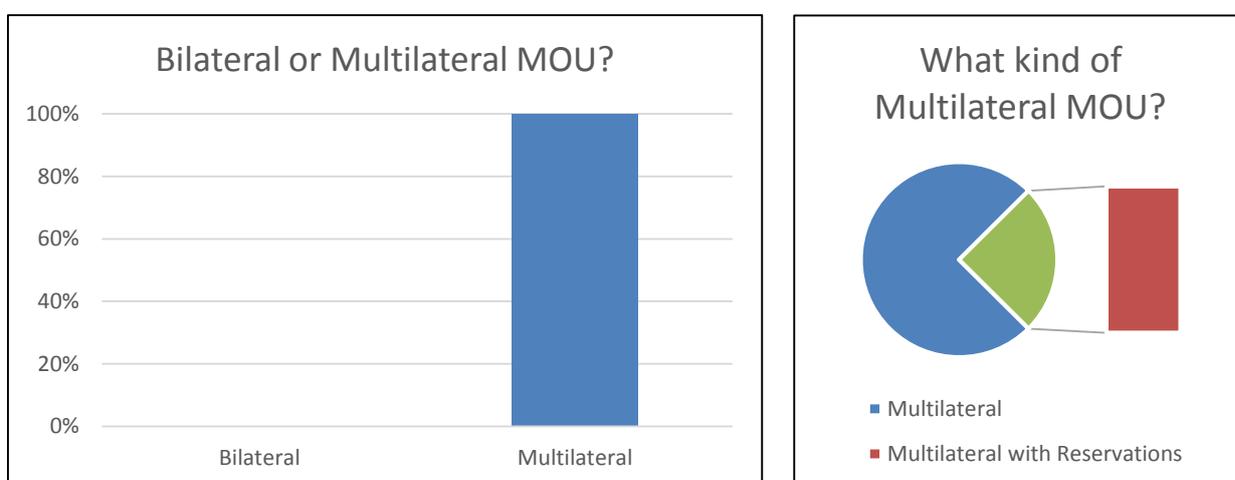
CONCLUSION: All jurisdictions bar one said that new confidentiality requirements would not become an obstacle to engage in AIE. This is surprising, given that many OECD countries that have traditionally being reticent to exchange information with developing countries have been emphasising the need to ensure confidentiality and data protection and could use their own confidentiality standards to exclude provision of information to other countries. Respondent jurisdictions may believe that by having exchanged information (pursuant to the upon request standard) they already meet all confidentiality requirements. However, they may be unaware that some OECD jurisdictions are claiming that since AIE involves a larger quantity of information than in the case of “upon request”, then higher confidentiality and data protection requirements are needed as well, which could be used to exclude the provision of information to developing countries.

### 5.2.5 Preference between a bilateral or multilateral memorandum of understanding

**QUESTION:** The OECD Convention on Mutual Assistance will be the legal basis for the new global standard of AIE, as explained above, though it conditions its practical application to the signing of specific memoranda of understanding (MOUs) between competent authorities (also called competent authority agreement, CAA). This question asked jurisdictions whether they preferred to sign many bilateral MOUs or just a unique multilateral one to operationalize AIE (binary scale).

**OBSERVATION:** This question was answered by all jurisdictions.

**RESULTS:**



**CONCLUSION:** All jurisdictions preferred to sign a unique multilateral MOU. This is understandable given the costs, especially in terms of time and resources, in having to sign many bilateral MOUs. Bilateral negotiations further subject developing countries pressure or influence from developed countries with more bargaining power, to water down the transparency. Finally, this would endanger universal consistency, because any jurisdiction could require specific provisions for each bilateral MOU, preventing a consistent collection, provision and reception of information, effectively interrupting the flow of information.

Two jurisdictions, however, expressed in the follow-up communication that they would prefer a multilateral MOU with the option restrict the exchange of information with specific jurisdictions for particular and justified reasons. These reasons should be limited and restricted to prevent them from being used as way to contradict the object of multilateral AIE.

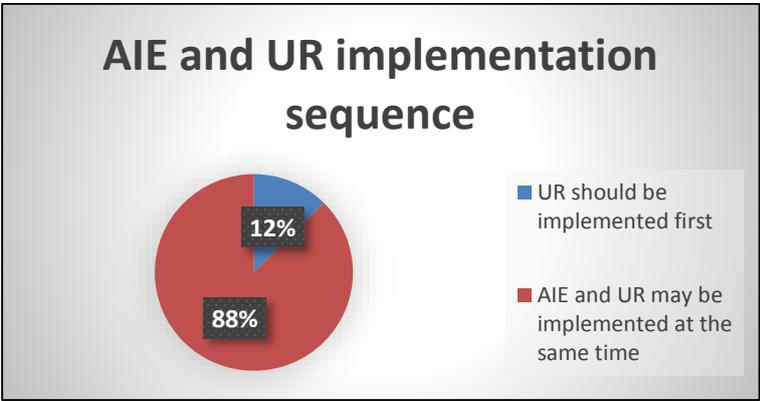
One jurisdiction said reservations should be used also to determine the kind of information that has to be provided for exchange. However, we consider that if a jurisdiction were unable to collect and provide information from the beginning, then non-reciprocity provisions would make more sense than establishing detailed reservations on the scope.

**5.2.6 Time sequence between AIE and “Upon Request” (UR): parallel or “first UR”?**

QUESTION: We asked jurisdictions if they thought AIE and UR could be implemented at the same time, or if they thought AIE could be implemented only after they have become proficient in using UR. This (binary) question is valid both for jurisdictions that have not implemented any information exchange yet, as well as for jurisdictions implementing only UR, which could now (commit to) implement AIE once it becomes operational.

OBSERVATION: This question was answered by all jurisdictions.

RESULTS:



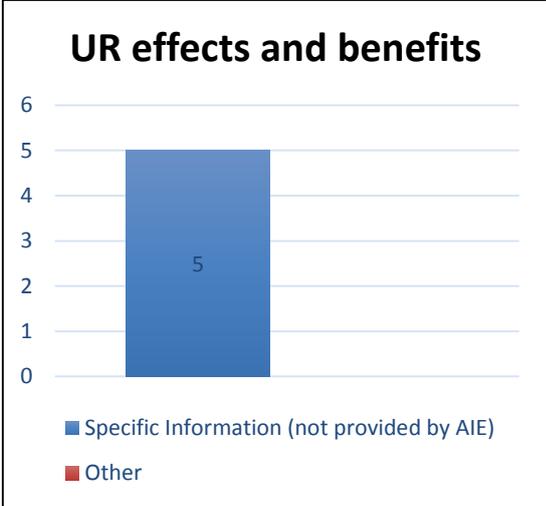
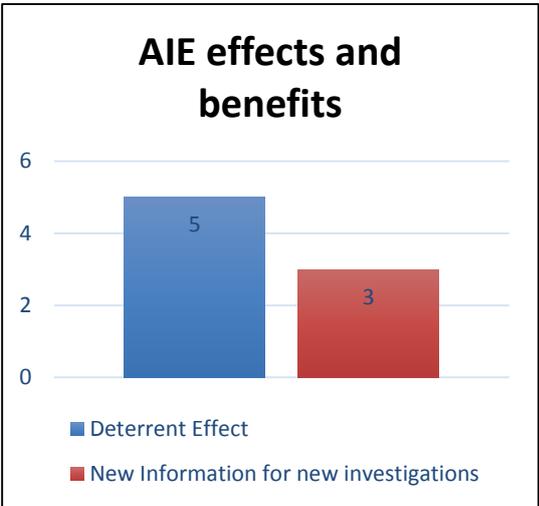
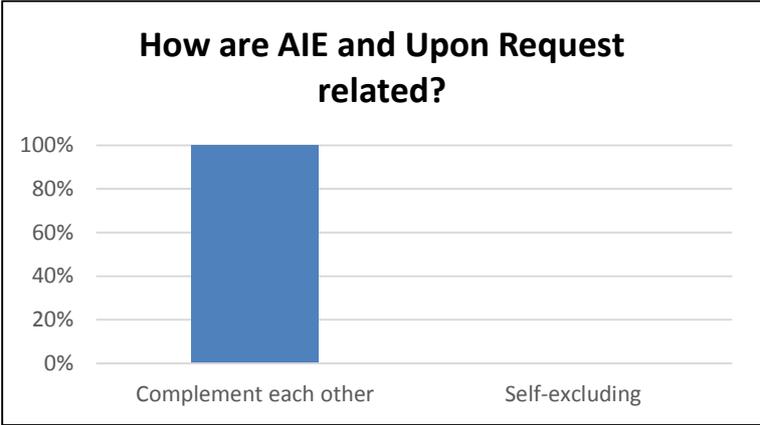
CONCLUSION: Seven out of eight, or 88 %, considered that AIE may be implemented at the same time as UR. When asked for their reasons, two explicitly referred to the benefits of AIE as complementing and making possible specific UR investigations, (also see next question). Two other jurisdictions detailed particular preconditions for implementing AIE simultaneously: non-reciprocity was one, and also they specified the format in which information would be received. This confirms again the need for special provisions for developing countries (non-reciprocity as well as capacity building) so that they may engage in AIE. The only jurisdiction that opposed immediate implementation of AIE referred to internal reasons (necessary legislative changes) to make AIE possible.

**5.2.7 Relationship between AIE and “Upon Request” (UR): complementary or self-excluding**

QUESTION: We asked jurisdictions whether they considered that AIE and UR complement each other, serving different purposes; or if they considered them to be “one or another.” Jurisdictions were asked to specify the benefits for each type of information exchange.

OBSERVATION: One jurisdiction did not answer. In addition, one respondent did not answer on the specific effects/benefits of each standard (AIE and UR) and one jurisdiction only referred to AIE’s effects.

**RESULTS:**



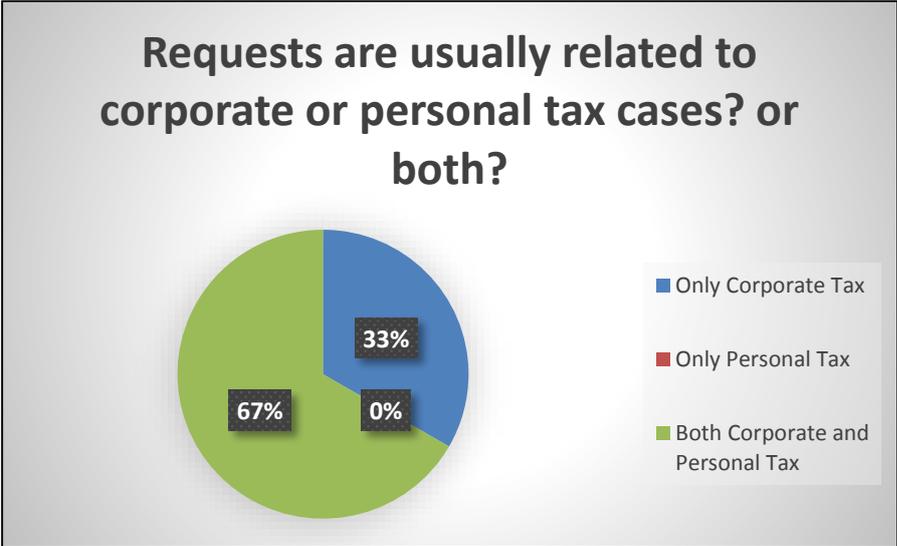
**CONCLUSION:** All respondent jurisdictions agreed on the complementary relationship between AIE and “Upon Request”. When asked to determine each standard’s specific effects or benefits, they replied the following. On AIE, the “deterrent effect” was again the most prevalent answer, chosen by 5 out of 6 respondent jurisdictions. Half of respondents (3 jurisdictions) also understood that AIE provides new information which allows the undertaking of new investigations, which could be pursued under the “upon request standard”. As regards UR effects and benefits, all 5 respondent jurisdictions confirmed that the upon-request standard is used to obtain specific information not provided by the AIE, because of its limited scope. The next question demonstrates which information is usually sought pursuant to UR.

**5.2.8 Requests of Corporate or Personal Tax Information**

**QUESTION:** We asked jurisdictions to choose if the information requests they send usually relate to corporate or personal tax information, or both (plus “other” and “never sent request” option; ordinal scale measurement).

**OBSERVATION:** This question was answered by all jurisdictions. Two jurisdictions had not yet prepared any information requests. Answers are based on those that have already requested information.

**RESULTS:**



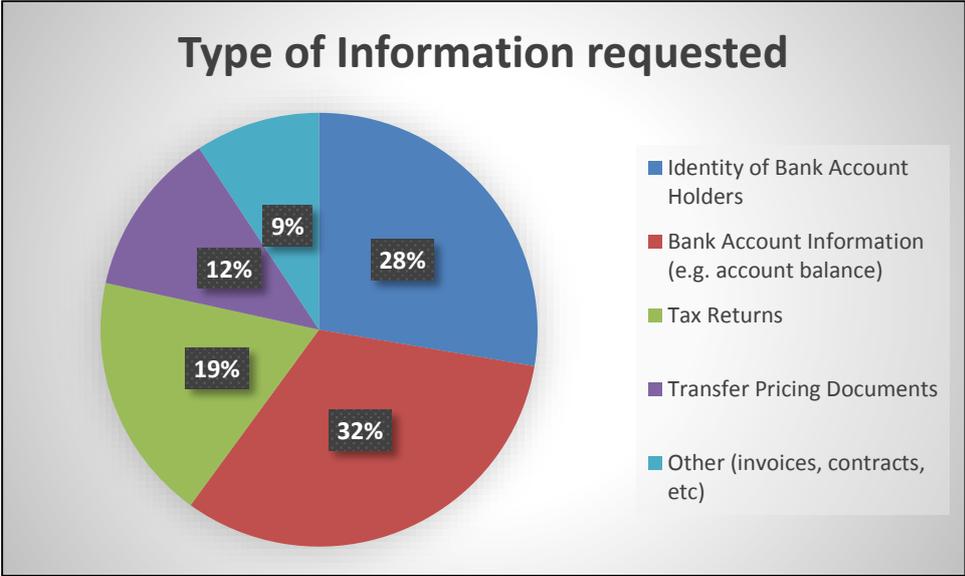
**CONCLUSION:** Two thirds (67%) of respondents who had already requested information were interested in receiving information on both corporate and personal tax cases; one third (33%) was interested in obtaining only corporate tax information; no jurisdiction wanted only personal tax information. This shows on the one hand, the importance of corporate income tax for most developing countries. The relative lack of interest in obtaining personal income tax could be related to a lack of a smoking gun to trigger investigations, low interest in or political pressures against finding information on local élites, the relatively low weight of personal income tax in state revenues, or a combination of all of the above.

**5.2.9 Type of Information Requested**

**QUESTION:** We asked jurisdictions what type of information they are usually interested in receiving, when sending an information request. Answers were assigned a value between 1 (always requested) and 5 (seldom requested), plus "other" and "never sent request" option (ordinal scale measurement).

**OBSERVATION:** This question was answered by all jurisdictions. However, two jurisdictions have not prepared any information requests yet. Answers are based on those that have already requested information.

**RESULTS:**



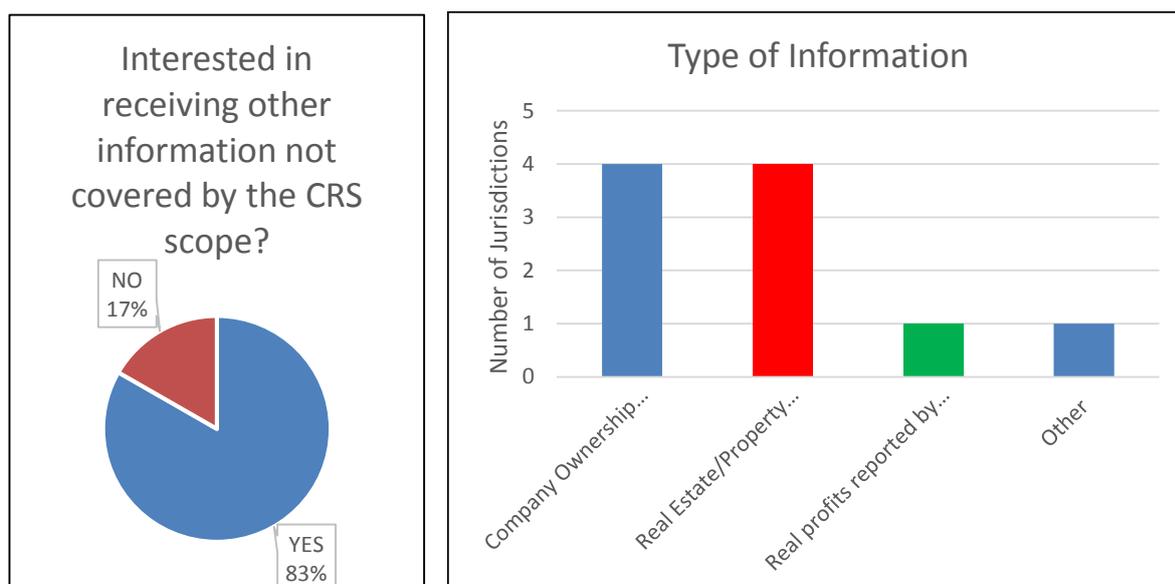
**CONCLUSION:** The answers show that the information most frequently sought refers to bank information, with bank account ownership information (28%) and bank account information such as account balance (32%) being referred to most often. This reveals the importance of following the money trail. The next most frequent types of information sought are tax returns (19%) and transfer pricing documentation (12%). The least frequent requests relate to other information (9%). Departing from these findings, the potential of AIE to reduce the burden of filing requests becomes evident. If AIE fixes its loopholes and becomes effective, then a good share of the requests (related to bank information, which should be covered by the CRS) may no longer be needed, and tax authorities in developing countries could spend more time and resources focusing on other investigations.

**5.2.10 CRS Information Scope: Interest in other information to be exchanged**

**QUESTION:** This was a follow up question sent to those jurisdictions that had sent answers. It asked jurisdictions whether they were interested in receiving any other information not covered by the CRS (binary scale), and invited to specify which information would be of interest (open question with some tentative suggestions).

**OBSERVATION:** Two jurisdictions did not answer this question.

## RESULTS:



**CONCLUSION:** More than 80% of those who responded would be interested in receiving other information not covered by the CRS scope. This high number is perhaps not surprising given that the OECD designed the CRS without consulting with developing countries.

As regards the type of information that developing countries would be interested in receiving, all jurisdictions but one expressed interest in obtaining company ownership information (e.g. shareholders' identity) as well as ownership information from real estate or other properties' registries. The cost of collecting company ownership information and sending it will be avoided if and when beneficial ownership central registries become available online for any person to access, which will be one of the most fundamental pillars of transparency and the fight against crime, money laundering and corruption affecting most developing countries. Beneficial ownership information of real estate properties is also very important, and is not subject to the risk of companies fleeing or migrating in response to more transparency: while changing the domicile of a company requires only paperwork, a house cannot be moved. However, given that real estate property only is a share of high net worth individuals' (HNWIs) wealth (most of whose income is from dividends and other financial assets), beneficial ownership information on real estate holdings should complement, but could never replace that of companies' and other entities (especially trusts and private foundations).

One jurisdiction also expressed interest in receiving information on real profits reported by Multinational Companies (MNCs) and their reported management expenses. While this is relevant for tax evasion and avoidance schemes, and for transfer pricing procedures, if [country by country reporting](#)<sup>32</sup> was implemented

<sup>32</sup> <http://www.taxjustice.net/topics/corporate-tax/country-by-country/>

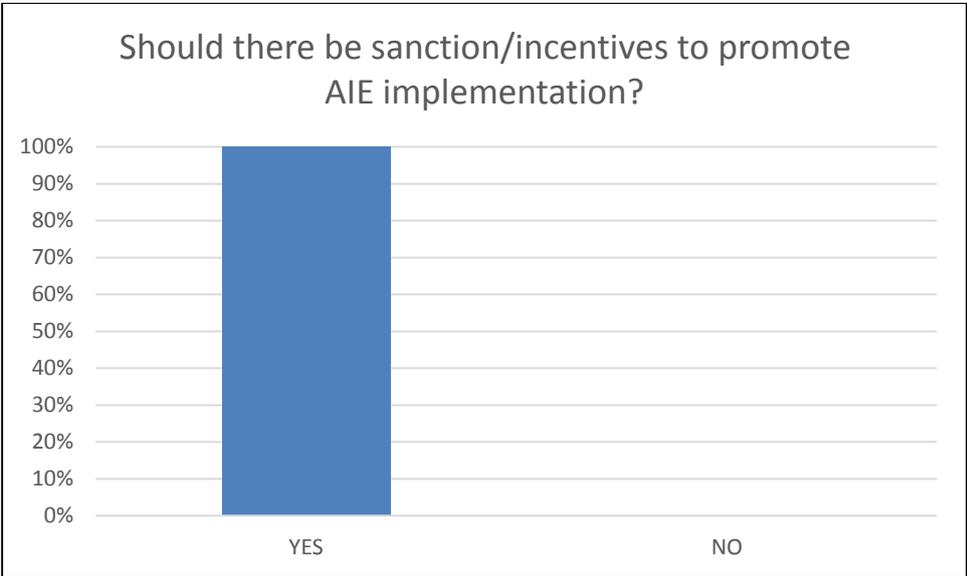
effectively, this information would not be required to be covered by AIE. Lastly, one jurisdiction expressed interest in obtaining information on transfers from their own jurisdiction.

**5.2.11 Incentives and sanctions to encourage secrecy jurisdictions’ implementation**

QUESTION: This question was a follow up-question sent to those jurisdictions that had sent some answer. The U.S. FATCA project entails a 30% withholding tax for non-participating jurisdictions. Yet the OECD’s CRS involves no incentives or sanctions to promote secrecy jurisdictions’ or tax havens’ participation. This question asked jurisdictions whether they considered that a sanction or incentive scheme would be necessary for tax havens (binary scale).

OBSERVATION: This question was not answered by two jurisdictions.

RESULTS:



CONCLUSION: All respondent jurisdictions agreed on the need for sanctions or incentives to promote tax havens’ participation in AIE. When asked for examples of incentives or sanctions, some suggested either suspension from international bodies, fines, non-recognition of credits or a FATCA-like withholding tax. Other respondents emphasised that incentives should be used, leaving sanctions as a last resort, though they did not provide examples of such incentives.

The current problem is that the only (implicit) incentive present in the CRS is “reputation”. However relevant this could be for a tax haven (some of which would take advantage of their non-participation to attract illicit funds), history shows that that tax havens only generally care about reputation with respect to developed countries. They may eagerly engage in AIE with developed countries, yet still exclude developing countries.

The OECD and other commentators have expressed that there is no need for sanctions, and that in any case they should not be part of the CRS but

established by each country individually. Contrary to this view, FATCA imposes the withholding tax within the very same FATCA text. So it is not evident why the CRS, which is modelled to a large extent on FATCA, has removed the sanctions element.

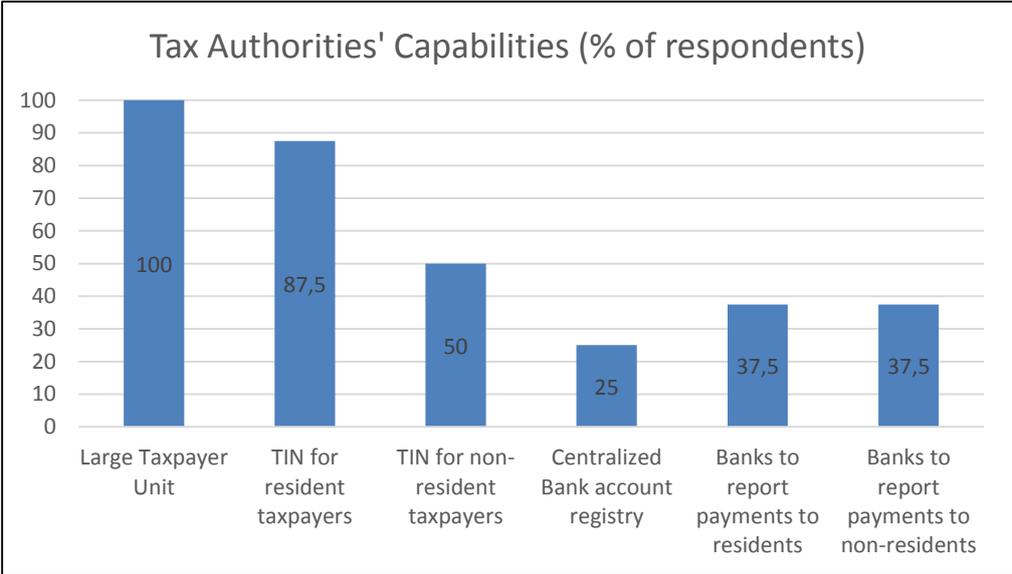
Because sanctions by a developing country against recalcitrant jurisdictions would hardly be a great threat – particularly ones that do not have a large financial market to incentivise compliance – it is important to develop a multilateral sanction scheme as part of the CRS. Financial institutions in Switzerland or the BVI may ignore or simply avoid unilateral sanctions imposed by low income countries in Africa, Asia or Latin America by leaving the country. To encourage financial institutions in Switzerland or the BVI to exchange information automatically with an African, Asian or Latin American country, a multilateral sanction regime is required.

**5.2.12 Fit for AIE: Tax authorities’ capabilities**

QUESTION: This question asked jurisdictions about their current capabilities and domestic legislation requirements, related to collecting and analysing information. Each question could be answered yes or no (binary scale).

OBSERVATION: This question was answered by all jurisdictions. However, some issues remained unanswered. We considered in these cases that there is no collection/requirement to collect that information.

RESULTS:



CONCLUSION: As regards legal requirements that entail tax authorities’ capabilities to process and analyse information received by AIE, all responding jurisdictions confirmed they have a Large Taxpayers Unit, allowing them to analyse more complex cases, including those of HNWIs and MNCs. In addition, more than 85% assign Tax Identification Numbers (TINs) for their resident taxpayers, facilitating matching their domestic databases with information

received from abroad. However, only 38% of responding countries require banks to report on payments to residents.

With regards to capabilities to provide information to other jurisdictions, only 50% of surveyed jurisdictions collect TINs for non-resident taxpayers and merely 38% require banks to report on payments to non-residents; 25% have a centralised bank account registry.

These results suggest that developing countries may be closer to being able to analyse information they receive from abroad than they are able to reciprocate by collecting and sending quality information, as demonstrated by the relative lack of collection of non-resident TINs, of reporting on payments to non-residents and of a centralised bank account registry). This both shows the need for capacity building and provides an argument in favour of non-reciprocity.

### **5.3 Conclusion of Survey Responses: benefits and challenges for developing countries**

While the findings of the survey rest on a small sample of developing countries, its results are enlightening in a context where no similar survey has ever been published. There is a surprising degree of consistency on a number of issues, allowing us to draw some conclusions.

- **Many developing countries are aware of the benefits of AIE and are interested in participating.** Its deterrence effect as well as revenue collection potential are the main reasons why developing countries are interested in AIE. Likewise, they all agree that AIE complements the Upon Request (UR) standard, and under certain conditions almost 90% would be willing to implement it as soon as UR – which is now.
- **Joining AIE will provide developing countries with relevant information, a substantial share of which they are currently forced to seek (if at all) via costly individual requests.** Two thirds of developing countries that responded and are engaging in UR are already requesting information on both corporations and individuals. The most frequently sought types of information concern bank account ownership information and the account balance. Since this data will be covered by the CRS, joining the new AIE standard will result in a great advantage for developing countries' tax authorities, since the time and resources spent until now to prepare those information requests could be saved and spent on other tasks, increasing the administrations' efficiency.
- **The scope of the CRS should be expanded.** Had the OECD or the Global Forum asked developing countries about their needs and interests, they would have found out that most of them would benefit from receiving real

estate and other luxury assets' ownership information as well as shareholder and corporate ownership information. Some also expressed interest in multinational companies' profits abroad and director's fees. The latter information items could be tackled by developing central registries of beneficial ownership which are publicly available online, and by country by country reporting, respectively.

- **Non-reciprocity could alleviate capacity constraints.** While there is a clearly expressed need for support in capacity building, reciprocity would create a substantial amount of additional capacity constraints, making the implementation of AIE for some developing countries more costly and time consuming. More than 80% refer to lack or limitation to provide and analyse information, or lack of IT technology. The widespread lack of centralised bank account registries, absence of a requirement to collect TINs on non-residents and of reporting of payments to non-residents all testify to the additional hurdles reciprocity would impose. To mitigate this, non-reciprocity provisions would reduce immediate costs of collecting information, while allowing developing countries to invest in IT technology to analyse the received information (benefitting from AIE as the G20 committed) while providing time to implement the reforms required to collect information (payments to non-residents, non-resident's TIN, etc.).
- **Multilateral MOU and sanctions against recalcitrant jurisdictions.** All responding developing countries answered that they would prefer a unique multilateral MOU to operationalise AIE instead of signing a separate bilateral treaty with each jurisdiction. This would avoid the extra costs; it would reduce risks of inconsistency and overlap, and make it harder for developed countries to use their superior bargaining powers in bilateral negotiations. As regards promotion of global AIE implementation, all developing countries' answers were in favour of a sanction or incentive scheme becoming part of the CRS to promote participation of recalcitrant jurisdictions.

## 6. Conclusion

AIE is a major breakthrough for fighting illicit financial flows and marks an important step towards more international transparency and cooperation. However, it is still doubtful how effective the CRS of the OECD will be once it is implemented, given that the [identified loopholes, exemptions and limited scope](#)<sup>33</sup> remain to be addressed by the commentary to the CRS, and given the OECD's open doors towards [financial sector lobbying](#)<sup>34</sup>.

This affects all countries in the world. But developing countries have extra obstacles to overcome: not only do they have more capacity building needs, but they also face a push by notorious secrecy jurisdictions and some OECD countries to exclude them from the process.

AIE has the potential to become extremely powerful for tackling tax evasion and corruption and for increasing tax revenues. So developing countries need to join forces. The first challenge is to demand more democratic institutions to design international standards, where they can enjoy a seat at the table. The second challenge would be to ensure that notorious secrecy jurisdictions and some OECD member states do not succeed in imposing bilateral MOUs, new arbitrary confidentiality requirements or the requirement of full reciprocity from the start, as a way to prevent – in practice – developing countries from engaging in AIE.

Unless governments, citizens and civil society organisations understand how these problems deprive them of resources for the benefit of a tiny elite, the benefits of transparency will be unlikely to materialise. Governments are often too internally conflicted over their own assets hidden offshore or lobbying by the financial sector or offshore enablers, preventing them from pressing for more transparency at an international and national level. So grass roots engagement is needed to help deliver real change.

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<sup>33</sup> [http://www.internationaltaxreview.com/pdfs/TJN2014\\_OECD-AIE-Report.pdf](http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf); 18.6.2014.

<sup>34</sup> <http://www.taxjustice.net/2014/06/11/insurance-sector-seeking-trick-oecd-giant-secrecy-loophole/>; 18.6.2014.

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## **Appendix I: Survey on countries already engaging in AIE**

### **Methodology**

The following findings are the result of a survey sent by email to the competent authorities and political parties of a sample of countries which are already engaging in AIE, extending the scope of TJN's previous report on AIE (Meinzer 2012b).

The survey contained questions on the practice of AIE as country receiver and sender of information (number of countries with AIE, legal basis, scope of information, type of taxpayer's covered, matching ratio, etc.). In addition, there were questions on sanctions, spontaneous EOI, policy on reciprocity and legal framework and infrastructure regarding TIN collection for residents and non-residents, centralized bank account registries, obligation to report on payments, and others.

The survey was sent in English or Spanish to 44 countries (supposed to be) already engaging in AIE, including mostly developed countries, OECD countries and G20 countries, but not limited to them.

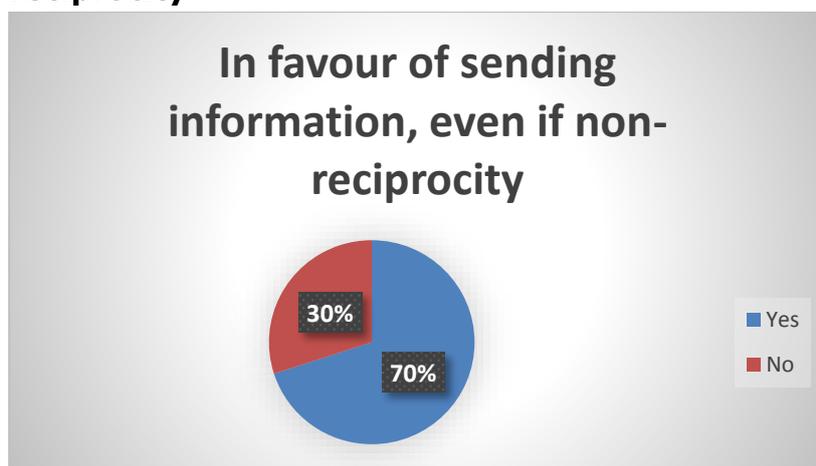
We received valuable information from 12 jurisdictions: ten European states (Austria, Denmark, Finland, Germany, Gibraltar, Hungary, Lithuania, Romania, Slovakia, the Netherlands), Argentina and Australia, resulting in a 27% response rate. However, not all replies were comprehensive. We included those answers that were relevant to this survey, and in case information was missing, we referred to the most recent Global Forum Peer Review Report to complete the information.

While there are multiple reasons for answering the questionnaires, in one specific case we became aware that the authorities of a British Crown Dependency (and a well-known secrecy jurisdiction) were advised not to cooperate with us owing to TJN's work against financial secrecy and tax evasion, which would affect them.

## General Findings

While the findings of the survey rest on a small sample of countries thus limit the weight of its findings, its results are relevant as no similar survey has been carried out or published.

### **Non-reciprocity: willingness to send information regardless of reciprocity**



According to the surveys and/or Global Forum Peer Review Reports, 70% of respondent jurisdictions are in favour of sending information regardless of reciprocity. Among these, one jurisdiction specified that while reciprocity is preferred, information would not be withheld absent reciprocity. On the contrary, among those against non-reciprocity, one jurisdiction expressed that it would only allow non-reciprocity if relating to a European country.

### **Matching Ratio (between information received and domestic tax returns)**

Matching ratios of respondent jurisdictions ranged from as low as 11% (regarding information sent by one specific country) to a rate of 98% reported by one European country. There was consensus among the expressed reasons for a low matching ratio, related to a lack of TIN, date of birth or low quality of the name and address received. There was no mention of lack of staff or technology to process the information.

The TJN AIE 2012 Report had concluded that "Multilateral procedures for AIE have been shown to yield better automatic matching ratios and thus improve the effectiveness and efficiency of AIE" (Meinzer 2012b: 3). Consistent with this view, the matching ratio reported in the 2014 survey is higher in case of jurisdictions only engaging in multilateral AIE (e.g. the European Savings Directive) and also for jurisdictions which broke the matching ratio down into multilateral and bilateral AIE. In one case the matching ratios were 91% compared to 69%, respectively.

## **Material Scope of AIE**

Respondent jurisdictions are already exchanging information on a wide range of income and payments (not only interests, dividends and royalties) and even include non-financial account information, such as shareholdings and company participation.

Examples of information being exchanged automatically includes: interests, dividends, royalties, salaries, pensions, capital gains, business profits, income from independent personal services, income from immovable property, director fees, income to artists, sportsmen and students, shareholdings and participation in companies.

## **Summary of Country Information**

### **ARGENTINA**

Argentina engages in AIE based on bilateral treaties with 5 countries. It received information on almost 70.000 individuals between 2010 and 2011 (most frequently related to interest), and has sent information on close to 50.000 individuals. As for the scope of information, Argentina receives information on interests, dividends, royalties, director's fees and pensions. However, as sender of information, it provides data on dividends, shareholdings and company participations.

The country is also involved in spontaneous exchange of information. While there is a good infrastructure for information collection (company participation available to tax authorities, central bank account registry, banking report on payments to residents and non-residents), there is no TIN issuance for non-residents. Even though enforcement rules were provided, Argentina did not specify if there have been cases of sanctions for non-compliance.

### **AUSTRALIA**

No substantial new information was provided, please refer to TJN AIE 2012 Report (Meinzer 2012b: 20) for more details.

### **AUSTRIA**

A letter from the Finance Ministry to TJN informed that Austria is not engaged in AIE activities. However, they expressed that due to the obligations of Directive 2011/16/EU, in particular its Art. 8, Austria is currently preparing AEI as of 1 January 2014 in regard of the following types of income: income from employment, director's fees and pensions.

### **DENMARK**

Denmark engages in AIE with at least 70 countries, based on European Directives, DTAs and the Multilateral Convention. In 2012 it received information on more than 116.000 individual and entity taxpayers, involving a value of more than 4.7 billion euros (most of which related to interest) covering interest, dividends, royalties, salaries, pensions, capital gains, business profits, income from independent personal services, income from immovable property, director

fees, and income to artists, sportsmen and students. In 2012, Denmark sent information – twice a year - on more than 660.000 individual and entity taxpayers, involving a value of more than 60 billion euros (most of which referred to interest) covering interest, dividends, salaries, pensions, sales proceeds, etc.

The country is also involved in spontaneous exchange of information. In 2013 it sent more than 3.600 records to 52 countries and received 533 records from 15 countries. As for the infrastructure for information collection, Danish tax authorities have access to company's registries, TIN collection for residents and non-residents, reporting by banks on payments to residents and non-residents, although there is no central bank account registry. Even though enforcement rules were provided, there was no information available on cases of sanctions for non-compliance.

### **FINLAND**

Finland engages in AIE based on DTAs, European Legislation and the Nordic Convention. Information scope includes employment and pension income, interest, royalties, VAT related information and information on trade with securities. Statistics on Finland's current practice on AIE was unavailable for confidentiality reasons. However, more details are available in TJN's 2012 report (Meinzer 2012b: 32).

Finland informed being involved in spontaneous exchange of information, having sent 218 records in 2013. As for the infrastructure for information collection, while banks are required to report on payments to residents and non-residents, TINs are only issued for residents (for non-residents only when needed for tax purposes in Finland), there is no central bank account registry nor is the commercial registry involved in the AIE process. Finland reported no cases of sanctions for non-compliance.

### **GERMANY**

Germany engages in AIE with 28 countries (EU members) and 8 more European jurisdictions or British related territories (if no withholding has taken place) based on European Directives, covering interest payments for individuals. In 2011, Germany received through AIE information on 3.3 billion euros of interest payments and sent records involving 1.2 billion euros. Germany reported no cases of sanctions for non-compliance. More details can be found in TJN's study of 2012 (Meinzer 2012b: 35).

### **GIBRALTAR**

Gibraltar engages in AIE pursuant to the EU Savings Directive. No statistics were available.

As for the infrastructure for information collection, there is no central bank account registry, TINs are issued to all taxpayers regardless of their residence, and banks are requested to report on interest payments to non-residents pursuant to EU Savings Directive.

## **HUNGARY**

Hungary engages in AIE based on European Directives. In 2013 it received information on interests and VAT on more than 13.500 individuals and 171.400 entity taxpayers and sent information regarding 84.500 individuals and 410.000 entity taxpayers.

The country is also involved in spontaneous exchange of information, having received information on almost 6200 taxpayers from 17 countries (10 European ones) in 2012; and sent information on 128.800 taxpayers to 65 countries. As for the infrastructure for information collection, there is no central bank account registry nor is the commercial registry involved in AIE. However, TINs are issued and banks report on payments to both residents and non-residents. There was no information available on cases of sanctions for non-compliance.

## **LITHUANIA**

Lithuania engages in AIE based on DTAs and European Directive covering individual and entity taxpayers, involving interests and dividends. In 2013 it received data on 95.500 individuals and sent data on 15.000 individuals.

It does not engage in spontaneous exchange of information. As for its infrastructure for information collection, the commercial registry is not involved in AIE, but the country has a central bank account registry, and TINs and payments are issued and reported on both residents and non-residents. Lithuania reported no cases of non-compliance.

## **ROMANIA**

Romania did not provide statistics or details on practice of AIE, nor is there a Global Forum Peer Review Report available.

As for its infrastructure for information collection, Romania informed that commercial registries are involved in AIE, there is no central bank account registry but information on TINs and payments are issued and reported on both residents and non-residents.

## **SLOVAKIA**

Slovakia engages in AIE with 11 countries based on DTAs. In 2012 it received information on more than 21.000 individual taxpayers regarding their income; it did not send information to other countries. The Global Forum Peer Review Reports did not provide additional information on AIE statistics.

Slovakia does not engage in spontaneous exchange of information. As for its infrastructure for information collection, the commercial registry is not involved in AIE, there is no central bank account registry and there is no TINs issuance or reporting on payments to non-residents.

## **THE NETHERLANDS**

The Netherlands engages in AIE with 34 countries based on DTAs and European Directives. In 2013 it received information involving more than 460.000 individuals and 24.300 entities for a value of 17.8 billion euros of interests, 14.6 billion of dividends, 1.9 billion of royalties and 8.9 billion of other information. In 2012, it sent information involving more than 290.000 individual taxpayers for a value of 230 million euros of interests and 7.3 billion of other type of information.

The Netherlands engages in spontaneous exchange of information. As for its infrastructure for information collection, the commercial registry is not involved in AIE nor does it have a central bank account registry. However, information on TINs and payments are issued and reported on both residents and non-residents. No information was provided on enforcement and sanctions for non-compliance. Please refer to TJN's 2012 AIE report (Meinzer 2012b: 44) for more information.

## **Appendix II: Survey sent to developing countries**

### **TAX INFORMATION EXCHANGE: POLICIES AND CONCERNS**

#### **QUESTIONNAIRE**

- 1- Are there political or technical discussions in your country/institution about implementing Automatic Information Exchange (AIE) for tax purposes, e.g. once the new standard is endorsed by OECD and/or the Global Forum?  
YES/NO
  
- 2- What are the arguments in favor of implementing AIE? (If more than one, please specify by relevance: 1 = most relevant)
  - a) Deterrence Effect
  - b) Potential to collect more taxes from received data
  - c) Reduction of corruption
  - d) International Pressure if left out of the system
  - e) Other? Please specify \_\_\_\_\_
  
- 3- What are the arguments against implementing AIE? (If more than one, please specify by relevance: 1 = most relevant)
  - a) Lack or limited resources/training of tax administration to provide information to other countries
  - b) Lack or limited resources/training of tax administration to analyze the information sent by other countries
  - c) Lack of electronic registries/IT expertise
  - d) Costs (of sending and analyzing received information) will be greater than benefits (deterrence effect/increased collection of taxes)
  - e) Other countries are not joining and that affects our country's competitive advantages
  - f) Other? Please specify \_\_\_\_\_
  
- 4- Would non-reciprocity provisions (your country acting only as recipient of data from other countries, without needing to send information) be relevant so as to promote implementation of AIE?  
YES/NO
  
- 5- Would new confidentiality requirements/demands against your country

be relevant to discourage implementation of AIE?

YES/NO

6- To implement AIE with other jurisdictions, would your country prefer to:

- a) Sign a specific bilateral agreement with every jurisdiction?, OR
- b) Sign only one multilateral agreement that covers all jurisdictions?

7- If the bilateral process is chosen (previous question), would this discourage your country's implementation of AIE?

YES/NO

8- Has your county sent information to other jurisdictions pursuant to the Upon-Request standard?

YES/NO

9- If YES, how would you define the costs incurred in terms of resources:

- a) Extremely demanding for your tax administration
- b) Moderately demanding for your tax administration to the Upon-Request standard?

10- Has your received information from other jurisdictions pursuant

to the Upon-Request standard?

YES/NO

11- If YES, has the information received resulted:

- i. Very useful? WHY? (i.e. because more taxes were collected, or have deterred cases of tax avoidance): \_\_\_\_\_  
\_\_\_\_\_
- ii. Moderately useful? WHY? (i.e. because it required time and resources but limited taxes were collected//penalties imposed):  
\_\_\_\_\_
- iii. Useless? WHY? (i.e. because it wasn't matched to many resident taxpayers, it arrived too late, information sent was wrong):

12- If information received from other jurisdictions was not useful, how would your weigh the reasons?

- a) Mostly external reasons (i.e. information arrived too late, with mistakes, etc.)

- b) Just as many external as internal reasons
- c) Mostly internal reasons (i.e. authorities were unable to process the information and/or to collect taxes)

13- When comparing Automatic Information Exchange (AIE) with Information Exchange Upon Request (UR), do you find that:

COMPLEMENTARY / EXCLUDING

- a) AIE and UR complement each other (they provide different benefits. Benefits increase if both AIE and UR are provided)

Please describe AIE benefits (i.e. provides deterrent effect for all):\_

Please describe UR benefits (i.e. helps in specific investigation):\_\_\_

- b) AIE and UR may replace each other because they serve the same purpose (if you have AIE you do not need UR, and vice versa)

Please describe those benefits (i.e. either provides deterrent effect):

SEQUENCE TO IMPLEMENT

- a) UR should be implemented first, and only then AIE

WHY? (i.e. AIE is more complex/costly, better first understand how to use UR):\_\_\_\_\_

- b) AIE may be implemented as soon as UR

WHY? (i.e. AIE is too important to postpone its benefits):\_\_\_\_\_

14- Your tax administration has been using Information Exchange Upon Request (UR) to assess/investigate cases relating to:

- a) Corporate taxation
- b) Individual's income/wealth tax
- c) Both
- d) Other: \_\_\_\_\_
- e) UR has not been used yet (no exchange of information requests have been made)

15- When requesting information, pursuant to Information Exchange Upon Request, you ask for:

[1 = always requested – 5 = seldom requested]

- a) Bank account ownership (i.e. the owner of a specific bank account)

- b) Specific bank account information (i.e. account balance, transactions)
- c) Tax Returns
- d) Transfer pricing documentation
- e) Other: \_\_\_\_\_
- f) UR has not been used yet (no exchange of information requests have been made)

16- Does your tax administration have/ Do your regulations prescribe:

- a) a Large Taxpayer's Unit?  
YES/NO
- b) TIN to identify resident taxpayers?  
YES/NO
- c) TIN to identify non-resident taxpayers?  
YES/NO
- d) A centralized bank account registry?  
YES/NO
- e) Paying agents (i.e. banks) to report payments to residents to tax authorities? YES/NO
- f) Paying agents (i.e. banks) to report payments to non-residents to tax authorities? YES/NO

## FOLLOW-UP QUESTIONS

The following questions are two follow-up questions sent to those jurisdictions that had sent some answer to the questionnaire.

### I- OTHER INFORMATION NOT INCLUDED IN THE CURRENT AIE SCOPE

The OECD Common Reporting Standards on Automatic Information Exchange (published last February 2013) include automatic exchange of "financial account" information (bank account balance, income from dividends, interests, etc). Is there any other information that you believe would be useful for [COUNTRY] to receive automatically? For example, other jurisdictions referred to receiving information on their residents who are shareholders or directors of companies abroad, or information on their residents who own real estate properties abroad, or profits reported by multinational companies and management fees. Is there any information (not included in the OECD standard) that you believe would be important for your country to receive?

### II- SANCTIONS/INCENTIVES

Do you consider that sanctions/incentives are necessary to encourage major financial centres and tax havens to implement AIE (and send information to other countries, including developing countries)? For example FATCA imposes a 30% withholding tax for non-participating financial institutions, and many believe that it is for this reason that most financial institutions have decided to join FATCA. Do you think that a similar sanction would work for the Global Standard on AIE? Otherwise, what sanctions or incentives do you consider would be necessary to promote tax havens' participation?



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For more information visit [www.taxjustice.net](http://www.taxjustice.net)