Identifying the New International Standard for Effective Information Exchange

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1. Introduction

The Group of Twenty (G-20) announced at its meeting in London on April 2, 2009 that “the era of bank secrecy is over”. Countries that have long protected the accounts of foreign depositors from disclosure to foreign tax authorities are being told by the G-20 that they must conform to an international standard for transparency and effective information exchange. The content of that international standard, nevertheless, was not specified by the G-20. The OECD seized the moment to promote the standard that it had promulgated back in 2002 with the publication of its first model tax information exchange agreement (TIEA). If the OECD’s antiquated standard were to prevail, then the G-20 attack on tax evasion would be a charade. Fortunately, it appears that a more robust standard is emerging in response to the global economic meltdown of 2008.

The OECD’s favored standard of information exchange, which requires that a country provide information only after the requesting state has identified a specific individual as a likely tax offender, was ineffective in curtailing tax evasion and regulatory fraud over the past decade. Indeed, cross-border tax evasion has grown exponentially during that period. An effective standard requires an automatic exchange of information in at least some cases. For example, it requires a sharing of information about the names and addresses of bank depositors and the names of the beneficial owners of companies and trusts.

The European Commission has been a leader in developing the new standard of effective information exchange as part of the proposed revision of its 2003 Savings Directive. The 2003 directive went into effect, with disappointing results, in 2005. The results were disappointing because the directive, although requiring automatic exchange with respect to individuals, was filled with loopholes that preserved bank secrecy for a variety of legal entities. The Commission now has proposed that the directive be modified to require automatic exchange of information with respect to all taxpayers, whether individuals or legal entities, whatever their formal structure.

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1 Leaders of the Group of Twenty, The GLOBAL PLAN FOR RECOVERY AND REFORM, April 2, 2009, para. 15 (“In particular we agree . . . to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over.”).


4 Commentators noted at the time of its adoption that the Savings Directive would be ineffective, due to the obvious loopholes. Apparently an ineffective measure was all that the politics of the time would allow. For discussion of the limitations and potential of the Saving Directive, see Tax Justice Network, European Union Savings Tax Directive (March 2008), available on line at: http://www.taxjustice.net/cms/upload/pdf/European_Union_Savings_Tax_Directive_March_08.pdf (last visited May 4, 2010).
In section 2, below, I discuss the new standard for transparency and information exchange that has been emerging in the past two years. Section 3 describes the disappointing response of the OECD to the political opening for reform resulting from the 2008 economic meltdown and the unified public support of the G-20 for an end to bank secrecy. In section 4, I discuss a draft model information exchange agreement that I prepared for consideration by the United Nations Committee of Experts on International Cooperation in Tax Matters (UN Committee). That document is appended as an appendix. Section 5 provides some concluding comments.

Although I favor the widespread adoption of effective information exchange agreements, I do not suggest that such agreements will bring an end to international tax evasion. They are simply a useful tool, which, in conjunction with other tools, can do the following:

1. They can allow tax authorities to detect tax evasion in many cases and to penalize its perpetrators.
2. They can deter some taxpayers otherwise inclined to evade taxes to become compliant with the tax laws.
3. They can raise the costs of evasion to its perpetrators, thereby reducing the economic incentive to evade.
4. They can undermine the mass-marketing of tax-evasion mechanisms that the world has witnessed over the past three decades.
5. They can dissuade financial intermediaries, international lawyers, and international accounting firms from facilitating tax evasion and aggressive tax avoidance.5

I do not attempt in this paper to catalog all of the steps that might be helpful in controlling international tax evasion. One step that I strongly favor is a revision in accounting standards to require multinational enterprises to make public reports of the income they earn in each country and the tax paid on that income, with sufficient balance-sheet data to allow for an effective audit of the income reports. I also strongly endorse international support for the efforts of countries, developing countries in particular, to improve their ability to process and utilize information obtained through information exchange and company audit reports. I also favor withholding at source, even at a low rate, on all forms of investment income.

Secrecy and confidentiality, although closely related, are not the same. Bank secrecy is about concealing information from legitimate inquiries by a government, whereas confidentiality is about protecting the legitimate privacy rights of bank customers. An effective exchange-of-information

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5 The exposure of UBS as a facilitator of tax evasion by American investors has led UBS to give assurances that its bad old ways will not continue. It has adopted a code of conduct which provides, inter alia, as follows:

Our tax reporting complies with the spirit as well as the letter of any applicable laws, regulations or treaties and to accuracy in tax-related records.

We do not provide assistance to clients or colleagues in acts aimed at deceiving tax authorities nor do we support transactions where the tax efficacy relies on assumptions that are inconsistent with the commercial facts or on non-disclosure of material facts.

agreement is properly viewed as an assault on bank secrecy. It is not an attack on the ancient and admirable tradition of banker confidentiality. That is, an exchange-of-information agreement undermines the ability of banks and other financial intermediaries to keep secret from responsible governments the account information of their clients. Any information received under such an agreement, however, remains confidential.

The fact that certain information is confidential does not mean that it cannot be shared in appropriate circumstances. Banks routinely share customer-account information with their own subsidiaries or their parent companies. In some countries, banks share information, on a confidential basis, with auditors, credit card companies, and others with a legitimate interest in the information being shared. Most countries require their banks to cooperate with investigations of drug trafficking and terrorism. All model information exchange agreements that I have seen recognize the obligation of confidentiality. They expressly prohibit governments that receive confidential information from disclosing that information except in limited circumstances, such as court proceedings.

Rules for ending bank secrecy need to be fashioned so as to be respectful of the rights of individuals to privacy with respect to their financial affairs and to avoid conflicts with basic human rights. The right to privacy on financial matters, however, is not absolute and should not be treated as absolute. In some cases, it collides with the right of taxpayers to a fair and effective tax system. It also must yield to the right of the government to regulate financial institutions that put the world economy at risk. In such circumstances, some balancing of rights is required. Reasonable people can disagree on how the proper balance should be struck. There should be no disagreement, however, that privacy rights cannot prevail over the right of the people to a government that can protect its public finances and financial systems against governments that conspire with financial institutions to facilitate international tax evasion and aggressive tax avoidance.

2. The Emerging Standard of Effective Information Exchange

Information exchange by specific request has proven to be ineffective in curtailing international tax evasion. The reason is clear. To utilize that method of exchange, a requesting state must already have identified a taxpayer as a likely tax offender. Tax offenders, however, go to extraordinary means, with the help of their lawyers, accountants, and financial intermediaries, to keep their status as a tax offender secret from the tax authorities. The main benefit to be obtained from information exchange is the identification of likely tax offenders, and that benefit obviously is denied if the tax authorities must already know that information before they can request it.

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6 In its code of conduct, UBS provides the following statement about confidentiality:

We maintain the confidentiality of any information entrusted to us by our clients, except when disclosure is authorised by them or required by applicable laws, rules or regulations. We share such information internally with appropriate discretion.

Countries do not publish data on the number of requests they have made under their information exchange agreements or on the response to those requests. In my view, the OECD should encourage its member states to make that information available to the public. My general impression, from many anecdotal accounts, is that the annual number of requests worldwide is in the hundreds, whereas hundreds of thousands of taxpayers are suspected of engaging in international tax evasion. More significantly, the number of successful requests made to offshore tax centers is likely to be tiny.

That the OECD standard of information exchange only by request is not a serious threat to bank secrecy is evident from the rush of offshore financial centers to enter into OECD-sponsored agreements in the wake of the G-20 announcement in 2009 that the era of bank secrecy is over. According to the OECD, over 300 such agreements were signed in 2009 by countries that cater to offshore tax offenders and have long sought to attract offshore clients through the promise of bank secrecy. What is almost certainly happening is that governments that depend on bank secrecy to sustain their financial institutions have concluded that the OECD is offering them a very attractive deal. These governments agree to an ineffective method of information exchange in return for the OECD imprimatur as a complying state. Because virtually all of their competitors for offshore accounts are entering into similar agreements, these governments do not even suffer the modest competitive disadvantage that might come from the appearance of propriety.

While the OECD is engaging in its widely publicized charade, some real efforts at effective information exchange have been occurring. One of the more interesting such efforts, mentioned above, is the move of the European Commission to require an effective exchange of information within the European Union with respect to bank deposits by closing the loopholes in its 2003 Savings Directive. Even the Swiss Minister of Finance now seems to believe that Switzerland will need to agree to some form of automatic exchange of information if it is to continue as a major player in the financial life of Europe.

As an outsider, I will not attempt to recount to European tax experts the political winds blowing in Europe with respect to automatic exchange of information. Newspaper accounts indicate that some of the major players in the EU, including France, Germany, and the United Kingdom, have indicated from time to time their support for automatic exchange of information. Many members of the Parliamentary Assembly of the Council of Europe recently urged member states that have not yet done so to sign and ratify the Council of Europe Convention on Mutual

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8 See Statement of Hans-Rudolf Merz, Swiss Finance Minister, quoted in Jason Rhodes, “Swiss minister urges debate on tax data: report,” Reuters, February 7, 2010 (“If we want such a (financial services) agreement, we have to be prepared to take on European rules — and Europe has the automatic exchange of information.”). See also Jessica Dacey, “Swiss ‘must act now’ on banking secrecy,” swissinfo.ch, Mar 15, 2010, available at http://www.swissinfo.ch/eng/politics/Swiss_must_act_now_on_banking_secrecy.html?cid=8468210 (last visited, April 30, 2010).
Administrative Assistance in Tax Matters of 1988. That convention was revised by a protocol scheduled for adoption on May 27, 2010. The protocol eliminates bank secrecy as a ground for refusing to exchange information, and it otherwise brings the convention into line with the OECD’s TIEA of 2002. The 1988 version, unchanged in this respect by the protocol, provides in Articles 5 and 6 for limited automatic and spontaneous exchange of information.

The United Kingdom, in its 2010 Budget, has proposed that penalties for tax evasion will be increased if the evasion is attempted through a country that fails to provide for an automatic exchange of information. The clear implication is that the UK government views a country that does not offer an automatic exchange of information as one that is facilitating international tax evasion.

In brief, I see substantial support in Europe for the view that the OECD model of exchange by specific request is inadequate and that a more robust standard is needed. Getting political agreement in Europe on a new standard is no easy task, especially in light of the reluctance of some member states with strict bank-secrecy laws to change their ways. The aspirational standard in Europe, however, seems to include some requirements for an automatic exchange of information.

Developing countries are major victims of international tax evasion and avoidance, so it is no great surprise that some of them have shown an interest in an effective exchange of information. In 2006, I presented a proposal to the United Nations Committee of Experts on Cooperation in Tax Matters (UN Committee) for the drafting and adoption of a UN code of conduct setting aspirational goals for cooperation in combating international tax evasion and aggressive forms of tax avoidance. Largely at the insistence of the developing countries, I was asked to provide the...
UN Committee with a report explaining the function of a code of conduct on information exchange and its relationship to other codes of conduct promulgated by the United Nations. After completing that report and presenting it to the UN Committee in October of 2007, I then prepared a draft code of conduct, which I presented to the subcommittee dealing with information exchange. I was a member of that subcommittee and its former interim chair. The code of conduct I drafted for consideration by the UN Committee was revised substantially by the member from Spain, who served as chair of the exchange of information subcommittee. The chair’s draft was objected to by myself and the member from Russia and supported by two members from OECD countries, the chair and the member from Italy. To the best of my knowledge, the other members of the subcommittee, who represented offshore financial centers, did not participate in the email exchanges dealing with the chair’s draft. At its fifth annual meeting, the UN Committee adopted, with some revisions, the draft prepared by the

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compliance by taxpayers and tax cooperation. . . . It was further agreed that Mr. McIntyre would be invited to expand on his work by providing more details on what such a code of conduct would contain.

For many years, I served as the consultant to the UN Expert Group, the predecessor of the UN Committee. Prof. Stanley S. Surrey had filled that position from the inception of the Expert Group until his death in 1984. After a lapse of some years without a consultant, I assumed that position. In that capacity, I worked with Hamid Bouab, Secretary to the Expert Group, and Antonio Figueroa, longtime chairman of the group, to persuade ECOSOC and the General Assembly of the United Nations to convert the group into a UN committee and to provide it with additional funding. That goal was accomplished in 2004. See Secretariat of the Ad Hoc Group of Experts on International Cooperation in Tax Matters, INSTITUTIONAL FRAMEWORK FOR INTERNATIONAL TAX COOPERATION, ST/SG/AC.8/2003/L.6, December 2003, available on line at: http://faculty.law.wayne.edu/tad/Documents/UN/UN_institutional_frame.pdf.

13 The Report on the third session of the Committee of Experts on International Cooperation in Tax Matters (29 October - 2 November 2007), at para. 60, states as follows:

The idea of the proposed Code of Conduct on Cooperation in Combating International Tax Evasion was widely supported, although it was noted that references addressing the possible political and economic isolation of countries should be removed. It was suggested that the title of the document should be amended to refer to tax evasion only and that the relationship between normal tax planning and abusive practices should be explained. It was decided that the work should be fully integrated into the work of the subcommittee on Exchange of Information, with a view to making available a revised report and Code of Conduct as soon as possible.


16 The report of the meeting indicated that only one member objected and implied that the rest of the subcommittee support the position of the chair. See DRAFT REPORT ON THE FIFTH SESSION OF THE COMMITTEE OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS (19-23 October 2009), at para. 50 (“As noted in Mr. Ferre’s [the chair’s] paper, there had not been unanimity in the Subcommittee — one member of the Subcommittee considered that the Code was too based [sic] on Article 26, and should be more “ambitious”.”).
That draft called for exchange of information on request; in contrast to the draft I prepared, it did not call for automatic or spontaneous exchanges, although it acknowledged that the code was establishing only minimal goals.

My primary objection to the code, as adopted by the UN Committee, is that it did not go beyond Article 26 (Exchange of Information) in the UN model convention. I envisioned the code as an aspirational document that would promote but not mandate a level of information exchange that went beyond Article 26 and beyond what many governments of offshore financial centers would agree to in the absence of sanctions. I sought to set guidelines for future development, whereas the UN Committee, under pressure from its OECD members, sought to avoid going beyond the limited exchange of information contemplated in the OECD’s 2002 standard. The one bright spot in the UN code, from my perspective, was the reference to the UN Commentary to Article 26. As discussed below, that commentary gives at least implicit support for automatic exchange of information and requires an exchange of information “to the widest possible extent”.

In 2008, the UN Committee updated Article 26 of its model income tax convention to include the language inserted in 2005 by the OECD into its model convention that would prevent a contracting state from refusing to comply with a request for information based on its internal bank secrecy laws. The UN Committee went beyond the OECD in two respects. First, its version of Article 26 is broader than the comparable OECD article. Paragraph 1 of that article includes the following sentence, not found in the OECD counterpart: “In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes.” It is difficult to read this language as limiting exchanges only on specific request. In addition, paragraph 6 of Article 26 of the UN model provides as follows: “The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made.”

In my view, the meaning of paragraph 6 of the UN model is not entirely clear. Read in context with the UN Commentary to Article 26, however, it can be understood to call for automatic exchange of information. Paragraph 29.1 of the UN Commentary states as follows (emphasis added):

To carry out the exchange of information in accordance with the preceding paragraphs of this article, paragraph 6 provides that the competent authorities of the Contracting States shall work together to establish procedures for the exchange of information,

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19 To its credit, the UN Committee’s code emphasized that “the Code of Conduct is a practical means of enhancing international tax co-operation to an acceptable level but that individual countries should aspire to a higher level of cooperation to the extent their circumstances allow.”

20 In the interest of full disclosure, I note that I prepared the initial draft of the UN Commentary on Article 26 in my role as interim chair of the subcommittee on the exchange of information. At the request of members from OECD countries, my draft was modified in places by the UN Committee to limit the obligation to exchange information. Most of my original draft, however, was adopted without significant change.
including routine exchanges, typically in electronic form. Although paragraph 6 does not require them to make such arrangements in advance of the need for particular exchanges of information, this is strongly advisable to achieve an effective exchange of information.

A related point is made in paragraph 5.4 of the commentary:

Article 26 provides in paragraph 6 that “the competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made”. This language authorizes the competent authorities to exchange information in at least three modes: exchange by specific request, automatic exchange, and other exchanges, understood to include spontaneous exchanges.

That Article 26 of the UN model should be interpreted broadly is evident in the first paragraph of the UN Commentary to that article. It states as follows (emphasis added):

Article 26 embodies rules under which information may be exchanged to the widest possible extent, both to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws. Consequently, the obligation to exchange information under this article should be interpreted broadly, and the limitations on that obligation should not be extended by analogy beyond their specific meaning. In particular, the article should be understood to require the Contracting States to promote an effective exchange of information.

Among tax reformers, the term “effective exchange of information” is code for a standard that includes automatic exchanges in some important cases. I do not suggest, however, that this meaning should be attributed to the UN Commentary. Nevertheless, that language certainly suggests that the standard for exchanges of information should not result in an ineffective exchange, as occurs with the OECD’s 2002 standard.

An additional recent development suggests the emergence of a standard for information exchange in the North American Free Trade Zone (NAFTA) that includes some automatic exchanges. In a letter dated February 9, 2009, from Mexican Finance Secretary Agustin Carstens to U.S. Treasury Secretary Timothy Geithner, Mexico has requested that the United States, in accordance with the U.S.-Mexico tax treaty, agree to provide an automatic exchange of information with respect to American deposits in Mexican banks and Mexican deposits in American banks. Secretary Carstens noted that Mexico and the United States already have such automatic exchange with Canada and that Mexico and the United States already have automatic exchanges on dividends and other types of periodical income.

No public response from the United States has been announced so far to this important Mexican initiative. If that exchange arrangement is accomplished, it might make information exchange in the North American Free Trade Zone as extensive as the exchange contemplated in the European Union. That is, the two largest trading blocks in the world would have instituted an effective exchange of information that would go well beyond the OECD 2002 standard.
A recent letter (TJN Letter) prepared by the Tax Justice Network and addressed to the UN Committee’s subcommittee on information exchange calls attention to the U.N. Commission of Experts on Reforms of the International Monetary and Financial System, chaired by Joseph Stiglitz (“Stiglitz Commission”). The report of the commission recommends that the international standard for the exchange of information include automatic exchanges. The basic point made by the Stiglitz Commission is that governments have both a right and an obligation to protect their fiscal systems and that an effective information exchange, including automatic exchange, is needed to provide that protection.

The TJN Letter also contends that automatic exchange of information is more widespread than commentators may realize. It notes that the Convention among the Nordic Countries (Denmark, Faroe Islands, Finland, Iceland, Norway, and Sweden) on Mutual Administrative Assistance in Tax Matters (effective 1991) requires automatic exchange of information with regard to dividends, interest, ownership of real property, royalties, wages, salaries, fees, pensions, and insurance (Articles 11 and 20). The letter also calls to the attention of the UN subcommittee an OECD report published back in 2000 that noted that many countries were engaging in an automatic exchange of information. That report states:

A number of countries (Australia, Canada, Denmark, Finland, France, Japan, Korea, New Zealand, Norway, Sweden, and United Kingdom) automatically exchange bank information with their treaty partners. In some cases, the automatic exchange of information is limited to certain treaty partners based on an agreement (Denmark, France, Korea, Sweden). The automatic exchange of bank information also may depend on reciprocity (Australia, Canada, Denmark, France, Norway, and Sweden).

The Tax Justice Network suggests that the list of countries exchanging information automatically is likely to have grown over the past nine years. As discussed in section 3, below, the OECD, back in 2000, was promoting the automatic exchange of information.

Apologists for international tax evasion have suggested that tax evasion is simply the market’s response to excessive taxation. The implication is that the market is an appropriate mechanism for establishing moral values. To me, that claim is preposterous. That said, I do find it interesting the way the market is now responding to the value that financial centers have created in information about offshore tax offenders. If someone knows that a taxpayer is cheating on his or her taxes, he may be in a position to sell that information to a government that could collect far more than the purchase price by auditing the alleged offender and collecting the tax due with penalties.


22 OECD, IMPROVING ACCESS TO BANK INFORMATION FOR TAX PURPOSES (March 2000) at 40.

23 On its web site, the OECD states: “Most OECD countries do engage in automatic exchange of information on a range of different types of income.” See Frequently Asked Questions, “Why exchange of information on request not automatic?,” http://www.oecd.org/document/50/0,3343,en_21571361_43854757_44234930_1_1_1_1,00.html#whyexchangeofinformation (last visited May 4, 2010).
The persons in the best position to know about potential tax offenders are the employees of banks located in financial centers that cater to tax evaders. In recent months, several such individuals have sold CDs with detailed information about bank accounts to European countries that are intent on controlling the international tax evasion of their taxpayers. Germany has been the leader in this “self help” information exchange by paying employees of Liechtenstein and Swiss banks millions of euros for information about potential German tax offenders.\textsuperscript{24} Undoubtedly, the Swiss and other financial centers will attempt to stop this trafficking in depositor information through higher criminal penalties and stepped up enforcement of their bank secrecy laws. They may find, however, that their ability to fight market forces is rather limited as long as foreign governments are willing to pay high fees for the information that the financial centers have made valuable.

Some commentators have suggested that paying fees to informants who have broken the law of the country in which the financial institution is located is immoral or at least improper. Others see no objection, analogizing the purchase of the bank data to the payments that law enforcement officials routinely pay to informants. How the payments are viewed is likely to turn on how the offshore financial centers are viewed by the public. If the view is benign or even favorable, then the payments may appear to be a breach of the comity normally extended to sister states. Lots of people, however, are no longer viewing those regimes as benign. The G-20 has characterized them as a threat to their public finances and financial systems. So viewed, the regimes become in some sense “the enemy”. A government paying informants to protect itself against an enemy seems hardly controversial at all.

### 3. The OECD and Its Lapse of Leadership on Effective Information Exchange

Certainly the OECD is well aware that its 2002 standard for information exchange has not been effective. It has a competent technical staff, and the country representatives on Working Group One, which manages the OECD’s tax treaty program, typically are experienced people. It is interesting to speculate, therefore, as to why the OECD has attempted to focus the world’s attention on its ineffective 2002 standard instead of joining forces with the various governments and nonprofit organizations that are seeking to promote an effective exchange of information.

I offer the following speculations about the OECD’s motives, with some exceedingly brief commentary on each speculative point. I do not claim, however, any real insight into the motives of the OECD or Working Group One.

- Do one or more of the major G-20 states not want effective information exchange, thereby constraining the OECD from taking a more aggressive position? I can imagine that some G-20 states would view an end to bank secrecy as a threat to their own banks or to their position as a major financial center. I believe, however, that the most likely suspects — China, the United States, and the United Kingdom — now generally favor an effective exchange of information.

\textsuperscript{24} See, e.g., Judy Dempsey, “Battle Over Tax Data Heats Up Between Switzerland and Germany,” \textit{New York Times}, February 15, 2010 (“If the German government wants to buy account data stolen from Swiss banks, then the Swiss accounts of German officials and other public figures should also be exposed, according to the head of an influential lobby that represents the interests of Swiss taxpayers.”).
information. I do have some concern that the United States, due to its efforts at attracting investment from international tax cheats through its so-called “Qualified Intermediary” program, has disqualified itself from taking a leadership role in promoting an effective exchange of information. I also note that the OECD does not classify Hong Kong and Macao as tax havens, suggesting that the OECD is treading lightly in matters of concern to the Government of China. The United Kingdom, which suffered greatly from the economic collapse of 2008, seems to have become energized in the campaign for greater information exchange.

- Is the OECD under pressure from the international banking community? In the past, the OECD has been quite solicitous of the concerns of the bankers. The bankers, however, have never been so weak.

- Is the OECD hamstrung by the fact that Switzerland and Luxembourg, which oppose most measures to limit bank secrecy, each have veto power over actions by the OECD? I have my doubts that a veto threat is the problem. For whatever reason, the OECD seems to be able to manage despite the veto threat unless the veto threat comes from one of the dominant member states. It seems likely that the G-20 would look elsewhere for leadership on the exchange-of-information issue if it learned that the veto was crippling the OECD.

- Does the OECD have some complex plan to draw the off-shore financial centers into a minimalist program of information exchange as a first step toward an effective exchange of information? We can hope it has such a plan. It does appear, however, that the OECD is missing a rare political moment to take effective action against international tax evasion and aggressive tax avoidance.

- Has the G-20 failed to give the OECD a real mandate to combat international tax evasion, fearing that such action would jeopardize the financial stability of some important banks and other financial institutions? Although some financial institutions undoubtedly reap large profits by facilitating tax evasion and regulatory evasion, as we all saw in the UBS case, I have trouble believing that we would not be hearing noises from some members of the G-20 if they felt that the OECD attack on international tax evasion was a charade. It would appear from its various communiques, that the G-20 has ceded responsibility for dealing with tax evasion to the OECD, at least for the time being.

- Is the OECD afraid of failure if it tries to accomplish something truly ambitious? Actually stopping international tax evasion is a daunting task that cannot be accomplished completely. In contrast, signing up countries to an ineffective TIEA is a pretty sure win. As discussed below, the OECD did fail in its early attempts at controlling what it characterized as “harmful tax competition” when the United States embraced tax competition after the regime change in Washington following the 2000 election. “Once bitten, twice shy,” the proverb goes.

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25 For discussion of the U.S. encouragement of investments in the United States by tax cheats and the resulting decline in its ability to lead an attack on international tax evasion, see Michael J. McIntyre, “A Program for International Tax Reform,” 122 Tax Notes 1021, 1023 (Feb. 23, 2009).
• Is the OECD merely behaving like any hegemonic institution would behave when it is faced with competition from forces outside its control? I certainly see hegemonic behavior in the OECD’s dealings with the UN Committee and in its various crude attempts to co-op the developing countries. That behavior is understandable once the OECD has decided it wants to promote the standard for information exchange embodied in its 2002 TIEA. The natural tendency for hegemony, however, does not explain why the OECD did not attempt to upgrade that antiquated standard and do something meaningful to combat tax-haven abuses.

Who can say if any of these speculations comes close to the mark? Unfortunately, speculation is about all that outside observers can do when trying to understand the motives of the OECD’s Working Group One. The decision-making process of that group is not transparent or even translucent. Those actions are shrouded in a thick, nearly impenetrable cloud. Whatever the reason for it, the behavior of the OECD is disappointing, to say the least.

The OECD has not failed to promote even limited automatic exchange of information out of ignorance. At one time, it was the leader in promoting and refining automatic exchange methods. The Tax Justice Network, in its letter to the UN Committee, set forth a list of actions by the OECD that illustrates that the OECD both understands the importance of automatic exchange and was prepared to promote it. For example, the March 2000 OECD report, “Improving Access to Bank Information for Tax Purposes,” emphasized the importance of automatic reporting of tax information.26

When the OECD first promulgated its model TIEA in 2002, it did have some limited success. As previously discussed, the various agreements signed by offshore financial centers under pressure from the OECD had little practical effect. The OECD did have some success, however, in changing the terms of debate about tax havens. For the first time, a major segment of the international tax community came to agree that unlimited bank secrecy was unacceptable and that concerted action by the governments injured by such secrecy was appropriate. The basic discussion turned from whether unlimited bank secrecy was an acceptable practice to whether particular steps to limit that secrecy were acceptable by the international community. That change in public attitudes has proven useful now that the political climate has turned against the tax havens as a result of the financial collapse of 2008.

In understanding the OECD’s behavior today, it may be useful to recount what happened to the OECD a decade ago when it sought to control what it characterized as “harmful tax competition”. In 1998, it published its landmark report on that subject.27 Rather quickly, the

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26 TJN Letter, supra note 18 at 3 (“The [OECD Fiscal Affairs] Committee is analyzing ways to improve the exchange of information on an automatic basis within the context of its study of the use of withholding and/or exchange of information to enhance the taxation of cross-border interest flows and the [OECD Fiscal Affairs] Committee will review progress on this work.”). The promised report never materialized. The TJN letter also notes that the OECD has produced a manual on the automatic exchange of information and a training course on that subject for a developing country. Id at 3-4.

27 OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998). The report projected self-confidence and a crusader’s zeal:

The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of

(continued...)
OECD received the full attention of the offshore financial centers. Aside from Switzerland and Luxembourg, the major developed countries appeared united in a campaign against the beggar-thy-neighbor practices of the tax havens. Prior to the OECD initiative, there was a widespread view that the problems of tax havens and unbridled tax competition were unsolvable. That view changed rapidly as tax havens clamored to get on the OECD’s “White List”.

Then came the American election of 2000. With the regime change in Washington, the American support for concerted action against tax-haven abuses vanished. On May 10, 2001, Treasury Secretary Paul O’Neill issued a statement in which he pulled the rug out from under the OECD. He claimed, falsely, that the OECD considered a country to be engaging in “suspect” behavior merely because it had low tax rates. The OECD Report repeats over and over that low rates were a problem only when coupled with predatory practices. But O’Neill’s careless rhetoric was simply annoying. One serious problem was that O’Neill signaled that the United States would not support any coercive measures to combat harmful tax practices. Without a hammer, the campaign against tax-haven abuses was largely finished. The second problem was that O’Neill indicated he supported information exchange only “to obtain specific information from other countries upon request”. That is, he supported what became the information-exchange standard embodied in the OECD model TIEA of 2002.

I have no insider information on what happened within the OECD after the O’Neill bombshell. I do know that the OECD acted as if its wings had been clipped. Without the threat of a hammer, its attack on tax havens collapsed. It even lost the ability to induce many offshore tax havens to agree to its ineffective TIEA. Noncompliant states apparently concluded that the notoriety achieved from noncompliance was good for business. The OECD’s public rhetoric changed radically. In its “2001 Progress Report” on its efforts to deal with harmful tax competition, the OECD boasts of the “competitive environment” that led to “the reduction of tax rates” and the “competitive forces which have encouraged countries to make their tax systems...

(...continued)

27 (...continued)
financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems. . . . By discouraging the spread of tax havens and harmful preferential tax regimes and encouraging those countries which presently engage in harmful tax practices to review their existing measures, the Report will serve to strengthen and to improve tax policies internationally. The Report and Recommendations address harmful tax practices in both Member and non-member countries and their dependencies.

28 Both Switzerland and Luxembourg disassociated themselves from the OECD report but declined to exercise their veto, reflecting, perhaps, a political judgment that total intransigence would only exacerbate what for them was already a difficult situation. In an appendix to the report, Switzerland defended tax competition on the ground that “it discourages governments from adopting confiscatory regimes, which hamper entrepreneurial spirit and hurt the economy, . . . ” Id. at 76. Luxembourg, in its statement, correctly noted that the Report implicitly was an attack on bank secrecy and noted that “Luxembourg does not share the Report’s implicit belief that bank secrecy is necessarily a source of harmful tax competition”. Id. at 74. Both statements correctly accused the OECD of a “repressive” and “selective” approach, with Luxembourg noting the failure to address seriously various tax-haven countries with ties to OECD countries (e.g., Jersey) and Switzerland noting the failure of the OECD to promote withholding at source.


30 The OECD’s basic plan was to black list “uncooperative” tax-haven jurisdictions and subject them to sanctions (“defensive measures”).
more attractive to investors.”  The tone is defensive, unthreatening, and in line with the conservative economic thinking of the day.  The zeal of the reformer, protecting Europe’s tax systems from reprehensible practices of offshore tax havens, had dissipated. Not once, however, in its many reports on the progress of its 1998 initiative, does the OECD acknowledge that its position on harmful tax competition had changed as a result of the loss of support from its most powerful member state.

It is so far unclear whether the United States is fully supportive of the efforts to bring the era of bank secrecy to a close. The G-20, at its initial meeting in Washington, D.C., on November 16, 2008, made a rather modest commitment to promote the exchange of information on tax matters. It promised to “promote” information sharing, with the focus on jurisdictions “that have yet to commit to international standards with respect to bank secrecy and transparency.”  Those international standards are left undefined. The G-20 then shifted the responsibility for expanding information exchange to the tax authorities of various countries, urging them to “continue efforts to promote tax information exchange.”  These rather tepid statements about information exchange came at the tail end of the Bush Administration, after Barack Obama had won the election as President of the United States but before he took office.

The G-20 made a stronger statement in support of effective information exchange at the conclusion of its meeting in London on April 2, 2009.  That statement announced, somewhat optimistically, that the “era of bank secrecy is over”. The group also expressed a willingness to impose sanctions if necessary on “non-cooperative jurisdictions, including tax havens,” in order to “protect our public finances and financial systems”. That language seems like a mandate that goes well beyond the language in the G-20’s Washington statement and suggests that the Obama administration has reversed the Bush administration’s opposition to sanctions. The statement, nevertheless, seems to endorse the OECD’s narrow definition of the “international standard for

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33 The United States was co-chair of the Forum on Harmful Tax Practices from October 1998 until October 2000. The United States also was one of four members of the Bureau to the Forum — the Forum’s steering group.

34 Statement from G-20 Summit, Washington, D.C., November 16, 2008 at para. 9(3) (“We will also promote information sharing, including with respect to jurisdictions that have yet to commit to international standards with respect to bank secrecy and transparency.”).

35 Action Plan of G-20 Summit, Washington, D.C., November 16, 2008, “Promoting Integrity in Financial Markets,” Medium-term Actions, para. 3 (“Tax authorities, drawing upon the work of relevant bodies such as the Organization for Economic Cooperation and Development (OECD), should continue efforts to promote tax information exchange. Lack of transparency and a failure to exchange tax information should be vigorously addressed.”).

36 Leaders of the Group of Twenty, The Global Plan for Recovery and Reform, London, April 2, 2009 (“In particular, we agree . . . to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.”).
exchange of tax information”. Perhaps the G-20 leaders were uninformed at the time how ineffective the OECD standard has been.

At its meeting in Pittsburgh in September of 2009, the G-20 seems to have accepted the OECD’s assessment that great progress had been made in dealing with offshore tax abuses. That progress presumably was the success of the OECD in inducing many offshore financial centers to sign a TIEA. A more telling measure of progress, which the OECD ignores, would be the widespread apprehension of tax offenders. The G-20 reiterated its willingness to impose sanctions, beginning in March of 2010. In general, the statement, although welcome, does read as if it were drafted at the OECD headquarters in Paris. The OECD apparently has not imposed any sanctions as of May 4, 2010, despite the fact that it has identified 17 countries that have not yet complied with what it characterizes as the international standard for information exchange. Apparently, it is enough to promise compliance, even though some countries, such as Panama, made that promise back in 2002 and have failed to honor it.

Perhaps the initial efforts of the OECD, which have amounted to very little, are merely prologue to more effective measures to deal with international tax evasion. We must hope so because it appears that the G-20 is the driving force for fiscal reform, and, with respect to international tax evasion, it has ceded leadership on implementation of its goal of effective information exchange to the OECD. We can hope that more assertive supporters of an effective exchange of information will have a major input through the Global Forum on Transparency and Exchange of Information that has been set up under the mandate of the G-20.

4. A Proposed Model TIEA

The draft TIEA that I prepared for consideration by the UN Committee goes far beyond the OECD 2002 TIEA, which the OECD is promoting as the international standard for transparency and information exchange. It requires, of course, the automatic and spontaneous exchange of information. It revises language that countries seeking not to exchange information have latched upon to justify a refusal to exchange information. It goes beyond the OECD TIEA in many other respects. Still, it is not a radical document. Although some parts of it are original with me, it draws heavily from information-exchange agreements that have been around for some time, including the Convention on Mutual Administrative Assistance in Tax Matters, prepared by the Council of Europe and the OECD back in 1988. It also draws heavily from the UN Commentary to Article 26 (Exchange of Information) of the UN Model Income Tax Convention.

37 Leaders’ Statement, The Pittsburgh Summit, September 24 – 25, 2009: Our commitment to fight non-cooperative jurisdictions (NCJs) has produced impressive results. We are committed to maintain the momentum in dealing with tax havens, money laundering, proceeds of corruption, terrorist financing, and prudential standards. We welcome the expansion of the Global Forum on Transparency and Exchange of Information, including the participation of developing countries, and welcome the agreement to deliver an effective program of peer review. The main focus of the Forum’s work will be to improve tax transparency and exchange of information so that countries can fully enforce their tax laws to protect their tax base. We stand ready to use countermeasures against tax havens from March 2010.
The following are the most significant changes in the TIEA I drafted from the OECD Model TIEA:

1. As noted above, the proposed TIEA requires not only an exchange of information on specific request but also on an automatic and spontaneous basis. Through automatic exchanges, a Contracting State can identify taxpayers having accounts in the banks of a treaty partner and can take steps to determine whether those taxpayers have properly reported their income from those accounts. The Convention on Mutual Administrative Assistance in Tax Matters (1988), although providing for an automatic exchange of information under some circumstances, leaves all of the details to the competent authorities. The 2010 Protocol to that convention is no improvement in that regard. Article 6 of the proposed TIEA gives greater detail in order to induce the Contracting States to be serious about automatic exchanges. It also makes some types of automatic exchange mandatory.

2. Information relating to tax avoidance is required to be exchanged under the proposed TIEA. The OECD Model limits the exchange to matters of tax evasion. This provision in the proposed TIEA is borrowed from Article 26 (Information Exchange) of the UN Model Income Tax Convention, as amended in 2008.

3. The rules in Article 9 (Possibility of Declining a Request) of the proposed TIEA, which allow for the avoidance of an obligation to exchange information under some circumstances, have been tightened significantly and clarified. The revised language is based in part on paragraph 19.5 of the OECD Commentary to Article 26 (Exchange of Information) of its model income tax convention.

4. The jurisdictional limitations found in the OECD Model TIEA have been relaxed significantly to prevent the use of those limitations to avoid an effective exchange of information. In particular, the proposed TIEA does not limit the obligation of the requested party to exchange information “within its territorial jurisdiction”. That limitation is included in the OECD TIEA. The meaning of the term “territorial jurisdiction” is unclear and, in any event, is an unnecessary restriction on the obligation to exchange information. A Contracting State should be obligated to exchange information that it has the power to obtain without engaging in fine points about the nature of the jurisdictional basis for that power.

5. For clarity, and perhaps to avoid abuse, the proposed TIEA uses the term “may be relevant” rather than the OECD term “forseeably relevant” in specifying the information that must be exchanged. The OECD Commentary to Article 26 (Exchange of Information) of its Convention With Respect to Taxes on Income and on Capital implies that the two terms have essentially the same meaning. Although the meaning of the term “forseeably relevant” is unclear, perhaps intentionally so, the term “may be relevant” probably is the broader term.\(^{38}\) It is the term

\(^{38}\) Despite the OECD claim in its commentary that the term is essentially equivalent to “may be relevant,” the OECD members of the UN Committee fought hard to get the former term included in the UN model. At the second session of the UN Committee, the members agreed by majority vote to adopt the term “may be relevant,” partly to avoid the use of an essentially meaningless term and partly to make clear that any information that the requesting party thought was relevant could be exchanged. The following year, the UK representative reopened the issue. He had at that point organized the OECD members of the UN Committee to support “forseeably relevant” and was able to carry the (continued...)
I have argued that some form of automatic exchange of information is essential for an effective TIEA. It must be conceded, nevertheless, that the usefulness of automatic exchanges often depends on the capacity of the receiving state to make effective use of that information. For many years, the Internal Revenue Service made little use of information returns provided by banks and other intermediaries because it had no effective way of processing that information. Now that information is provided to the Service in electronic form, with particular items of income linked to particular taxpayers by their taxpayer identification number (TIN). As a result, the information has become extremely valuable. The French tax authorities, however, made effective use of such information when the information was being provided in paper form.

The proposed TIEA specifically requires automatic exchange of the following two types of information:

1. Information concerning the formation in the requested state of a legal entity or body, including corporations, partnerships, or trusts, that is controlled by persons resident in, or citizens of, the requesting state;

2. Information concerning the payment of dividends, interest, rents, royalties, or other periodical income paid by a resident of the requested state to a resident or citizen of the requesting state.

The first type of information is not difficult for the requesting state to utilize, even if their tax department is not particularly advanced. The real problem is that many offshore financial centers do not currently have the capacity to provide that information, even if they were inclined to do so. Thus, capacity building in the offshore financial centers ought to be a goal of the G-20 and, by implication, of the OECD.

The second type of information is relatively easy for many requested states to provide, since banks and other financial institutions have internal reasons for keeping records of income earned by their customers. Some of the information is likely to be incorrect, due to the dishonesty of some taxpayers having accounts in offshore financial centers. Still, much of the information will be useful, especially in banks subject to know-your-customer laws.
A requesting state may have difficulty utilizing voluminous information received automatically about offshore accounts unless the information is provided in electronic form, as required in the proposed TIEA. Even then, the requesting state must have some effective method for linking the information with particular taxpayers. That task is often manageable when the volume of information is low, but it becomes increasingly difficult as the volume of information increases.

Use of information about dividends, interest, and other periodical payments would become particularly useful if the taxpayer has a TIN in the requested state that is the same or compatible with the TIN in the requesting state. Unfortunately, the world is some ways away from uniform or compatible TINs. As a result, even automatic exchange of information in electronic form has some serious limitations. Those limitations might have been reduced if the OECD had pursued its various unfinished projects to facilitate automatic exchanges of information.

In many cases, the requesting state would gain the upper hand with a likely tax offender merely by learning that the taxpayer had opened an account in an offshore financial center. Once it had that information, it could pursue a case of tax evasion though its own investigatory means and, if necessary, through a specific request for information under its TIEA with the offshore center. In many respects, it is the automatic exchange of information that gives significant value to the exchange of information by specific request.

5. Concluding Comments

International tax evasion has reached pandemic levels. For years the problem kept growing, everyone knew it was growing, and no country, or group of countries seemed capable of stopping it. There are many reasons why tax evasion is difficult to stop or even control. Here are three important ones.

First, there is opportunity. In the global economy, money flows easily from country to country, providing easy opportunities for large-scale tax fraud.

Second, there is political paralysis. The most important tax offenders are rich and powerful, and their enablers — financial institutions, law firms, and accounting firms — also are rich and powerful. The rich and powerful often have the means to block efforts at reform, especially reform of something as complex, and requiring such a high level of international cooperation, as international tax rules.

Third, there is ideology. The conventional view over the past decade and beyond was that the market could do no wrong — well, little wrong. The story was that taxpayers evaded taxes because the benefits they could obtain from government were less than the taxes they were required to pay. The proper response to tax evasion under this ideology is lower taxes.

The world described above has changed since the financial crisis of 2008. The market, as effective regulator of financial institutions, is out of favor, and financial institutions, which were responsible in significant part for the financial crisis, also are out of favor. In addition, after taking government bailout money, the financial institutions are in a weakened position to resist efforts at reform. The worldwide crisis has required coordinated action by many governments, and the G-20
has stepped forward, for the first time ever, to provide the needed leadership. Many commentators contend that a lack of transparency in the global financial system was a major cause of the economic collapse. The G-20 seems to have accepted, in general terms, that diagnosis. As a result, the G-20 is keen on increasing transparency and effective information exchange and has threatened to impose sanctions on noncomplying regimes.

The global economy still allows for an easy flow of capital, so the opportunities for massive tax evasion remain. But the changes in the balance of power and in public tolerance for the institutions that contributed to the financial crisis have opened up a window of opportunity for genuine reform. That window may not stay open for long. My concern is that the OECD has failed to seize the moment. Instead, the OECD has taken the relatively easy step of getting offshore financial centers to sign nearly useless TIEAs. The TIEAs themselves do no harm and may do a little good. Unfortunately, they are diverting attention from the substantive reforms that need to be taken to deal effectively with international tax evasion.

Automatic exchange of information is no panacea. In conjunction with other measures, however, it can provide governments with a useful tool for reducing international tax evasion. As discussed in detail above, it is an essential feature of the emerging international standard for transparency and information exchange.
Appendix

A Model Effective Tax Information Exchange Agreement

AGREEMENT BETWEEN THE GOVERNMENT OF [COUNTRY A] AND THE GOVERNMENT OF [COUNTRY B], FOR THE EXCHANGE OF INFORMATION RELATING TO TAXES

The Government of A and the Government of B, desiring to facilitate the effective exchange of information relating to taxes, have agreed as follows:

Article 1
Object and Scope

The Contracting States shall provide each other with information concerning civil and criminal tax matters covered by this Agreement that may be relevant to the administration or enforcement of their domestic laws. In particular, they shall exchange information that would be helpful in preventing avoidance or evasion of those taxes, including information that may be relevant to the determination, assessment and collection of those taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. The competent authorities shall, through consultation, develop appropriate methods and techniques for the effective exchanges of information under this Article.

Article 2
Jurisdiction

A requested party is obligated to provide information which is held by its authorities or is in the possession of or under the control of a resident or nonresident person over which it is able to exercise jurisdiction. In particular, a requested party is obligated to provide information concerning resident and nonresident persons if those persons are engaged in business within that jurisdiction, are making investments in that jurisdiction, are required to register in that jurisdiction, or are otherwise subject to the laws or regulations of that jurisdiction.

Article 3
Taxes Covered

1. This Agreement shall apply to all national taxes imposed on behalf of a Contracting State, irrespective of the manner in which they are levied.

2. The existing taxes to which the Agreement shall apply are, in particular:

   (a) In the case of [Country A]: . . .

   (b) In the case of [Country B]: . . .

3. This Agreement shall also apply to any identical or substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the [Country A] or [Country B] taxes.
Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting States in the form of an exchange of letters. The competent authorities of the Contracting States shall notify each other of any substantial changes to the taxation and related information-gathering measures covered by this Agreement.

**Article 4**

**Definitions**

For the purposes of this Agreement, unless the context otherwise requires:

1. The term “Contracting State” means [Country A] or [Country B], as the context requires.

2. The term “competent authority” means:
   
   (a) for [Country A], . . . , and
   (b) for [Country B], . . . .

3. The term “person” means a natural person, a company, a partnership, a trust, an estate, a foundation, or any other body or group of persons.

4. The term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes by either Contracting State.

5. The term “tax” means any tax covered by this Agreement.

6. The term “requested party” means the party to this Agreement which is requested to provide or has provided information in response to a request.

7. The term “requesting party” means the party to this Agreement submitting a request for or having received information from the requested party.

8. The term “information-gathering measures” means judicial, regulatory or administrative procedures enabling a requested party to obtain and provide the information requested.

9. The term “information” means any fact, statement, document, or record in whatever form.

10. The term “tax evasion” means any act intended to defraud the public revenue or to evade or attempt to evade any tax liability.

11. The term “tax avoidance” means any act that is legal under the tax laws of the relevant Contracting State but nevertheless defeats the ostensible purpose of those tax laws, typically because the form of the act is inconsistent with its substance or because the act does not have a substantial business purpose other than the avoidance of tax.

12. The term “publicly traded company” means any company whose principal class of shares is listed on a recognized stock exchange provided its listed shares can be and are readily purchased and sold by the public. Shares can be purchased or sold “by the public” if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors.
13. The term "principal class of shares" means the class or classes of shares representing a majority of the voting power and value of the company.

14. The term "recognized stock exchange" means any stock exchange agreed upon by the competent authorities of the Contracting Parties.

15. The term "collective investment fund or scheme" means any pooled investment vehicle, irrespective of legal form. The term "public collective investment fund or scheme" means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold and redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold and redeemed "by the public" if the purchase, sale and redemption is not implicitly or explicitly restricted to a limited group of investors and sales and purchases by persons outside a limited group actual occur on a regular basis.

**Article 5**

Exchange of Information Upon Request

1. The competent authority of the requested party shall provide upon request by the requesting party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested party if it had occurred in the territory of the requested party.

2. If the information in the possession of the competent authority of the requested party is not sufficient to enable it to comply with the request for information, the requested party shall take all relevant information gathering measures to provide the requesting party with the information requested, notwithstanding that the requested party may not, at that time, need such information for its own tax purposes.

3. If specifically requested by the competent authority of the requesting party, the competent authority of the requested party shall provide information under this Article in the form of depositions of witnesses and authenticated copies of original records.

4. The competent authority of the requesting party shall provide the following information to the competent authority of the requested party when making a request for information under this Agreement in order to indicate the possible relevance of the information sought by the request:

   (a) A statement of the information sought, including its nature and the form in which the requesting party wishes to receive the information from the requested party.

   (b) To the extent known, the name and address of the person under examination or investigation.

   (c) The purpose for which the information is sought.

   (d) To the extent known, the name and address of any person believed to possess or have control over the information requested.

   (e) A statement that the request for information is in conformity with this Agreement and with the law and administrative practices of the requesting party and that, if the requested information were
within the jurisdiction of the requesting party, then the competent authority of the requesting Party
would be able to obtain the information under the laws of the requesting party or in the normal course
of its administrative practices.

A requested party may request additional information from the requesting party that it believes would
be helpful to it in complying with a request. No information, other than the information listed above,
however, may be required by a requested state as a condition for providing the requested information.

5. The competent authority of the requested party shall forward the requested information as
promptly as possible to the competent authority of the requesting party. To ensure a prompt response, the
competent authority of the requested party shall act as follows:

(a) It shall confirm receipt of a request for information in writing to the competent authority of the
requesting party, and shall notify the competent authority of the requesting party of any deficiencies in
the request within 30 days of receipt of the request.

(b) If the competent authority of the requested party has been unable to obtain and provide the
information requested within 90 days of receipt of the request, it shall explain immediately to the
competent authority of the requesting party the reasons for its inability, including an explanation of
any obstacles it may have encountered in furnishing the information.

(c) If the competent authority of the requested party intends to decline to provide the information in
accordance with the provisions of Article 9 of this Agreement, it shall provide a statement to the
competent authority of the requesting party its intent not to comply with the request for information
and the basis for its refusal. Unless that statement is provided within 30 days of receipt of the request
for information, the rights of the requested party to refuse to supply the information under Article 9 is
waived.

Article 6
Automatic Exchange of Information

1. With respect to categories of cases and in accordance with procedures which they shall
determine by mutual agreement, the Contracting States shall exchange automatically the information
referred to in Article 1.

2. In particular, each Contracting State shall establish procedures for the automatic exchange of
information on:

(a) the formation of a legal entity or body, including corporations, partnerships, or trusts, in that
Contracting State that is controlled by persons resident in, or citizens of, the Other Contracting State;

(b) the payment of dividends, interest, rents, royalties, or other periodical income paid by a
resident of a Contracting State to a resident or citizen of the other Contracting State.

Exchanges under this paragraph shall occur annually or at such shorter intervals as agreed to by the
competent authorities.
3. The Contracting States are obligated under this Article to provide information in electronic form if such action is necessary for an effective exchange of information.

**Article 7**

**Spontaneous Exchange of Information**

1. A Contracting State shall, without prior request, forward to the Other Contracting State information of which it has knowledge in the following circumstances:

   (a) The first-mentioned Contracting State has grounds for supposing that there may be a loss of tax revenue in the Other Contracting State as a result of tax evasion;

   (b) Business dealings between a person acting within the first-mentioned Contracting State and a taxpayer in the Other Contracting State are conducted in such a way that tax avoidance is likely to result in the Other Contracting State.

2. Each Contracting State shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to the Other Contracting State.

**Article 8**

**Tax Examinations (or Investigations) Abroad**

1. The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned. The competent authority of the requesting party shall notify the competent authority of the requested party of the time and place of the meeting with the persons concerned.

2. At the request of the competent authority of the requesting party, the competent authority of the requested party may permit representatives of the competent authority of the requesting party to attend a tax examination in the territory of the requested party.

3. If the request referred to in paragraph 2 is granted, the competent authority of the requested party conducting the examination shall, as soon as possible, notify the competent authority of the requesting party of the time and place of the examination, the authority or person authorized to carry out the examination, and the procedures and conditions required by the requested party for conducting the examination. The requested party shall make all decisions regarding the manner of conducting the examination.
Article 9
Possibility of Declining a Request

1. The competent authority of the requested party may decline a request for information or other assistance:

   (a) whenever the request is not made in conformity with this Agreement; or

   (b) whenever the disclosure of the information requested constitutes a state secret or otherwise would be contrary to the public policy of the requested party and would threaten its vital interests.

   A public policy inconsistent with the obligations established under Article 11 of this Agreement shall not constitute a ground for declining a request for information under this paragraph.

2. This Agreement shall not impose upon a Contracting State any obligation to provide any trade, business, industrial, commercial, or professional secret or any secret trade process if that trade or other secret information has significant commercial value. Financial information, including books and records, does not by its nature constitute a trade, business or other secret within the meaning of this paragraph. In addition, a Contracting State may not decline to provide information under this paragraph merely because the information is included in a document that contains information protected from disclosure under this paragraph. Information held by financial institutions or that the requested party must be able to provide under Article 11, paragraph 2, shall not be treated as a secret or trade process merely because it meets the criteria in that paragraph.

3. This Agreement shall not impose on a Contracting State an obligation to obtain or provide information which would reveal a confidential communication between an attorney, solicitor, or other admitted legal representative and that person's client when the communication:

   (a) is protected from disclosure under the laws of the Contracting State in which the advice was given;

   (b) was produced either for the purpose of seeking or providing legal advice or for the purpose of use in existing or contemplated legal proceedings;

   (c) is unrelated to the status of the legal representative as an agent, fiduciary, or nominee;

   The protection for a confidential communication between a client and a legal representative does not apply to any documents that were delivered to the legal representative to avoid disclosure. In addition, documents or other items held by a legal representative with the intention of furthering a criminal purpose are not protected from disclosure. When the context permits, the protection for a confidential communication should be interpreted narrowly so as not to frustrate an effective exchange of information.

3. A request for information shall not be refused on the ground that the tax liability giving rise to the request is disputed by the taxpayer.

4. The requested party shall not be required to obtain and provide information which the requesting party would be unable to obtain in similar circumstances under its own laws for the purpose of the
enforcement of its own tax laws or in response to a valid request from the requested party under this Agreement.

5. In no case shall the provisions of this article be construed to permit a requested party to decline to supply information on the ground that the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because the information relates to ownership interests in a person.

6. If information is requested by a requesting party in accordance with this Agreement, the requested party shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own purposes. In no case shall a requested party be permitted to decline to supply information because it has no domestic interest in such information.

7. A requested party may fulfill a request for information under this Agreement even if it could invoke this Article to decline that request. If the requested party declines to exercise its right under this Article and supplies the requested information, the information exchanged remains within the framework of the Agreement and is subject, for example, to the confidentiality requirements of Article 10.

Article 10
Confidentiality

1. Any information received under Article 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State.

2. If the information provided was originally regarded as secret in the state of the requested party, it shall be disclosed only to persons or authorities (including judicial, administrative, and oversight authorities) officially concerned with the purposes specified in Article 1. It may be used by such persons or authorities only for such purposes or for oversight purposes, including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in other judicial proceedings.

3. Information received under Article 1 may be used for a purpose other than for the purposes stated in Article 1 only with the prior consent of the requested party. That consent shall not be withheld unreasonably.

4. Information received under Article 1 may be disclosed to a person not specified in subparagraph 2, above, only with the prior consent of the requested party. That consent shall not be withheld unreasonably.

Article 11
Implementation Legislation

1. Each Contracting State shall enact any legislation and establish any administrative practices necessary to comply with, and give effect to, the terms of this Agreement.

2. In particular, each Contracting State shall ensure that its competent authority, for the purposes of this Agreement, has the authority to obtain and provide upon request the following information:
(a) Information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity.

(b) Information regarding the nominal and beneficial ownership of companies, partnerships, trusts, estates, foundations, “Anstalten” and other persons, including all persons in an ownership chain or within a common ownership group.

(3) The information specified in paragraph 2, above, shall include:

(i) In the case of trusts, information on settlors, trustees, and direct and indirect beneficiaries, and persons having the ability to direct the way assets of the trust are managed, held, or distributed.

(ii) In the case of foundations, information on founders, members of the foundation council, beneficiaries, and persons having the ability to direct the way assets of the foundation are managed, held, or distributed.

(iii) In the case of collective investment funds, information on shares, units and other interests;

(4) This Agreement does not create an obligation on the Contracting Parties to enact legislation or establish administrative procedures that would allow it to obtain or provide ownership information with respect to companies or public collective investment funds that are widely held and are publicly traded on a recognized stock exchange.

Article 12
Safeguards

Rights and safeguards secured to persons by the laws or established administrative practices of the requested party shall not be applied to the extent that these laws and practices act as impediments to an effective exchange of information under this Agreement.

Article 13
Administration Costs or Difficulties

1. Unless otherwise agreed to by the competent authorities:

   (a) Ordinary costs incurred in providing assistance shall be borne by the requested party;

   (b) Extraordinary direct costs, including litigating expenses, incurred in providing assistance shall be borne by the requesting party.

2. In the event that compliance with the obligations under this Agreement create undue difficulties for either Contracting State, as a result either of the number or the complexity of requests, the respective competent authorities shall consult with a view to resolving the difficulties under Article 14.
Article 14
Mutual Agreement Procedure

1. Should difficulties arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavor to resolve the difficulties by mutual agreement.

2. The competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5, 6, 7 and 8.

3. The competent authorities of the Contracting Parties may communicate with each other directly, rather than through diplomatic channels, for purposes of reaching agreement under this Article.

4. The competent authorities of the Contracting Parties may agree to pursue other forms of dispute resolution, including mediation and arbitration.

Article 15
Entry into Force

1. This Agreement shall enter into force when each party has notified the other of the completion of its necessary internal procedures for entry into force.

2. Upon entry into force, this Agreement shall have effect with respect to all civil and criminal matters covered in Article 1 beginning on 1 January 20xx.

Article 16
Termination

1. This Agreement shall remain in force until terminated by either Contracting State.

2. Either Contracting State may terminate this Agreement by giving notice of termination in writing through diplomatic channels or by letter to the competent authority of the other Contracting Party.

3. A notice of termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of that notice by the other Contracting State.

3. A Contracting State after termination of this Agreement shall remain bound by the provisions of Article 10 (Confidentiality) with respect to any information obtained under this Agreement.

In witness whereof, the undersigned, being duly authorized in that behalf by the respective parties, have signed this Agreement.

Done at […], in duplicate, this […] day of […].

For the Government of [Country A]:

For the Government of [Country B]:
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