

THE OECD'S TAX INFORMATION EXCHANGE AGREEMENTS AN EXAMPLE OF (IN)EFFECTIVE GLOBAL GOVERNANCE?

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ABSTRACT

The Organisation for Economic Co-operation and Development (OECD) through the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) is actively extending its impact globally through its Tax Information Exchange Agreement (TIEA) initiative which commenced in the early 2000s and has grown in intensity since 2009 in terms of agreements negotiated and the roll out of peer review reports for Global Forum members. This paper argues that as a scheme for implementing a form of global governance in information exchange, the TIEA, and the peer review process in particular, has to date failed to make any effective change in information exchange, and is unlikely to do so unless major changes are made to the operational scope of TIEAs. The prospects for such changes appear to be unlikely at best.

I. INTRODUCTION

... the OECD scored an *embarrassing own goal* by allowing secrecy jurisdictions to sign up to TIEAs with other secrecy jurisdictions. Oops! ... A *new dawn* of global financial transparency? *Hogwash*. Or perhaps we should say *whitewash*.¹

As a relatively recent development of the OECD, Tax Information Exchange Agreements (TIEAs) gathered momentum in 2002 with the release of the OECD's Model Agreement.² TIEAs have now moved from a quantitative oriented initiative towards one that is more qualitatively-focussed with the commencement of the Peer Review process and the release of the first Peer Review reports. In an earlier study, Sawyer observed:

While it is clear that the initial focus of the TIEA initiative has been a 'numbers game' (both in terms of the number of agreements signed and the minimum requirement of twelve agreements for a country to come off the OECD's 'blacklist'), the intent behind the peer review process suggests it is more than a numbers game. Furthermore, these 'numbers' have led to the emergence of a creature that will place considerable pressure on the OECD to deliver on its intentions of creating a new environment for information exchange on a global scale.³

Looking at the 'numbers' in this new phase of the TIEA initiative, as at 1 June 2011, 34 Peer Review reports have been released, with a further 26 expected by the end of the year. With over 100 members, and somewhere in the vicinity of 650 signed agreements, by year end over half of the Global Forum's members will have gone through the Peer Review

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1 Tax Justice Network, 'The Death of International Exchange Agreements?' on *Tax Justice Network* (19 April 2011) <<http://taxjustice.blogspot.com/2011/04/death-of-information-exchange.html>> (emphasis added).

2 OECD, *Agreement on Exchange of Information on Tax Matters* (2002) <<http://www.oecd.org/dataoecd/15/43/2082215.pdf>>.

3 Adrian Sawyer, 'Peer Review of Tax Information Exchange Agreements: Is it *More* than just about the Numbers?' (2011) 26(3) *Australian Tax Forum* 397, 418.

process. For the majority this will be a Phase 1 review only, with a minority having a combined Phase 1 and Phase 2 review. This level of activity suggests that a much clearer picture of the potential effectiveness of the TIEA initiative should be emerging during 2011.

This paper seeks to build on the earlier work of Addison,⁴ Avi-Yonah,⁵ McIntyre,⁶ and Sawyer⁷ through evaluating the remainder of the first 34 Peer Review reports, and analysing the evidence and contributions of various commentators. The paper also seeks to draw inferences about the OECD's attempt to 'impose' a form of global governance in the area of information exchange in relation to international cross border tax avoidance and evasion.

The remainder of this paper is organised as follows. Section II includes a brief review of the OECD's Information Exchange Initiative and an introduction to OECD developments regarding information exchange. Section II also summarises prior research into TIEAs and the research method used for this study. This discussion builds upon the contribution of Addison, Avi-Yonah, McIntyre, and Sawyer.

Section III considers which countries sign TIEAs and with whom they sign TIEAs. It also briefly examines the OECD's Peer Review process and provides an assessment of the first 34 Peer Review reports. This is followed by section IV which raises a number of issues in relation to the practical effectiveness of TIEAs as a form of global governance undertaken by the OECD. Section V sets out the conclusions, limitations and suggestions for further research.

II REVIEW OF THE OECD INFORMATION EXCHANGE INITIATIVE, RECENT DEVELOPMENTS AND PRIOR RESEARCH

In the OECD Model Agreement on Exchange of Information on Tax Matters (Model TIEA)⁸ developed through the Global Forum Working Group on Effective Exchange of Information, a number of key principles behind TIEAs (with respect to transparency and information exchange) are set out. These may be summarised as:

- Existence of mechanisms for exchange upon request;
- Exchange of information for purposes of domestic tax law in both criminal and civil matters;
- No restrictions of information exchange caused by application of dual criminality principle or domestic tax interest requirement;
- Respect for safeguards and limitations;
- Strict confidentiality rules for information exchanged; and
- Availability of reliable information (in particular, bank, ownership, identity and accounting information) and powers to obtain and provide such information in response to a specific request.

The aim of OECD's Model TIEA is to establish effective exchange of information in a manner that is not binding. Supplementary purposes include an intention to reduce evasion and treaty shopping. The Model TIEA contains multilateral and bilateral formats, together with Commentary, the interpretation of which is to be determined by principles of

4 Timothy Addison, 'Shooting Blanks: The War on Tax Havens' (2009) 16 *Indiana Journal of Global Legal Studies* 700.

5 Testimony of Reuven S-Yonah before the Senate Finance Committee on Offshore Tax Evasion, 110th Cong. (3 May 2007), as cited in Addison, *ibid* 718.

6 Michael McIntyre, 'How to End the Charade of Information Exchange' (2009) *Tax Notes International* 255.

7 Sawyer, 'Peer Review', above n 3, 397.

8 OECD, *Agreement on Exchange of Information on Tax Matters*, above n 2. .

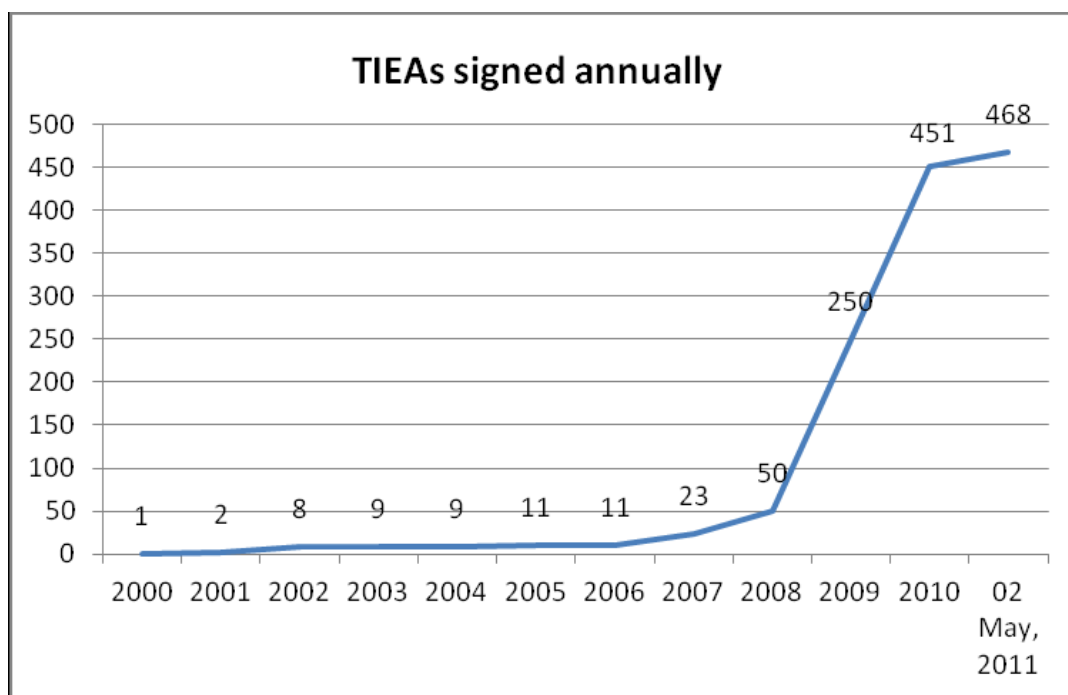
international law. The Model TIEA is based upon Article 26 of the OECD's *Model Tax Convention on Income and on Capital*.⁹

In addition to TIEAs negotiated on the basis of the Model TIEA, separate or supplementary double tax agreements (DTAs) may also be negotiated. Several of Australia and New Zealand's (NZ's) TIEA partners have negotiated such agreements with Australia and NZ, respectively.

TIEAs, being a relatively recent development, do not have an extensive literature outside OECD-initiated publications and a small (but growing) number of independent researchers and research organisations. It is not the intention of this paper to provide a comprehensive review in addition to that provided in Sawyer, who examines the literature as at 31 December 2010,¹⁰ but it does summarise the contributions of several key contributors to the debate.

The growth in the number of TIEAs negotiated escalated following various G20 Summits with now somewhere between 480¹¹ to 680¹² agreements signed as at 1 June 2011. Figure 1 illustrates the growth in the number of agreements signed annually, with Figure 2 highlighting the growth in the number of agreements between the various G20 Summits.

Figure 1: TIEAs signed annually¹³



9 OECD, *Model Tax Convention on Income and on Capital* (OECD, 2008) – updated to July 2010.

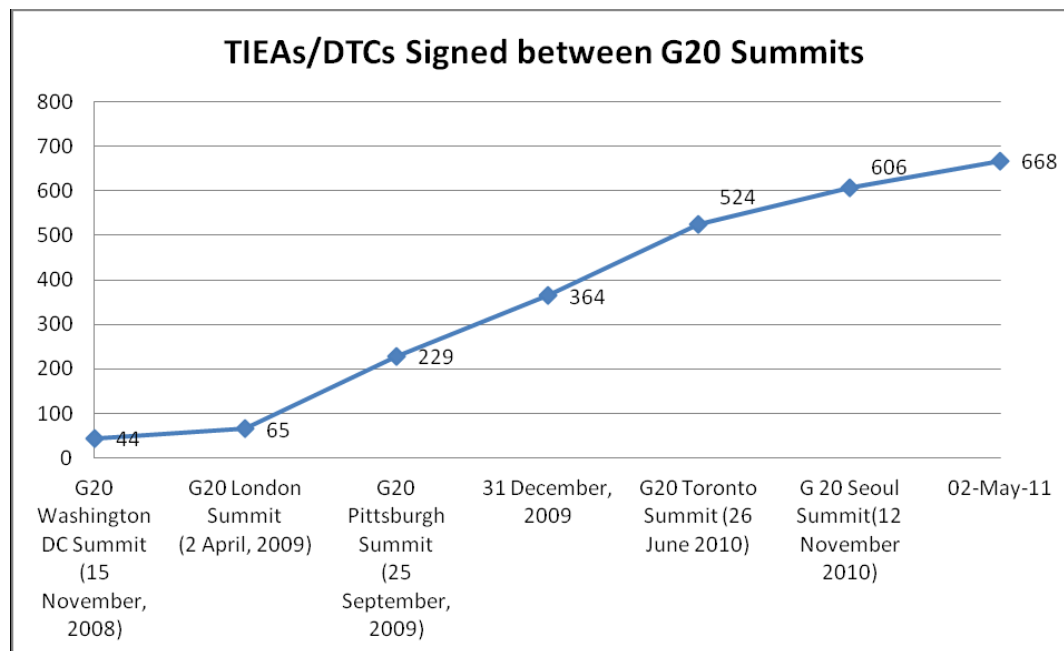
10 Adrian Sawyer, 'Tax havens "coming in from the cold": A sign of changing times?' (2010) 64(11) *Bulletin for International Taxation*, 546.

11 Available on the OECD's website, *Tax Information Exchange Agreements (TIEAs)* <http://www.oecd.org/document/7/0,3746,en_2649_33767_38312839_1_1_1_1,00.html>.

12 Reported as negotiated in various OECD publications; see eg, OECD, *The Global Forum on Transparency and Information for Tax Purposes* (Information Brief, OECD, Paris, 10 August 2011) <<http://www.oecd.org/dataoecd/32/45/43757434.pdf>>.

13 OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes* (Background Information Brief, OECD, Paris, 2 May 2011) 16.

Figure 2: TIEAs signed between G20 Summits¹⁴



Addison observes that tax havens only cooperate with investigations when they are presented with evidence of wrongdoing. Importantly, without a tax haven’s cooperation, he suggests that this evidence is usually unavailable and nearly impossible to obtain.¹⁵ Notwithstanding the rhetoric of the OECD Model Agreement, Addison argues that tax havens are not required to help another government identify previously unknown tax evaders, which is where most of the help is needed.¹⁶

Professor Avi-Yonah has testified to the US Senate Finance Committee that most TIEAs do not ‘override bank secrecy provision[s] in the tax haven laws’.¹⁷ Consequently, Avi-Yonah argues, ‘existing tax information exchange agreements, while helpful and important in some cases, are of limited value in closing the overall international tax gap’.¹⁸

Addison also comments that, should a TIEA actually be effective in achieving the desired goal, a rational taxpayer would transfer their financial assets to another tax haven that had yet to enter an ‘effective’ TIEA. Addison suggests that providing financial incentives to tax havens, and fully utilizing domestic polices first are key steps in conjunction with a move away from this power and dominance model.¹⁹

McIntyre offers his own model for a more effective TIEA than the Model Agreement. He also compares the difference between the OECD Model Agreement and his ‘improved’ TIEA model, which he offered to the United Nations ‘Committee of Experts on International Cooperation in Tax Matters’.²⁰ In Appendix B to McIntyre’s article, he makes a number of key points concerning the differences between the OECD Model Agreement and his proposal (which is directed at providing something closer to effective information disclosure).²¹ McIntyre’s recommendations are discussed in detail by Sawyer.²²

14 Ibid 17.

15 Addison, above n 4, 718.

16 Ibid 718.

17 Testimony of Reuven S Avi-Yonah before the Senate Finance Committee on Offshore Tax Evasion, 110th Cong. (3 May 2007), as cited in Addison, *ibid* 718.

18 Ibid.

19 Addison, above n 4, 727.

20 McIntyre, above n 6.

21 Ibid 265.

22 Sawyer, ‘Tax havens’, above n 10.

The Society of Trust and Estate Practitioners (referring to the Peer Review process) stated:

... the peer review process currently underway as part of the OECD's tax transparency initiative only focuses on the efficiency with which countries provide information. It does not cover how countries receiving tax data handle this highly sensitive information. This deficiency needs to be urgently addressed.

TIEAs should only be agreed when the participating countries meet explicit minimum standards ... on issues such as national governance. Performance against these minimum standards should be an integral part of the OECD peer review process.

Confidence in the integrity of tax data exchange should be further reinforced by making access to information via TIEAs conditional on adherence to best practice in terms of data security procedures.²³

Another important contribution to the literature is that of Neslund, who is highly critical of the effectiveness of TIEAs, when he states:

Despite the recent 'success' in getting havens to commit to entering TIEAs, *taxpayers actually have little to fear from them*. ... Model TIEA is a *slow, largely ineffectual, resource-intensive process* that seems unlikely to be used much more in the future than it has been in the past, despite the increased number of haven jurisdictions adopting it.²⁴

Sawyer concludes on TIEAs:

Thus in response to the question posed in the title to this paper [*Peer Review of Tax Information Exchange Agreements: Is it More than just about the Numbers?*], the early stages of the TIEA initiative have been (all) about the numbers – the next period focuses more on qualitative and country-specific factors through the Phase 1 and Phase 2 reviews, suggesting that there is more to the TIEA initiative than just the numbers (and possibly the rhetoric). Ultimately time will be the judge.²⁵

In addition to the studies noted above there is an emerging critical literature on the potential effectiveness of the OECD's TIEA initiative from both practitioners and various monitoring organisations.²⁶ The common theme is the expected ineffectual nature of TIEAs, along with their failure to deal with the real issues surrounding tax havens, such as bank secrecy and highly protective domestic legislation.

In terms of research method this study is qualitative and takes a critical perspective. Analytical analysis is employed in describing and critiquing the Global Forum's Peer Review process and TIEAs as a global governance instrument. To this end extensive use is made of document content analysis to extract key themes. The key data source is the OECD's website²⁷ especially the information exchange portal²⁸ (two sources that are constantly being updated).

23 Society of Trust and Estate Practitioners, 'Making Tax Data Exchange Secure' (Policy Briefing, London, August 2010) 2.

24 Kristofer Neslund, 'Why Tax Information Exchange Agreements are "Toothless"', *Tax Insider* (16 July 2009) <http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2009/Tax/Toothless.jsp> (emphasis added).

25 Sawyer, 'Peer Review', above n 3, 420.

26 See generally the discussion in Sawyer, 'Tax Havens', above n 10, on the prior literature.

27 <<http://www.oecd.org/>> with the key words 'tax information exchange agreement'.

28 OECD, *Tax Information Portal* <<http://www.eoi-tax.org/>>.

III. WHO SIGNS TAX INFORMATION EXCHANGE AGREEMENTS AND WITH WHOM DO THEY SIGN, AND THE GLOBAL FORUM'S PEER REVIEW PROCESS

It is very interesting to look collectively at the 650 plus TIEAs and identify the patterns or clusters of joint signatories. One theme to emerge is that non-OECD and G20 members have signed a majority of their agreements with OECD/G20 members, with the exception of Belgium which has signed over 40 agreements.²⁹ The number of agreements for Belgium is confusing – while the OECD suggests in one place there are at least 40 agreements, elsewhere only 13 agreements can be identified!³⁰

New Zealand has signed 18 TIEAs,³¹ while Australia has signed 27.³² Both have signed TIEAs with: Anguilla, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Dominica, Gibraltar, Guernsey, Isle of Man, Jersey, Marshall Islands, Netherland Antilles, Samoa, St Kitts and Nevis, St Vincent and Grenadines, Turks and Caicos Islands, and Vanuatu. New Zealand's agreements represent a complete subset of the Australian agreements, which is not a matter of coincidence, as many of the TIEAs to which Australia and NZ are signatories, were signed at the same meeting. Another similarity is that for both countries few of these TIEAs are currently operative as they are awaiting their formal confirmation through domestic ratification processes.

Sawyer provides a succinct overview of the Global Forum's Peer Review process. Essentially the Peer Review process is conducted through the Peer Review Group (PRG). The PRG comprises a chair, 4 vice chairs and 25 member jurisdictions. Its purpose includes technical analysis, practical assessment of frameworks and dialogue as part of a transparent process.³³ OECD states that the Global Forum is:

... conducting systematic examinations and assessments of jurisdictions' legal and regulatory frameworks for transparency and exchange of information for tax purposes and also of the jurisdictions' practical application of their frameworks. ...

involves a mix of formal recommendations in the peer review reports and informal dialogue by the peer jurisdictions, public scrutiny, and the impact on all of the above on domestic public opinion, national administrations and policy makers.³⁴

Sawyer observes that there is extensive OECD (Global Forum) documentation that outlines the PRG's process, including the Terms of Reference, Methodology for Reviews (effectively guidelines), Evaluation Outcomes, and Report Adoption Process.³⁵ The Global Forum provides regular updates on the information portal on the OECD's website the numbers of agreements per country, who signed with whom, and such like.³⁶ As at 1 June 2011 the Global Forum's information portal indicates that it has reached 101 members. The membership comprises all current 31 OECD countries, all of the remaining G20 countries, and numerous tax haven nations.

The Global Forum's responses to various frequently asked questions (FAQs) are revealing, including the following comments:

29 OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes* (May 2011), above n 13, 27.

30 Ibid.

31 See Inland Revenue, New Zealand, Policy Advice Division, *Tax treaties* <<http://taxpolicy.ird.govt.nz/tax-treaties>>.

32 See Australian Taxation Office, *Countries that have a tax information exchange agreement (TIEA) with Australia* <<http://www.ato.gov.au/content/00161158.htm>>, information current as at 1 June 2011.

33 Sawyer, 'Peer Review', above n 3, 405..

34 OECD, *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions* (2010) 10-11.

35 Sawyer, 'Peer Review', above n 3, 408-9.

36 The Global Forum's website can be found at <<http://www.oecd.org/tax/transparency>>.

Global Forum will conduct a review even if the jurisdiction does not wish to participate [no opt out]; ... Jurisdictions will need to justify choice of TIEA partners; ... Can a jurisdiction be 'whitened' by signing with 12 partners? – not if the 12 agreements are of no relevance.³⁷

Mike Rawstron, the Chair of Global Forum, states:

[The peer review process] ... is the most comprehensive, in-depth review on international tax co-operation ever. ... peer review process will identify jurisdictions that are not implementing the standards. These will be provided with guidance on the changes required and a deadline to report back on the improvements they have made.³⁸

Notwithstanding these comments, the big issue that remains unanswered is the approach to *enforcement* of change.

The OECD also indicates in its FAQs:

19. How will the Global Forum take into account improvements jurisdictions make after their reviews are accepted?

The reports will be followed-up on and an effective system to monitor developments as they occur is being put in place where jurisdictions can alert the Global Forum that they have made a change that will affect a determination or rating, these changes will be reviewed and a supplemental report will be prepared for adoption ...

22. The G20 has stated that it stands ready to implement sanctions, are the results of the peer review process going to be used to determine these?

Neither the Global Forum nor the OECD has the power to impose sanctions on countries that do not implement the standards. Individual countries ... will decide for themselves what actions they consider necessary to ensure the effective enforcement of their tax laws.³⁹

Sawyer describes this situation as a form of unenforceable voluntary compliance with publicity of uncooperative nations,⁴⁰ with McIntyre arguing for a much tighter form of TIEA if it is likely to be effective.⁴¹

The Global Forum releases a Peer Review report for each of the member countries following its scheduled review and after the opportunity to comment on the content of the report. Each report includes discussion on the rules for ensuring information is available; the process by which information is accessed by competent authorities; the mechanisms to exchange the information with foreign tax authorities; and any recommendations for improvement to the information exchange process, information gathering and documentation.

At the time of Sawyer,⁴² only eight Peer Review reports had been released (seven were examined in detail). The number of released reports has since risen to 34 as at 1 June 2011, comprising 22 Phase 1 Reviews and 12 combined Phase 1 and 2 Reviews). Somewhat ambitiously I would suggest, the PRG expects to have 60-70 Reports released by the end of 2011, meaning that a further 26-36 need to be released. Drawing upon the schedule provided by OECD,⁴³ and assuming that the reviews underway as at mid 2011 are progressing on track; 16 reviews were scheduled to be completed by the end of 2010 (nine

37 OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes* (May 2011), above n 13, 24/25 (paraphrased).

38 Mike Rawstron, as quoted in OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax transparency - Global Forum launches country-by-country reviews* (23 March 2010) <http://www.oecd.org/document/4/0,3746,en_21571361_43854757_44855876_1_1_1_1,00.html>.

39 OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes* (May 2011), above n 13, 26.

40 Sawyer, 'Peer Review', above n 3, 419.

41 McIntyre, above n 6, 260.

42 Sawyer, 'Peer Review', above n 3, 419.

43 OECD, *The Global Forum on Transparency and Exchange of Information for Tax Purposes* (May 2011), above n 13, annex II.

Phase 1 and seven combined Phase 1 and 2 Reviews – the latter group including New Zealand, the report for which was released on 1 June 2011), with a further 22 due by mid 2011 (comprising twenty Phase 1 and two combined Phase 1 and 2 Reviews). In steady state approximately 40 Peer Reviews are expected to be conducted each year.

In regard to the Third Global Forum held in Bermuda from 31 May to 1 June 2011, the OECD stated in a media release of 13 May 2011 that the Global Forum will:

- assess and release peer review reports on the implementation of the global standard for France, Hungary, Italy, Isle of Man, New Zealand, Philippines, Singapore, Switzerland and the United States;
- discuss ways to assist small and developing countries to implement the global standard, including the development of multilateral instruments and technical assistance;
- discuss and adopt a report to the G20 on the progress made towards tax transparency.⁴⁴

On 1 June 2011 a further nine Peer Review reports were publicly available for analysis, including five combined Phase 1 and 2 reports and four Phase 1 reports.

The key findings from the 34 Peer Review reports issued as at 1 June 2011 are as follows. Most of the Phase 1 reports (22 in total) recommend areas for improvement (some major changes, others more minor in nature), with the Phase 2 reviews for these member countries scheduled in the period late 2012 to early 2014 (the exceptions are Botswana and Panama, where major concerns were expressed with no fixed date for their Phase 2 Reviews).⁴⁵

A common theme is encouragement for the reviewed country to complete the formalities needed to bring signed agreements into force. This recommendation goes to the heart of one of the major inhibitors of the TIEA process – the numbers have been secured but the next step of making the agreements operative is proving more difficult. This raises the question: Do tax havens really have incentives to make these agreements operative? For example, even Belgium, which is an OECD member, has been extremely active in signing agreements (41 agreements to date), but only has one in force! This was an issue identified in their country report.

For the combined Phase 1 and 2 reports (12 in total) most have only minor recommendations for improvement, including implementing changes and facilitating conclusion of agreements in a more timely manner.⁴⁶ This is not a surprise when the country is an OECD member (ten of the twelve countries with combined reviews to date are OECD members - Australia, Canada, Denmark, France, Germany, Ireland, Italy, New Zealand, Norway and the United States). Mauritius and Belgium (the latter is an OECD member) are exceptions, receiving numerous recommendations for improvement.⁴⁷ Thus overall OECD members came through the review process ‘successfully’.

The OECD announced on 1 June 2011 at the Global Forum meeting in Bermuda that it has amended by way of a protocol its Multilateral Convention on Mutual Administrative Assistance in Tax Matters so as to open this Convention to all countries. This is intended to allow them to benefit from cross-border tax cooperation and information sharing. The OECD claims that the updated Convention is the most comprehensive multilateral instrument available for tax co-operation. It provides a wide range of tools for cross-border

44 OECD, 'Tax: Third meeting of Global Forum on Transparency and Exchange of Information for Tax Purposes, Bermuda, 31 May-1 June 2011' (Media Release, 13 May 2011) <http://www.oecd.org/document/30/0,3746,en_21571361_44315115_47869278_1_1_1_1,00.html>.

45 This information is available through the OECD's, *Exchange of Tax Information Portal* <<http://www.eoi-tax.org/>>.

46 Analysis drawn from examining Peer Review Reports, available through the OECD's, *Exchange of Tax Information Portal* <<http://www.eoi-tax.org/>>.

47 Information on these two countries is available at the OECD's, *Exchange of Tax Information Portal* at <<http://www.eoi-tax.org/jurisdictions/MU>> and <<http://www.eoi-tax.org/jurisdictions/BE>>, respectively.

tax co-operation including exchange of information, multilateral simultaneous tax examinations, service of documents, and cross-border assistance in tax collection, while imposing safeguards to protect the confidentiality of the information exchanged.⁴⁸

IV PRACTICAL EFFECTIVENESS OF TAX INFORMATION EXCHANGE AGREEMENTS AS A GOVERNANCE MEASURE – ISSUES

The OECD, and more recently the Global Forum, has sought to take a leadership role in improving information exchange, especially in a tax context. Outside of taxation the OECD takes a major lead in countries' economic development, with tax policy a major contributor to such development. Without any form of international institution to monitor tax developments globally,⁴⁹ the OECD (and more specifically the Global Forum) has sought to fill the void, with the Peer Review process an important component.

Christians makes the following pertinent comments with respect to the OECD's rhetoric in seeking to shape global tax policy:

Since the OECD cannot expressly purport to determine policies and dictate their implementation by member countries, let alone non-member countries, its official rhetoric may simply reflect what insiders think will either encourage compliance or provide a palatable justification of the imposition of consequences in the event of non-compliance. As a result, official OECD rhetoric is susceptible to interpretation as little more than a means to mask or legitimize what is essentially an illegitimate use of political or economic force to achieve the aims of the powerful against those of the weak.

But this factor itself makes a strong case for searching for a theory of duty in the rhetoric emanating from this institution. To the extent the OECD's project derives from an authentic analysis of sovereignty and duty, national legislators might choose to adopt OECD recommendations to the extent they agree with these ideas. On the other hand, to the extent the OECD is perceived as using ideology merely to achieve self-interested economic goals, its attempt to legitimate its use of economic and political pressure opens up its reasoning to intense public scrutiny. This suggests at the very least that the individuals serving on the OECD's Committee on Fiscal Affairs must perceive a duty to justify their recommendations when they might be seen as attempting to interfere with the desires or goals of states not represented on the Committee (especially non-OECD member states) in exercising (or not exercising) taxation. At a minimum, the justification process provides a starting point for further analysis of sovereign duty.⁵⁰

The Global Forum attempts to resolve part of this concern at least through expanding membership beyond the OECD membership. However, this situation does not absolve the OECD from legitimising its statements and accepting that it must be open to intense public scrutiny as it prescribes what it sees as a global standard with respect to information exchange, a critical aspect of global tax policy.

In the context of the European Union (EU) Martinez Barbara examines the role of good governance in the tax systems of the EU. She emphasises that more transparency, better exchange of information, fair tax competition and coordination are regarded as the cornerstones of the promotion of good governance in the tax area.⁵¹ These themes (with the exception of coordination) are also behind the OECD's TIEA initiative albeit on a larger scale than the EU. While the EU's tax coordination and related initiatives have met with a

48 OECD, 'Tax: Updated multilateral tax convention now open to all countries' (Media Release, 1 June 2011) <http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48093843_1_1_1_1,00.html>.

49 See Dale Pinto, and Adrian Sawyer, 'Towards Sustaining the Future of Taxation: Is a World Tax Organization Necessary and Feasible in Today's Globalized World?' (2009) 24(2) *Australian Tax Forum* 179; and Adrian J Sawyer, *Developing a World Tax Organisation: The Way Forward* (Fiscal Publications, 2009).

50 Alison Christians, 'Sovereignty, Taxation and Social Contract' (2009) 18 *Minnesota Journal of International Law* 99, 115-116 (footnotes omitted).

51 Gemma Martinez Barbara, 'The Role of Good Governance in the Tax Systems of the European Union' (2011) 64(4-5) *Bulletin for International Taxation* 270, 280.

reasonable degree of success, I would anticipate that the EU's track record (and its less ambitious plan from a global perspective) makes for a higher chance of ongoing improvements in governance in the tax area than is the likely case for the Global Forum. Establishing a governance policy in respect of taxation needs to be a priority in conjunction with a robust plan for implementation and review.

The following key issues concerning the practical effectiveness of TIEAs are drawn from two leading (critical) commentators, namely the Tax Justice Network (TJN)⁵² and Baker & McKenzie.⁵³ TJN, according to its website, has the following objectives:

TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. We work to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. Our objective is to encourage reform at the global and national levels. We are not aligned to any political party.⁵⁴

Baker & McKenzie is a global legal firm operating in 69 offices worldwide, providing services in all aspects of global business, including taxation policy and practice. On their website Baker & McKenzie claim:

We are the most highly rated and recommended tax adviser among law firms, recognized worldwide as thought leaders in direct and indirect taxation, transfer pricing, and dispute resolution. Our more than 650 Tax lawyers, economists and advisers in 41 countries are in touch with changing tax laws, practices and dispute resolution techniques and can help design, implement, and defend tax strategies for international operations and transactions.⁵⁵

Collectively TJN and Baker & McKenzie have established their credentials to offer practical and independent (but not necessarily academic) insights and perspectives on the TIEA initiative. The following discussion sets out a number of issues discussed within themes.

A. Bilateralism v Multilateralism

The TJN⁵⁶ indicates that the Isle of Man, Jersey, Guernsey have each concluded TIEAs with Greenland and the Faroe Islands (both nations have a very small populations). Greenland and the Faroe Islands, TJN suggests, might need to investigate their citizens' use of secrecy jurisdictions for evasion and avoidance, but it is more likely that these treaties will be rarely used.⁵⁷ TJN concludes that these agreements were signed in order to *bulk up* the number of TIEAs signed.⁵⁸

Furthermore, TJN suggests that TIEAs do not work for developing countries if powerful OECD/G20 countries pursue bilateral TIEAs with tax havens.⁵⁹ In particular, developing countries receive no benefit and their collective negotiating position will be weakened. To that end a multilateral approach should be followed with automatic

52 Tax Justice Network, 'Tax Information Exchange Agreements' (Draft Briefing Paper, April 2009) <http://www.taxjustice.net/cms/upload/pdf/Tax_Information_Exchange_Arrangements.pdf> and Tax Justice Network, *The Death of International Exchange Agreements?*, above n 1. While the TJN is well known to be highly critical of exchange information initiatives to combat global tax avoidance and evasion, it is a non-politically aligned organisation, although it is acknowledged that it is without the credentials of well established academics such as Addison, Avi-Yonah and McIntyre.

53 Baker & McKenzie (various authors), 'The Death of International Exchange Agreements?: Part Three' (2011) 22(4) *Journal of International Taxation* 48.

54 See Tax Justice Network website <http://www.taxjustice.net/cms/front_content.php?idcatart=103>.

55 See Baker & McKenzie's website at: <<http://www.bakermckenzie.com/tax/>> .

56 Tax Justice Network, *Tax Information Exchange Agreements*, above n 52.

57 Ibid.

58 Ibid.

59 Ibid.

information exchange but this has not been a model or approach pursued by the OECD or the Global Forum.

B. No automatic information exchange

TJN states that 'the evidence so far is that TIEAs have produced little more than a trickle of information. For instance, the TIEA between the US and Jersey – two of the biggest players in the offshore system - was used only four times in 2008.'⁶⁰

The strict conditions for information exchange under TIEAs make effective information exchange unlikely in any event.

C. No information to exchange or difficulty to collect

TJN suggests that information may not exist in the requested country (and this may be an intentional approach). There is an underlying presumption that sufficient information gathering powers are in place for domestic purposes, an assumption that may not be correct for all Global Forum members. Furthermore, there is no obligation to create new or quicker mechanisms to access information than that provided under a TIEA.⁶¹

D. Solution – Multilateral automatic information exchange

TJN suggests, correctly in my view, that if the TIEA initiative is to be successful (and represent a form of global governance in the area of information exchange), all states need to be included with support provided for developing countries to be fairly involved in process.⁶² TJN argues that this is an unrealistic goal with the OECD/Global Forum's mechanism.⁶³ However, I would suggest that this may be possible with a World (International) Tax Organisation (ITO); for further discussion on this possible approach see Sawyer and Pinto and Sawyer.⁶⁴

E. TIEAs are based on Article 26 OECD Model (as at 2002)

TJN provides further examples of deficiencies in the TIEA approach.⁶⁵ TIEAs omit changes to OECD Model Tax Convention⁶⁶ since the Model Agreement was put in place in 2002.⁶⁷ However, some parties to TIEAs have included additional content to the Model TIEA, indicating that the 2002 Agreement is a guide to negotiations only. That said, vital provisions added to Article 26 in 2005 relating to the need for contracting countries (the secrecy jurisdictions) to obtain information for exchange (paragraph 4), and to over-ride banking secrecy laws (paragraph 5), are omitted.

F. Very low bar for black/grey/white listing process

TJN comments that:

Having set the bar so low that the black list was emptied within a matter of days, and the grey list was rapidly vacated as secrecy jurisdictions scurried round the world signing up to the required 12 TIEAs amongst themselves, the OECD finds itself in an embarrassing mess entirely of its own creation.⁶⁸

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 See Pinto and Sawyer, 'Towards Sustaining the Future of Taxation', above n 49; and Sawyer, *Developing a World Tax Organisation*, above n 49.

65 Tax Justice Network, *The Death of International Exchange Agreements?*, above n 1.

66 OECD, *Model Tax Convention*, above n 9.

67 OECD, *Agreement on Exchange of Information on Tax Matters*, above n 2.

68 Tax Justice Network, *The Death of International Exchange Agreements?*, above n 1.

TJN suggests that the threshold should be 60 TIEAs.⁶⁹ Such a threshold would mean no nation would meet the required number yet that would take it off the black list, but would this higher hurdle really still just be about numbers? I would suggest this threshold would lead to the proliferation of agreements, delay the process for conducting peer reviews, and potentially see members leave the Global Forum.

G. Specificity of request – a ‘Catch 22’ situation

TJN observes that in order to make a request for information the requestor needs to specify detailed information, much of which may not be known beforehand.⁷⁰ This raises the question: How does a nation get this specific detail? To date there is no clear indication of how a country requesting information may go about this process of gathering sufficient information to instigate a formal request.

H. Some countries have interpreted agreements in a very narrow way, even enacting domestic legislation to impede compliance with information requests

In this regard TJN offers the example of Austria which enacted legislation allowing the (non)taxpayer an opportunity to issue an injunction against fulfilment of a request for information exchange which could potentially delay the process for up to four years!⁷¹ Other examples can be offered.

As noted earlier, other commentators such as Addison,⁷² Avi-Yonah⁷³ and McIntyre⁷⁴ have provided further insights into the problems and deficiencies associated with the current TIEA model. Further discussion is also provided in an earlier paper by Sawyer.⁷⁵

New Zealand Taxation, according to its website is an independent information channel, documenting the most important events and news regarding taxation in New Zealand and across the world.⁷⁶ It has been publishing daily news since August 2008, and comprises a number of consultants, taxation professionals, and business writers. In relation to NZ, New Zealand Taxation state:

[In late June 2010] ... the [Inland Revenue Department] ... [intends] to utilize New Zealand’s existing TIEAs to catch potential tax evaders. ... the Inland Revenue Department is particularly interested in discovering NZ tax residents’ undisclosed offshore bank accounts, overseas life-insurance policies and superannuation benefits. ... in the future [the Inland Revenue Department] expects even greater levels of availability of information on financial transactions involving New Zealanders.⁷⁷

As at 30 April 2011 there is no (publicly available) evidence to indicate the effectiveness of this action.

Neslund⁷⁸ analyses the strengths and weaknesses of TIEAs. Under the strengths he suggests the following key areas:

1. Minimal uniform level of cooperation;
2. Cover civil and criminal matters;
3. Matter need not be criminal in both requesting and requested jurisdictions; and
4. Matter need not be needed by requested jurisdiction for its own purposes.

69 Ibid.

70 Ibid.

71 Ibid.

72 Addison, above n 4.

73 Testimony of Reuven S Avi-Yonah before the Senate Finance Committee on Offshore Tax Evasion, 110th Cong. (3 May 2007), as cited in Addison, *ibid* 718.

74 McIntyre, above n 6.

75 Sawyer, ‘Tax havens’, above n 10.

76 See New Zealand Taxation, *About* <<http://www.newzealandtaxation.com/about-2/>>.

77 New Zealand Taxation, *IRD to Investigate Offshore Incomes* (5 July 2010) <<http://www.newzealandtaxation.com/2010/07/ird-to-investigate-offshore-incomes/>>.

78 Neslund, above n 24.

In terms of weaknesses, Neslund suggests the following are critical:

1. Rush to announce commitment just to 'play for time';
2. Domestic bank secrecy laws *trump* TIEAs;
3. Requested jurisdictions exempt from supplying information they do not collect; and
4. Procedural restrictions prevent 'fishing expeditions', make for a slow and unwieldy process that precludes serious real-time assistance to tax authorities.⁷⁹

I agree with Neslund that the rapid adoption of the Model TIEA is little more than a public relations exercise, allowing tax havens to make a show of cooperation while going about business as usual.⁸⁰ Furthermore, the OECD's Model TIEA represents a 'lowest common denominator' approach which tends to be a path towards least resistance (and arguably ineffectiveness). There is no (public) indication of any capital flight following the TIEA initiative to date. Concurrent with the TIEA initiative practitioners are urging caution should be shown until the outcome of 'testing' through the Peer Review process is completed, which may not be for the next two to three years. I would argue that this advice is supported by governments when one observes that they appear to be 'happy' to have their taxpayers believe that offshore tax evasion has become much more 'risky'. These views are generally supported by other academic commentators such as Addison,⁸¹ Avi-Yonah⁸² and McIntyre.⁸³

V. CONCLUSIONS, LIMITATIONS AND FURTHER RESEARCH

It is interesting to contrast the views of the Global Forum (through its Chair) with that of organisations and commentators who have been highly critical of the TIEA initiative. Mike Rawstron of the Global Forum stated in April 2011:

The Global Forum has already delivered key progress with all its members committing to the international standards on tax transparency, including putting an end to bank secrecy for tax purposes. It is now time for the Global Forum to work with developing countries so that they too can benefit from the changed international environment.⁸⁴

This very positive view is in stark contrast with that of several prominent commentators. Baker & McKenzie state:

TIEAs continue to be signed weekly. With no countries on the black list, and almost all countries on the white list, the question is whether these TIEAs really have 'teeth.' The major countries of the western world have clearly started to focus on other means of obtaining data because TIEAs in practice do not work. ... the question is what will be the legacy of the extensive TIEA web?⁸⁵

TJN offers the following rather provocative concluding comment:

Is the possibility for effective information exchange dead, or is it more likely the case that OECD countries (especially major secrecy jurisdictions like Austria, Luxembourg, Switzerland, UK and USA) did everything in their power to prevent tax information exchange from ever coming to life?⁸⁶

McIntyre also concludes:

79 Ibid.

80 Ibid.

81 Addison, above n 4, 718.

82 Testimony of Reuven S Avi-Yonah before the Senate Finance Committee on Offshore Tax Evasion, 110th Cong. (3 May 2007), as cited in Addison, *ibid* 718.

83 McIntyre, above n 6, 260.

84 Mike Rawstron, 'Tax: Global Forum on Transparency groups more than half the world' (Media Release, 13 April 2011).

85 Baker & McKenzie, above n 53, 62.

86 Tax Justice Network, *The Death of International Exchange Agreements?*, above n 1 .

... the OECD efforts at getting countries to sign information exchange agreements based on its model TIEA is a sideshow, even a charade. With all these illusory TIEAs being signed with great fanfare, some may fear that we are seeing the end of the reform movement rather than the beginning. I agree that there are reasons for concern about the future direction of reform. That said, I find a lot to be encouraged about. ...⁸⁷

These contrasting views raise the following questions: Who should we believe? Does the TIEA initiative represent 'effective' global governance? The Global Forum has a vested interest in emphasising the 'success' of the TIEA initiative, while the TJN and Baker & McKenzie are in a position to take a more neutral (and potentially critical) perspective. Academic commentators are able to bring more rigorous research to support their arguments and propositions.

The initial focus of Global Forum was a 'numbers game', illustrated by the total number of TIEAs, plus minimum of 12 agreements per 'blacklist' jurisdiction. To be fair, there is now some qualitative analysis emerging with the Peer Review process and the release of their country reports.

TIEA 'effectiveness' is seriously in question. While there is a regulatory processes in place this does not necessarily guarantee effective information exchange. In my view this suggests a carefully developed ITO could be more effective even if the organisation was not designed to impose global governance. Assuming that an ITO is unlikely to emerge in the near future, then the TIEA initiative will need to undergo major revision if it is to have any realistic chance of making effective inroads to information exchange. Systematic change to the Model TIEA (and associated updating of the 600 plus individual TIEAs) appears to be most unlikely. This leaves the question open as to whether the TIEA initiative is an expensive exercise in 'window dressing' that leaves tax havens with little to fear and other countries with little to gain. Furthermore, this view is underscored when measured against the (implicit) compliance and administrative costs associated with Global Forum membership (as well as I would suggest the costs for the review team visit not met by the Global Forum which must be absorbed internally by the member under review).

There are a number of limitations to this paper. One major limitation as at the time of writing is that only 34 reports have been released (including 12 combined Phase 1 and 2 review reports). However, with a further 26 to 36 reports due by end of 2011 this will significantly reduce this limitation with more than 50 per cent of Global Forum members having completed at least a Phase 1 Review, enabling inferences to be drawn. Another major limitation is the reliance on OECD and Global Forum material, although there are now a growing number of independent commentators offering their views on the TIEA initiative.

Future research could include further reducing the limitations by building on this work (and that of other researchers such as Addison, Avi-Yonah and McIntyre), including more detailed analysis of the content of the Peer Review reports, examine information requests made under TIEAs (if details are at some point made publicly available), and examining taxpayer rights' implications of the TIEA initiative. Assuming the outcomes of requests under TIEAs become publicly available (such as reports on the Global Forum's website or through litigation), then this will further enable assessment of the practical effectiveness of the TIEA initiative at some future time.

87 Michael McIntyre, 'How to End the Charade of Information Exchange' (26 October 2009) *Tax Notes International* 255, 260 (emphasis added).