India's Experience with EXCHANGE OF INFORMATION AGREEMENTS

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Given the global momentum towards creating an institutional framework which will enable countries to curb Illicit Financial Flows (IFFs), it would be useful to look at the existing international financial regulatory and taxation framework. Studying the current institutional architecture could help in identifying and subsequently remedying the potential loopholes in the current architecture. A study of this nature could also highlight the potential hurdles in the implementation of practices aimed to curb IFFs at the national level, especially by developing countries. Being aware of these difficulties could enable governments of developing countries to effectively implement global standards as well as optimise their own resources.

Towards this end, the study 'India's Experience with Exchange of Tax Information Agreements' seeks to treat India and its use of the Exchange of Tax Information framework to curb IFFs, as a model for other developing countries. India was chosen for this study as the country has been one of the most vocal ones to support these issues on international forums and has had exchange of information agreements in place for several decades. It can also act as a model for other developing countries in terms of concerns, resources and priorities.

Three aspects of India's experience with and its implementation of the Exchange of Information (EOI) framework are assessed in this study:

i. Nature and provisions of EOI agreements;

ii. Prerequisites for the implementation of EOI agreements; and

iii. Evaluation of EOI agreements from an Indian standpoint.

The paper has been divided into four sections. Section I presents an overview of severity of illicit financial flows and the pathways used to generate IFFs. Section II deals with the EOI framework. It lays out the EOI arrangement, a brief history of the process, the current global EOI framework and the Indian framework for EOI. In Section III, we briefly look at other studies assessing the impact of EOI, and present our findings regarding the process of implementation of EOI agreements by India. Finally, Section IV lists recommendations that other developing countries could use based on India's experience with Exchange of Information

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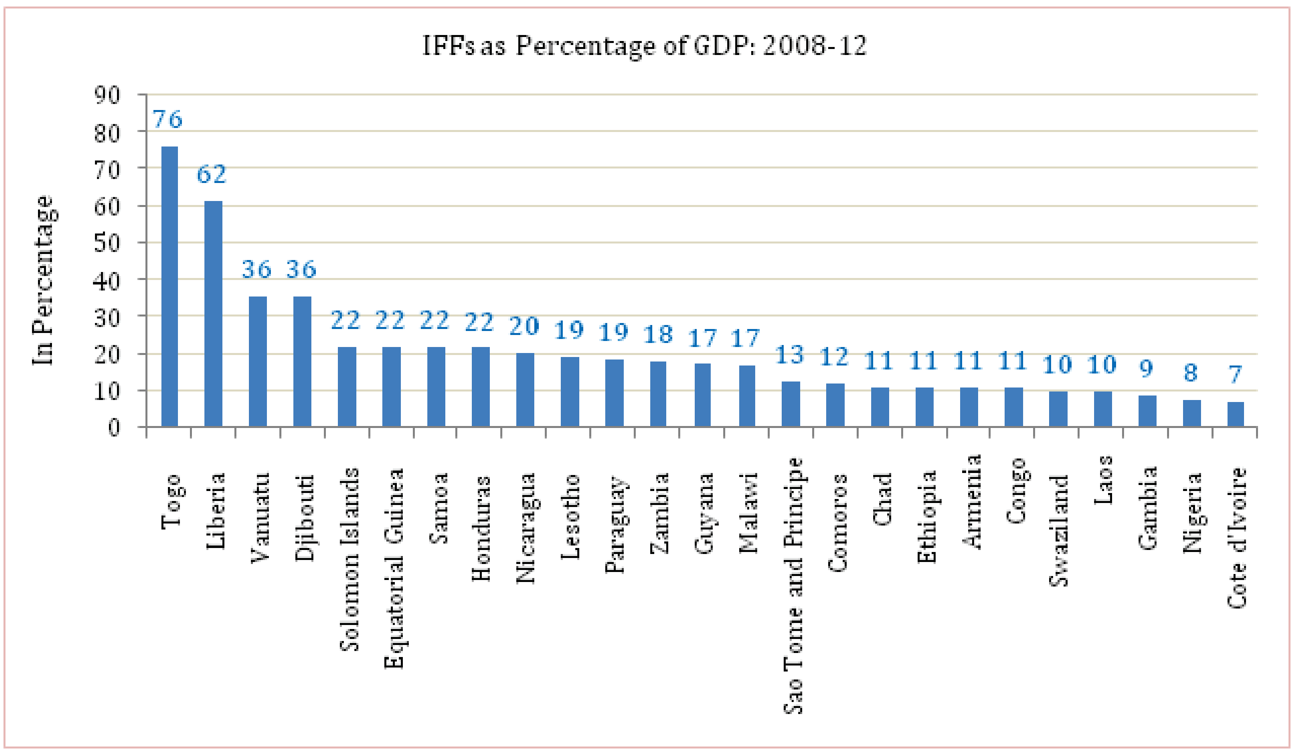
I. Introduction

Illicit Financial Flows or IFFs are defined as movements of money or capital from one country to another that is illegally earned, transferred, or utilised[1]. Illicit flows include activities which are illegal, along with those which follow the letter of the law but not its spirit. These illicit flows may result from corporate tax evasion or avoidance, money laundering, criminal activity like drugs or human trafficking, or corrupt public officials siphoning off government funds for personal use.

A recent study by Global Financial Integrity (GFI)reveals that in the last 10 years, the quantum of IFFs lost from India saw a four-fold increase from \$19.5 billion in 2004 to \$83 billion in 2013[2]. India is not the only developing country suffering from the corrosive impacts of IFFs on domestic resource mobilisation and ultimately on various development indices like education, health, etc. Countries across the globe are suffering from this phenomenon; developing and least developed countries being the worst affected[3]. Another study finds that between 1980 and 2009, the net capital outflows from Africa - driven mainly due to IFFs - are in the tune of up to \$1.4 trillion, which is far more than the total capital inflows to the continent in the same period[4].

The following chart shows the 25 countries impacted most severely by illicit financial flows, in terms of resources lost to **IFFs as percentage of their respective GDPs[5].**

Chart 1: IFFs as percentage of GDP



(Source: Global Financial Integrity. 2015 b).

Many developing countries face the challenge of mobilising revenue to finance development and invest in public welfare schemes in a sustained manner. Losing crucial resources to IFFs, further straps these countries' capacity to spend adequately on government schemes. These illicit flows not only deprive the state of resources, but also prove detrimental for the domestic economy due to outflow of capital. A further comparison of the revenue collected by

[1] http://www.gfintegrity.org/issue/illicit-financial-flows/

[2] Global Financial Integrity, 2015 a

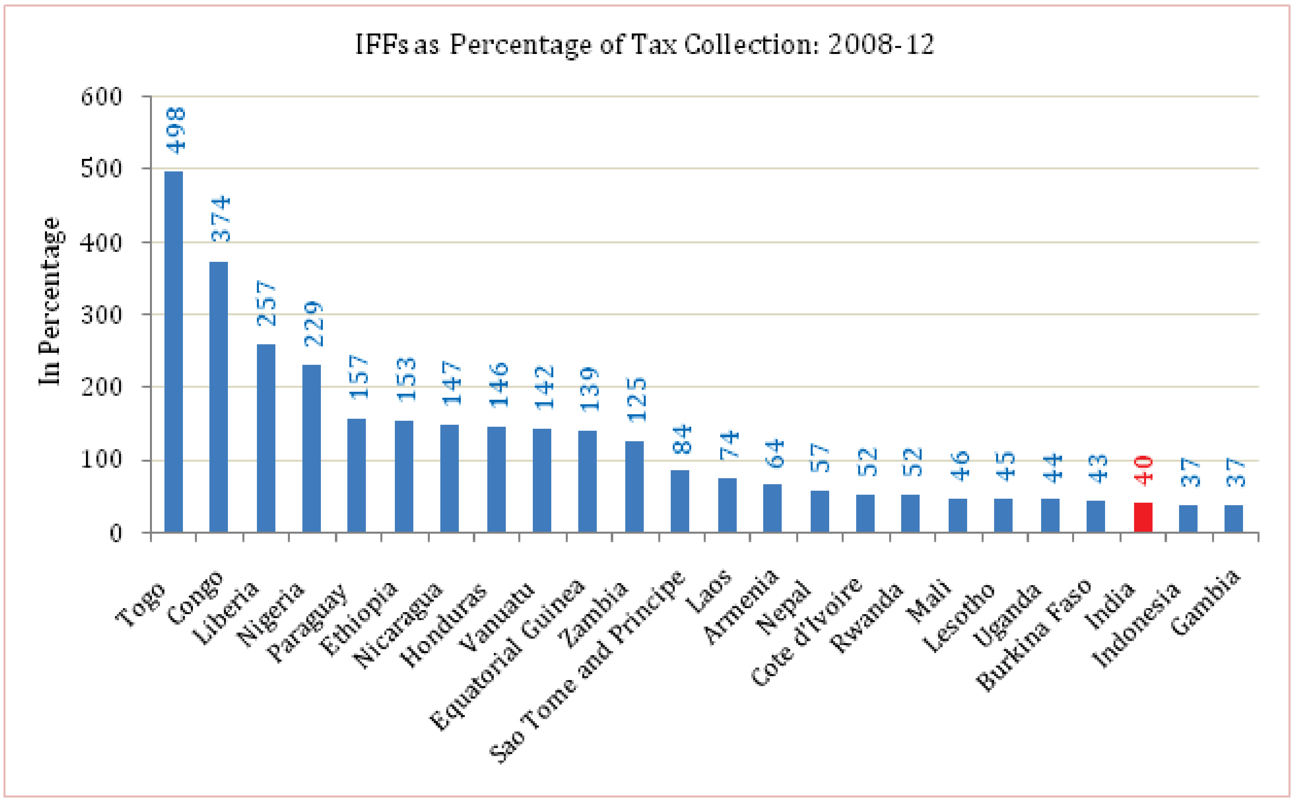
[3] Global Financial Integrity, 2015 b

[4] African Development Bank and Global Financial Integrity. 2013

[5] Global Financial Integrity, 2015 b

developing countries' governments and the resources lost to IFFs produces some disquieting results. The following chart portrays 25 of the most severely impacted countries by IFFs as a percentage of their total tax collections[6].

Chart 2: IFFs as percentage of Tax Revenue[7]



(Source: Global Financial Integrity. 2015 b)

In more than 10 countries, resources lost to IFFs are far greater in magnitudethan their tax collection, which reinforces the severity of the issue.

Cobham (2015) lists a few prominent activities contributing to the generation of IFFs[8]:

1. **Market or regulatory abuse:** Existing market regulations are often bypassed, using illegal or unethical practices, thus contributing to the generation of IFFs.For instance, traders often engage in either under-invoicing their exports or over-invoicing their imports, a practice known as trade misinvoicing. This process not only artificially reduces the tax bills for traders but also works as a mechanism for moving capital out of the country, bypassing the legal framework.
2. **Tax abuse:** Multinational corporations and wealthy individuals often abuse the technical loopholes in the legal framework to reduce the taxes they owe to the jurisdictions they operate in. Transfer mispricing is an example in this regard. A company may transfer the ownership of patents to a subsidiary located in a tax haven or a secrecy jurisdiction, and proceed to artificially lower its profits in a country where it originally operates, by inflating the royalties for the same patents. This way the company not only evades the taxes but also shifts capital to secrecy jurisdictions, where the entity pays very little or close to no taxes.
3. **Abuse of political power:** In a lot of countries, especially resource-rich developing economies, state resources are often used for private gain. Instead of using a transparent, competitive process, allocation of licenses for extractives are often politically motivated. This leads to undue gains for a few individuals or entities at the expense of revenue owed to the state.

[6] Ibid.

[7] According to the GFI Report, Samoa loses 98,000% of its tax revenue as IFFs and is the most severely affected country; it was not included in the chart here because of its outlier nature distorting the chart.

[8] Centre for Budget and Governance Accountability. 2015

4. **Criminal activities:** Criminal activities and corruption result in the generation of illegal income and wealth, which are transferred from one country to another. In this regard, money laundering refers to the process of legitimising wealth earned through illegal means. Not only is this practice illegal and harmful to society, but these flows could further be used to fund various criminal activities at a global scale, such as terrorist financing, human trafficking, drug trade, etc.

At the heart of illicit financial flows, lie tax havens or secrecy jurisdictions– jurisdictions that offer powerful individuals and corporation the chance to escape scrutiny, tax, financial regulations and secrecy in various forms[9]. Secrecy jurisdictions make it harder for concerned government authorities to access relevant information. Along with presence of a strong network of enablers (individual as well as institutional); these jurisdictions have a very low taxation rate for foreign nationals and entities, thus making them lucrative destinations for IFFs.

Along with the role played by secrecy jurisdictions and anonymity associated with IFFs, illicit flows also often go unchecked because tax authorities are constrained by national boundaries, whereas individuals and multinational corporations can move funds globally, often in the guise of international trade. In such cases even the detailed examination of information available within a particular country is insufficient. In this context, cooperation between countries on a bilateral and multilateral basis could prove effective in identifying individuals and entities contributing to the generation of IFFs.

An important measure in this regard would be disclosing and sharing of relevant financial information between the tax authorities of different countries, which would enable them to assess the legality of financial flows and transactions and the need for further scrutiny and legal action. This process of sharing financial information between different jurisdictions is known as Exchange of Tax Information and is institutionalised by 'Exchange of Information Agreements'.

[9] http://www.tackletaxhavens.com/whats-a-tax-haven/

II. The Framework for Exchange of Information

1. What is Exchange of Information?

Exchange of tax and financial information or EOI refers to a process whereby two or more countries engage in sharing relevant information related to the legal entities and citizens of partner countries, available within their own jurisdiction, with the respective government authorities of those individuals and entities. Exchange of information is institutionalised by 'Exchange of Information Agreements' between concerned authorities.

There are three different ways for exchange of information:

1. **Information upon Request:** A jurisdiction which requires the information, requests another jurisdiction for the desired information. Such a request requires providing specific details regarding the individual or entity concerned, such as the name of the account holder, account number, bank or branch name, etc.
2. **Spontaneous Exchange of Information:** A jurisdiction may share some financial information with another country, if and when the former finds information within its jurisdiction deemed relevant for the latter, and there is a legal basis to do so.
3. **Automatic Exchange of Information:** Under this arrangement, jurisdictions exchange financial information automatically at regular intervals.

Based on the participating countries and nature of agreements, the frameworks that provide the legal basis for EOI can be divided into the following categories:

1. **Double Tax Code/Double Tax Avoidance Agreements (DTC/DTAA):** DTCs or DTAAs are bilateral agreements that focus on sharing of taxation rights between participating countries for entities which are domiciled in one jurisdiction while operating in other jurisdictions. Most DTAAs also have provisions for exchange of information.
2. **Tax Information Exchange Agreements (TIEA):** These agreements are signed between countries for the specific purpose of exchange of information.
3. **Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAA):** MCMAA is an OECD multilateral tax convention, with different clauses regarding the nature of exchange (upon request / spontaneous / automatic). Under this agreement, each country can choose the particular clauses it wants to agree to, as well as decide which countries it wants to engage with for EOI, using those particular clauses.
4. **Foreign Account Tax Compliance Act (FATCA):** FATCA is a United States federal law, signed between the USA and other countries. Under this agreement, financial institutions of other countries need to report the financial record of the US entities to the US authorities on an annual basis. It has partial reciprocity provisions from USA.

2. Brief History of Exchange of Information

One of the earliest attempts to obtain financial information from other countries for tax purposes can be traced back to 1945, when American and French authorities made demands on Switzerland to disclose the information related to accounts and assets of French nationals in Swiss banks, with a focus on ownership of American securities[10]. The rapid advancement of international trade following World War II created more opportunities for the international movement of capital which resulted in a more complex international taxation system. Early global frameworks to deal with tax issues such as tax evasion and double taxation include a UN model, which was prepared by an expert committee between 1968 and 1977. The guidelines for the UN model were published in the 'Manual for Negotiation of Bilateral Tax Treaties between Developed and Developing Countries'. Over the next couple of years there were substantial changes in the manual and finally in 1980, the reviewed draft was published as 'United Nations Model Double Taxation Convention between Developed and Developing Countries.' Since then, there have been two major updates - in 1999 and 2011[11].The other model convention for tax treaties has been the OECD model. The beginning of OECD Double Taxation model can be traced back to 1955 when the Organisation for European Economic Co-operation (OEEC) adopted its first recommendations regarding double taxation, which has been revised notably in 1963, 1977 and

[10] Gabriel Zucman. 2015
[11] United Nations, 2011

1992[12]. The model, as it exists today, has been greatly influenced by the report 'Harmful Tax Competition: An Emerging Global Issue' published by the OECD in 1998. In its current form, the provision for exchange of information is covered in Article 26, which provides specific details regarding the nature, extent, requirements and use of Exchange of Information. At present, most bilateral agreements are based on either of the two model conventions.

3. Global Forum on Transparency and Exchange of Information for Tax Purposes

The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (hereafter, Global Forum) was established in 2000 against the backdrop of OECD's work in the area of tax compliance and the risk posed by non-cooperative jurisdictions. The original members of the Global Forum consisted of OECD countries and other jurisdictions that had agreed to implement transparency and exchange of information[13]. It is an international body, with 132members as of February 2016, that provides a multilateral framework within which work in the area of transparency and exchange of information has been carried out by both OECD and non-OECD countries. The Global Forum is working towards establishing a common and internationally accepted standard for EOI, which deals with:

- Existing mechanisms for exchange of information
- Availability of reliable information and powers to obtain and provide such information in response to a specific request in a timely manner
- Respect for safeguards, limitations and strict confidentiality rules for information exchanged[14].

Towards this, Global Forum has formulated a Model Agreement on Exchange of Information on Tax Purposes, which acts as standard for new agreements; while to evaluate the compliance of old agreements to the recommended standard, it has devised a Peer Review Process. The Peer Review process carries an in-depth evaluation of the existing framework used by all members of Global Forum as well as jurisdictions identified as relevant to its work.

The Peer Review process takes place in two phases: Phase 1 Review examines the legal and regulatory framework for transparency and the exchange of information for tax purposes. Phase 2 Review looks into the implementation of the standard in practice. There are provisions for combined reviews as well, which simultaneously evaluates both the legal and regulatory framework (Phase 1) and the implementation of the standard (Phase 2). The process also provides for supplementary reviews, which can be launched when a jurisdiction reports significant improvements[15].

The reviews focus on three broad areas, and each of the three is again broken down into various essential elements, where an element refers to one particular aspect of that area. The three areas and their elements are listed below:

A. Availability of Information

1. **Ownership and identity information:** This aspect looks into whether the details related to ownership and identity of all relevant entities and arrangements (individual, corporations, trust, fund, etc.) are available to the competent authority of the country being reviewed.
2. **Accounting records:** The aspect of accounting records requires that accounting standards being used are reliable, and accounting records are kept for minimum of five years for all the relevant entities and arrangements.
3. **Banking information:** This aspect looks into whether the banking information (owner details, opening of account, transaction details) are available for all account holders with the financial institute in question.

B. Access to Information

4. **Competent Authority's ability to obtain and provide information:** The Competent Authority of the country being reviewed should have the power to obtain and provide the information, sought under an EOI agreement, from any individual or entity within their territorial jurisdiction. This applies even when there is any legal obligation on such entity to maintain secrecy of the information.

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[12] OECD. 2014
[13] http://www.oecd.org/tax/transparency/
[14] http://www.oecd.org/tax/transparency/abouttheglobalforum.htm
[15] Ibid.

5. **Notification requirements and rights and safeguards:** The rights and safeguards that apply to the subject of request (the entity whose details are being sought) in the requested jurisdiction should be compatible with EOI agreements. In case of any incompatibility, the agreements need to be altered to match the model convention or the domestic laws need to be amended to meet the requirements.

C. Exchanging Information

6. **Exchange of information mechanism:** Each jurisdiction should allow for effective exchange of information with its treaty partners and vice versa.
7. **Exchange of information mechanism with all the relevant partners:** Each jurisdiction should have a network of information exchange mechanisms that cover all the relevant partners – countries with which it shares significant trade, capital flows, diaspora, neighbors, tourist flows etc.
8. **Confidentiality:** There should be adequate provisions related to confidentiality and safeguard of the information, such that it is only accessible by authorized persons as well as used only for purposes mentioned in agreements.
9. **Rights and safeguards of taxpayers and third parties:** It should respect rights and safeguards of taxpayers and third parties.
10. **Timeliness of response to requests of information:** It should provide information requested under EOI agreements with its network partners in a timely manner, or provide regular updates when the process is taking longer than expected.

With respect to each of the 10 essential elements mentioned above, a determination is made in both the phases and a rating is given to the jurisdiction being reviewed. For Phase I of the Peer Review, there are three ratings as follows:

1. **The element is in place:** It indicates that the existing legal framework adheres to the standard recommended by the Global Forum.
2. **The element is in place but certain aspects need improvement:** It indicates that while the framework meets minimum requirements, there are changes needed to match the recommended standard.
3. **The element is not in place:** It means that the current framework does not meet the standard and needs complete overhaul.

Phase II of the Peer Review process evaluates the same aspects of a particular jurisdiction, and accords one of the following ratings:

1. **Compliant:** It indicates that the jurisdiction has been implementing EOI agreements as per the standard.
2. **Largely compliant:** It indicates that the country or jurisdiction, while following the practice largely, needs minor improvement to be at par with the standard.
3. **Partially compliant:** This indicates that the jurisdiction, while following the framework in some aspect, lags behind the standard and need major improvement.
4. **Non-compliant:** A non-compliant rating means that the jurisdiction's practice does not meet the standard at all.

These ratings are accompanied, if required, by recommendations on how improvements can be made to meet the standard recommended by the Global Forum. An overall rating is also assigned to reflect the reviewed jurisdiction's overall compliance with OECD standards.

The peer review process designed by the OECD however, focuses on a jurisdiction's capacity to send out information and not the reception of such information. While this process was designed to focus on financial centres and their compliance, the deterring effect of this peer review process on developing countries needs to be assessed. Developing countries do not have substantial information to provide during the peer review process, and may run the risk of being blacklisted. There were also some reports regarding contentions regarding Switzerland clearing Phase I of the peer review process, despite Switzerland's robust refusal to cooperate with countries' requests relating to stolen or leaked data from Swiss banks. Switzerland has maintained its position on its banking secrecy laws, and has stated on numerous occasions that it would not cooperate on the basis of stolen data[16]. Switzerland's success in clearing the Phase I of the peer review process contradicts Luxembourg's 'non-compliant' status in the Phase II scrutiny, after Luxembourg refused to exchange information in cases involving stolen data.

The Global Forum is mandated by the G20 and the OECD for overseeing the implementation of Automatic Exchange of Tax Information (AEOI). Under this arrangement, pre-agreed information related to non-resident financial account holders will be shared with the account holders' country of residence on an annual basis. It is expected to help in detecting previously unknown cases of tax evasion. A Common Reporting Standard (CRS) prepared by the Global Forum would act as model for the agreements. CRS provides specific details on the steps and requirements by government and financial institutions for effective implementation of AEOI. It also spells out guidelines on how to address the operational and transitional challenges arising during implementation. The Multilateral Competent Authority Agreement (MCAA) lays out the legal framework for implementation. Though it is a multilateral entity, the participating countries are required to agree on a bilateral basis for exchange of information. MCAA provides the details of the nature of information, financial institutions that need to report and the types of accounts to be covered under AEOI. To ensure the accuracy and completeness of information being shared, MCAA provides the guidelines for gathering information by financial institutions.

As of March 2016, 96 jurisdictions have committed to implementing Automatic Exchange of Information. Work is currently underway to implement this standard, with the first exchanges scheduled to take place between select countries (known as early adopters) in 2017.The following charts provide the categorisation of countries based on the year in which they will adopt AEOI[17].

Table 1: Automatic Exchange of Information Adopters

Jurisdictions Undertaking First Exchanges from 2017			
1. Anguilla	15. Dominica	29. Isle of Man	43. Poland
2. Argentina	16. Estonia	30. Italy	44. Portugal
3. Barbados	17. Faroe Islands	31. Jersey	45. Romania
4. Belgium	18. Finland	32. Korea	46. San Marino
5. Bermuda	19. France	33. Latvia	47. Seychelles
6. British Virgin Islands	20. Germany	34. Liechtenstein	48. Slovak Republic
7. Bulgaria	21. Gibraltar	35. Lithuania	49. Slovenia
8. Cayman Islands	22. Greece	36. Luxembourg	50. South Africa
9. Colombia	23. Greenland	37. Malta	51. Spain
10. Croatia	24. Guernsey	38. Mexico	52. Sweden
11. Curacao	25. Hungary	39. Montserrat	53. Trinidad and Tobago
12. Cyprus	26. Iceland	40. Netherlands	54. Turks and Caicos Islands
13. Czech Republic	27. India	41. Niue	55. United Kingdom
14. Denmark	28. Ireland	42. Norway	

[16] Swissinfo.ch, 2015
[17] OECD, 2015

Jurisdictions Undertaking First Exchanges from 2018			
1. Albania	11. Canada	21. Japan	31. Saint Kitts and Nevis
2. Andorra	12. Chile	22. Kuwait	32. Samoa
3. Antigua and Barbuda	13. China	23. Marshall Islands	33. Saint Lucia
4. Aruba	14. Cook Islands	24. Macao (China)	34. Saint Vincent and Grenadines
5. Australia	15. Costa Rica	25. Malaysia	35. Saudi Arabia
6. Austria	16. Ghana	26. Mauritius	36. Singapore
7. The Bahamas	17. Grenada	27. Monaco	37. Sint Maarten
8. Belize	18. Hong Kong (China)	28. New Zealand	38. Switzerland
9. Brazil	19. Indonesia	29. Qatar	39. Turkey
10. Brunei Darussalam	20. Israel	30. Russia	40. United Arab Emirates
			41. Uruguay

(Source: OECD, 2015)

Apart from mentoring the implementation of AEOI, Global Forum is also working towards creating a mechanism for developing countries to help them have the necessary legal framework and the requirements pertaining to physical infrastructure, institutional capability and human resources for effective implementation of the AEOI standard[18].

4. Case of India – Putting the Legal Framework in Place

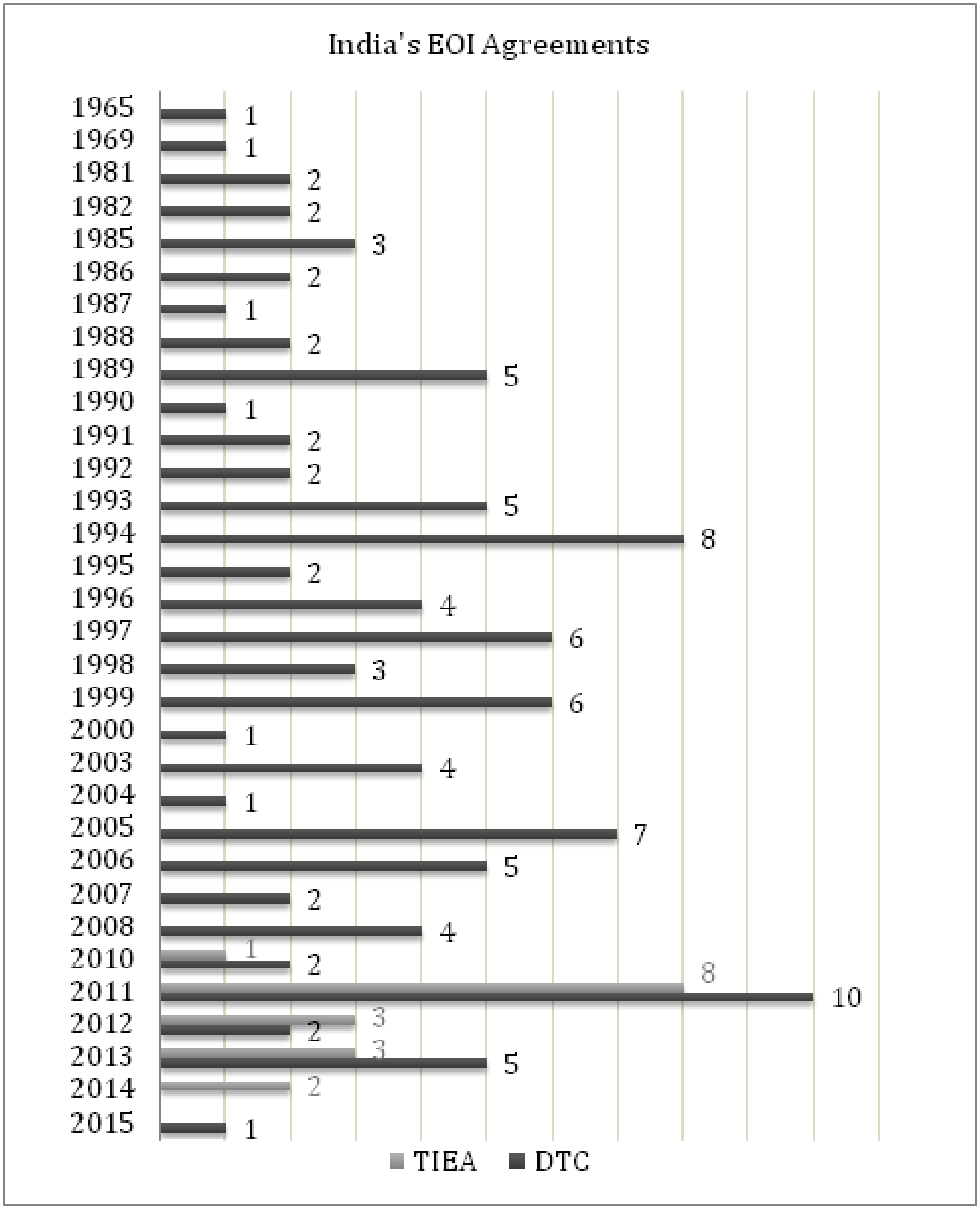
India has a long history with exchange of information and is a strong advocate for international cooperation with respect to EOI. It is regarded by its partners as an important and fully committed jurisdiction towards EOI arrangements. At present India is a member of the steering group and a Vice Chair of the Peer Review group. It is also one of the early adopters of AEOI, having committed to the first exchange in 2017. As of March 2016, it has signed 100 DTAAs and 17 TIEAs[19] with various jurisdictions, while negotiations are ongoing for more treaties.

India signed its first bilateral tax treaty with Greece in 1965, followed by one with Egypt in 1969. 17 more bilateral agreements were concluded in the 1980s with countries like Japan, Mauritius, USA and Brazil, among others. In the 1990s, this process gained momentum and 39 treaties were signed, notably with France, the United Kingdom, Singapore, Switzerland, China and Russia. While the momentum in favour of DTAAs was maintained in the 2000s, an emerging trend has been the signing of Tax Information Exchange Agreements (TIEAs) which focus exclusively on sharing of information, unlike DTAAs which are primarily concerned with allocating taxing rights to countries. Starting with Bermuda in 2010, India has signed 17 TIEAs, most notably with secrecy jurisdictions like Cayman Islands, Jersey, the Bahamas and British Virgin Islands. It may be useful to note here that due to very little risk regarding double taxation with secrecy jurisdictions (given how little they tax), TIEAs have been the more preferred option with secrecy jurisdictions.

[18] http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm
[19] Exchange of Tax Information Portal, Global Forum on Transparency and Exchange of Information for Tax Purposes

The following chart provides a brief summary and timeline depicting the signing of treaties by India:

Chart 3: Timeline of India's EOI Agreements



(Source: Global Forum on Transparency and Exchange of Information for Tax Purposes, Exchange of Tax Information Portal)

India became a member of the Global Forum after it was restructured in 2009 and agreed to implement the international standard for Transparency and Exchange of Information for Tax Purposes. The Global Forum peer review process has been completed for India and the final assessment of both phases has been published. The Phase I Review, which assesses the quality of the jurisdiction's legal and regulatory framework for exchange of Information, was done in 2010 and covered 78 DTAAs which were in place at that time. The Phase II Review, which assesses the practical implementation of the legal and regulatory framework, was carried out for the period July 2009 to June 2012.

The summary for reviews of both the phases is as follows:

Table 2: Peer Review Reports: India

S. No.	Phase I Review	Phase II Review	Recommendation
1	Ownership and identity information		
	Element in Place	Compliant	
2	Accounting records		
	Element in Place	Compliant	
3	Banking information		
	Element in Place	Compliant	
4	Competent Authority's ability to obtain and provide information		
	Element in Place	To be finalised as soon as a representative subset of Phase II reviews is completed	
5	Notification requirements and rights and safeguards		
	Element in Place	Compliant	
6	Exchange of information mechanism		
	Element in Place	Compliant	
7	Exchange of information mechanism with all the relevant partners		
	Element in Place	Compliant	In addition to the current round of negotiations, it is recommended that the Indian Government make progress with agreements with additional partners
8	Confidentiality		
	Element in Place	Compliant	
9	Rights and safeguards of taxpayers and third parties		
	Element in Place	Compliant	
10	Timeliness of response to requests of information		
	N/A - To be dealt with in the Phase II review	Compliant	India should monitor the new system put in place to ensure that answer to EOI requests are made in a timely manner

(Source: Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: India 2013, Phase 2)

III. Evaluation of EOI Arrangements

1. Global Perspective

Many leaders around the world regarded exchange of information agreements as the stepping stone towards curbing illicit financial flows. G20 leaders, after a meeting in London in 2009, declared: "The era of banking secrecy is over."[20] This assertion was based on the work done by the Global Forum related to CRS for EOI and publication of a list of tax havens. Following that, OECD assessed the impact of these initiatives on some of the broader changes in attitude towards tax evasion and aggressive tax planning by both individuals and corporations and subsequently published a report in 2011 titled 'The Era of Bank Secrecy is Over'. An excerpt from the report highlighting the success of the initiative is as follows:

"Since the London Summit... the countries surveyed... brought in almost EUR 14 billion of additional revenue through voluntary compliance initiatives that take advantage of the increased risk of detection for tax evaders as a result of removing bank secrecy for tax purposes."[21]

This report also predicted that in the near future, more revenue would be accruing to states due to these initiatives. In this regard, the report notes:

"We can expect a multiple of these amounts to be collected over the coming years since the "deterrence" effect will send a strong signal to would-be evaders."[22]

On the contrary, working with the data on deposits, before and after the treaties were signed, in select tax havens across the world (including Switzerland, Luxembourg, and the Cayman Islands), Zucman and Johannesen deduce that:

"...After treaties were signed some evaders perceived an increase in the probability to be detected, but most did not. The tax evaders who responded did not repatriate their funds but transferred them to havens not covered by a treaty. We observe this pattern in the aggregate data: the global value of deposits held in tax havens is the same two years after the G20 have cracked down as before, but havens that have signed many treaties lost deposits at the expense of havens that have signed few treaties."[23]

They argue that while the role of some tax havens has reduced in facilitating illicit flows; the existence of some other jurisdictions, which can act as tax haven for a particular country, has simply substituted them. Till all tax havens have signed EOI agreements with all relevant countries, illicit flows can hardly hope to be curtailed.

While the OECD report as well as Zucman and Johannesen's study focus primarily on quantitative evaluation of the framework, Nicholas Shaxs on and John Christensen analysed the loopholes present in the framework[24]. They point out that the standard of Exchange of Information upon Request would require a requesting country to already possess certain information regarding a particular individual or entity, in order to make a request for information. This standard, therefore, only works as a confirmation mechanism rather than a detection mechanism. Moreover, the countries in the OECD 'black list'[25] need to be signatories to only 12 treaties to have their status escalated. It was found that tax havens signed many treaties between themselves or with small jurisdictions where the need to share information is minimal, such as Greenland, Iceland and The Faroes, as these jurisdictions cover less than half a million people. These treaties comprised almost a fifth of all the agreements. The study also highlighted the relatively lesser number of agreements involving developing and least developed countries.

While these studies assess the quantitative impact of EOI on OECD and relatively developed economies, the GFI report highlights the fact that developing and Least Developed Countries are the worst victim of illicit flows. In 2013 alone, these countries lost more than $1 trillion to IFFs. In this regard, the differentiated needs of underdeveloped and developing countries must be taken into account. Developing countries also differ from developed countries with regard to legal framework, human resources, physical infrastructure, technical knowhow, maturity of economy and

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[20] G20, 2009
[21] OECD, 2011
[22] Ibid.
[23] Johannesen, Niels and Zucman, Gabriel. 2014
[24] Nicholas and John Christensen. 2011
[25] OECD has created a list of countries that it finds to be non-cooperativeon matters of International Tax Transparency and Exchange of Information initiatives.

financial institutions. These differences in concerns and ability between developed and developing countries make it necessary to separately evaluate the impact of EOI on IFFs with a focus on developing countries.

2. The Indian Experience –An Assessment

This section attempts to appraise the impact of EOI agreements from an Indian perspective. However, due to the lack of quantitative data in the public domain, the focus was on a qualitative assessment of the arrangement as well as the challenges in the implementation of these agreements. For this purpose, the evaluation of EOI agreements from different stakeholders and experts who have worked substantially on these issues were sought. Indian government officials, tax professionals and academics were interviewed, and their assessment was sought on various aspects of EOI arrangements between India and its partners. Substantiated by official documents from the OECD, G20 and manuals and handbooks published by the Government of India, our findings are categorised into three broad areas: a) Nature of agreements, b) Implementation and requirements, and c) Assessment of the impact of India's EOI treaties.

A. Nature of Agreements

Since India signed its first EOI treaty in 1965, there have been considerable changes in the nature of international trade, capital flows, tax evasion issues, global financial architecture, geo-political scenario and international co-operation on tax issues. Each of these factors has contributed to change the approach towards information sharing arrangements, and this evolution is evident in the changing nature of Indian EOI agreements.

Due to this rapidly changing environment and the regulatory requirements to deal with emerging tax and financial issues, many of the earlier Indian treaties have been found to be inadequate in some aspects.

The Global Forum Peer Review found that while 7 treaties failed to meet the standard, 74 of them did not contain paragraphs 4 and 5[26] under article 26 of the OECD model convention. An absence of these two clauses increases the possibility of declining the request for information by a partner jurisdiction, citing domestic factors, such as sought information not used by domestic authorities or domestic laws for confidentiality or non-disclosure. The absence of these provisions in almost 60% of India's agreements with other jurisdictions highlights the need for strengthening India's legal framework.

Peer Review Phase I notes that – "Absence of a specific provision requiring Exchange of Information unlimited by bank secrecy will serve as a limitation on the exchange of information."[27]

A few of the treaties also have clauses limiting the use of information received under EOI for purposes other than those specifically mentioned in the treaty – implying that information received under such treaties cannot be used for aiding administration and the enforcement of domestic laws even if the information is useful in those cases.

A tax professional interviewed by CBGA was of the opinion that one of the main reasons behind India not being able to benefit greatly from EOI arrangements is "poorly drafted treaties between India and other jurisdictions".

It needs to be pointed out that jurisdictions were not very forthcoming on the issue of EOI. The scenario started changing after the financial crisis of 2008, when the issues tax evasion and tax avoidance caused mass outcry, subsequently resulting in political pressure on the tax havens and secrecy jurisdictions to comply with tax transparency standards. The rising number of EOI Agreements, especially TIEAs involving countries regarded as non-cooperative jurisdictions indicates this change. In the last few years, India has managed to sign TIEAs with a few tax havens such as Cayman Islands, Jersey and the Bahamas. Along with signing new agreements, India has also been working on re-negotiating the older treaties to address persisting concerns.

At the same time, many jurisdictions have been reluctant to engage in EOI citing concerns regarding confidentiality and

[26] Para 4 and 5 of Article 26 of the OECD model convention are as follows:

4) If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5) In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

[27] Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews. 2010: India, Phase 1

security provisions for information shared with developing countries. An analysis of India's domestic laws and its EOI treaties however, suggests that the country has the necessary legal provisions for the confidentiality and safeguard of not only the information received through EOI agreements, but also for personal tax information.

Peer Review Phase I notes that – "All EOI Articles in Indian treaties have confidentiality provisions…India's domestic legislation contains relevant confidentiality provisions."[28]

This view was upheld by Mr. D. P. Sengupta, a leading academic on international taxation issues. He added that there has never been a case of information leakage from the Indian Tax Department. This is in contrast to some threats to information in developed countries, such as the United Kingdom. In 2007, two computer disks containing information on families receiving government financial benefits for children were sent out from a UK government tax agency unregistered, via a private delivery system. This episode was reportedly one of the three instances when the agency improperly handled its vast archive of personal data. The disks lost in Britain contained detailed personal information on 40 percent of the population – in addition to bank account numbers, there were names, addresses and national insurance numbers; and the data on almost every child under the age of 16[29].

In recent years, India has taken many initiatives to further strengthen the safeguard framework for tax related information. Mr. Akhilesh Ranjan, the Indian Competent Authority on International Taxation, highlighted the various initiatives being taken for the same, which include:

- Publication of different guidelines on security and safeguarding of information, like 'e-safe guidelines', manuals and guidelines by the India's Central Board of Direct Taxes (CBDT)[30]
- Collation of existing guidelines to make it more coherent and robust
- Appointing a Chief Information Security Officer
- Establishment of an Information Security Committee within the CBDT
- Establishment of 18 local Information Security Committees in different tax jurisdictions in India

B. Implementation and Requirements

Once the necessary legal framework has been prepared, the next step of implementation requires: 1) Physical infrastructure; 2) Human Resources; and 3) Institutional Capability.

Physical Infrastructure

The robustness of the physical infrastructure is an important determining factor in the smooth facilitation of the process of EOI. Mr. Ranjan pointed out that with the changing nature of EOI towards online and electronic transfer; there has been huge requirement to update the necessary infrastructure in the country. Since outdated transfer machinery may create the potential threats to information, there isa need for continuous and regular upgradation of the system. Establishing new systems and regular updates are often expensive, and may prove difficult to acquire for small developing and underdeveloped countries. Also, the integration of new system has to be such that it maintains the continuum of work. For instance, the transition from paper records to computer files should not create any hurdles in the functioning of the tax department. Mr. Ranjan added that Indian infrastructure requirements are in place and up to date, and that India being one of the 48 early adopters has had its system reviewed for the Automatic Exchange of Information scheduled to start from 2017.

Human Resources

Mr. Sengupta pointed out that the number of working employees in the Indian Tax Department has in fact decreased in the last couple of decades. It was found that in October 2015, more than 600 posts at the level of assistant

[28] Ibid.
[29] New York Times, 2007
[30] CBDT is a statutory body responsible for policy and planning of direct taxes in the country, and for the administration of direct tax laws through the Income Tax Department.

commissioners were vacant, while at grade B and C staff levels the proportion of vacancies rose to an alarming 30%[31]. Another government official interviewed for this study was of the opinion that shortage of human resource affected the efficient use of EOI. This shortage creates problem in domestic investigation as well in follow up of EOI requests. This shortage also meant that the focus remained on tax collection even when there is a possibility of pressing for criminal charges. The absence of criminal litigations creates further incentive for tax evaders.

A study done by the CBDT on the Indian EOI agreements points out:

"Despite the existence of legal instruments for administrative assistance and the willingness of our treaty partners to provide information, these provisions are still under-utilised."[32]

The report elucidates the following reasons for such under-utilisation:

1) Officers of the tax department are not fully aware of the provisions in the treaties and their use.
2) Tax officials are unaware of recent developments in the field of EOI.
3) Framing of requests needs improvement such that treaty partners are able to understand the request, while being devoid of any technical loopholes creating the possibility of request rejection.

Lack of awareness, lack of specialisation and inadequacy of human resources were pointed out as the main reasons for the inefficient use of EOI, opined the government official interviewed for this study.

The tax professionals interviewed by CBGA argued: "Requests for information are often unsuccessful due to the poor framing of these requests. While willing jurisdictions find it difficult to provide information due to vagueness of requests for information, it also provides opportunities to unwilling jurisdictions to find technical loopholes for not providing or delaying the requested information."

Along with vacancies, there are some other issues related to human resources. Citing reasons of irregularities in promotions and lack of basic infrastructure, the workers' union in the Indian tax department announced a nationwide strike in October 2015. These issues create a tense work environment, affecting work in the domains of domestic taxation as well as international cooperation.

Institutional Capacity

Mr. Sengupta commented that the Indian government is already in possession of large volumes of data, which it should strive to use meaningfully. He highlighted the need for specialised work force along with technical infrastructure. In his words, "The Indian Tax department needs more number of tax officials, but the need for a specialised work force is urgent too." This includes the induction of new officials as well as skill upgradation of the existing staff. Mr. Sengupta touched upon the need to use technology (like data mining) to extract 'actionable information' from large volumes of data.

Mr. Ranjan echoed the same sentiment regarding the fact that availability of data alone is not enough –finding 'actionable evidence' from the large volumes of available data is vital.

To address some of these concerns, CBDT has brought out manuals regarding the framework of EOI for sensitising tax officers working on the field. CBDT has also increased the number of training sessions, workshops and seminars for tax officers to make them aware of recent development and their skill upgradation.

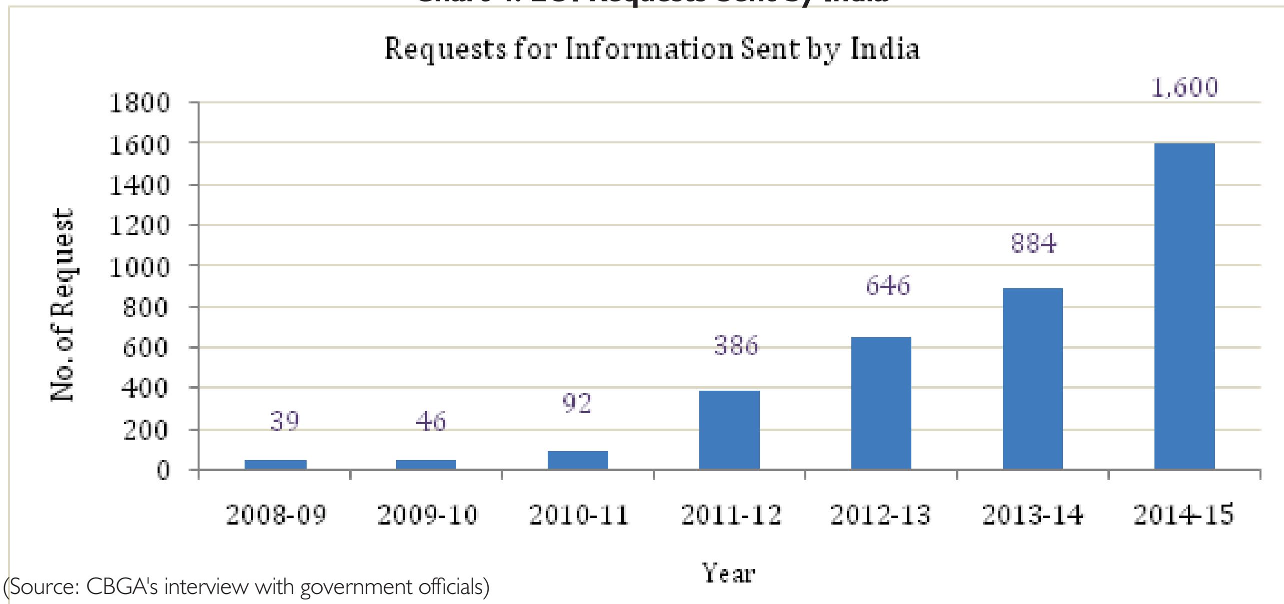
C. Assessment of Indian EOI Treaties impact

Evaluating the success of the EOI agreements is a complex issue as it deals with information which is not in the public domain, due to confidentiality provisions in the treaties. In this case, we combined publicly available data with the assessment from our panel.

[31] DNA India, October 2015
[32] Central Board of Direct Taxes, Government of India. 2015

The following chart depicts the number of requests sent by India to its treaty partners:

Chart 4: EOI Requests Sent by India



(Source: CBGA's interview with government officials)

From the chart, we can see a marked increase in the number of requests for information sent by India in the recent years. However, a government official interviewed by CBGA recommended that this number should be treated with caution as chances of duplication (especially in case of information requests sent out after the HSBC leaks) are high. Notwithstanding this concern, the number of requests being sent out by India and the use of exchange of information has certainly seen an upward trend.

The government official also stated that although the 90-day window period for responding to a request is generally adhered to, a few cases witness delay when the jurisdiction approached by India asks for further clarification regarding the request made. The information received through these requests is at different stages of investigation by the Indian tax authorities. Although there have been a few cases where the clarification sought was delayed or not provided from field officers, leading to the request for information not yielding any results, they were attributed to a lack of awareness and shortage of human resources. It was added that the situation is improving in this regard due to various measures taken by CBDT, such as training workshop and seminars.

Mr. Ranjan echoed this sentiment and remarked that sensitisation of tax officers was proving useful, and this could be one of the reasons behind the upward trend in the number of requests for information sent by India. He added that in the last few years, the rate of prosecution has certainly increased, even though the exact number is not in the public domain. Unavailability of data makes a quantitative assessment of the impact of EOI difficult.

Mr. Sengupta argued that only EOI is not sufficient by itself – rather, it is only an enabling mechanism for curbing IFFs. He opined that other aspects of the country should be taken into account as well, including the efficiency of the legal system, technical expertise of tax officers and the government's political will. He added that even with availability of relevant data, it would be useful only if it was to be exploited efficiently by the tax department and the legal system. He argued that while illicit flows between countries were receiving a lot of attention, tax evasion and avoidance within the country are probably bigger concerns, and can be dealt with by strengthening the tax administration in India.

The aspect of political will is crucial in this regard, as there is a strong possibility of vested interests hampering the progress made towards curbing IFFs. Tax professionals interviewed by CBGA argued that more often than not, individuals engaging in perpetuating illicit flows are politically well connected as well as monetarily influential, thereby making it harder for the concerned authorities to act against them. In this regard an effective drive against domestic tax evasion will signify the effectiveness and the political will of the government which should prove to be a strong deterrent for IFFs at the international level as well.

In conclusion, Mr. Ranjan was of the opinion that although EOI agreements have been used for a few decades now, the focus on and awareness regarding the practical uses of EOI are rather recent. India signing the Multilateral Competent Authority Agreement and becoming an early adopter of Automatic Exchange of Information are also a few steps forward towards strengthening Exchange of Information.

IV. Recommendations for Other Developing Countries

In the previous sections we assessed the role and impact of EOI agreements from an Indian perspective, based on which we list a few recommendations for other developing countries on the subject of exchange of information.

1. Nature of Agreements

- Jurisdictions should strive for signing the agreement for Automatic Exchange of Information, as that would address the hurdles posed by EOI upon request to a large extent.
- Jurisdictions should strive for collecting data for all account holders and make such data available to concerned authorities to aggregate it into 'totals' by country of residence, without identifying any individual or entity account holder to be able to show the size of assets and number of accounts held by residents from each jurisdiction of the place. Such an exercise would help in having reliable data on the size and composition of offshore financial markets, see the changes over time, and reveal avoidance schemes and other strategies to avoid reporting of information. The concerns over confidentiality too, do not arise in this case.
- Countries and jurisdictions should also attempt to strengthen the number and nature of their Exchange of Information Upon Request agreements with partner jurisdictions, and include necessary clauses which eliminate the scope for withholding the requested information.

2. Implementation Requirements

- Countries should ensure adequate number of skilled and specialized personnel at their tax departments. Tax officials working on EOI should be able to frame effective requests, examine the available information, extract 'actionable evidence' from the data available to them and follow the developments on policy fronts.
- Jurisdictions should strive to institutionalise technical expertise. In the absence of a well-functioning institutional set-up, the success of implementation of procedures often runs the risk of being excessively dependent on individual officials. In case these individual officials are transferred or promoted, continuation of work suffers. To avoid this, expertise on these issues has to be institutionalised.
- Countries should endeavor to have efficient physical infrastructure in place to enable exchange of information with treaty partners in a timely and effective manner, timely transmission of information to concerned office-bearers, safeguarding the information from unauthorised use, and the optimum exploitation of information received.
- A well-functioning domestic legal system is required to operationalise EOI. A legal system has to be such that it is able to penalise evaders in a just, effective and timely manner, thus creating a strong deterrent effect on potential evaders.

Given that these requirements cannot be fulfilled either solely by developing countries on their own or in a short period of time, these countries need to continue to strive to build capacity. The Global Forum, along with a select group of developed countries, is willing to help developing countries on building capacity. India too, is willing to set up a regional centre which could play a mentoring role for SAARC countries[33]. Developing countries, along with taking advantage of such existing initiatives, need to push for more such platforms and capacity building assistance for physical infrastructure and technical know how.

However, there is also a dynamic process between signing agreements and increasing capacity. From India's experience, it can be noted that the number of agreements signed with partner countries increased since 2009, which led to India prioritizing building domestic capacity in this domain. Developing countries therefore should maintain focus on signing agreements for Exchange of Information –which would simultaneously also lead to building capacity.

A number of factors could have contributed to the significant increase in the number of agreements being signed by India in the recent years. Since 2009, the attention paid by the Indian political leadership to illicit wealth (referred to as 'black money' in India) spurred the initiative to curb illicit wealth and further generation of illicit income in the country. India's membership of the G20 also plays a crucial role in the acceptance of India as a part of the international processes led by the G20. India's status as a G20 member as well as its geopolitical position has helped India gain access to treaties with a number of countries, while spontaneously compelling the country to reprioritise its capacity building efforts towards EOI.

While India's geostrategic position may have helped the country with EOI and AEOI, there needs to be a discussion regarding factors that could enable developing countries which are not members of the G20 to adopt EOI and AEOI.

[33] South Asian Association for Regional Cooperation (SAARC) is an economic and geopolitical organisation of eight countries that are located in South Asia. Member countries include Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

V. Concluding Remarks

Exchange of information arrangements are getting increased prominence as a tool to curb illicit financialflows across the world. While several countries are engaging in bilateral treaties for EOI, Global Forum has created a multilateral platform for exchanging information and setting standards, as well as building capacity for developing countries. With Automatic Exchange of Information being adopted by around 100 countries by 2018, the focus on Exchange of Information arrangements will continue to increase.

The current standard for EOI recommended by the Global Forum has been evaluated, and the following concerns need to be addressed:

- In the absence of beneficial ownership registries, accounts may be held anonymously and thus not be identified.
- The exclusion of non-financial assets leaves a substantial portion of wealth out of the purview of exchange of information.
- Accounts that were opened before 2016 and those with account balance below a certain threshold are not required to be reported.
- Automatic Exchange of Information would be operationalised by exchanging information between countries on a fixed day during the year, and this loophole could potentially be exploited.

Furthermore, developing countries have expressed concern regarding the implementation and compliance of these arrangements on the basis on required capacity. During our study, we noted the hurdles India faced on the count of human resources and technical capacity. While India is striving to address these issues, it continues to learn from its engagement with bodies such as the Global Forum, as well as its own experiences.

An assessment of the impact of these arrangements in developing countries could be carried out, to map the loopholes and consequently solution could be identified to enable effective implantation of Exchange of Information agreements and Automatic Exchange of Information.

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