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Joint Standing Committee on Treaties
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Submission on the Convention on Mutual Administrative Assistance in Tax Matters

The Tax Justice Network Australia welcomes this opportunity to make a submission on the *Convention on Mutual Administrative Assistance in Tax Matters.* The Tax Justice Network Australia urges the Joint Standing Committee on Treaties to recommend that Australia ratify the Convention. While far from perfect, the Convention contains many features that are significant improvements on the system of Tax Information Exchange Agreements based on the OECD 2002 model. Specifically, the Convention is a welcome and long overdue step towards building a multilateral system of automatic information exchange between jurisdictions to curb large scale tax evasion. Hopefully it will increase the pressure on secrecy jurisdictions to end their legal regimes that facilitate the transfer and concealment of funds from tax evasion and other illicit flows.[1]

The Tax Justice Network Australia requests that the Joint Standing Committee on Treaties recommends the Australia Government support developing countries being invited to join the Convention when they request to do so.

The Tax Justice Network Australia welcomes the intention of the Australian Government not to make any reservations in relation to the Convention.

Background on the Tax Justice Network Australia
The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN). 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

[1] While many 'secrecy jurisdictions' are also defined as 'tax havens', the definitions of the two are different. The Australian Taxation Office is now also using the language of 'secrecy jurisdictions', and has indicated a particular focus on Vanuatu, Liechtenstein, Switzerland, Panama, Samoa and the Channel Islands.

The Tax Justice Network defines of a secrecy jurisdiction is in three parts. Firstly, secrecy jurisdictions are places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain. It must deliberately create laws that wholly or mainly relates to activities that take place 'elsewhere' as far as it is concerned.

Secondly, a secrecy jurisdiction deliberately designs the regulation they create for use by people who do not live in their territories so that it undermines the legislation or regulation of another jurisdiction.

Thirdly, the secrecy jurisdiction creates a deliberate, legally backed veil of secrecy that ensures those from outside the jurisdiction making use of its regulation cannot be identified to be doing so. While all three of these characteristics must be present for a state to be considered a secrecy jurisdiction, this third characteristic is the most important.

and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels.

The Tax Justice Network aims to:
(a) promote sustainable finance for development;
(b) promote international co-operation on tax regulation and tax related crimes;
(c) oppose tax havens;
(d) promote progressive and equitable taxation;
(e) promote corporate responsibility and accountability; and
(f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Anglican Overseas Aid
- Australian Education Union
- Baptist World Aid Australia
- Caritas Australia
- Columban Mission
- Global Poverty Project
- Jubilee Australia
- Oaktree Foundation
- National Tertiary Education Union
- Social Justice Around the Bay
- Synod of Victoria and Tasmania, Uniting Church in Australia
- TEAR Australia

Comments on the *Convention on Administrative Assistance in Tax Matters*

The Tax Justice Network has been concerned at how easy it has been for multinational companies and wealthy individuals to evade tax by shifting money offshore, hidden from domestic tax authorities. This means either other tax payers need to pay more or governments have less revenue to provide services for their populations. The following comments on the *Convention on Administrative Assistance in Tax Matters* are drawn from the Tax Justice Briefing on the Convention from February 2012 prepared by Markus Meinzer of the TJN International Secretariat.

Existing Tax Information Sharing Mechanisms

There already exist various bilateral and multilateral information-sharing mechanisms, each with their own strengths and weaknesses. Under the *EU Savings Tax Directive* participating countries automatically share all relevant information with each other. This treaty is reported to work well in reducing tax evasion by European citizens in relation to participating countries.[2]

Many bilateral treaties, usually Tax Information Exchange Agreements (TIEA), are weaker and usually involve 'on request' or 'on demand' information exchange, where information about particular tax payers is only provided after a specific request. The countries that currently have a TIEA with Australia are:[3]

1. Andorra
2. Anguilla
3. Antigua and Barbuda
4. Aruba *
5. Bahamas
6. Bahrain

[2] Nicholas Shaxson, 'Treasure Islands. Tax havens and the men who stole the world', The Bodley Head, 2011, p. 280.
[3] http://www.ato.gov.au/businesses/content.aspx?doc=/content/00161158.htm

7. Belize
8. Bermuda
9. British Virgin Islands *
10. Cayman Islands
11. Cook Islands *
12. Costa Rica
13. Dominica
14. Gibraltar
15. Grenada
16. Guernsey *
17. Isle of Man *
18. Jersey *
19. Liberia
20. Liechtenstein
21. Macao
22. Marshall Islands *
23. Mauritius *
24. Monaco
25. Montserrat
26. Netherlands Antilles
27. Samoa *
28. San Marino
29. St. Kitts & Nevis
30. St Lucia
31. St Vincent and the Grenadines
32. Turks and Caicos Islands
33. Vanuatu

* These countries have signed an Agreement for the Allocation of Taxing Rights with Respect to Certain Income of Individuals with Australia.

Positive Aspects of the *Convention on Administrative Assistance in Tax Matters*

The TJN-Aus is of the view that the *Convention on Administrative Assistance in Tax Matters* embodies a number of legal improvements over TIEAs. Its multilateral nature is an important improvement over the bilateral processes that dominate the field of cross-border information exchange. It is also much broader than most TIEAs: providing differing mechanisms for exchanging information ('on request', 'spontaneous' and 'automatic' information exchange) and allows for joint tax audits of multinational corporations. This may be particularly useful for developing countries struggling to untangle complex multi-jurisdictional tax structures.

Other positive aspects of the Convention include:

- State parties to the Convention can reserve against assistance only in some types of taxes, but those mentioned under Article 2.1.a cannot be reserved against. Article 30.1.a and Article 30.2 in combination prevent state parties from reserving against any taxes mentioned under Article 2.1.a, that is, against not cooperating in centrally levied taxes on profits and income, capital gains and net wealth. This limit on reservations may act as a strong dividing device between those jurisdictions willing to give up their tax haven activities for improved international cooperation and those not willing to do so.

- The Convention prevents a state party from categorically reserving against automatic information exchange (covered in Article 6) and spontaneous information exchange (covered in Article 7), by provisions in Article 30.1 and 30.2.

- Generally speaking, the 'upon request' mode of information exchange contained in the Convention establishes a lower threshold for requesting information than under an OECD 2002 TIEA. The OECD based TIEAs require that the requesting jurisdiction effectively has to

know in advance what it is looking for before it makes the request. The OECD model TIEA's Article 5, Paragraph 5, states that the information sought from a treaty partner must be "foreseeably relevant"; and sub-paragraphs (a) to (e) of the TIEA impose daunting obligations on the requesting state.[4] These require the requesting jurisdiction to provide:

> *(a) the identity of the person under examination or investigation;*
> *(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;*
> *(c) the tax purpose for which the information is sought;*
> *(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party; and*
> *(e) to the extent known, the name and address of any person believed to be in possession of the requested information.*

These represent powerful deterrents against making requests. The Convention contains nothing like this level of hurdles. The absence of a requirement to explain the tax situation or to provide an initial lead about where to look for the data appears to make the Convention significantly stronger than the OECD 2002 model TIEA.

- With regards to the obligation to provide relevant data when requested, the Convention contains similar language to the UN model tax convention and the OECD model double tax treaty, as well as the OECD's 2002 model TIEA.

- Developing countries trying to counter transfer mispricing by multinational companies have often been thwarted by lack of cooperation with other countries. For example, several African countries that sought to investigate allegations of transfer mispricing and other forms of tax dodging raised in relation to SABMiller by ActionAid[5] have been unable to due to the lack of a multilateral instrument. The Convention's Articles 8 and 9 could, in theory, answer such a need and it is desirable for Australia to help develop such a global norm.

- The requirement of Article 6 for automatic information exchange, combined with the inability to reserve against this Article, means the Convention clearly asserts that automatic information exchange is a standard feature of effective tax cooperation. In this respect the multilateral Convention is a significant advance on both the OECD's model Double Tax Treaty and 2002 model TIEA, neither of which mention automatic exchange of information.

  However, the qualification about agreeing categories of cases and procedures casts doubt on the practical implications of Article 6. Further, given the unspecified nature of automatic information exchange, there is a risk that any bilateral arrangements to automatically exchange information can be easily circumvented by taxpayers through the interposition of third party legal entities and arrangements. So it remains open to question as to how far this Article will provide for effective, multilateral automatic information exchange.

- A significant advantage of the Convention over its alternatives is that it allows for multilateral sharing of information, in Article 22.4:

  > *Information provided by a Party to another Party may be transmitted by the latter to a third Party, subject to prior authorisation by the competent authority of the first-mentioned Party.*

  In contrast, the OECD 2002 model TIEA establishes a more demanding threshold for forwarding information in Article 8:

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[4] OECD Agreement on Exchange on Information on Tax Matters, http://www.oecd.org/dataoecd/15/43/2082215.pdf

[5] ActionAid, "Calling Time. Why SABMiller should stop dodging taxes in Africa", November 2010, updated April 2012, http://www.actionaid.org.uk/doc_lib/calling_time_on_tax_avoidance.pdf

The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Similarly, the sharing of this information with other state agencies, such as financial intelligence units or police, appears easier under the Convention (Article 22.4) than under the OECD model TIEA. While the provision of TIEAs requiring an "express written consent" relates to sharing or information with any other but the tax authorities in the respective state, the Convention is more admissive. If a state allows domestically the use of tax related information for other purposes, the competent authority may authorise a party to the Convention to do the same (Article 22.4). This may be an important tool for combating money laundering and corrupt practices.

- The TJN-Aus welcomes Article 10 of the Convention, regarding reporting of conflicting information to the senders of the piece of information is likely to reduce errors and foster co—operation across borders.

- The TJN-Aus welcomes the fact the Convention contains safeguards against its provisions being abused by a party for the purposes of persecution or human rights abuse of individuals or groups. These safeguards are included in Articles 21.1, 21.2(b) and 21.2(d) and Commentary to the Convention Paragraphs 206 and 223.

Shortcomings of the Convention

The Convention is undermined by the fact secrecy jurisdictions (whose legal frameworks often facilitate tax evasion by foreign tax payers) face little or no incentive to adhere to it, and it is unclear whether the Convention will require secrecy jurisdictions to obtain the information that needs to be exchanged.

In addition, there are no mechanisms for assessing how well the Convention is performing in practice, and consequently no evidence as to how well it performs. There is no provision to encourage wealthier countries to bear more of the costs involved in complying with the Convention.

The TJN would also have strongly preferred to see the UN as the appropriate forum for advancing international tax cooperation, instead of the OECD.

The Convention places the location of the coordinating body "under the aegis of the OECD" (Article 24.3), which excludes developing countries from having a voice. Solutions to any potential conflicts under the Convention risk being biased towards OECD interests. In addition, the coordinating body's role of initiating new actions and methods in the field of international tax cooperation represents an inappropriate claim of growing authority for the OECD that goes well beyond the current legal scope of the Convention. The Convention extends an unjustified amount of influence to the future of international tax cooperation. A failure to refer to the UN is of particular concern in this respect.

Disappointingly, the Convention's Article 21.2.a and 21.2.c restrict the obligation to be able to obtain relevant information. A state party is not required "to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice". By contrast, the OECD 2002 model TIEA, contains additional language with respect to the capacity to obtain relevant data. The OECD's 2002 model TIEA obliges states to be able to obtain information held by banks as well as ownership information on persons and arrangements (TIEA Article 5.4). That specifically includes information on persons such as settlors, trustees and beneficiaries of trusts, foundations and Anstalt. In this respect, the Convention is weaker than the model TIEAs.

The reason for this language would appear to be that the model TIEA is aimed specifically at secrecy jurisdictions, which necessitates the inclusion of such a provision. States joining the multilateral Convention are assumed to have domestic taxes including income tax, and to have powers to obtain information to enforce those taxes, and are obliged to use those powers to assist others. The implications for a secrecy jurisdiction without income tax joining the Convention are therefore uncertain.

The TJN-Aus is concerned invitation to join the Convention for countries outside of the Council of Europe and the OECD "may also consider whether the State concerned is a member of the Global Forum on Transparency and Exchange of Information" (Convention Commentary, Paragraph 303). The Global Forum is the body that promotes and reviews the implementation of the OECD's tax information exchange standards. Implementation of these standards, while weak and riddled with loopholes, nevertheless imposes substantial costs on developing countries without obvious direct benefits to them.[6] Developing countries joining in the Global Forum may have to make substantial and costly changes in their internal laws and regulations to comply with the standards. Compliance may not be a priority for a developing country because the standards review to what extent a country requires the collection of, can access and exchange information about non-resident investors, rather than for the purpose of assessing its own taxpayers. Even if a developing country is not host for large tax-evading foreign financial investments, it would still be required to prioritise access to information in the same way as required of secrecy jurisdictions. So if a developing country wishes to reap the benefits of information exchange under the Convention but is first required to become a member of the Global Forum, it risks diverting scarce resources to implement the obligations under the Global Forum. These may be materially irrelevant to improving the taxation of its citizens and corporations. Thus, TJN-Aus would urge that Australia support developing countries being invited to join the Convention when they request to do so.

Thank you for the opportunity to provide comments on the Convention and convey our endorsement of Australia's intention to ratify the Convention.

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[6] Markus Meinzer, "The Creeping Futility of the Global Forum's Peer Reviews", Tax Justice Briefing, Tax Justice Network International Secretariat, March 2012.