

# INTERNATIONAL COOPERATION IN TAX MATTERS: A GAP ANALYSIS OF THE LEGAL INSTRUMENTS FRAMEWORK OF GHANA, NIGERIA AND SOUTH AFRICA

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## Abstract

Illicit financial flows (IFFs) strip essential resources from developing countries, which could be used to foster development. International tax evasion constitutes one major source of IFFs out of developing countries. This problem, being global by nature, resulted in an unprecedented peak in global tax cooperation with a creation of global infrastructure to jointly fight IFFs resulting from tax aversion. Although this global cooperation covers various aspects, one main element is the consensus that transparency is an important antidote. Vast amounts of resources are allocated to global exchange of information for tax purposes between countries. There are additional efforts to broaden the scope for which the information exchanged can be used so that not only tax authorities can benefit from the information received (so-called inter-agency cooperation). Additionally, one can see an increase in the cross-border assistance in the collection of taxes. However, for various reasons many developing countries are benefiting from the increased global tax cooperation in a limited way. Accordingly, this chapter focuses on the global tax cooperation mechanisms implemented by Ghana, Nigeria and South Africa with regards to (i) global transparency; (ii) inter-agency cooperation; and (iii) the cross-border assistance in the collection of taxes. It provides a gap analysis with regard to the embeddedness of the respective countries into bi- or multilateral frameworks. Based on the results of the gap analysis, recommendations are given on how to improve the benefits of the increased global tax cooperation in respect of Ghana, Nigeria and South Africa.

## 1 Introduction

Governments around the globe are joining forces to combat illicit financial flows (IFFs) with special attention being given to the position of developing countries. While IFFs occur and are damaging in all countries, their impact are more severe in developing countries due to their limited resource base and smaller, less stable markets. Estimates on the exact volume of IFFs are heavily debated and vary greatly. However, in these debates there is general consensus that each year large amounts of money

are transferred illegally out of developing countries, likely exceeding inbound aid and investment flows in volume.

There is further consensus that the IFFs strip essential resources from developing countries, which could otherwise be utilised to finance public infrastructure and services in education, health, security and justice, with a decelerating effect on development. Various definitions are used for IFFs, which in essence can be summarised as ‘methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws’.<sup>1</sup> International tax evasion constitutes a major source of illicit financial flows from developing countries. As capital – be it from individuals or companies – has become more mobile, all countries on equal footing are dealing with new international challenges, such as the tracing of offshore assets; how to tax multinational enterprises adequately; building effective transfer pricing regimes; establishing and using information sharing arrangements to obtain tax information about taxpayers from other countries; and how to use this information most effectively. These challenges, being global by nature, resulted in an unprecedented peak in global tax cooperation with a creation of global infrastructure to jointly fight IFFs resulting from tax aversion. Although this global cooperation covers various aspects, one major element is the agreement that transparency is the antidote. Since the primary goal of IFFs is to hide funds from governments, vast amounts of resources are allocated to the global exchange of information for tax purposes between countries. There are additional efforts to broaden the scope for which the information exchanged can be used so that not only tax authorities can benefit from the information received (so-called inter-agency cooperation). Additionally, one can see an increase in the cross-border assistance in the collection of taxes.

Developing countries are included in the discussions and can benefit from this global momentum in cooperation. Strikingly, however, many developing countries are only utilising and benefiting from the increased global tax cooperation in a limited way. They rarely use the global infrastructure that now exists to request information on companies and wealthy individuals, to share the information exchanged with other government agencies or request assistance in the cross-border collection of taxes.<sup>2</sup> The reasons are diverse, for instance, the lack of a legal basis; the lack of awareness of tax administrations of the potential benefits of global cooperation; or simply a lack of knowledge about the implementation of

1 OECD *Illicit financial flows from developing countries: Measuring OECD responses* (2014), [https://www.oecd.org/corruption/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries.pdf](https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf) (accessed 10 November 2016).

2 Global Financial Integrity *Illicit financial flows: The most damaging economic condition facing the developing world* (2015) 132, <http://www.gfintegrity.org/wp-content/uploads/2015/09/Ford-Book-Final.pdf> (accessed 10 November).

required means to enable tax cooperation.<sup>3</sup> However, the argument commonly brought forward about the lack of capacity and bargaining power to include instruments in relevant treaty negotiations no longer is a valid excuse, since multilateral instruments for the exchange of information are now readily available, which developing countries can adhere to without the need to negotiate individually with other states. However, it still is not being utilised sufficiently.

## 1.1 Aim of the research

All these limitations seem abstract without placing them into an actual country's framework. Hence, this chapter focuses on the global tax cooperation mechanisms implemented by Ghana, Nigeria and South Africa with regard to (i) global transparency; (ii) inter-agency cooperation; and (iii) the cross-border assistance in the collection of taxes. It provides a gap analysis with regard to the embeddedness of the respective countries into bi- or multi-lateral frameworks. However, this chapter does not cover national law mechanisms. Based on the results of the gap analysis, the aim is to develop recommendations on how to improve the benefits of the increased global tax cooperation for Ghana, Nigeria and South Africa. The first part provides a general overview of the range of the bi- and multi-lateral frameworks of each country. Thereafter, the second part conducts the gap analysis on the three aspects, namely, global transparency, interagency cooperation and the cross-border assistance in the collection of taxes. Based on the conclusions of the gap analysis, the last part provides some recommendations.

## 2 Network of global tax cooperation partners

In order to utilise the new global infrastructure in international cooperation in tax matters, developing countries need to have in place an adequate framework. First, a legal basis is required for doing so, which can be included in a bilateral or a multilateral framework. Second, it is important that the framework covers all relevant countries that constitute trading partners and wealth management centres.

### 2.1 Bilateral framework

A bilateral framework would require tax treaty partners to incorporate administrative assistance provisions, such as an exchange of information article in their relevant double tax treaty (DTT). The disadvantage of solely relying on such a provision in a bilateral tax treaty is that they might not

3 Tax and Development *Practical guide on exchange of information for developing countries, ATAF and OECD* (2012), <http://www.g20dwtg.org/documents/pdf/view/306/> (accessed 10 November 2016).

represent international standards due to pressure in the process of negotiations. Additionally, as international standards on global cooperation are over time steadily refined and changed, a bilateral provision needs to be renegotiated in order to reflect the 'state of the art'.

Since developing countries may not have the capacity, negotiation skills or bargaining power, the clauses might be outdated and restrictive, not exhausting the whole potential of the global cooperation. Another bilateral instrument is the conclusion of tax information exchange agreements (TIEA), which have a material scope of only covering the provision of information exchange. However, since these instruments are bilateral, again they require resources and the willingness of third countries to conclude such agreements with developing countries. Hence, multilateral instruments in this regard are far more beneficial, since harmonised wording applies to a wide network of treaty partners with no need for individual negotiations by the developing country.

## 2.2 Multilateral framework

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters constitutes such multilateral framework. It's 'birth' resulted from the work carried out jointly by the Council of Europe and by the Organisation for Economic Co-operation and Development (OECD). It constitutes one of the most ambitious and comprehensive endeavours for cross-border tax cooperation and originally was opened for signature only to members of the Council of Europe and the OECD as of 25 January 1988.<sup>4</sup>

The Convention was amended according to the call of the G20 at its 2009 London Summit to harmonise it to the international standard on exchange of information on request included in article 26 of the 2008 OECD Model Tax Convention. It is understood that the EoI provisions of the Convention, as amended by the 2010 Protocol (amended Convention), are generally given the same interpretation as that expressed in the OECD Commentary thereon.<sup>5</sup> Furthermore and, more importantly, the amending protocol opened the Convention to all interested countries, with the rationale to ensure in particular that developing countries could benefit from the new more transparent and cooperative environment. On 1 June 2011 the amended Convention was ready for signature.<sup>6</sup> A non-OECD or

4 See [http://www.oecd.org/ctp/exchange-of-tax-information/Explanatory\\_Report\\_ENG\\_%2015\\_04\\_2010.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf) (accessed 10 October 2016).

5 See [http://www.oecd.org/ctp/exchange-of-tax-information/Explanatory\\_Report\\_ENG\\_%2015\\_04\\_2010.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf) (accessed 10 November 2016); OECD 'Preface' in *The multilateral convention on mutual administrative assistance in tax matters: Amended by the 2010 Protocol* (2011) <http://dx.doi.org/10.1787/9789264115606-1-en> (accessed 10 November 2016).

6 See <http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> (accessed 10 November 2016).

non-Council of Europe member wishing to join the amended Convention must address the Secretary-General of the OECD or of the Council of Europe. The decision to invite a requesting country to become a party to the Convention will be taken by consensus by the parties through the coordinating body. The decision will be based on several factors, taking into account, *inter alia*, the confidentiality rules and practices of the country concerned and whether the country is a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.<sup>7</sup> As of 26 September 2016, 104 jurisdictions participate in the amended Convention. This covers a wide range of different countries, including all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries.<sup>8</sup>

### **2.3 Outreach to trading partners and wealth management centres**

A treaty network – be it bi- or multi-lateral – that facilitates cross-border cooperation in tax matters with all relevant trading partners of a country is very valuable, since it can help in circumstances of tax audits on cross-border activities; transfer pricing issues; the transfer of knowledge with regard to special industry practices; or to share strategic information on VAT evasion schemes. Additionally, since high net worth private individuals often use offshore global wealth management centres for the management of their funds, a treaty network covering the classical wealth management hubs is also important. The biggest global wealth management centres currently comprise of Switzerland, the United Kingdom (UK), the United States (US), Panama and the Caribbean, Hong Kong and Singapore.<sup>9</sup> Although Switzerland still constitutes the biggest wealth management hub, Hong Kong has achieved a growth of 146 per cent (±US \$0.4 trillion) in cross-border client assets during the period between 2008 to 2014 and, hence, has the biggest amount of inflows of new assets – more inflows than any other centre.<sup>10</sup> Below, one can find an overview of the outreach of the global tax cooperation partners of Ghana, Nigeria and South Africa.

7 See [http://www.oecd.org/ctp/exchange-of-tax-information/Process\\_to\\_Become\\_a\\_Party\\_to\\_the\\_Amended\\_Convention.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/Process_to_Become_a_Party_to_the_Amended_Convention.pdf) (accessed 10 November 2016).

8 See [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (accessed 10 November 2016).

9 Descending order with regard to volume of assets under management based on the Deloitte Wealth Management Centre Ranking 2015, <https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/financial-services/ch-en-financial-services-the-deloitte-wealth-management-centre-ranking-2015.pdf> (accessed 8 November 2016).

10 Deloitte Wealth Management Centre Ranking (n 9 above) 2

### 2.3.1 Ghana

Ghana has a market-based economy with relatively few policy obstacles to trade and investment in comparison with other countries in the region. Ghana is a commodity-exporting country as it is equipped with natural resources and has a strong agricultural sector. Agriculture accounts for nearly one-quarter of gross domestic product (GDP), and the services sector accounts for about half of the GDP. Gold and cocoa exports, as well as individual remittances, are major sources of foreign exchange. The expansion of Ghana's nascent oil industry has boosted economic growth, but the recent crash in the oil price reduced by half Ghana's 2015 oil revenue.<sup>11</sup> Ghana's main export and import commodities and partners are summarised in Table 6.1 below.

**Table 6.1: Ghana's Import and Export Commodities and Partners**

<b>Imported commodities</b>	Capital equipment; refined petroleum; foodstuffs
<b>Import partners</b>	China 32.6%; Nigeria 14%; Netherlands 5.5%; US 5.4% (2015)
<b>Exported commodities</b>	Oil; gold; cocoa; timber; tuna; bauxite; aluminium; manganese ore; diamonds; horticultural products
<b>Export partners</b>	India 25.2%; Switzerland 12.2%; China 10.6%; France 5.7% (2015)

Source: World Factbook – Central Intelligence Agency (2016).

With regard to its global tax cooperation partners, Ghana only has a limited treaty network in place. Currently, with only nine DTTs in force, the treaty network covers Belgium, Denmark, France, Germany, Italy, Netherlands, Switzerland, the United Kingdom and South Africa. Ghana further has concluded one tax information exchange agreement (TIEA) with Liberia.<sup>12</sup> As a major step forward, on 10 July 2011 Ghana signed the amended Convention on Mutual Administrative Assistance in Tax Matters with entry into force on 1 September 2013. Participation in the Convention significantly broadened Ghana's framework of global tax cooperation partners, since the Convention currently covers the participating countries listed in Box 6.1.<sup>13</sup>

11 For more information on Ghana's economy, see <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/gh.html> (accessed 7 November 2016).

12 See List of recent exchange of information agreements <http://www.oecd.org/ctp/harmful/43775845.pdf> (accessed 10 October 2016).

13 See [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (accessed 10 October 2016).

**Box 6.1: Participating countries in the Convention on Mutual Administrative Assistance in Tax Matters**

Albania; Andorra\*\*, Anguilla; Argentina; Aruba; Australia; Austria; Azerbaijan; Barbados; Belgium; Belize; Bermuda; Brazil; British Virgin Islands; Bulgaria; Burkina Faso\*; Cameroon; Canada; Cayman Islands<sup>5</sup>; Chile; China (People's Republic Of); Colombia; Costa Rica; Croatia; Curaçao; Cyprus; Czech Republic; Denmark; Dominican Republic\*; El Salvador\*; Estonia; Faroe Islands; Finland; France; Gabon\*; Georgia; Germany; Ghana; Gibraltar; Greece; Greenland; Guatemala\*; Guernsey; Hungary; Iceland; India; Indonesia; Ireland; Isle Of Man; Israel\*; Italy; Jamaica\*; Japan; Jersey; Kazakhstan; Kenya\*; Korea; Latvia; Liechtenstein\*\*; Lithuania; Luxembourg; Malaysia\*; Malta; Mauritius; Mexico; Moldova; Monaco\*; Montserrat; Morocco\*; Nauru; Netherlands; New Zealand; Nigeria; Niue; Norway; Pakistan\*; Panama\*; Philippines\*; Poland; Portugal; Romania; Russia; Saint Kitts And Nevis\*\*, Saint Vincent And The Grenadines\*\*, Samoa\*\*, San Marino; Saudi Arabia; Senegal\*\*; Seychelles; Singapore; Sint Maarten; Slovak Republic; Slovenia; South Africa; Spain; Sweden; Switzerland\*\*; Tunisia; Turkey\*; Turks & Caicos Islands; Uganda; Ukraine; United Kingdom; United States\*; Uruguay\*\*

Notes:

\*) signed but not in force;

\*\*\*) signed and entry into force latest by 1 January 2017.

Source: [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (accessed 10 October 2016).

Accordingly, Ghana's bi- and multi-lateral framework of global tax cooperation partners generally covers its main import and export partners.<sup>14</sup> With regard to global wealth management centres, Ghana's global tax cooperation network covers Switzerland, the United Kingdom, some of the Caribbean islands and Singapore. However, since the United States and Panama have not ratified the amended Convention yet and Hong Kong is not participating so far, Ghana's treaty network does not cover these countries/regions.

### 2.3.2 Nigeria

Nigeria constitutes Africa's largest economy, with 2015 GDP estimated at USD1.1 trillion. Nigeria is a commodity-exporting country with a strong

14 With the exception of the United States, since it signed the Convention but ratification is still open.

agricultural sector. Oil has been a dominant source of income and has constituted approximately 70 per cent of government revenues since the 1970s. Over the last five years, Nigeria's economic growth has been driven in the sectors of agriculture, telecommunications and services. Due to regulatory constraints and security risks, only limited new investment in oil and natural gas has taken place and Nigeria's oil production has contracted every year since 2012. Because of lower oil prices, GDP growth in 2015 fell to around 3 per cent, and government revenues declined, while the non-oil sector also contracted due to economic policy uncertainty.<sup>15</sup> In Table 6.2 Nigeria's main export and import commodities and partners are summarised.

**Table 6.2: Nigeria's Import and Export Commodities and Partners**

<b>Imported commodities</b>	Machinery; chemicals; transport equipment; manufactured goods; food and live animals
<b>Import partners</b>	China 25.7%; US 6.4%; Netherlands 6.1%; India 4.3% (2015)
<b>Exported commodities</b>	Petroleum and petroleum products 95%; cocoa; rubber (2012 est)
<b>Export partners</b>	India 18.2%; Netherlands 8.5%; Spain 8.2%; Brazil 8.2%; South Africa 7.8%; France 5.2%; Japan 4.5%; Côte d'Ivoire 4.2%; Ghana 4% (2015)

Source: World Factbook – Central Intelligence Agency (2016).

With regard to its global tax cooperation partners, Nigeria only has a limited treaty network in place. Currently, with only 14 DTTs in force, the treaty network covers Belgium, Canada, China, Czech Republic, France, Netherlands, Romania, Slovak Republic, South Africa, Spain, Sweden and the United Kingdom. As a major step forward, on 29 May 2013 Nigeria signed the amended Convention on Mutual Administrative Assistance in Tax matters with entry into force on 1 September 2015. Participation in the Convention significantly broadened Nigeria's framework of global tax cooperation partners, since the Convention covers multiple countries. Nigeria's bi- and multi-lateral framework of global tax cooperation partners generally covers its main import and export partners. With regard to global wealth management centres, Nigeria's global tax cooperation network covers Switzerland, the United Kingdom, some of the Caribbean Island States and Singapore. However, since the United States and Panama have not yet ratified the amended Convention and

15 For more information on Nigeria's economy, see <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ni.html> (accessed 14 November 2016).



Hong Kong is not participating so far, Nigeria’s treaty network does not cover these countries/regions.

2.3.3 South Africa

South Africa is a middle-income emerging market well equipped with natural resources, well-developed financial, legal, communications, energy and transport sectors, and a stock exchange that is Africa’s largest and among the top 20 in the world. However, unemployment, poverty and inequality – among the highest in the world – remain a challenge. The current government faces growing pressure from urban constituencies to improve the delivery of basic services to low-income areas and to increase job growth.<sup>16</sup> South Africa’s main export and import commodities and partners may be summarised as follows:

**Table 6.3: South Africa’s Import and Export Commodities and Partners**

<b>Imported commodities</b>	Machinery and equipment; chemicals, petroleum products; scientific instruments; foodstuffs
<b>Import partners</b>	China 17.6%; Germany 11.2%; US 6.7%; Nigeria 5%; India 4.7%; Saudi Arabia 4.1% (2015)
<b>Exported commodities</b>	Gold; diamonds; platinum; other metals and minerals; machinery and equipment
<b>Export partners</b>	China 11.3%; US 7.3%; Germany 6%; Namibia 5.2%; Botswana 5.2%; Japan 4.7%; UK 4.3%; India 4.2% (2015)

Source: World Factbook – Central Intelligence Agency (2016).

With regard to its global tax cooperation partners, South Africa has in place an extensive treaty network. Currently, with 76 DTTs in force, the treaty network covers the countries listed in Box 6.2.

16 For more information on South Africa’s economy, see <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/sf.html> (accessed 14 November 2016).

### **Box 6.2: South Africa's Treaty Network**

Algeria; Botswana; Brazil; Bulgaria; Canada; China; Democratic Republic of the Congo; Croatia; Cyprus; Czech Republic; Denmark; Egypt; Ethiopia; Finland; France; Germany; Ghana; Grenada; Greece; Hong Kong; Hungary; India; Indonesia; Iran; Ireland; Israel; Italy; Japan; Kenya; Korea (South); Kuwait; Lesotho; Luxembourg; Malawi; Malaysia; Malta; Mauritius; Mexico; Mozambique; Namibia; Netherlands; New Zealand; Nigeria; Norway; Oman; Pakistan; Poland; Portugal; Qatar; Romania; Russian Federation; Rwanda; Saudi Arabia; Seychelles; Sierra Leone; Singapore; Slovak Republic; Spain; Swaziland; Sweden; Switzerland; Taiwan; Tanzania; Thailand; Tunisia; Turkey; Uganda; Ukraine; United Kingdom; United States; Zambia; and Zimbabwe.

South Africa has further concluded three TIEAs with Cayman Islands, Guernsey and San Marino.<sup>17</sup> Additionally, on 3 November 2011, South Africa signed the amended Convention on Mutual Administrative Assistance in Tax matters with entry into force on 1 March 2014. Participation in the Convention further broadened South Africa's framework of global tax cooperation partners, since the Convention covers multiple countries. South Africa's bi- and multi-lateral framework of global tax cooperation partners generally covers its main import and export partners. With regard to global wealth management centres, South Africa's global tax cooperation network covers Switzerland, the United Kingdom, the United States, some of the Caribbean island states, Singapore and Hong Kong. Only Panama is not included, since Panama has not yet ratified the amended Convention.

## **3 The Gap Analysis on Global Tax cooperation Framework**

### **3.1 Global transparency**

The late US Justice Louis Brandeis famously stated that 'sunlight is the best disinfectant'. Correspondingly, an important mechanism for the elimination of tax avoidance and aversion is transparency. Transparency through the exchange of information on a global scale helps to avoid information asymmetries though enhancing a more transparent global tax footprint. Particularly for developing countries, it constitutes an important tool to inhibit the loss of revenues from assets held offshore or misrepresented cross-border activities. The G20 and the OECD's Global

17 See List of Recent Exchange of Information Agreements (n 12 above).

Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) were the driving forces to improve transparency through setting global standards for information-sharing around the world. As a result, the number of agreements on exchange of information between tax authorities and the scope of the exchange have steadily increased, incorporating also the agreements between OECD countries and developing countries.<sup>18</sup> The Global Forum became the venue for a peer review programme aimed at assessing the effective practical implementation of OECD transparency standards.<sup>19</sup> Action was taken against jurisdictions that fail to comply with the international standards of fiscal transparency, and the era of bank secrecy was declared extinct because of the new information exchange obligations. The international standard for the exchange of information upon request over time was gradually refined and now envisages information exchange to the widest extent possible, namely, that the information can relate to persons who are not resident in either contracting state, and it can cover information regarding taxes that are not covered by the tax treaty, such as VAT.<sup>20</sup> However, speculative requests for information with no apparent nexus to an open inquiry or investigation – so-called ‘fishing expeditions’ – are not permitted. This fine balance between broadness and the limit on ‘fishing expeditions’ was created by introducing the standard of ‘foreseeable relevance’ into article 26(1)<sup>21</sup> of the OECD and UN Model Tax Convention.<sup>22</sup>

### 3.2 Automatic exchange of information

Invited by the G20 countries, the OECD has recently developed what it refers to as the new single global standard for the automatic exchange of information (AEOI) between tax authorities globally. The OECD defines the AEOI as the systematic and periodic transmission of ‘bulk’ taxpayer information by the source country to the residence country in a common

18 OECD (n 1 above).

19 Statement of G8 Finance Ministers, Lecce, Italy, 13 June 2009: ‘We welcome progress in negotiations of agreements on the exchange of information for tax purposes. We urge further progress in the implementation of the OECD standards and the involvement of the widest possible number of jurisdictions, including developing countries. It is also essential to develop an effective peer-review mechanism to assess compliance with the same standards. This could be delivered by an expanded Global Forum. We also look forward to an update on progress on the G20 agreement to tackle tax havens at the next OECD Ministerial meeting.’ <https://www.treasury.gov/press-center/press-releases/Pages/tg171.aspx> (accessed 15 November 2016).

20 Para 7.2 UN Model: Commentary on Article 26 (2011) and para 5 OECD Model: Commentary on Article 26 (2014).

21 See Appendix A for the wording of art 26 of the UN Model (2011) and the OECD Model (2014).

22 The commentaries to art 26 OECD and UN Model Tax Convention additionally stipulate that the term ‘foreseeably relevant’ can be substituted with ‘necessary’, ‘relevant’ or ‘may be relevant’. These terms are equivalent to the international standard of the term ‘foreseeably relevant’, if those terms are understood to require an effective exchange of information and are understood to mean ‘appropriate and helpful’ but not ‘essential’; paras 7.1-7.2, UN Model: Commentary on Article 26 (2011).

reporting format or standard.<sup>23</sup> Local banks and financial institutions of participating countries would be required to obtain information on financial accounts, which they would make available to the local tax authorities. In turn, they would provide that information on an automatic basis to other countries in a standardised format (without the need for sending a specific request). As at 10 April 2017, 52 jurisdictions have committed to undertaking their first exchange by 2017, with another 48 indicating that they would start their exchange by 2018.<sup>24</sup>

Generally, the principal purpose of exchanging information is to provide countries with information to detect tax evasion, thereby allowing them to protect their tax base and limit their exposure to revenue loss. Especially for developing countries, the detection of tax evasion is considered critical, due to the estimation by the OECD that approximately US \$8,5 trillion of household assets are held abroad in developing countries.<sup>25</sup> For instance, in 2012 more than 25 per cent of all Latin American and almost 33 per cent of all Middle Eastern and African household wealth was held abroad compared to the worldwide average of 6 per cent.<sup>26</sup> The successful implementation of the AEOI can alert tax administrations to tax evasion that was previously unknown and, hence, limit the tax revenue and illicit financial flows lost by developing countries.

However, the practical adoption of the AEOI standard presupposes an onerous administrative burden on countries, and this burden arguably is bigger on developing countries. Developing countries usually – albeit on different degrees – do not have the same level of administrative resources and intellectual capital as developed countries. Additionally, developing countries also are not at the same level regarding the system already in place for the exchange of information as developed countries are.<sup>27</sup>

The special needs and position of developing countries in their AEOI implementation was acknowledged by the OECD and G20, in particular, at the St Petersburg Summit in 2013.<sup>28</sup> G20 leaders called on the Development Working Group (DWG) in conjunction with the Finance

23 OECD (n 1 above) 76.

24 See <https://www.oecd.org/tax/transparency/AEOI-commitments.pdf> (accessed 1 May 2017).

25 G20 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: *Automatic exchange of information: A roadmap for developing country participation* (2014) 9.

26 Boston Consulting Group (BCG) 'Global wealth 2013: Maintaining momentum in a complex world' 2013 <http://www.bcg.de/documents/file135355.pdf> (accessed 10 November 2016).

27 K Sadiq & A Sawyer 'Developing countries and the automatic exchange of information standard - A 'one-size-fits-all' solution?' (2016) 31 *Australian Tax Forum* 102.

28 G-20 'Leaders' declaration with regard to AEOI and BEPS' [www.g20.org/sites/default/files/g20\\_resources/library/Saint\\_Petersburg\\_Declaration\\_ENG\\_0.pdf](http://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf) (accessed 10 November 2016).

Track, to work with the OECD, the Global Forum and other international organisations to develop a roadmap to assist developing countries.<sup>29</sup>

The mentioned roadmap for developing countries to participate in the AEOI was delivered by the Global Forum to the G20 DWG on 5 August 2015.<sup>30</sup> It is described as a high-level implementation policy by the OECD to broadly address the concern of developing countries.<sup>31</sup> However, next to the identification of high-level hurdles<sup>32</sup> and the drafting of principles and steps, the roadmap does not provide concrete solutions or tangible assistance suggestions. Thus, it does recommend to all developing countries to volunteer to participate in a pilot project, which should assist with effective implementation.

The pilot projects are conducted by the Global Forum, together with the World Bank Group and other Global Forum members. These projects are undertaken as a collective effort by the pilot country (the developing country participant) and a developed country that has agreed to partner with the pilot country, the Global Forum Secretariat, the World Bank Group and other organisations depending on the particular case.<sup>33</sup> According to the Global Forum, six pilot projects are already underway: Albania supported by Italy; Colombia by Spain; Ghana by the United Kingdom; Morocco by France; the Philippines by Australia; and Pakistan by the United Kingdom. The pilot projects are conducted through a step-by-step approach to implementation. Thereby it is assumed that gradually each developing country participant ('pilot country') would reach full implementation in accordance with the standard.

Next to the pilot projects, dedicated further technical assistance is being offered by the Global Forum on Transparency and Exchange of Information for Tax Purposes, including training seminars (with more than 400 government officials attending training in 2015 alone) and one-one-one advisory services, particularly focusing on legislation and other areas highlighted through an ongoing monitoring process.<sup>34</sup>

29 G-20 (n 29 above) para 52.

30 As above.

31 Sadiq & Sawyer (n 28 above) 114.

32 As above.

33 More information on the outline of a pilot project can be found in Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Information: Pilot Project Outline (2015), <http://www.oecd.org/tax/transparency/technical-assistance/aeoi/AEOI-pilot-project-briefing.pdf> (accessed 10 November 2016).

34 More information on the technical assistance provided can be found at <http://www.oecd.org/tax/transparency/technical-assistance/aeoi/#d.en.352223> (accessed 10 November 2016).

Nevertheless, the participation of developing countries in the AEOI remains an exception due to their lack of capacity, and its wide-scale accessibility will still require some time.<sup>35</sup>

### **3.3 Interim period before AEOI**

Until AEOI becomes viable for developing countries, the exchange of information upon request will be instrumental to attaining cross-border information. Likewise, its workability includes difficult hurdles to pass. The tax authorities need to link a tax evader to a specific different jurisdiction in order to pass the ‘foreseeably relevant’ hurdle. In order to do so, someone must have spilled evidence and this information needs to be adequate. Hence, the use of exchange of information upon request in practice might be of limited use, due to the difficulties to attain this evidence, when one only has limited resources available. However, what one should not forget is that the exchange of information is not restricted to taxpayer-specific information. More generic industry knowledge can also be subject to exchange. Industry knowledge is particularly helpful for tax administrations in developing countries that may lack valuable industry-specific knowledge necessary for adequate transfer pricing outcomes. An industry-wide exchange of information is the exchange of tax information, especially concerning a whole economic sector (for instance, the oil or pharmaceutical industry, the banking sector, and so forth) and not taxpayers in particular.<sup>36</sup>

Irrespective of the mode of exchange – be it upon request, spontaneous or automatic – as stated above, countries need to have an adequate legal basis for doing so. The following part will be devoted to a gap analysis of the frameworks available for Ghana, Nigeria and South Africa, with regard to the exchange of tax-specific information.

#### **3.3.1 Gap analysis on Ghana, Nigeria and South Africa**

##### ***Bilateral framework***

As already discussed above, Ghana and Nigeria have in place only a limited bilateral treaty network while South Africa has an extensive bilateral treaty network. All three countries underwent the peer-review process of the Global Forum, implying an in-depth monitoring and peer review of the implementation of the international standards of

35 The OECD’s new landmark model agreement on automatic exchange of financial information currently is likely to exclude many less-developed countries from its benefits on the grounds that they lack the resources to set up the data collection arrangements required to qualify as a reciprocating partner. However, resources are allocated in order to help developing countries to build their capacity.

36 Para 6.1 OECD Model: Commentary on Article 26 (2014).

transparency and exchange of information for tax purposes. Accordingly, for purposes of this chapter, there is no need to go into details with regard to the quality of the jurisdictions' legal and regulatory framework for the exchange of information. This issue is covered extensively in the respective peer-review reports.<sup>37</sup>

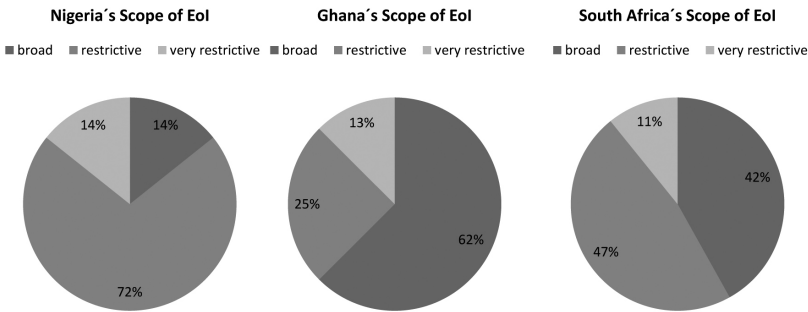
In summary, the exchange of information provisions in DTT of Ghana, Nigeria and South Africa vary strongly in their wording and scope. They are generally based on article 26 of the OECD or UN Model Treaty. However, depending on the point in time the DTT was concluded and the tax policy considerations of the two contracting parties, there are significant treaty variations. The majority of the EoI provisions of Ghana, slightly less than half of those of South Africa, and only two of those of Nigeria contained in bilateral treaties include a broad personal as well as material scope and, hence, could facilitate information exchange to the widest extent possible with regard to taxes and persons covered. Accordingly, these provisions potentially facilitate a broad exchange, which can relate to persons who are not resident in either contracting state and they can cover information regarding taxes that are not covered by the Convention, for instance, VAT. However, the rest of their EoI provisions are either restricted to information requests limited to 'taxes covered by the Convention', generally taxes on income and capital gains. A minority of EoI provisions even are very restrictive, since they are firstly restricted in their taxes covered and the persons covered. Additionally, they can include wording that can significantly limit the information to be exchanged.<sup>38</sup>

37 OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Ghana 2014: Phase 2: Implementation of the Standard in Practice (2014), <http://dx.doi.org/10.1787/9789264222878-en> (accessed 10 November 2016); OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Nigeria 2016: Phase 2: Implementation of the Standard in Practice (2016) <http://dx.doi.org/10.1787/9789264250857-en> (accessed 10 November 2016).; OECD Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013: Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings (2013) <http://dx.doi.org/10.1787/9789264205901-en> (accessed 10 November 2016).

38 Eg, the exchange of information provision in the treaty between Ghana and Switzerland limits the scope of exchange to the residents of the contracting states and does not cover taxes of every kind and description, but is limited to 'the taxes which are the subject of the Convention', ie taxes on income, capital and on capital gains. A further restricting factor is the treaty provides for the exchange of 'such information (being information which is at their disposal under their respective taxation laws in the normal course of administration)'. If interpreted restrictively, this wording can significantly limit the information to be exchanged to information that is already available to the tax authorities. However, on 22 May in Accra, Switzerland and Ghana signed a protocol amending the agreement for the avoidance of double taxation (DTA) with respect to taxes on income, capital and capital gains. This protocol broadens the exchange of information provision and brings the administrative assistance clause into line with the applicable international standard for the exchange of information upon request. It still needs to be approved by parliament in both countries before it can enter into force. A further example of a very restrictive clause is South Africa's DTT with Switzerland. It is drafted in a distinct way and constitutes a good example of a restrictive clause with various elements. First, the EoI provision provides for the exchange of information 'as is necessary for carrying out the provisions of this

Chart 6.1 below provides an overview of the scope of the bilateral EoI provisions of the three countries. ‘Broad’ means neither restricted by article 1 (persons covered) nor by article 2 (taxes covered); ‘restrictive’ means either restricted by article 1 (persons covered) or by article 2 (taxes covered); and ‘very restrictive’ means restricted by article 1 (persons covered) and by article 2 (taxes covered) and, in some cases, with additional restrictive wording.

**Chart 6.1: Scope of the Bilateral Exchange of Information Provisions**



Source: Author's own analysis of treaties.

Looking at the bilateral treaty landscape of the three countries, Ghana and Nigeria generally have a very limited network of DTTs in place. Although South Africa's bilateral network is more extensive, the level of the EoI

Convention and, upon request, of the provisions of domestic law concerning tax fraud in relation to the taxes which are subject of this Convention'. This wording provides that other than for carrying out the provisions of the Convention, the exchange of information is only granted in case of tax fraud. The protocol further defines the term 'tax fraud' as fraudulent conduct which constitutes a tax offence which, in both contracting states, can be punished with imprisonment. Hence, in order for information to be exchanged, the act needs to constitute a crime under the laws of both contracting states. To put it in different words, this so-called principle of dual criminality requires the act under investigation to constitute a crime also under the laws of the requested state. This requirement limits the scope of the EoI provision extensively, because of an idiosyncratic feature in Swiss law. Under Swiss law, there is a distinction between tax fraud and mere tax evasion. Tax evasion is given when a taxpayer fails to submit a tax return or submits incomplete information. This tax evasion is seen as a regulatory offence, which is subject to a fine rather than constituting a criminal offence. Tax fraud, on the other hand, occurs when falsified or non-genuine records, such as accounts, balance sheets or income statements are used for the purpose to avoid taxes. The concept of tax fraud was further broadened by the Swiss Supreme Court, stipulating that tax fraud does not necessarily imply the use of false documents; there may also be tax fraud in situations of tax evasion, which have been provoked by a particularly cunning act (astuce) on the part of the taxpayer. The mere omission to declare something, however, constitutes only tax evasion. Accordingly, the threshold under Swiss law to constitute tax fraud is much higher than in other jurisdictions and even further limits the EoI.



mechanisms leaves sufficient room for improvement for all three countries. Since renegotiation or – in the case of Ghana and Nigeria – the conclusion of new DTTs with more countries, is time and resource-consuming, it is positive to note that bilateral EoI provisions do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the contracting states which relate to cooperation in tax matters.<sup>39</sup> Hence, it is worthwhile exploring the scope of EoI under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

### 3.3.2 *Multilateral framework*

The amended Convention is the most comprehensive multilateral instrument available for all forms of tax cooperation to tackle tax evasion and avoidance and provides for a single legal basis for bilateral and multi-country cooperation. As stated above (sec II.1-3), Ghana, South Africa and Nigeria have already signed the Convention, and it has gone through the required ratification processes and entered into force.<sup>40</sup> Accordingly, by being members of the Convention, all three countries have expanded their network of mutual administrative assistance partners extensively through one single legal basis.

Generally speaking, the amended Convention provides for wide-ranging cooperation between tax authorities. First, the personal scope is broad, since it is stipulated that the parties shall provide administrative assistance to each other in tax matters, irrespective of whether the person affected is a resident or national of a party or of any other state (article 1). Second, the material scope is even broader. Different forms of administrative assistance are contemplated, including the exchange of information that is foreseeably relevant for the administration or enforcement of domestic laws concerning taxes covered by the Convention – explicitly mentioning exchange of information upon request; automatic exchange of information as may be agreed between two or more parties; and spontaneous exchange of information in specified circumstances.<sup>41</sup> The Convention also provides for assistance in the recovery of taxes;<sup>42</sup> simultaneous tax administrations;<sup>43</sup> and tax examinations abroad.<sup>44</sup> Regarding taxes covered, the Convention potentially covers all forms of

39 See para 5.5 OECD Model: Commentary on Article 26 (2014).

40 Ghana signed the amended Convention on 10 July 2011 with entry into force on 1 September 2013; South Africa signed the amended Convention on 3 November 2011 with entry into force on 1 March 2014; Nigeria signed the amended Convention on 29 May 2013 with entry into force on 1 September 2015. The list of the participating countries and the status of the amended Convention can be found on the following link (status 26 September 2016): [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (accessed 10 October 2016).

41 Ch III, sec I, arts 4-6.

42 Ch III, sec II, arts 11-16.

43 Ch III, sec I, art 8.

44 Ch III, sec I, art 9.

compulsory payments to the general government with the sole exception of customs duties and all other import-export duties.<sup>45</sup> However, *de facto* the taxes covered are not homogenous between the different contracting parties. At signature or upon ratification of the amended Convention, states are free to declare reservations within stated limits as to the taxes covered, or as to certain types of administrative assistance that they will not provide.<sup>46</sup>

- In the case of Ghana, the amended Convention applies to income tax; petroleum income tax; mineral royalties; withholding tax on interest; withholding tax on dividend; withholding tax on goods and services; capital gains tax; gift tax; value added tax; and excise tax.
- In the case of Nigeria, the amended Convention applies to personal income tax; company income tax; petroleum profit tax; capital gains tax; value added tax; excise duty; tertiary education tax; and a national information technology development levy. However, taxes imposed on behalf of political subdivisions or local authorities, compulsory social security contributions payable to general government or social security institutions established under public law and taxes on the use or ownership of motor vehicles are explicitly excluded in Nigeria.
- In the case of South Africa, the amended Convention applies to income tax; withholding tax on royalties; tax on foreign entertainers and sportspersons; turnover tax on micro-businesses; dividend tax; withholding tax on interest, effective date 1 March 2015; capital gains tax; estate duty; donations tax; transfer duty; value added tax; excise tax; and securities transfer taxes. However, taxes imposed on behalf of political subdivisions or local authorities, compulsory social security contributions payable to general government or social security institutions established under public law and taxes on the use or ownership of motor vehicles are explicitly excluded in South Africa.

The resulting asymmetrical application of the amended Convention is not formally addressed by the Convention itself. However, paragraph 11 of the explanatory report stipulates:

The legal principle of reciprocity is another element of balance in the implementation of the Convention, since a state cannot ask for a form of assistance that it is not ready to grant to other states. The same principle of reciprocity is also a factor in the development of mutual assistance, because a state which wishes to draw more benefits from the Convention will be encouraged to offer more extensive assistance to other states.

Accordingly, the more a state decides to limit the taxes covered, the less information it will receive from other states. Hence, one must also assess the reservations made of the requested party to see the exact scope of the

45 Ch I, art 2.

46 Ch VI, art 30; the list of the reservations at the time of writing can be found at <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations> (accessed 11 October 2016).

taxes covered. However, irrespective of the reservations made, the taxes covered by Ghana, Nigeria and South Africa are wide-ranging and the number of countries participating in the amended Convention are extensive. Hence, the participation of the three countries in the amended Convention significantly upgraded their constrained bilateral framework.

Due to the participation in the amended Convention, the network of global cooperation partners with broad EoI provisions in compliance with the international standard covers all relevant trading partners. Since the US and Panama have not yet ratified the amended Convention and Hong Kong is not party to the Convention, these wealth management centres are not part of the network (with the exception of Hong Kong and the United States with regard to South Africa, since a bilateral framework is in place). Due to the growing importance of Hong Kong, it is advisable to try to establish a framework for EoI that includes Hong Kong.

Additionally, since the AEOI will require some time until developing countries are able to participate, the EoI upon request is the standard for attaining information. Due to the hurdles of overcoming the ‘foreseeably relevant’ threshold, receiving taxpayer specific information upon request is in practice of limited use. To enhance the benefits of the EoI instrument in the interim period before AEOI is in place, the competent authorities of Ghana, Nigeria and South Africa could establish specific procedures<sup>47</sup>, for instance routine exchange of industry know-how, with timeframes and types of information to be exchanged. This can be especially helpful if such a procedure is established with targeted sophisticated tax administrations, with extensive exposure to industry practices and know-how, such as the UK, The Netherlands and Switzerland. Since Ghana, Nigeria and South Africa are all commodity exporting countries, receiving pricing information or other industry know-how from these countries might be of value.

### 3.3.3 *Interagency cooperation*

Since the tax information exchanged – in whichever mode – is likely not only to be valuable to the recipient tax administrations, but may be useful to other government agencies, for instance, to prosecute additional crimes such as money-laundering, bribery, corruption and terrorism financing, there is a further international understanding to improve the holistic use of the information received. This transparency should spread over other

47 In order to encourage the development of methods and techniques for efficient and effective information exchange, the UN Model includes an additional paragraph 6 in its art 26 for the establishment of procedures. Although the OECD Model does not contain such a provision, the OECD Commentary also offers drafting options (para 10, OECD Model: Commentary on Article 26 (2014)). Looking at the DTTs of Ghana, Nigeria and South Africa, neither Ghana nor Nigeria has such an additional provision in place. Six out of its 76 DTTs in force in South Africa have a similar provision.

government authorities. In a world of limited resources and increasing complexity, different government authorities should not work in a vacuum but rather should work together in a 'whole of government' approach to pursue shared objectives.<sup>48</sup> Accordingly, the role of national tax administrations has been elevated, constituting a vital cog in the fight against illicit financial flows. Tax authorities have moved closer to other authorities, including customs administration, the Financial Intelligence Unit (FIU) and law enforcement agencies. The enabling legal instruments increasingly are present in bilateral or multilateral frameworks to facilitate the better use of the intelligence received by tax authorities and facilitate the exploitation of information synergies between different authorities. The bundling of knowledge with closer cooperation between different authorities is important to inhibit tax and other serious crimes.<sup>49</sup> However, restrictive confidentiality provisions in EoI instruments are an inhibiting factor for inter-agency exchange.

Generally, the confidentiality provisions stipulate that information received through the information exchange mechanism shall be treated as secret in the receiving state in the same manner as information obtained under the domestic laws of that state. Since an absolute prohibition on disclosure would render the information exchange useless, they mostly enumerate the persons and authorities to whom the information can be disclosed and for what purpose, which means mainly that the information received can only be used for tax purposes.<sup>50</sup> However, under such strict confidentiality rules, if the information obtained through the EoI framework appears to be valuable to the receiving state for purposes other than tax and outside the scope of purposes mentioned in the EoI provision, that state may not use the information for such other purposes. Other means for those non-fiscal purposes need to be utilised, such as a treaty concerning judicial assistance. This fragmentation can be impractical and time-consuming due to the additional procedural layers. Hence, in case the same set of information on the taxpayer is useful to a third country or for purposes other than tax, for example to prosecute additional crimes such as money-laundering, bribery, corruption and terrorism financing, a certain provision needs to be present in the EoI provision. In order to

48 For more information, see OECD *Improving co-operation between tax and anti-money laundering authorities: Access by tax administrations to information held by financial intelligence units for criminal and civil purposes* (2015), <http://www.oecd.org/ctp/crime/report-improving-cooperation-between-tax-anti-money-laundering-authorities.pdf> (accessed 10 November 2016).

49 This is why, in October 2010, the OECD Council's Recommendation 'to facilitate co-operation between tax and other law enforcement authorities to combat serious crimes' included a recommendation to establish 'an effective legal and administrative framework and provide guidance to facilitate reporting by tax administrations of suspicions of serious crimes, including money laundering and terrorism financing, arising out of the performance of their duties, to the appropriate domestic law enforcement authorities'. For more information, see OECD (n 49 above).

50 Para 13, UN Model: Commentary on Article 26 (2011).

facilitate a broader use of the information, the contracting states need to include the following sentence:<sup>51</sup>

Notwithstanding the foregoing, information received by a contracting state may be used for other purposes when such information may be used for such other purposes under the laws of both states and the competent authority of the supplying state authorises such use.

The incorporation of this sentence into the EoI provision enables the pooling of knowledge and skills between different government authorities to make the fight against financial crimes more effective. Subject to prior authorisation, it could also enable the transmittal of received information to a foreign authority, to which the information could be of value.

### 3.3.4 Gap analysis of Ghana, Nigeria and South Africa

#### *Bilateral framework*

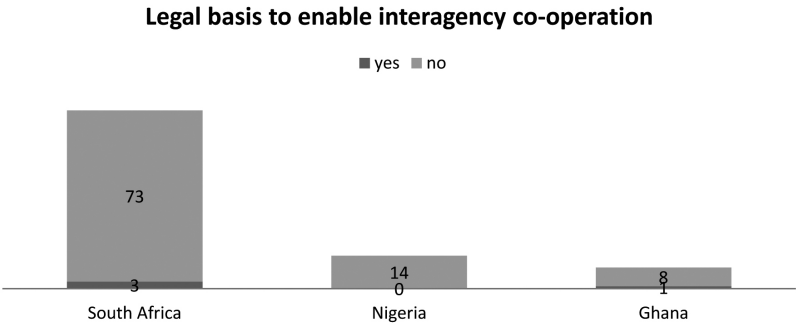
All EoI articles in the DTTs of Ghana, Nigeria and South Africa contain confidentiality provisions. Although there are slight variations in the wording, these provisions generally contain all the essential aspects of the international standard on confidentiality, enshrined in article 26(2) of the OECD/UN Model Tax Convention. The Global Forum on transparency and exchange of information for tax purposes came to the same conclusion with regard to the three countries. The respective peer review results further stated that also the complimentary domestic legislation contains appropriate confidentiality provisions and enforcement measures.<sup>52</sup> In addition, the *de facto* practice was assessed, coming to the conclusion that all three countries in practice also have a comprehensive system of measures in place to assure confidentiality when processing EoI requests; there are clear handling and storage security measures; and all personnel are bound by strict confidentiality rules against any disclosure of information concerning EoI requests. Further information on the domestic procedures available can be found in the respective peer review reports. Whether these confidentiality provisions enable interagency cooperation was not subject to the peer review reports.

51 Para 13.3, UN Model: Commentary on Article 26 (2011).

52 Ghana: OECD *Global forum on transparency and exchange of information for tax purposes peer reviews: Ghana 2014: Phase 2: Implementation of the standard in practice* (2014) 90, <http://dx.doi.org/10.1787/9789264222878-en> (accessed 10 November 2016); Nigeria: OECD *Global forum on transparency and exchange of information for tax purposes peer reviews: Nigeria 2016: Phase 2: Implementation of the standard in practice* (2016) 121, <http://dx.doi.org/10.1787/9789264250857-en> (accessed 10 November 2016); South Africa: OECD *Global forum on transparency and exchange of information for tax purposes peer reviews: South Africa 2013: Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings* (2013) 71, <http://dx.doi.org/10.1787/9789264205901-en> (accessed 10 November 2016).

If one examines the DTTs of Ghana, Nigeria and South Africa, they include the amendment to their confidentiality provision only in very limited cases (see Chart 6.2). Nigeria has none, whereas Ghana has only one such provision in the treaty with Denmark. South Africa has three DTTs in force that include such a provision.<sup>53</sup>

**Chart 6.2: Analysis of treaties regarding the presence of interagency cooperation provision**



Source: Author's own analysis of relevant treaties.

***Multilateral framework***

As already stated, Ghana, South Africa and Nigeria have already signed the Convention, and it has gone through the required ratification processes and entered into force.<sup>54</sup> Accordingly, by being members of the Convention, all three countries have extensively expanded their network of mutual administrative assistance partners through one single legal basis. Also, the Convention includes confidentiality provisions, which restrict the purpose for which the information may be used. According to article 22, paragraph 1, any information obtained by a party under the Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that party. This corresponds to the secrecy obligation included in article 26 of the OECD/UN Model. The amended Convention, however, goes further by stipulating that

53 The DTTs with Norway, India and Austria.

54 Ghana signed the amended Convention on 10 July 2011 with entry into force on 1 September 2013; South Africa signed the amended Convention on 3 November 2011 with entry into force on 1 March 2014; Nigeria signed the amended Convention on 29 May 2013 with entry into force on 1 September 2015. The list of the participating countries and the status of the amended Convention can be found at (status 26 September 2016) [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (accessed 10 October 2016).

to the extent needed to ensure the necessary level of protection of personal data, [any information obtained by a party under the Convention shall be treated as secret and protected] in accordance with the safeguards which may be specified by the supplying party as required under its domestic law.

Furthermore, the exchanged information should 'be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes of that party, or the oversight of the above' (article 22, para 2).

Notwithstanding these limitations, the amended Convention includes the exception to facilitate inter-agency cooperation and the exchange of such information to a third state. The amended Convention stipulates that 'information received by a party may be used for other purposes when such information may be used for such other purposes under the laws of the supplying party and the competent authority of that party authorises such use'. In addition, information received by one party could be transmitted to a foreign authority, subject to prior authorisation of the initial information sending party (article 22, para 4). Hence, though the participation of the three countries in the amended Convention, their constrained bilateral framework with regard to inter-agency cooperation was upgraded. However, the effective inter-agency cooperation ultimately will be dependent on the national law of the countries involved.

Since most of the DTTs of Ghana, Nigeria and South Africa do not include the amendment to the EoI provision which enlarges the scope for which information can be used, the fact the amended Convention includes such a provision by default is a huge advantage. Hence, information received through the EoI mechanism in the amended Convention can be shared with other agencies, subject to certain conditions. The final conditions, however, are determined by domestic law. The effective inter-agency cooperation ultimately is still dependant on the national law of the countries involved; an analysis which is outside the scope of this chapter.

## **4 Cross-border assistance in the collection of taxes**

The enhanced global cooperation with regard to transparency helps tax authorities track and trace foreign assets and determine the correct amount of tax due at a lower cost. However, since the taxpayers may have their assets spread throughout the world, the collection of the tax can be difficult. Because of state sovereignty, tax authorities usually cannot work beyond their borders to collect taxes. However, based on a bilateral or multilateral legal framework, foreign tax authorities can assist in the collection of taxes of the other state. Previously, cross-border tax collection on the basis of bilateral tax treaties was rarely seen and, when present, only

in a restricted form of assisting some neighbouring countries with strong economic and political ties (such as the 1952 Benelux Mutual Assistance Treaty or the 1972 Nordic Convention on Mutual Assistance in Tax Matters). In 2003, the new optional article (article 27) on assistance in tax collection was approved by the OECD Council for its inclusion in the update of the OECD Model Convention. Where contracting parties agree to help in the collection of taxes levied by the other state, they can include the article in their treaties. The decision will be based on a number of factors, including the importance of their cross-border investment; reciprocity; the ability of their respective administrations to provide such assistance; and the similarity of the level of their legal standards, particularly the protection of the legal rights of taxpayers.<sup>55</sup> In addition to the potential recovery of taxes, one should not underestimate the deterrent effect created through such a provision. In some countries, this deterrent effect might be even more beneficial than the benefit of the actual tax debts recovered. So far, of the 222 treaties signed between OECD countries and developing countries between 2007 and 2012, only 20 treaties included a provision for assistance in tax collection (between 11 developing countries and 13 OECD countries).<sup>56</sup> Accordingly, these OECD countries have the legal basis for collecting taxes on behalf of their developing country treaty partners if requested to do so. They need to take the necessary steps to recover taxes that are enforceable under the laws of the requesting state and owned by a person who, at the time, cannot, under the laws of the requesting state, prevent their collection. Such revenue claims need to be collected by the requested state in accordance with its tax enforcement and collection laws as if it were its own revenue claim.<sup>57</sup>

Accordingly, this possibility potentially can provide developing countries with a valuable tool to combat international tax evasion and facilitate the actual payment of taxes legally due by their citizens or companies. One could also say that it constitutes a very practical way for OECD countries to provide meaningful assistance to developing countries in mobilising domestic resources.<sup>58</sup> However, since its use is dependent on the knowledge of developing countries on the location of offshore funds to be able to request such assistance, the real benefits of such instrument will truly unfold once the AEOI is in place.

55 OECD (n 1 above) 66.

56 As above.

57 See art 27 of OECD Model (2014) and UN Model (2011).

58 As above.

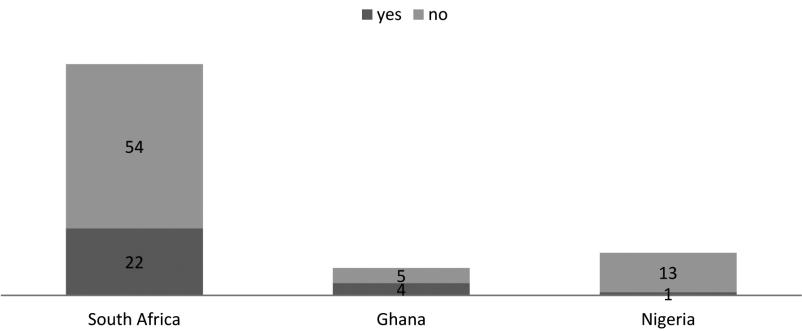


4.1 Gap analysis of Ghana, Nigeria and South Africa

*Bilateral framework*

In the treaty networks of Ghana, Nigeria and South Africa, a legal basis for the assistance in the collection of taxes is only scarcely present (see Chart 6.3.) Ghana’s treaties with Belgium, Denmark, the Netherlands and South Africa include such a clause; Nigeria has one DTT with France that entails a legal basis for the cross-border assistance in the collection of taxes. South Africa’s DTTs with the following countries include a relevant legal basis: Algeria, Algeria, Botswana, Democratic Republic of the Congo, Denmark, Ghana, India, Japan, Kenya, Lesotho, Mauritius, Mexico, Mozambique, Namibia, The Netherlands, Norway, Swaziland, Tanzania, Uganda, Ukraine, the United Kingdom and the United States.

Chart 6.3: Cross-border assistance in the collection of taxes



Source: Author’s own analysis of relevant treaties.

*Multilateral framework*

Ghana, South Africa and Nigeria have already signed the Convention, and it has gone through the required ratification processes and entered into force. Since the amended Convention includes a legal basis for cross-border assistance in the collection of taxes, all three countries generally expanded their network for global tax cooperation partners in this regard. Article 11, para 1 stipulates that at the request of the applicant state, the requested state – subject to certain conditions<sup>59</sup> – shall take the necessary

59 Eg, the assistance applies only to tax claims that form the subject of an instrument permitting their enforcement in the applicant state and, unless otherwise agreed

steps to recover tax claims of the first-mentioned state as if they were its own tax claims.<sup>60</sup>

However, as indicated above, the amended Convention does not have a homogenous application between the different contracting parties. At signature or upon ratification of the amended Convention, states are free to declare reservations within stated limits to certain types of administrative assistance which they will not provide, which includes assistance in the recovery of tax claims.<sup>61</sup> Several contracting parties have made use of such reservations. Hence, only the states listed in Box 6.3 will provide this form of assistance either broadly or to certain types of taxes.

**Box 6.3: Reservations regarding assistance in the recovery of tax claims**

Albania; Aruba; Australia; Azerbaijan; Belgium; Bulgaria; Burkina Faso\*; Curaçao; Czech Republic; Denmark; Dominican Republic\*; El Salvador\*; Estonia; Faroe Islands; Finland; France; Gabon\*; Georgia; Ghana; Greece; Greenland; Guatemala\*; Hungary; Iceland; India; Italy; Jamaica\*; Japan; Kenya\*; Korea; Latvia; Lithuania; Luxembourg; Malaysia\*; Malta; Mauritius; Mexico; Moldova; Monaco\*; Morocco\*; Nauru; Netherlands; New Zealand; Niue; Norway; Pakistan\*; Philippines\*; Poland; Portugal; Romania; San Marino; Saint Maarten; Slovenia; South Africa; Spain; Sweden; Tunisia; Turkey\*; Turks & Caicos Islands; Uganda; Ukraine; and the United Kingdom.

Notes:

\*) signed but not in force;

\*\*) signed and entry into force latest by 1 January 2017.

Source: Own analysis of the list of reservations, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations> (accessed 11 October 2016).

The other states either excluded the application of this provision (as Nigeria did) or reserved their right to decide not to do so, which results in an asymmetrical application of the amended Convention. Due to the legal principle of reciprocity as discussed above, this means that those who

between the parties concerned, which are not contested. However, where the claim is against a person who is not a resident of the applicant state, the assistance in recovery shall only apply, unless otherwise agreed between the parties concerned, where the claim may no longer be contested (art. 11, para 2).

60 Except in relation to time-limits which are governed solely by the laws of the applicant state (art 14) and in relation to priority (art 15).

61 Ch VI, art 30; the list of the reservations at the time of writing can be found at <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations> (accessed 11 October 2016).

reserved their right not to provide these form of administrative assistance, will not receive such assistance by other contracting states either. Irrespective of the outreach of the global cooperation partner in this regard, the actual benefits of such assistance are still rather limited, since they presuppose a knowledge of the funds located in a different country. Once the AEOI is in place, the existence of such knowledge will no longer constitute an impediment.

Before the AEOI is in place, though, a more effective method of cross-border assistance in the collection of taxes, based on an alternative path, could be established. Ghana, Nigeria and South Africa could try to conclude bilateral agreements with major wealth management centres, under which a withholding tax is levied at source by the bank, acting as paying agent.<sup>62</sup> The withholding taxes applied should correspond to the rate of tax in the country of residence of the taxpayer and transferred back to the state of residence, while preserving the confidentiality of the taxpayer. This method has already been applied by Switzerland, known as 'Rubik Agreements' and offered to Austria and the UK.<sup>63</sup> It could be a valuable tool for developing countries to receive taxes on the wealth held by their residents in offshore jurisdictions. It preserves confidentiality while also securing tax compliance. Since it does not presuppose the burdensome administrative request for information and the existence of knowledge on offshore funds, such a system would be a workable and practicable alternative as an interim solution, before the AEOI is in place.

Ghana's network of global cooperation partner for cross-border assistance in the collection of taxes covers only three of its major trade partners, namely, India, France and The Netherlands. With the exception of the UK and some Caribbean islands, the major wealth management centres are not included. With regard to Nigeria, due to its reservation, it will not receive administrative assistance in the cross-border collection of taxes. It only has one bilateral connection with France, which includes a legal basis for doing so. South Africa has a more extensive network available. Some of its major trading partners (the US, Botswana, Japan, the UK and India) are either bilaterally or multilaterally covered. However, with the exception of the UK, some Caribbean Islands and the US, no wealth management centre is included.

Since the benefit of such administrative assistance is dependent on a knowledge of offshore funds and administrative burdens, the three countries should try to conclude bilateral agreements with major wealth management centres on withholding taxes levied at source by paying agents. This would facilitate tax revenues from the funds located and

62 On this topic, see EB Bonanomi & S Meyer-Nandi, 'Schweizer Doppelbesteuerungsabkommen: Aktuelle Politik und Entwicklungsrelevanz' *Jusletter* 30 June 2014.

63 For more information on the Rubik Agreements, see X Oberson *International exchange of information in tax matters: Towards global transparency* (2015) 143ff.

managed in these wealth management centres without the passing of the foreseeable relevant threshold to receive information. Since some of these centres already offered such a model to some OECD countries (for instance Switzerland), which implies that the relevant infrastructure is already in place and due to the current momentum of sincerely trying to help developing countries in their revenue generation, there could be sufficient political willingness of states to offer such interim solution before the AEOI is a viable instrument for developing countries.

## **5 Conclusion and Recommendations**

Based on the gap analysis above, the following recommendations are suggested to assist Ghana, Nigeria and South Africa in improving their benefits from the unprecedented peak in global tax cooperation:

- Participate in pilot programmes for AEOI implementation. Since transparency is the foundation of all other global tax co-operation instruments, having the AEOI in place as soon as possible is key to increase tax compliance.
- Focus on the multilateral framework. The bilateral framework of Ghana, Nigeria and South Africa either does not cover all relevant trading partners and wealth management centres, the wording is outdated, or the legal basis for inter-agency co-operation and the cross-border assistance of taxes is missing. The necessary renegotiation or conclusion of new bilateral treaties would be very resource and time-consuming. In light of the fact that the amended Convention already includes the relevant provisions, devoting resources into the bilateral framework is not necessary.
- Reconsider reservation. In the amended Convention, due to the principle of reciprocity, Nigeria should reconsider its reservation on the cross-border assistance in the collection of taxes in order to benefit from it.
- Include Hong Kong in the network as a global tax corporation partner. There should be increased effort to have Hong Kong sign the amended Convention due to its rising importance in the wealth management centre landscape.
- Establish a specific procedure for routine exchange of industry know-how with targeted tax administrations. Since in the interim period before the AEOI is in place, the EoI upon request is the only instrument to receive cross-border information and its practical benefits for receiving taxpayer specific information are limited due to the hurdle of passing the 'foreseeably relevance' test, the exchange of information mechanism should be used to receive more generic industry know-how. Such specific procedures should be implemented with tax administrations, having extensive industry exposure and know-how, such as the UK, The Netherlands and Switzerland.
- Conclude bilateral paying agent withholding tax agreements with wealth management centres under which a withholding tax is levied on passive income at source by the bank located in the wealth management centre.

Examples already exist between OECD countries. Such agreements can be used as an interim solution before the AEOI.

### Appendix: Wording of art 26 of the UN Model (2011) and the OECD Model (2014)

The wording of Article 26 is as follows (the underlined text can only be found in the Article 26 of the UN Model (2011) and the **bold text** in the OECD Model (2014)):

1. The competent authorities of the Contracting States shall exchange such information as is *foreseeably relevant* for carrying out the provisions of this Convention or *to the administration or enforcement* of the domestic laws of the Contracting States concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. In particular, information shall be exchanged that would be helpful to a Contracting State in preventing avoidance or evasion of such taxes. The exchange of information is not restricted by Articles 1 and 2.
2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. **Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.**
3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
  - (a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - (b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
  - (c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or

information, the disclosure of which would be contrary to public policy (*ordre public*).

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.
6. The competent authorities shall, through consultation, develop appropriate methods and techniques concerning the matters in respect of which exchanges of information under paragraph 1 shall be made.

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