A Comment on the Interface of Harmful Tax Practices, Human Rights and WTO Law, in Light of the Panama Papers Scandal and Argentina-Financial Services case

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Abstract *Anti-corruption measures and increasing the transparency and accountability of financial transactions and taxation policy, has become a major issue of public concern in recent times. The 'Panama Papers' scandal highlights the large scale international tax avoidance and evasion occurring currently, which can also be linked with global corruption, money laundering, organized crime and terrorist financing. The lack of good governance in relation to inefficient or harmful financial and tax regulatory measures and the resulting impact*

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on revenue can also be linked to serious negative repercussions for progressively achieving human rights obligations, especially obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) which require provision of public goods and services, such as education, healthcare and other social welfare. Coinciding with the Panama Papers scandal, in April 2016, the Appellate Body of the World Trade Organization issued its decision in Argentina-Financial Services, a case which draws attention to the shortcomings in the global regulation of cross-border private capital flows. This dispute originated when Panama, a country well known as a tax haven, alleged that various Argentine domestic legal regulations concerning financial transparency, which were applied against Panama, were inconsistent with Argentina's WTO obligations. This comment analyzes the interface between recent developments in the interpretation of human rights obligations of States in the context of harmful tax practices and the WTO obligations of States with regard to the design and implementation of defensive measures against harmful tax practices of other States. While domestic legal reform and Inter-State cooperation for greater transparency and accountability in tax regulation is generally recommended, it also remains possible to take a set of measures which are non-discriminatory and non-arbitrary, to restrict financial goods and services trade with tax havens. The recent scandals and the legal developments both highlight the importance of the principles of good governance and rule of law in the design and implementation of the relevant regulation.

I. TAX HAVENS AND THE PANAMA PAPERS SCANDAL

> For almost half a century principals and their intermediaries in certain 'offshore' jurisdictions have incorporated and operated a global network of 'nested' shell companies, which remained impervious to international regulation. Some of those jurisdictions have remained unwilling to cooperate with national and international authorities in conducting criminal investigations or in enforcing smart sanctions. Others have even made it their business to establish corporations designed to evade tax, launder money and flout sanctions regimes.[1]

This comment was inspired by the issues surrounding the Panama Papers exposure by the International Consortium of Investigative Journalists in

[1] Footer, Mary E., *The Panama Papers, corporate transnationalism and the public international order*, 6:1 *ESIL Reflection* (2017).

April 2016 and the World Trade Organization (WTO) Appellate Body decision, *Argentina-Financial Services,* which was also decided in April 2016. These issues can be discussed in the broad context of standards of good governance and the obligations of States regarding tax havens, but it is additionally also possible to look at it in terms of the impact on the achievement of human rights, especially economic and social rights. The harmful consequences of the failures of both domestic law and harmonized global efforts to take action to prevent and punish large scale tax avoidance has to also be looked at from this view – that it is a barrier to the achievement of human rights objectives. The comment intends to identify and analyze the interface between recent developments in the interpretation of human rights obligations of States in the context of harmful tax practices and the WTO obligations of States with regard to the design and implementation of defensive measures against harmful tax practices of other States.

Good governance, particularly regarding taking steps against corruption and increasing the transparency and accountability of financial transactions and taxation policy is a major issue of public concern. There has been deep disappointment expressed by the voting public in many countries in recent times about the lack of regulatory measures or lack of their enforcement, in order to hold persons accountable for serious corruption, tax evasion or financial crimes at the domestic level. At international level, there is concern regarding the nature and effectiveness of financial and tax laws in certain foreign jurisdictions. The consequences of lax laws, the lack of laws or lack of implementation in some jurisdictions can have detrimental consequences on other States as well; including indirectly assisting money laundering, rewarding corruption, assisting in financing criminal or terrorist activity, bypassing sanctions targeted towards terrorist financing etc., and thereby affecting global security and stability.[2]

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[2] *See* for an example of consideration of effects on global security and stability: UNSC Resolution 2253, *Threats to international peace and security caused by terrorist acts,* 17th December 2015, S/RES/2253 (2015) -

Para.16: "*Strongly urges* all Member States to implement the comprehensive international standards embodied in the Financial Action Task Force's (FATF) revised Forty Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation…"

Para.18: the Security Council "*Encourages* FATF to continue its efforts to prioritize countering terrorist financing, in particular identifying and working with Member States with strategic anti-money laundering and countering terrorist financing (AML/CFT) deficiencies that have hindered Member States from effectively countering the financing of terrorism, including by ISIL, Al-Qaida…".

Also see: UNSC Resolution 2270, *Non-proliferation/Democratic People's Republic of Korea*, 2nd March 2016, S/RES/2270 (2016), condemning the Democratic Republic of North Korea for its nuclear test on 6th January 2016 noted the frequent use of "front companies, shell companies, joint ventures and complex opaque ownership structures for

The abovementioned issues in financial and tax laws and policies may relate to both *tax evasion*, which entails criminal penalties in the domestic law of many countries, as well as *tax avoidance* which may not be illegal *per se*. Tax avoidance is the result of planning ones' financial matters, sometimes moving assets across borders, in a manner so as to minimize the payment of taxes.[3] Therefore at times these avoidance practices have been cast as merely issues of ethics and morality, if at all, rather than societally harmful behaviour which require strict regulation and criminalization.[4] The setting up of 'off-shore companies' with foreign capital in 'tax-havens' or providing 'offshore banking' services is also not usually illegal *per se*. The terms 'tax abuse' and 'illicit financial flows' are also used in this regard, but the terms are difficult to define, and therefore generally remain a grey area in domestic and international law. In the WTO Panel Report, *Argentina - Measures Relating to Trade in Goods and Services,* it was declared that "the expression "harmful tax practices" covers tax evasion, avoidance and fraud".[5] According to a recent United Nations Human Rights Council study, a broad definition of these terms is preferable, identifying 'illicit financial flows' to include both illegal tax evasion and legally questionable tax avoidance and covering all funds that "circumvent the spirit of the law" through legal loopholes and other artificial arrangements.[6]

There is also no generally accepted common definition of 'tax haven'. The OECD's 1998 Report, *Harmful Tax Competition: An Emerging Global Issue,* identified a number of factors for identifying tax havens, including

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the purpose of violating' sanctions and '*directs* the [Sanctions] Committee … to identify individuals and entities engaging in such practices".

See further: D'Souza, Jayesh, *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the Performance of Financial Intelligence Units*, CRC Press, 2011.

3 Glossary of Tax Terms, http://www.oecd.org/ctp/glossaryoftaxterms.htm

A term that is difficult to define but which is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow.

4 *See* discussion of the historical and current attitudes towards tax law in Chohan, Usman W., *The Panama Papers and Tax Morality,* April 6, 2016, available online at SSRN: https://ssrn.com/abstract=2759418.See further Pogge, Thomas and Krishen Mehta, *Introduction: The Moral Significance of Tax-Motivated Illicit Financial Outflows*, in Thomas Pogge and Krishen Mehta (eds.), GLOBAL TAX FAIRNESS, Oxford University Press, 2016.

5 Panel Report, *Argentina - Measures Relating to Trade in Goods and Services*, footnote 867.

6 Human Rights Council, *Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights,* UN Doc. A/HRC/31/61, 15th January 2016, paras 6-7.

the lack of effective exchange of information and the lack of tax transparency.[7] However, currently, the OECD Committee of Fiscal Affairs does not identify any jurisdiction as being an 'uncooperative tax haven', on the basis that commitments have been undertaken by most States regarding adhering to the OECD Standards on transparency and exchange of information.[8] The Tax Justice Network has identified *secrecy* of banking and financial information and information on established legal entities (companies, corporations, trusts, foundations, or other legal entities, such as the beneficial owners), as key features of a tax haven.[9]

There is binding international law and non-binding recommendations, as well as domestic law in many States on how to tackle these issues, but their enforcement still remains unsatisfactory as it is generally acknowledged that there is insufficient Inter-State cooperation or domestic political will to comprehensively tackle these major cross-border issues. The recent 'Panama Papers' scandal - a data leak of 11.5 million documents from Panamanian law firm *Mossack Fonseca* - highlights the large scale international tax evasion and tax avoidance occurring currently, which can also be linked with global corruption, money laundering, organized crime, terrorist financing and with persons connected to regimes subject to international sanctions for human rights violations.[10] The estimated wealth being held by a relatively small number of individuals and families in tax havens is estimated to be between $7 trillion and $36 trillion – considerably more than the social services budgets of many countries put together and higher than all the Foreign Direct Investment (FDI) flowing into developing countries.[11] For several countries, it is estimated that illicit outflows exceed tax revenue and in some they exceed the total budget for key public service sectors such as health and

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7 OECD, *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, May 19, 1998, p. 22; Four key factors identified were: having only nominal or no taxes, impeding the free exchange of information on taxpayers with other governments through administrative practices or laws, non-transparency, and a lack of substantial activities.

8 *See* further, http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm.

9 Booijink, Laurens and Francis Weyzig, *Tax Justice Network Briefing Paper: Identifying Tax Havens and Offshore Finance Centres*, available online at https://www.taxjustice.net/cms/upload/pdf/Identifying_Tax_Havens_Jul_07.pdf, last accessed 04.04.2017.

10 International Consortium of Investigative Journalists, The Panama Papers, *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption,* available onlineathttps://panamapapers.icij.org/20160403-panama-papers-global-overview.html.

See further, Bastian Obermayer and Frederik Obermaier, *The Panama Papers: Breaking the Story of How the Rich & Powerful Hide Their Money,* Oneworld Publications Ltd., 2016.

11 Human Rights Council, *Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, UN Doc. A/HRC/31/61, 15th January 2016, paras.10-16.

education.[12] The Panama Papers reveal how funds are being moved across jurisdictions and hidden from tax authorities, and particularly exposed that Panama has continued to *not adhere* to the contemporary legal standards, despite promises to do so.[13]

Panama has ratified the *United Nations Convention against Corruption (2003)* in 2005 and the *United Nations Convention against Transnational Organized Crime (2000)* in 2003 and also updated the relevant sections on economic crimes and money laundering in their Penal Code. Furthermore, Panama is a member of the *Financial Action Task Force of Latin America (GAFILAT)* whose purpose is to work toward developing and implementing a comprehensive global strategy as set out in the *Financial Action Task Force* (FATF) Recommendations on international anti-money laundering and combating the financing of terrorism.[14] Panama also ratified in 1996, the *Inter-American Convention against Corruption* (OAS Convention, 1996), which was the first international anti-corruption Convention. Panama is a member of the *Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption* (MESICIC) which it became a State party to in 2001.[15] Despite agreeing to be bound by relevant international law, accepting non-binding international recommendations and revising domestic law in line with the international obligations and responsibilities, Panama failed to comply with the rules and standards. The participation in all these efforts, while showing that there has been progress at the international and regional level in creating targets and making commitments, highlights the unsatisfactory state of enforcement of these standards.

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[12] *Ibid*, para 33, citing Spanjers J. and H. Foss, *Illicit financial flows and development indices: 2008-2012*, Global Financial Integrity, 2015, pp. 30-33.

[13] *See* OECD, *Statement from OECD Secretary-General Angel Gurría on the "Panama Papers"*, available online at http://www.oecd.org/tax/statement-from-oecd-secretary-general-angel-gurria-on-the-panama-papers.htm, last accessed 04.04.2017:

> Panama is the last major holdout that continues to allow funds to be hidden offshore from tax and law enforcement authorities… Through the *Global Forum on Transparency and Exchange of Information*, we have constantly and consistently warned of the risks of countries like Panama failing to comply with the international tax transparency standards.

[14] *See* for GAFILAT members: http://www.fatf-gafi.org/countries/#GAFILAT - and see more generally on FATF: http://www.fatf-gafi.org/publications/fatfrecommendations/?hf=10&b=0&s=desc(fatf_releasedate) last accessed 26.04.2017. Note that Argentina is member of BOTH FATF and GAFILAT and has also ratified *United Nations Convention against Corruption (2003)* in 2005 and the *United Nations Convention against Transnational Organized Crime (2000)*.

[15] *See* http://www.oas.org/juridico/english/pan.htm.

See further for most recent MESICIC review report: http://www.oas.org/juridico/pdfs/Mesicic5_InformePAN_en.pdf, *Republic of Panama Final Report* (Adopted at the March 17, 2017 plenary session), OEA/Ser.L., Sg/Mesicic/Doc.492/16 Rev. 4.

II. Good Governance and Human Rights, with special reference to regulation of harmful tax practices

> Curbing tax-related illicit financial flows thus has the potential to make the largest fiscal impact and would enlarge domestic resources available for the realization of human rights, including social, economic and cultural rights.[16]

A commitment to good governance can be said to be the foundational value of any State's enforcement measures with regard to implementing international and domestic legal obligations, policy guidelines and political promises. In light of current understanding of the matter, it can be stated that good governance can be seen when the State and its government follows the rule of law, are accountable, transparent, effective and efficient and their relationship with the public is participatory, equitable, inclusive and responsive. In addition, it is notable that according to the Office of the High Commissioner of Human Rights:

> The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.[17]

International human rights does not prescribe any particular tax policy, but focuses on the possible outcomes: a good tax and financial regulation system is considered the most dependable method towards *raising revenue* which could be used for public goods and services, social welfare, social equality, non-discrimination and/or affirmative action measures which could be required under a State's international human rights law obligations,

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[16] Human Rights Council, *Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, UN Doc.A/HRC/31/61, 15 January 2016, para 5.

[17] The Office of the High Commissioner of Human Rights (OHCHR), *Good Governance and Human Rights,* http://www.ohchr.org/EN/Issues/ Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx. Also see OHCHR, *The role of good governance in the promotion of human rights*, Commission on Human Rights Resolution 2000/64, E.CN.4.RES.2000-64 :

> *Recognizes* that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights…
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> The OHCHR adds to the basic definition of good governance, all of the following:
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> full respect for human rights, Democratic Institutions & an efficient and effective public sector, multi-actor partnerships and political pluralism, Legitimacy, responsiveness and political empowerment of people, access to knowledge, information and education, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance [emphasis added].

especially the International Covenant on Economic, Social and Cultural rights (ICESCR). Thus, from a human rights perspective, good fiscal policy, and particularly taxation policies have been recognized by experts as a major determinant and key tool for the realization of human rights. For example, the 2014 *Report of the Special Rapporteur on extreme poverty and human rights* examines how a States' revenue raising powers have an impact on its compliance with international human rights obligations.[18]

There is of course, an assumption of good governance underlying this, that such revenue would actually be used for public purposes and for the achievement of human rights through the provision of public goods and services. Tax law and policy can also be designed and implemented so as to increase social inequality. A 2015 study by the International Bar Association noted how tax systems can represent, create, and perpetuate fundamental imbalances of power and wealth.[19] In order to make the link between tax policy and the goals of sustainable development, social justice and human rights, the tax system has to be designed with these ends in mind. International human rights creates a rights-based-language and framework of action towards making these ideas a reality. Under the ICESCR, a State has obligations to take steps 'progressively' and to the 'maximum of available resources',[20] to fulfil rights such as the right to education (including compulsory primary education, free of charge and the progressive introduction of free education at secondary and higher education levels), the highest attainable standard of physical and mental health and the right of everyone to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions. A State party to the ICESCR can take these steps either individually, as a State, or through "international assistance & co-operation"

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[18] *See* e.g. UN Human Rights Council, *The Report of the Special Rapporteur on extreme poverty and human rights*, Magdalena Sepúlveda Carmona, A/HRC/26/28, 22nd May 2014. The normative framework of the Report is that the Special Rapporteur

> "…examines how a State's use of its revenue-raising power has a direct impact on its ability to comply with international human rights obligations, in particular relating to the economic, social and cultural rights of people living in poverty" (page 5 of the Report).

[19] IBA, *Tax Abuses, Poverty and Human Rights, International Bar Association: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights*, 2015, pp. 88-89.

[20] ICESCR, Article 2(1):

> 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

and use all appropriate means, "including particularly the adoption of legislative measures".

In 2016, the negative effects of harmful tax practices on human rights have been highlighted by the UN *Human Rights Council Resolution No. 31* and in the *Study of the Independent Expert* on the Impact of Illicit Financial Flows on Human Rights.[21] The Study on Illicit Financial Flows emphasized the connections between harmful tax practices and corruption, rule of law violations, obstacles to sustainable development and the international human rights principles of equality and non-discrimination, in particular, economic inequality.[22] The right to health, education, social protection, water, sanitation, as well as the civil and political rights such as access to justice, free and fair elections, freedom of expression and personal security were highlighted in the study.[23]

The economic and social rights of people living in poverty are also emphasized in the context of the pro-poor tax policy of the *Lima Declaration on Tax Justice and Human Rights,* 2015 (the results of an international strategy meeting, "Advancing Tax Justice through Human Rights," held in Lima, Peru in 2015)[24] and the *Doha Declaration on Financing for Development*, 2008 (UN General Assembly Resolution 63/239).[25] The Doha conference of 2008 was followed by the Addis Ababa conference of 2015, which resulted in the negotiation of a new framework for financing sustainable development. The Forum on Financing for Development follow-up (FfD Forum) is an UN inter-governmental process which reviews the *Addis Ababa Action Agenda* and the UN Sustainable Development Goals (SDGs). The 2016 Report of the *Inter-Agency Task Force on Financing for Development* under FfD, stresses

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[21] Human Rights Council Resolution No. 31, *The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation*, UN Doc. A/HRC/31/L.24/Rev.1 (Mar. 23, 2016).

See also: Human Rights Council, Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/HRC/31/61, 15 January 2016.

[22] *Ibid* (*Study on Illicit Financial Flows, 2016*), paras 21-22.

[23] *Ibid* (*Study on Illicit Financial Flows, 2016*), para 21.

[24] "Advancing Tax Justice through Human Rights, Lima, Peru in 2015, convened by the Center for Economic and Social Rights, the Global Alliance for Tax Justice, Oxfam, *Red LatinoamericanasobreDeuda, Desarrollo y Derechos* (LatinDADD), *Red de Justicia Fiscal de América Latina y el Caribe* and the Tax Justice Network).

[25] UN General Assembly Resolution 63/239, *Doha Declaration on Financing for Development*, Annex, para 16. *See* also para 25. This is an Outcome Document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held in Doha in 2008.

the importance of combating illicit financial flows, and calls for strengthening international tax cooperation.[26] The report by Inter-Agency Task Force (IATF) highlights that:

> Governments recognized in Addis Ababa that the mobilization of domestic public resources is central to the pursuit of sustainable development, including achieving the SDGs.[27]

However, this report does not specifically mention human rights in this section on domestic resource mobilization, the first sentence of this chapter suggests the overarching linkage, in that it recognizes the following:

> Domestic public finance is essential to providing public goods and services, *increasing equity* and helping manage macroeconomic stability [emphasis added].[28]

The lack of clear linkages in the 2017 IATF Report to human rights was criticized by the Civil Society Financing for Development (FfD) Group, which is a global platform for around 800 civil society organizations, networks and federations which engage with the FfD issues. The failure of the Report to mention the work by UN Human Rights Council special rapporteurs and Independent Experts in analysing the human rights impact assessment is also highlighted by the Civil Society Group.[29]

Harmful tax practices are an issue that has been studied by the OECD, which has designed a number of multilateral conventions and instruments and has established the *Global Forum on Transparency and Exchange of Information for Tax Purposes*.[30] In 2011, the IMF, OECD, UN and the

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[26] *Inaugural 2016 Report of the Inter-agency Task Force on Financing for Development – Addis Ababa Action Agenda: Monitoring commitments and actions*, Chapter II.A Domestic public resources, p33-34, available online at http://www.un.org/esa/ffd/wp-content/uploads/2016/03/2016-IATF-Chapter2A.pdf, last accessed 02.05.2017.

[27] *Ibid*, p. 34.

[28] *Ibid*., p. 33. *See* also the in the *Advance unedited draft of 2017 report of the Inter-agency Task Force on Financing for Development – Progress and prospect*s, available online at http://www.un.org/esa/ffd/wp-content/uploads/2017/03/2017-IATF-Report_AUV_30-Mar-2017.pdf, last accessed 02.05.2017:

> ...the policy imperative for equitable, guaranteed and sustainable provision of certain services is a main reason for public funding of some forms of infrastructure, including in developed countries.

[29] *Civil Society Comments to the IATF Draft Report – Advanced Draft (Apr 11),* pp. 11 and 14, also see pp. 2, 3, and 5, available online at http://www.un.org/esa/ffd/wp-content/uploads/2017/03/CSO-FfD-Group-submission_11Apr2017.pdf, last accessed 02.05.2017.

See further for information on this CSO group: https://csoforffd.org/about/

[30] *See* further, OECD, The *OECD's Project on Harmful Tax Practices*: *the 2004 Progress Report*, available online at http://www.oecd.org/tax/harmful/30901115.pdf; the

See also the standards against corporate tax abuse linked with the implementation of the *United Nations Guiding Principles on Business and Human Rights*.

World Bank called on G-20 countries to analyze how their tax systems could have a negative 'spill-over effect' effect on other countries.[31] Subsequent studies by the Center for Economic and Social Rights, The International Bar Association and Oxfam have estimated that cross-border tax abuse (often connected with high level corruption) has caused the loss of billions of dollars from the public revenue of a number of countries.[32] The monies which *could have been used* for development programmes and infrastructure in developing countries or for social safety nets in times of financial crisis for developed countries facing austerity measures, have been siphoned away into tax havens. The poor in both developed and developing countries are ultimately the worst affected. Thus, it can be said that allowing the continuation of a financial and tax regulatory structure that negatively affects public revenue which could have been directed towards social services and which therefore impedes the achievement of human rights standards and goals *within your own territory or extraterritorially*, can be identified as a violation of State responsibility.

This issue of violation of State responsibility has been raised in the context of the observations of the Committee on the Rights of the Child[33], the recent concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) on the 6th periodic report of the United Kingdom[34]

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[31] IMF, OECD, UN, World Bank, *Supporting the Development of More Effective Tax Systems: A Report to the G20 Development Working Group (2011*), http:// www.oecd.org/ctp/48993634.pdf.

See also the July 2016 report which analysed how support for developing tax capacity can be improved, and provided the following recommendations - IMF, OECD, UN and World Bank Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries (2016), available at: http://www.oecd.org/tax/enhancing-theeffectiveness-of-external-support-in-building-tax-capacity-in-developing-countries.pdf, last accessed 05.04.2017.

See further, van der Does de Willebois, Emile, et al, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It,* World Bank, 2011. This is a report for the World Bank's Stolen Asset Recovery (StAR) initiative, which includes 213 corruption case studies from approximately 80 countries, which involved individuals holding public office or with political power or influence.

[32] CESR, *Panama Papers': When Tax Abuse Is Human Rights Abuse*, http://www.cesr.org/article.php?id=1834, last accessed 08.07.2016; OXFAM, *An Economy For The 1% - How Privilege And Power In The Economy Drive Extreme Inequality And How This Can Be Stopped,* https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf, last accessed 08.07.2016; International Bar Association's Human Rights Institute (IBAHRI) Task Force Report, *Tax Abuses, Poverty and Human Rights,* 23 April 2015.

[33] Committee on the Rights of the Child, *Concluding observations on Georgia*, U.N. Doc. No. CRC/C/15/Add.124 (2000) paras 18–19, mentioned the adverse effects of tax evasion on the implementation of treaty obligations. There is a proposed General Comment on public budgeting which is expected to include this issue.

[34] Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland,*

and as a submission against Switzerland to the CEDAW Committee.[35] The concluding observations by the CESCR on the 6th periodic report by the United Kingdom stated that:

> …the Committee is concerned that financial secrecy legislations and permissive rules on corporate tax are affecting the ability of the State party, as well other States to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.[36]

The Committee recommends at para 17(d) that the State Party should:

> Intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse.[37]

The submission to the CEDAW Committee was made by several non-governmental bodies and concerned Switzerland's financial services regulatory structure and stated that:

> ...the role played by Switzerland, as one of the world's leading financial secrecy jurisdictions, in facilitating large–scale cross-border tax abuse that deprives other States of the public resources needed to fulfil women's rights and promote their substantive equality. It argues that Swiss policy and practice in the tax and financial domains calls into question Switzerland's compliance with its obligations under Article 2 of CEDAW, read in conjunction with its duties as a State party to other international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), to realize women's rights both within and outside its territory.

The policy and regulatory measures with regard to financial and tax law and policy are thus seen as connected to the State responsibility to progressively realize the economic and social rights of their people, by preventing

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E/C.12/GBR/CO/6, 24 June 2016, para 16.

The Committee drew on the 'joint 'shadow Report' of the Center for Economic and Social Rights (CESR), the Tax Justice Network (TJN) and the Global Justice Clinic at NYU School of Law (GJC), *UK Responsibility for the Impacts of Cross-border Tax Abuse on Economic, Social and Cultural Rights,* Submitted on May 20, 2016, available online at http://cesr.org/downloads/GBR_CESCR_ SUBMISSION_JUNE_2016.pdf, last accessed 08.07.2016.

[35] Berne Declaration, Center for Economic and Social Rights Global Justice Clinic, New York University School of Law Tax Justice Network to the *Committee on the Elimination of Discrimination against Women* 65th Pre-Sessional Working Group Geneva, March 7-11, 2016.

[36] Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland,* E/C.12/GBR/CO/6, 24 June 2016, para 16.

[37] *Ibid*, para 17(d).

tax avoidance, using tax revenue for social welfare and cooperating with other States and international organizations towards making those rights a reality in other jurisdictions as well. As commented by Stiglitz and Pieth (formerly members of a Panamanian government 'Committee of Experts' appointed to strengthen the transparency of Panama's financial and legal system) in a November 2016 report:

> Over time, the rationale of the anti-corruption movement gradually expanded from safeguarding fair competition to a development and good governance agenda. In more recent times the anti-corruption and human rights instruments moved closer together.[38]

Thus it can be said that the lack of good governance, especially in relation to inefficient financial regulatory measures and the general impact on revenue can also be linked to serious negative repercussions for progressively achieving human rights obligations. The Panama Papers scandal can be said therefore to be a matter of concern for human rights, especially the progressive realization of economic and social rights.

III. Designing measures for the regulation of harmful tax practices within the framework of WTO Law.

> …a wide range of tax measures have been scrutinized at the WTO, including by the DSB, which has made major rulings in tax disputes between WTO Members. WTO rules can therefore be expected to continue to be an important factor in shaping tax policies, as Members will undoubtedly want to ensure that their tax policy measures do not infringe WTO rules.[39]

This brings us also to the next question of what kind of measures should and could a State take against foreign tax havens? What happens when a State actually takes measures concerning harmful tax practices, but there is an additional set of international standards to comply with, to judge the

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[38] Joseph E. Stiglitz and Mark Pieth, *Overcoming the Shadow Economy* (Friedrich-Ebert Stiftung, November 2016), at https://www.documentcloud.org/documents/3219549-Stiglitz-and-Pieth-Overcoming-the-Shadow-Economy.html, last accessed 20.04.2017. Also available at http://ciperchile.cl/wp-content/uploads/stiglitz_161110_IPA_ShadowEconomy_ptxt_online_1.pdf and http://library.fes.de/pdf-files/iez/12922.pdf.See further, International Justice Resource Center, *The Panama Papers: Connecting Tax Abuses and Human Rights*, 13th April 2016, available online at http://www.ijrcenter.org/2016/04/13/the-panama-papers-connecting-tax-abuses-and-human-rights/.

[39] Keen, Michael, *Is the WTO A World Tax Organization? A Primer on WTO Rules for Tax Policymakers,* IMF, Fiscal Affairs Department March 2016, available online at https://www.imf.org/external/pubs/ft/tnm/2016/tnm1602.pdf.

legality of these measures? Argentina imposed a number of measures on financial goods, services and service suppliers from jurisdictions such as Panama, which were deemed as not co-operating with Argentina on information exchanges and being transparent with regard to information on tax and financial matters. These types of measures are generally referred to as 'defensive tax measures'.[40] This led to a trade dispute with Panama. Argentina in its WTO dispute with Panama cited the OECD standards and 2012 FATF Recommendations discussed earlier as the basis for its defensive tax measures. Human rights obligations were not raised, but it could be said that broad societal values were in the backdrop of the dispute.

Coinciding with the Panama Papers scandal, in April of 2016, the Appellate Body of the WTO issued its decision in *Argentina-Financial Services*, a case which draws attention to the shortcomings in the global regulation of cross-border private capital flows. This dispute was initiated when Panama alleged in December 2012 that Argentinian domestic legal regulations concerning financial transparency were inconsistent with both the WTO GATT 1994[41] and WTO GATS[42] Agreements. There were eight financial, taxation, foreign exchange and registration measures[43] imposed by Argentina through regulations, which were challenged as WTO-inconsistent by Panama on the basis that the measures were applied with a distinction being made between countries considered co-operative or non-cooperative with regard to tax transparency. Panama was originally listed as a non-co-operative country. Shortly after Panama brought the issue to the attention of the WTO, the European Union and the United States also requested to join the consultations on the matter. The issue was not resolved in consultations and therefore a WTO Panel was established in 2013. Subsequently a number of additional countries also reserved their 3rd Party rights.[44]

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[40] *See* Appellate Body Report, *Argentina-Financial Services*, Annex B-2, Executive Summary of Argentina's other Appellant's Submission, para.2.

[41] General Agreement on Tariffs and Trade 1994 - Panama claimed that the disputed measures were inconsistent with Articles I:1, III:2, III:4 and XI:1 of the GATT 1994.

[42] General Agreement on Trade in Services - Panama claimed that the disputed measures were inconsistent with Articles II:1, XI, XVI and footnote 8, and XVII of the GATS.

[43] Measure 1 - withholding tax on payments of interest or remuneration
Measure 2 - presumption of unjustified increase in wealth
Measure 3 - transaction valuation based on transfer prices
Measure 4 - payment received rule for the allocation of expenditure
Measure 5 - requirements relating to reinsurance services
Measure 6 - requirements for access to the Argentine capital market
Measure 7 - requirements for the registration of branches
Measure 8 - foreign exchange authorization requirement

[44] Australia, China, Ecuador, Guatemala, Honduras, India, Brazil, Oman, the Kingdom of Saudi Arabia and Singapore.

In September 2015, the panel report, *Argentina - Measures Relating to Trade in Goods and Services,* was circulated to Members. This was the first WTO decision concerning measures taken by a WTO Member against harmful tax practices of countries such as Panama. Argentina stated in its defence that the measures are justified by the exceptions allowed in Articles XIV(c) and XIV(d) of the GATS and 2(a) of the GATS Annex on Financial Services (the "prudential exception") – and Article XX(d) of the GATT 1994.[45] After considering Panama's arguments on the inconsistency of the Argentine measures with GATT 1994, the Panel dismissed all the claims under GATT 1994 and refrained from ruling whether these measures could have been covered under the exception provided in Article XX(d) of the GATT 1994. Measures 2, 3, and 4 were found not to be inconsistent with Article XVII of the GATS (national treatment obligation) as Argentina was deemed not to have treated services and service suppliers from non-cooperative countries less favourably than 'like' services and service suppliers from Argentina, for the relevant services and modes on which Argentina made specific commitments. However, some of Argentina's actions were found by the Panel to be inconsistent with its obligations under the GATS, and it was recommended that Argentina should bring its measures into conformity. All eight measures were found to be inconsistent with Article II:1 of the GATS (most-favoured-nation obligation – MFN obligation). Measures 1, 2, 3, 4, 7 and 8 were found not to be covered under the exception of Article XIV(c) of the GATS because their application constituted arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS. This was due to the Panel finding that *the manner* in which Argentina designated cooperative and non-cooperative countries could not be justified, since Argentina had granted cooperative country status to countries with which it does not have an agreement for the effective exchange of tax and financial information. Measures 5 and 6 were found not to be covered by the exception provided in 2(a) of the Annex on Financial Services because, it was not accepted that there was a rational relationship of *cause and effect* between the measures and the 'prudential reasons' and thus they could not be accepted as being for 'prudential reasons'.

On the surface, the Panel decision may seem a victory for Panama, since Argentina was requested to take steps to bring itself into conformity with its WTO obligations. But it was noted by observers and legal experts that the decision was a somewhat strange or ironic victory, since it was ultimately a criticism of Argentina's decision to take Panama off the list of non-cooperative countries because of diplomatic steps to negotiate an agreement on

[45] Panel Report, *Argentina - Measures Relating to Trade in Goods and Services*, para.7.53.

the disputed issues. This decision to change the listing was taken during the WTO panel proceedings. Mark Warner, counsel at the OECD and advisor on harmful tax competition issues commented that:

> This was a Pyrrhic victory for Panama since the remedy for Argentina might have been as simple as putting Panama back on the non-co-operating list.[46]

WTO law expert Joost Pauwelyn commented that:

> So the small victory scored by Panama is actually grounded in the fact that Argentina "wrongly" put Panama on the "good guys" list [in 2014 during the WTO panel proceedings]. How strange is this? More systemically: this report says it is ok under WTO rules to take certain "sanctions" against tax havens …[47]

Panama was added to a non-cooperative list by Argentina and then, mid-dispute, added to the cooperative list. It was also noted that other tax havens were listed as cooperative and countries which were cooperating were listed as non-cooperative.

Panama and Argentina appealed the findings by the Panel on different grounds, but both relating to GATS discrimination claims under Article II:1 and Article XVII of the GATS (MFN and National treatment obligations). The Appellate Body did not consider matters under GATT 1994, but only the issues of the GATS. Due to this, the dispute before the Appellate Body is identified as '*Argentina-Financial Services*'. The key differences in the Appellate Body decision is that the Appellate Body found that with regard to Articles II:1 and XVII of the GATS, the Panel erred in its analysis of the term "like services and service suppliers" and it its assessment of the criteria of "no less favourable treatment" and therefore reversed the Panel decision on those points. However, with regard to the application of the exception in Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8, the Appellate body did not find that it had been demonstrated that the Panel had erred. Thus the Panels' finding that the Argentine measures designed to secure compliance with laws and regulations which were not otherwise WTO inconsistent, and that the measures were "necessary" was not reversed. Therefore, overall the

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[46] Warner, Mark, *Has the WTO climbed on board to deal with tax havens?* Globe and Mail online, Apr. 16, 2016, http://www.theglobeandmail.com/report-on-business/rob-commentary/has-the-wto-climbed-on-board-to-deal-with-tax-havens/article29650845/, last accessed 01.10.2016.

[47] Pauwelyn, Joost, *WTO Panel report on Argentine "Sanctions" against Panama Tax Haven,* 02.10.2015, available at http://worldtradelaw.typepad.com/ielpblog/2015/10/wto-panel-report-on-argentine-sanctions-against-panama-tax-haven.html, last accessed 10.10.2016.

8 measures were not found by the Appellate Body to be inconsistent with Argentina's GATS obligations, thus reversing the Panel findings.

It is relevant to assess the final result of this dispute with regard to both the importance of taking measures against harmful practices by tax havens as well as the manner in which the measures are designed and implemented. In the dispute, Argentina contended that their defensive tax measures were based on internationally recognized rules on standards on transparency and effective exchange of tax information of the Global Forum and the OECD, to which Panama had also made a commitment.[48] Panama did not deny that the purpose was important but claimed that however the rule of law and the principle of equality in tax matters were also of equal importance - which is a valid argument. The Panel in *Argentina-Financial Goods and Services* accepted that Argentina's measures were designed to secure compliance with its Constitution and domestic law as well as international obligations[49] and recognized that the objectives were extremely important[50], noting in particular that:

> ...the protection of its tax collection system and the fight against harmful tax practices and money laundering are objectives, interests or values of the utmost importance for Argentina.[51]

Furthermore, the Panel pointed out that the previous WTO GATS dispute of *US-Gambling* also emphasized that protecting society against the threat of money laundering is an interest that is important in the highest degree.[52] The Panel further added that:

> 7.680. We recall that, commenting on the relative importance of relevant common interests or values, the Appellate Body noted that "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument" [original footnote 866 - Appellate Body Report, *Korea - Various Measures on Beef*, para. 162.]
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> 7.681. In fact, the Panel considers that the common interests or values at stake are particularly important. In any country, tax collection is an indispensable source of revenue to ensure the functioning of the State and the various government services to citizens. Protection of the national tax base guarantees the viability of a country's public

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48 Appellate Body Report, *Argentina-Financial Services,* para 7.538.
49 Panel Report, *Argentina - Measures Relating to Trade in Goods and Services,* para 7.655.
50 See generally Panel Report, *Argentina - Measures Relating to Trade in Goods and Services,* paras 7.664-7.671.
51 Panel Report, *Argentina - Measures Relating to Trade in Goods and Services,* para 7.682.
52 Panel Report, *US-Gambling*, paras 6.492 and 6.493.

> finances and, by extension, its economy and financial system. The risks posed by harmful tax practices [original footnote 867 - The expression "harmful tax practices" covers tax evasion, avoidance and fraud] are even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies. Lastly, there can be no doubt that combating money laundering, which fits in with the fight against drug trafficking and terrorism, is a priority for the international community and thus also for Argentina.[53]

The Appellate Body did not disagree with the Panel's view on these issues, and although not citing the above paragraphs specifically, did refer to the Panel finding the objectives as being "of vital importance" and being in conformity with international priorities.[54]

It is interesting to note that the Panel, commenting on the interests and values at stake in the above quoted paragraphs, refers to the special needs of developing countries and how vital public revenue is for development. An improved global system which reduced harmful tax practices is overall better for developing countries in terms global solidarity and justice. But a discord in this argument for harmony can also be presented, from a developing country point of view – implementing international standards by improving regulatory frameworks and their enforcement is costly and can be an economic burden. And contradictorily, some small developing nations may be able to argue that being a tax haven is one of the few forms of economic growth and development which is open to them. Preventing small nations from doing this while more powerful nations continue to do so without sufficient effective reform of their own systems, while hypocritically imposing international standards on others, would be unjust.[55] This is one of the possible critiques of the creation and imposition of developed country-led standards. Such transformations need to particularly take into account the impact on small nations whose economies are heavily dependent on tax havens and about the alternative economic opportunities which could be created and developed by them.[56]

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[53] Panel Report, *Argentina-Measures Relating to Trade in Goods and Services*, paras 7.680-681.

[54] Appellate Body report, *Argentina-Financial Services*, paras 6.191-6.192.

[55] See for example: Brunson, Samuel D., *The US as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule,* Columbia Journal of Tax Law 5.2 (2017).

[56] See further Hampton, Mark P., *Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-configuration of Global Finance,* World Development Vol. 30, No. 9, pp. 1657–1673, 2002, commenting that many small island economies are highly dependent upon hosting offshore financial centers and tax haven activities with some having a majority of its government revenue through such activities and a significant percentage of its local labour force being directly employed in such centers.

The preamble of the GATS acknowledges the importance of 'national policy objectives' and the Appellate Body in *Argentina-Financial Services* reiterates that such national policy objectives can be "pursued through various means" with the proviso that such measures which affect the supply of financial services are taken 'for prudential reasons'[57] and are not 'used as a means of avoiding' the Member's GATS commitments or obligations.[58] Thus, the approach of a WTO Member to national development, economic growth and the national socio-economic attitudes and values are recognized as being able to play a role in the formation of policy and law within a WTO member's domestic jurisdiction.

While there is acknowledgement of national and international *values,* and even of OECD, FATF and G20 standards,[59] the Panel and Appellate Body *do not explicitly* refer to any human rights obligations in the context of international trade issues. It can be argued that this is unnecessary, since the importance of values underlying the human rights approach is broadly accepted. But the separation between the special regimes of human rights and WTO law maintained in the context of WTO dispute settlement, even if the connection between WTO law and *other* international standards is acknowledged. In contrast, Stiglitz and Pieth expressly acknowledge human rights in their 2016 report which was written in the aftermath of the Panama Papers revelations:

> These [illicit] flows undermine the rule of law, exacerbate inequality and have a detrimental impact, especially on developing countries, where severe deprivation suffered by the very poor continues to *infringe on their human rights* (social and economic as well as civil and political rights)…even developed countries have become aware of the massive amounts of offshore wealth and aggressive tax avoidance that strips public budgets; the corrosive effect that such leakages have on voluntary tax compliance; and the effect that they have on growing inequality, *increasingly identified as one of the world's most important problems* [footnotes omitted, emphasis added].[60]

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[57] The *Annex on Financial Services,* 2(a) includes an exception for 'prudential reasons' - "to ensure the integrity and stability of the financial system".

[58] Appellate Body Report, *Argentina – Financial Services*, para 6.260.

[59] Panel Report, *Argentina-Measures Relating to Trade in Goods and Services,* paras 7.673-7.676; Appellate Body Report, *Argentina-Financial Services*, section 5.2 and footnote 468.

[60] Stiglitz, Joseph E., and Mark Pieth, *Overcoming the Shadow Economy*, Friedrich-Ebert Stiftung, November 15, 2016, p.8 - https://www.documentcloud.org/documents/3219549-Stiglitz-and-Pieth-Overcoming-the-Shadow-Economy.html, last accessed 20.04.2017.

Also available at http://ciperchile.cl/wp-content/uploads/stiglitz_161110_IPA_ShadowEconomy_ptxt_online_1.pdf and at http://library.fes.de/pdf-files/iez/12922.pdf.

The international trade system is often described as one that offers opportunities for everyone to achieve prosperity. The Preamble of the WTO Agreement refers to these social objectives of WTO Members:

> Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living…

This reference to 'standards of living' could be used as a basis for the panels and Appellate Body to refer to international law and principles relating to human rights, especially to economic and social rights which identify core obligations of a State in order for an individual to live with dignity - but it has thus far not been used in this manner.

Some additional points can be highlighted with regard to the GATS exceptions that Argentina resorted to in its arguments. Article XIV of the GATS provides WTO Members with exceptions which it can use to argue for a justification or defence. Argentina sought to defend six of its measures under Article XIV(c) of the GATS, which states as follows:

> …nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures…
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …

The Panel rejected Argentina's defence under Article XIV(c) of the GATS on the basis that Argentina did not comply with the standard of the *chapeau* of Article XIV, which states that the exceptions are:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services…

Argentina did not appeal the Panel's ultimate rejection of its Article XIV defence (based on the *chapeau*), but *Panama* appealed the Panel's *intermediate finding of necessity* - that the six measures were "necessary to secure compliance with" certain GATS-consistent Argentine laws and regulations within the meaning of Article XIV(c) of the GATS. However, the Appellate Body did not find that the Panel had made any error or shortcoming in its analysis of 'necessity', noting that the Panel analysed both the objectives of the measures at issue and the specific provisions of the relevant laws and regulations, and had correctly made assessment of the contribution and

trade-restrictiveness of the measures and carried out a 'weighing and balancing' of the relevant factors for establishing necessity.

It is significant that the Appellate Body noted the *objectives* of a measure that the exception in Article XIV(c) of the GATS is argued as applying to. In particular, that looking at the objectives, or "common interests or values" protected by the relevant laws and regulations, would assist in understanding these laws and regulations better – and also, obviously, that a measure is only required to be designed to achieve the said objective, not that it guarantees that outcome.[61]

This comment will not go into detail on the Appellate Body analysis of the concept of 'likeness', but it is relevant to quote from Argentina's arguments differentiating 'likeness' for goods and services. A 'Likeness test' to determine whether services and/or service suppliers can be categorized as 'like' each other or 'unlike' each other is an important aspect of WTO law. The criteria for determining likeness has been gradually developed over time by case-law with regard to both GATT and GATS provisions. Criteria have included; properties of the goods or services, nature and quality, end-use, consumer preferences, 'competitive relationship' and classification of services under the UN Central Product Classification list. Argentina argued that "unlike the case of trade in goods, the *origin* of a service or service supplier may be highly relevant to its characteristics" and that services can be differentiated exactly because of the difference of the regulatory framework within which the service supplier operates[62] (– such as being a tax haven). If the origin can thus affect the nature and manner of supply of the service, it can also be said to affect the competitive relationship between service suppliers. The Appellate Body agreed that the Panel erred in its analysis of 'likeness' and reversed the Panels finding that services and service suppliers of co-operative and non-cooperative countries are 'like' each other – and

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[61] Appellate Body Report, *Argentina-Financial Services*, para 6.203:

> With respect to the first element, the phrase "to secure compliance" circumscribes the scope of Article XIV(c) of the GATS… A measure can be said "to secure compliance" with laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations [footnote 495], even if the measure cannot be guaranteed to achieve such result with absolute certainty [footnote 496]
>
> 495 In this regard, the objectives of, or the common interests or values protected by, the relevant law or
>
> regulation may assist in elucidating the content of specific rules, obligations, or requirements in such law or regulation.
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> 496 Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para 74.

[62] Appellate Body Report, *Argentina-Financial Services,* para 8.

furthermore that cooperative countries and Argentina's financial service also cannot be assumed to be 'like'.[63]

Ultimately, the Appellate Body did not find that Argentina's measures had been WTO non-compliant. However, this does not mean that similar defensive tax measures by other WTO Members *are* WTO compliant. The result of this complex dispute appears to be that the importance of taking defensive measures against tax havens is accepted and restricting trade with them is possible, so long as they are implemented in a justifiable, consistent and non-arbitrary way.

IV. CONCLUDING COMMENTS ON THE INTERFACE BETWEEN HUMAN RIGHTS, HARMFUL TAX PRACTICES AND WTO LAW

In the aftermath of both Panama Papers and *Argentina-Financial Services*, Panama took a number of steps regarding its international commitments on tax and financial transparency. Panama ratified the *Convention on Mutual Administrative Assistance in Tax Matters* on the 16th of March 2017. The Convention will enter into force for Panama on 1st of July 2017 and should deliver on its commitment to start exchanging information by 2018. On12 of April of 2016, 10 days after the Panama Papers revelation, the Government of Panama appointed an Independent Committee of eight experts, four national and four international, to investigate the country's offshore financial industry and strengthen the transparency of Panama's financial and legal system.[64] Nobel Prize-winning economist Joseph E. Stiglitz was made chairman of this Committee. However, both Stiglitz and Swiss expert Prof. Mark Pieth resigned from the Committee in August 2016, citing the lack of transparency in the proceedings and the lack of independence to investigate and make its findings public.

Stiglitz and Pieth released their own 25-page report and recommendations, titled *"Overcoming the Shadow Economy",* in November 2015.[65] Extracts from this report have been cited earlier in this paper. Key recommendations

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[63] Appellate Body Report, *Argentina-Financial Services*, para 6.82.

[64] *See* official https://www.presidencia.gob.pa/en/Comunicados/The-Government-announces-members-of-the-Independent-Committee-to-strengthen-the-platform-of-services-of-Panama.

[65] Stiglitz, Joseph E., and Mark Pieth, *Overcoming the Shadow Economy*, Friedrich-Ebert Stiftung, November 15, 2016, available online athttps://www.documentcloud.org/documents/3219549-Stiglitz-and-Pieth-Overcoming-the-Shadow-Economy.html, last accessed 20.04.2017.

Also available at http://ciperchile.cl/wp-content/uploads/stiglitz_161110_IPA_ShadowEconomy_ptxt_online_1.pdf and http://library.fes.de/pdf-files/iez/12922.pdf.

include that countries set up a searchable public registry of the beneficial owners of each corporation, trust, foundation, or other entity incorporated within its borders and compel annual reporting of the names of directors and beneficial owners and the jurisdictions in which they operate, with a full set of tax returns. It was also recommended that Governments introduce deterrent punishments to persons including lawyers who knowingly register a corporation or trust "whose primary purpose is to evade or avoid taxes or to engage in money laundering".[66]

The central issue discussed in this comment is a complex one as there is an interface between several different legal regimes and standards. Summarizing the findings, it can be stated as follows.

There are shortcomings in existing domestic and international tax regulation with regard to harmful tax practices, which can be linked to a lack of political will to introduce relevant policies and laws and implement overall good governance principles. There is also a lack of effective enforcement of existing domestic and international regulation which concerns cross-border private capital flows. At the same time there has been a recently developing broader human rights perspective on the impacts of the lack of effective enforcement of domestic and international regulatory frameworks governing tax and cross-border capital flows. The impact of tax practices on social inequity, the growing gap between the rich and the poor and the violation of human rights, is a link being highlighted by human rights experts, UN bodies, intergovernmental and non-governmental groups. Creating a more transparent and accountable global tax system is part of the responsibility of government to both their own citizens and to those in other States, with regard to collecting and using public revenue for public goods and services. Inaction on the above matters is gradually being accepted as a failure to fulfil a States' obligations regarding achievement of human rights and development - both their own domestic obligations as well as impacting the ability of other States affected by their actions or inactions, to fulfil their obligations.

It is clear that it the responsibility of the State to develop and introduce effective policies and measures to deal with their human rights and development obligations. Lack of regulation or ineffective regulation can result in cross-border private capital flows into tax havens. Some of these finances *could have* been collected as revenue and invested in socio-economic development and social services through better taxation policy supported by overall good governance. Thus there is a responsibility of States under international

[66] *Ibid*., p. 18.

human rights law to take steps to create and implement effective financial and tax policies, laws and regulations for such purposes.

Some of the measures which can be introduced may be seen as coming into conflict with WTO obligations. The WTO dispute settlement system as a whole and the decisions of Panels and the Appellate Body respond to disputes among WTO Members based on the interpretation and application of WTO law as specified in the covered Agreements such as GATT 1994 and the GATS. While there is acknowledgement of some international standards and broadly worded societal values, the panels and Appellate Body *do not explicitly* refer to human rights obligations in the context of international trade issues. The *Argentina-Financial Services* dispute highlights that WTO law has recognized the importance of the underlying values protected by enforcements measures against harmful tax practices – however, some measures may not be WTO compliant in the way they are designed or implemented. When States decide to take measures to combat harmful tax practices they must also abide by their obligations under WTO law, such as MFN and National treatment – or justify their measure as one which can fall within an exception clause. The panels and Appellate Body would assess arbitrary or unjustifiable discrimination among 'like' WTO members or among domestic and foreign suppliers as a violation, except if there is a differentiation which can be justified according to WTO law itself.

The impact of tax practices on social inequity, the growing gap between the rich and poor and the violation of human rights is not what may immediately come to mind when thinking of the Panama Papers scandal. However, this link is being highlighted by human rights experts, UN bodies, intergovernmental and non-governmental groups. Creating a more transparent and accountable global tax regulation system is part of the responsibility of government to both their own citizens and to citizens of other States with regard to collecting and using public revenue for public goods and services. Domestic legal reform and Inter-State cooperation is generally recommended, but there is also a possibility of using forms of trade sanctions, since the *Argentina–Financial Services* dispute has not completely closed the door on States/WTO Members taking a non-discriminatory, non-arbitrary, justifiable set of measures to restrict financial goods and services trade with tax havens. It is clear that measures which are expected to combat ills such as corruption, money laundering, tax avoidance or evasion, *must abide by the basic rule of law* by not discriminating in an arbitrary or unjustifiable manner among 'like' financial goods and services suppliers. In this way, it is encouraged that measures that are designed and applied fairly to all relevant parties, and that societal values or human rights justifications are not misused by being applied unevenly.