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الدورة السابعة والثلاثون

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البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير الخبير المستقل المعني بآثار الديون الخارجية للدول، وما يتصل بها من التزامات مالية دولية أخرى عليها، في التمتع الكامل بجميع حقوق الإنسان، وخاصة الحقوق الاقتصادية والاجتماعية والثقافية عن بعثته إلى بنما

مذكرة من الأمانة

تشرف الأمانة بأن تحيل إلى مجلس حقوق الإنسان التقرير الذي أعده الخبير المستقل المعني بآثار الديون الخارجية للدول، وما يتصل بها من التزامات مالية دولية أخرى عليها، في التمتع الكامل بجميع حقوق الإنسان، وخاصة الحقوق الاقتصادية والاجتماعية والثقافية، خوان بابلو بوهوسلافسكي، عن زيارته بنما.

وقد جرت الزيارة في الفترة ما بين ٢ و ١٠ أيار/مايو ٢٠١٧، بناء على دعوة من الحكومة. وعملاً بقراري مجلس حقوق الإنسان ٣/٣٤ و ١١/٣١، تمثلت أهداف هذه الزيارة في تقييم ثلاثة مجالات رئيسية ترتبط ارتباطاً مباشراً بالتمتع بحقوق الإنسان في بنما في ضوء الصكوك والمعايير الدولية الملزمة في مجال حقوق الإنسان. وسعى الخبير المستقل، أولاً، إلى اكتساب فهم أفضل للسياسات المالية والضريبية التي اتخذت من أجل تحسين الشفافية وكبح التجاوزات الضريبية والتدفقات المالية غير المشروعة. وتمثل هدفه الثاني في تقييم ما إذا كانت فوائد النمو الاقتصادي والسياسة المالية قد أدت إلى تحسين التمتع بحقوق الإنسان، وخاصة الحقوق الاقتصادية والاجتماعية والثقافية، ومدى تحسن التمتع بها. أما هدفه الثالث، فتتمثل في تقييم ما قد ينجم عن مشاريع البنية التحتية الممولة بقروض من آثار سلبية على تمتع الأفراد والجماعات، بمن فيهم الشعوب الأصلية، بحقوقهم الإنسانية.



الرجاء إعادة الاستعمال

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Report 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, on his mission to Panama*

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* Circulated in the language of submission and Spanish only.

I. Introduction: scope of the mandate and the visit

1. 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, Juan Pablo Bohoslavsky, conducted an official visit to Panama from 2 to 10 May 2017, at the invitation of the Government.

2. The mandate of the Independent Expert is wide and complex, and clearly framed within the scope and content of international human rights law and standards. In its most recent resolution extending the mandate of the Independent Expert, the Human Rights Council requested him to, inter alia, pay particular attention to the effects of public debt, economic reform and financial consolidation policies on the realization of the Sustainable Development Goals and the impact of illicit financial flows on the enjoyment of human rights. The Council also requested the Independent Expert to provide advice to States, the private sector and other stakeholders on the effective implementation of the 2030 Agenda for Sustainable Development in the field of international lending, financial policy and human rights, paying particular attention to Goals 10 and 17.¹

3. The purpose of the visit was to examine the implementation of international human rights principles and standards through legislation, policies and programmes, pursuant to Human Rights Council resolutions 34/3 and 31/11. Accordingly, the Independent Expert decided to focus on three main areas and on offering meaningful and constructive recommendations to the Government. The three areas were: (a) the financial and fiscal policies that have been put in place with the aim of enhancing transparency and curbing tax abuses and illicit financial flows; (b) whether and to what extent the benefits of economic growth have improved the enjoyment of human rights, particularly economic, social and cultural rights, for people in Panama; and (c) whether infrastructure projects might have adverse effects on the enjoyment of the human rights of individuals and groups, including indigenous peoples.

4. The Independent Expert has already devoted two thematic reports to the Council to the issue of illicit financial flows, exploring and unpacking their multiple, broad and serious negative implications for human rights, and explaining why, in an era of global exchange of goods and capital, the intimate links between financial policy and human rights must not be underestimated at the national and international levels.² The Independent Expert has underscored that illicit financial flows drain States across the globe of public resources that are sorely needed to ensure investment in social policies and programmes to effectively implement international human rights obligations and commitments, particularly for the poor and the disenfranchised. At the same time, illicit financial outflows affect countries' balance of payments, inhibiting their growth and investment, and leading to or exacerbating financial crises, which in turn badly hit the most vulnerable.

5. During his visit, the Independent Expert had the opportunity to meet and speak with a number of high level officials and with representatives of indigenous peoples, trade unions, civil society and community organizations, as well as with experts in fields pertaining to his mandate. The Independent Expert is grateful to the Government and all his interlocutors for their time, the frank and open discussions he had with them and the information and views they shared during and after his visit.

II. International human rights obligations and commitments applicable to Panama

6. Panama has ratified, and has binding obligations arising from, most core international human rights treaties, notably the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International

¹ See Human Rights Council resolution 34/3, paras. 9 and 12.

² See A/HRC/28/60 and A/HRC/31/61.

Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. All those instruments include provisions on non-discrimination and on the realization of economic, social and cultural rights.³ At the regional level, Panama has ratified the American Convention on Human Rights and the Additional Protocol thereto in the Area of Economic, Social and Cultural Rights.⁴

7. Those international treaties are recognized in article 4 of the Constitution of Panama, and have been incorporated into the domestic regime through ratification by law (art. 159.3). The Supreme Court of Panama, in a decision of 21 August 2008,⁵ established that all human rights treaties in force are part of the constitutional corpus (*bloque de constitucionalidad*), meaning that all the rights enshrined in international human rights instruments have constitutional status and therefore consolidate and expand on the provisions of the Constitution.⁶

8. Central to the realization of the human rights enshrined in those instruments is the obligation of States parties to take appropriate measures, to the maximum of their available resources, to ensure non-discrimination and the progressive realization of economic, social and cultural rights. As the Committee on Economic, Social and Cultural Rights has pointed out, appropriateness of measures refers not only to legislative measures, but to administrative and financial measures and to the provision of effective remedies for human rights violations.⁷ Financial measures include, among others, taxation and fiscal policies, as well as regulation of the actions and omissions of all financial actors and business enterprises in the public and private sectors. Actors operating in the financial sector include banks, financial institutions, accounting, insurance and law firms, and others.

9. Other pertinent sources of standards and norms are the guiding principles on foreign debt and human rights,⁸ and the Guiding Principles on Business and Human Rights.⁹

10. At the core of international human rights law stand the State's obligations to respect, protect and fulfil all human rights of individuals or groups within its territory or jurisdiction. The duty to protect entails taking measures to ensure that third parties operating under the umbrella of a State's legal system, including financial institutions and business enterprises, do not contribute to human rights abuses and do not undermine the enjoyment of human rights at home and abroad.¹⁰ In other words, all States have the responsibility to ensure that all enterprises operating in their territory and linked with their jurisdiction respect human rights, and most importantly, that their actions or omissions do not result in negative impacts in other jurisdictions, for example, by taking part in the flow of assets and capital that ought to be taxed and reported on elsewhere.¹¹

³ Panama ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights on 8 March 1977; the International Convention on the Elimination of All Forms of Racial Discrimination on 16 August 1967; the Convention on the Elimination of All Forms of Discrimination against Women on 29 October 1981; the Convention on the Rights of the Child on 12 December 1990; and the Convention on the Rights of Persons with Disabilities on 7 August 2007.

⁴ Panama ratified the American Convention on Human Rights on 8 August 1978 and the Additional Protocol on 28 October 1992.

⁵ See HRI/CORE/PAN/2017, para. 253.

⁶ *Ibid.*, paras. 252–254.

⁷ See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations.

⁸ See A/HRC/20/23, annex. Endorsed by the Human Rights Council in its resolution 20/10.

⁹ See A/HRC/17/31, annex. Endorsed by the Human Rights Council in its resolution 17/4.

¹⁰ See the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) for references to relevant international standards. Moreover, in its 2016 concluding observations on Switzerland, the Committee on the Elimination of Discrimination against Women interpreted the affirmation that States have extraterritorial obligations with regard to financial secrecy and illicit financial flows (see CEDAW/C/CHE/CO/4-5 and Corr.1, para. 41 (a)).

¹¹ See A/HRC/17/31.

III. Illicit financial flows impair human rights

11. In its resolution 31/11, which Panama voted in favour of, the Human Rights Council recognized that illicit financial flows, including tax evasion by high-net-worth individuals, commercial tax evasion through trade misinvoicing and tax avoidance by transnational corporations, contribute to the build-up of unsustainable debt, as Governments lacking domestic revenue may resort to external borrowing. The Council explicitly emphasizes the links between inequality, social exclusion and the occurrence of financial crises, which in turn adversely affect human rights. Crucially, the Council encourages States to explore further avenues for reforming parts of their legal systems with a view to developing a more equitable taxation system.

12. As the Independent Expert indicated in his 2015 thematic report,¹² there are various connections between illicit financial flows and human rights, especially because illicit financial outflows deprive Governments of crucial resources needed to put in place effective and independent institutions and to implement human rights. Often, a lack of adequate public resources affects the most vulnerable and marginalized groups of society. Illicit financial flows debilitate the rule of law and deter due process, with lasting effects with regard to equality before the law. They play a critical role in increasing impunity, corruption and abuse of authority, which can create a breeding ground for human rights violations and abuses.

13. Few would argue against the premise that illicit financial flows are a global challenge, affecting developed and developing economies alike. They are not accidental or a by-product of the market; rather they often appear to be the result of State-sanctioned practices and high levels of impunity, insufficient regulations, and the misuse of complex financial vehicles to avoid accountability and traceability. There is no doubt that they can be effectively addressed and curbed through mechanisms of international cooperation and shared accountability in all countries.

14. By the same token, responses by one country alone, isolated from structural changes in other jurisdictions or from international efforts to fight opacity, will seldom produce meaningful results. In that context, the Independent Expert welcomed the global commitment to significantly reduce illicit financial flows as part of target 16.4 of the 2030 Agenda for Sustainable Development. He also welcomed the synchronicity of commitments adopted by States Members of the United Nations agreeing in addition to reduce inequality within and among countries in Sustainable Development Goal 10. Curtailing illicit financial flows could make a considerable contribution to the reduction of national and global inequalities in wealth and income.

15. Closely linked is the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, which underlines that the mobilization and effective use of domestic resources is central to reach the Sustainable Development Goals. The reduction of illicit financial outflows stemming from trade misinvoicing,¹³ tax abuse, corruption and criminal activities is important in order to increase domestic resource mobilization. Both are inherently connected to each other and essential to ensure that all States have sufficient fiscal space, not only for attaining the Sustainable Development Goals, but most importantly, for the protection and realization of human rights. Public resources are necessary to ensure civil, cultural, economic, political and social rights, and to implement State obligations contained in international human rights treaties. No State can function properly without an independent and adequately funded judiciary, or well-trained law enforcement officials to protect the rule of law and the security and rights of people living in its territory. Similarly, significant public expenditures are required to ensure

¹² A/HRC/28/60 and Corr.1.

¹³ Trade misinvoicing and tax loss due to misinvoicing are important components of illicit financial flows worldwide and contribute to inequality around the world, especially in developing countries. Estimates of the scale of such flows can be found at www.gfintegrity.org/report/illicit-financial-flows-to-and-from-developing-countries-2005-2014/.

universal access to education, working hospitals and health centres, access to essential medicines, and various forms of social protection.

16. While a large number of phenomena contribute to illicit financial flows, it has been estimated that the majority of those flows are related to cross-border tax-related transactions.¹⁴ Indeed, the rationale for international capital movements transferring financial assets or accounting profits to jurisdictions with low (or no) taxation and strong secrecy rules is essentially to reduce or avoid tax payments. Curbing tax-related illicit financial flows ought to include minimizing tax evasion by high-net-worth individuals, commercial tax evasion through trade misinvoicing and tax avoidance through abusive transfer pricing by transnational corporations.

17. Global estimates point to a significant amount of wealth held offshore, benefiting from banking secrecy and the use of anonymous trusts and corporations to hide the true beneficial owners in foreign jurisdictions. Often the aim is to evade or reduce taxes or hide stolen assets. Sometimes those vehicles are also used to hide gains from corruption and other criminal activities. While most assets deposited offshore may have been acquired by legal economic activities, hiding them with the intention of evading taxation makes them illicit. Failing to declare those assets makes such behaviour in most jurisdictions a criminal offence, particularly if large amounts are involved.

18. According to 2015 estimates, there are between US\$ 24 trillion and US\$ 36 trillion in unrecorded private wealth invested offshore.¹⁵ It has been estimated that the relative amount of wealth from developing countries held abroad is much greater than that held from developed countries, ranging from 20 to 30 per cent in many African and Latin American countries. In terms of the greatly unequal ownership of offshore wealth, it has been estimated that 85 to 90 per cent of wealth belongs to fewer than 10 million people, just 0.014 per cent of the world's population.¹⁶ Another study has concluded that the probability that assets will be hidden rises very sharply with wealth, including within the very top groups. As a result, offshore wealth turns out to be extremely concentrated. By the authors' estimate, the wealthiest 0.01 per cent of the population owns about 50 per cent of wealth.¹⁷

A. The banking and financial sector in Panama

19. Panama is a pivotal financial and banking centre, with over 90 banks, 50 of which have a general licence for local and international banking. Panama boasts a highly liquid banking and financial sector. The Superintendency of Banks (*Superintendencia de Bancos*) requires local banks to maintain a minimum liquidity ratio of over 30 per cent, which has ultimately protected the local economy from the worst of the global financial crisis during the past decade. Currently, over 30 per cent of general licence bank deposits in Panama come from abroad, mostly within Latin America, underscoring the potential risk for Panamanian banks to receive funds without clear origins.¹⁸ The situation may well be even worse, as that percentage may not include cases in which, for example, a Panamanian company could be owned by foreign investors, but the deposits would be considered domestic.¹⁹

20. According to the Superintendency of Banks, the international banking centre's assets totalled US\$ 120.14 billion by March 2017, while the assets held by national general licence banks reached only US\$ 100.29 billion. In financial terms, the banking system in Panama has seen a profitable upward trend. For example, the international banking centre profits increased 12 per cent during the first quarter of 2017 (a net profit of US\$ 486

¹⁴ See A/HRC/31/61, para. 10.

¹⁵ Ibid.

¹⁶ Ibid., paras. 12–13.

¹⁷ A. Alstadsaeter, N. Johannesen and G. Zucman, "Tax evasion and inequality", 28 May 2017, p. 3. Available at www.nielsjohannesen.net/wp-content/uploads/AJZ2017.pdf.

¹⁸ See www.fitchratings.com/site/pr/1020745.

¹⁹ See www.anpanama.com/893-Centro-Bancario-de-Panama-podria-cambiar-forma-de-medir-depositos.note.aspx.

million between January and March 2017), and estimates point to similar or better results for the rest of the year. The national banks holding only a general licence show even better results, with accrued profits for March 2017 at US\$ 354 million, 18.4 per cent higher than 2016.²⁰

21. The financial and banking sector in Panama is only one component of a wide and well-integrated platform of services and logistics. It is considered to be comprehensive and sophisticated, and is among one of the most frequently used around the world, notably for transactions involving commerce between Latin America and the rest of the world. The platform of services includes the Panama Canal, and two of the top three international ports in Latin America and the Caribbean, Colón and Balboa, with a share of 15 per cent of the shipping in the region.²¹ In addition, there are 19 free trade zones, 11 of them concentrated in the cities of Panama and Colón.²² Those zones, which are regulated by Law No. 32 of 2011, offer tax benefits, simplified rules and migratory and labour incentives especially designed to attract foreign trade.

22. The history of Panama is directly connected to its banking and financial activity, and to date has benefited from its strategic geographic location. The first Banking Law, adopted in 1970,²³ provided for the creation of the National Banking Commission as a regulatory body and served to attract prominent international banks. It was perceived as a cornerstone in the establishment of an international banking centre specializing in external operations, taking advantage of fiscal incentives, a bilingual marketplace, telecommunications permitting international financial transactions, and a dollarized system.²⁴ The international banking centre grew and specialized primarily, but not exclusively, in providing funds to Latin America.

23. The political crisis of 1988 caused a decrease in assets of approximately US\$ 14 billion and the closure of domestic banking operations for nine and a half weeks. Only international operations were allowed. The crisis eventually ended when the United States of America intervened militarily in Panama in December 1989.

24. Between 1990 and 1999, assets in the financial centre have increased once again, and new legislation was adopted in 1998,²⁵ with the aim of adapting to the standards of the Basel Committee on Banking Supervision. Notably, the new legislation established administrative and financial autonomy for the Superintendency of Banks.

25. On 10 August 1998, Panama ratified the Inter-American Convention against Corruption and, on 4 June 2001, signed the declaration on the Mechanism for Follow-Up on the Implementation of the Convention. On 23 September 2005, it ratified the United Nations Convention against Corruption.²⁶ With Executive Decree No. 52 of 30 April 2008, a broad regulatory framework for banks was developed, attempting to comply with international standards.

26. In 2014, the Financial Action Task Force included Panama in the list of countries with strategic deficiencies in the areas of anti-money laundering and combating the financing of terrorism, also known as the “grey list”.²⁷ Although that move received serious criticism, it served as a turning point towards reforms and updating of the regulatory framework to prevent money laundering and funding of terrorism in the country. As a result, the Panamanian authorities implemented an action plan to ensure better results and

²⁰ See www.superbancos.gob.pa/superbancos/documents/financial-statistical/statistics-reports/2017/IAB.pdf.

²¹ See www.cepal.org/en/infographics/ports-ranking-top-20-latin-america-and-caribbean-2016.

²² See <http://logistics.gatech.pa/en/assets/special-economic-zones/free-zones>.

²³ Adopted by Cabinet Decree No. 238 of 2 July 1970.

²⁴ The United States dollar has been legal tender in Panama since 1904, and the balboa has been pegged to it.

²⁵ Adopted by Decree-Law No. 9 of 26 Feb. 1998.

²⁶ Panama has yet to ratify the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

²⁷ See www.imf.org/external/pubs/ft/scr/2014/cr1454.pdf.

less opacity in transactions.²⁸ It must be noted that in February 2016, the Financial Action Task Force recognized the significant progress achieved in the anti-money laundering and combating the financing of terrorism regime, and removed Panama from the list of jurisdictions under monitoring.

27. Partly as a result of being placed on the “grey list”, a key development occurred on 28 April 2015 with the entry into force of Law No. 23 of 2015 on the prevention of money laundering, terrorism financing and financing of proliferation of weapons of mass destruction. The law regulates several supervisory bodies, public and private entities, and natural or legal entities. It establishes the due diligence mechanisms for registering, reporting and identifying information about ultimate beneficial owners, also called the “know your client” principle. Under the Law, a financial intelligence unit was also established, as was the agency in charge of supervision and regulation of non-financial entities, such as the Colón Free Zone, money transfer companies, the national lottery, money exchange companies, casinos, real estate and building companies and precious stone sellers.

28. As detailed by the Organization for Economic Cooperation and Development (OECD),²⁹ articles 27 and 28 of Law No. 23 of 2015 establish different due diligence measures for natural and legal persons. For natural persons, the resident agent is required to verify the identity of the clients, verify the authority of the persons acting on behalf of other persons, identify the final beneficiary and take reasonable measures to verify the information and documentation provided by each natural person identified as final beneficiary. As for legal entities and other structures, the resident agent is required to request certificates proving the legal existence of the legal persons, request identification and ensure verification of officers, directors, agents, authorized signatures and legal representatives, identify and take reasonable measures to verify the final beneficiary using relevant information and reliable sources, and conduct due diligence for natural persons acting as administrators, representatives, agents, beneficiaries and signatories of the legal person.

29. Under article 29, financial reporting entities are explicitly required to keep updated records of ownership changes, the legal owners and the final beneficiaries of their clients. Executive Decree No. 363 of 13 August 2015 clarified that non-financial regulated entities and professions engaged in activities subjected to supervision are also required to maintain records on the transactions and updated information of their clients resulting from the due diligence measures (art. 19).

30. Furthermore, financial and non-financial reporting entities, as well as professionals engaged in activities subjected to supervision, including resident agents, are required to safeguard that information and documentation for five years from the date of termination of their professional relationship with the client (Law No. 23 of 2015, art. 29). That obligation is equally applicable to national and foreign individuals, legal entities and other legal arrangements.

31. Resident agents are prohibited from establishing a relationship or conducting a transaction when the client does not facilitate compliance with the relevant due diligence measures; they may report such suspicious activities to the financial intelligence unit (art. 36). There is a generic sanction for non-compliance with the provisions of the Law, and the Law provides that specific, proportionate and dissuasive sanctions will be established by the relevant supervisory bodies.

²⁸ In a letter to the Independent Expert dated 1 September 2017, the Government indicated that the International Monetary Fund had included Panama in the “grey list”, in part because the country was complying fully with only one of several recommendations from the Financial Action Task Force. Furthermore, one of the most relevant deficiencies was the lack of a comprehensive normative framework, with non-regulated sectors such as insurance, leasing, factoring, loans, precious stones, accounting, notaries and lawyers, and that Panama was not cooperating internationally as it should.

²⁹ See OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews: Panama 2016: Phase 2: Implementation of the Standard in Practice* (Paris, 2016), paras. 90–104.

32. In August 2016, when reviewing the country's tax transparency, OECD found Panama compliant for four essential elements, largely compliant for one element, partially compliant for two elements and non-compliant for three elements. The report concluded that "in view of the ratings for each of the essential elements taken in their entirety, the overall rating of Panama is Non-Compliant".³⁰ In June 2017, Panama was classified "provisional largely compliant" under the OECD fast-track evaluation procedure due to progress in improving its legal framework.

B. The so-called "Panama Papers"

33. As briefly detailed above, the Independent Expert learned that several measures to make the banking centre of Panama compliant with international standards had already started to be deployed prior to the "Panama Papers" scandal. Against that historical backdrop, the April 2016 scandal involving a law firm domiciled in Panama, Mossack Fonseca, should be considered.

34. At the outset, the Independent Expert wishes to note that during and after his visit, several interlocutors stressed how unfortunate the use of the term "Panama Papers" was and continues to be for the international image of the country. A large number of companies, trusts and transactions, even if they were created or made in Panama, have been traced to various jurisdictions around the world. Similarly, most of the money involved in those transactions comes from abroad.

35. The so-called "Panama Papers" demonstrated how international the problem is and how far-reaching and intricate the network of financial vehicles and actors is. The leaked files illustrate the vast and complex practices that are legal under Panamanian law, but have been misused by financial intermediaries from abroad to hide assets and evade taxation.

36. The leak refers to approximately 11.5 million files exposing offshore holdings from around the world, and details of the hidden financial dealings of thousands of people in over 200 countries and territories. The leaked documents included nearly 40 years' worth of data from a single law firm, revealing 214,488 offshore companies, many of which are still active in Panama in 2015, despite the increased scrutiny of offshore evasion after the financial crisis of 2007–08 when the leak occurred.³¹ The creation of offshore companies is not illegal per se, either in Panama or elsewhere. Evading and minimizing taxation was, however, a key reason why, for decades, politically exposed persons, high-net-worth individuals, businesses and financial institutions from all over the world had requested the financial services of a law firm in Panama to deposit financial assets in more than 20 jurisdictions.

37. While Mossack Fonseca was not the sole provider of offshore services domiciled in Panama, it was reportedly one of the major providers in Panama at the time. It should be noted that the existence of such a high number of companies created by one law firm does not in itself mean that all of them are used as proxies to escape responsibilities, cover illicit transactions or evade taxes. However, a substantial majority of those offshore companies are designed as part of a complex global business model aiding very rich individuals or corporations to conceal identities, distancing the actual company from the ultimate beneficial owner which, in turn, is highly functional in tax evasion, tax avoidance and money laundering.

38. Given the estimations available, the sophisticated services described above could have had serious adverse extraterritorial human rights effects by shrinking the revenues available to foreign governments for public services and the realization of human rights.³²

³⁰ OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes*, pp. 14-15.

³¹ A. Alstadster, N. Johannesen and G. Zucman, "Tax evasion and inequality", p. 11.

³² See A/HRC/28/60.

C. Measures taken by the Government

39. In the aftermath of the Mossack Fonseca law firm scandal, there were two main consequences in Panama: it accelerated and deepened a process that was already under way, aimed at enhancing transparency in the financial and banking sector, and it brought to the fore the need for additional regulatory measures domestically and internationally and more rigorous commitments to ensure their enforcement.

40. One such measure was the creation of the Committee of Independent Experts,³³ originally composed of eight members, the main purpose of which is to conduct objective analysis of the platform of services in Panama, with a view to formulating recommendations that can be incorporated as best practices, in order to ensure transparency, as required by the international community. The Committee was given a broad mandate, requested to consult with public, private and multilateral institutions, and to provide recommendations. In August 2016, four months after its creation, two of its most prominent members, Joseph Stiglitz and Mark Pieth, decided to leave the Committee, citing the lack of assurances of immediate publication of its final report after submission.³⁴

41. The Independent Expert wishes to highlight some positive financial reforms and measures that were taken: the introduction of new obstacles to corporate shares issued to bearer, the establishment of an obligation for companies to keep accounting books of offshore transactions, the reinforcement of due-diligence requirements on resident agents to identify the real owners of the corporate vehicles for which they provide services, and the regulation and supervision of non-financial actors, such as casinos, Colón Free Zone, accounting and legal firms and real estate, which are now obliged to report suspicious transactions.

42. In May 2017, Panama underwent an assessment against the 2012 Financial Action Task Force recommendations, which included an in situ visit. The evaluation focused on the effective implementation of the anti-money laundering and combating the financing of terrorism regime. The Government informed the Independent Expert that, after the visit, the Financial Action Task Force of Latin America shared a draft evaluation report with it, and the final report is expected to be published in December 2017.

43. On 23 February 2017, Panama deposited the instrument of ratification of the Convention on Mutual Administrative Assistance in Tax Matters and approved it through Law No. 5 of 2017.

44. The Convention sets standards for a multilateral exchange of information upon request on tax matters, and for the automatic exchange of information on a bilateral basis, in accordance with the policy statement of Panama regarding fiscal transparency.³⁵ Panama will exchange financial information automatically with only those countries with which it enters into a competent authority agreement. The Convention will serve as the legal basis for the negotiation of competent authority agreements with partner jurisdictions, and Panama has committed to negotiating those agreements with foreign jurisdictions that have an adequate legal framework and technological systems to guarantee the confidentiality and protection of information that will be subject to automatic exchange. It should be noted that the reservations Panama has entered to its application, including in relation to parts of articles 2, 9, 17 and 28 of the Convention, mean that Panama can choose not to assist in tax examinations abroad.³⁶

³³ Adopted by Executive Decree No. 94 of 29 April 2016. See the final report of the Committee, dated 18 November 2016. Available at www.presidencia.gob.pa/tmp/file/1503/INDEPENDENT%20EXPERT%20COMMITTEE.pdf.

³⁴ See Joseph E. Stiglitz and Mark Pieth, "Why we left the Panama Commission", *Time*, 10 August 2016. Available at <http://time.com/4446733/joseph-stiglitz-panama-commission/>.

³⁵ Executive Decree No. 10 of 2 February 2017 established the country's compliance policy regarding fiscal transparency and set out criteria for its automatic exchange of information in tax matters.

³⁶ EY Global Tax Alert, "Panama issues policy statement regarding its compliance with fiscal transparency", 14 February 2017. Available at www.ey.com/gl/en/services/tax/international-tax/alert-

45. Competent authority agreement negotiations on automatic exchange of financial account information will be undertaken on the basis of common interests and internationally accepted standards, such as those used by the OECD Global Forum or other jurisdictions such as Mexico, the United Kingdom of Great Britain and Northern Ireland and the United States, which have extensive experience in evaluating systems of data protection and confidentiality.

46. Panama has already signed several tax information exchange treaties,³⁷ including the Foreign Account Tax Compliance Act with the United States, and negotiations are under way for the establishment of bilateral tax information exchange agreements with Colombia, France and Japan.

D. Additional measures needed

47. While Panama has shown political commitment to move towards a more transparent financial and tax system, in the view of the Independent Expert, the country needs to broaden its approach to the ever-present challenges of financial and fiscal opacity that are at the heart of twenty-first century economies.

48. The Independent Expert's reasons for that overarching assessment are multiple: tax-related offences in Panama are territorial, and applicable only to those who reside in the country, which constitutes a strong limitation in fighting tax evasion across borders. Furthermore, tax evasion is considered a contravention solely under the Fiscal Code of Panama; it is not regulated or penalized as a criminal offence under criminal law. Income tax evasion is recognized and subject to a fine, or in some cases a prison sentence, but not criminal sanctions. The application of that provision is delegated to an administrative entity within the Ministry of Economy and Finance, which investigates and judges the contravention, and not to a prosecutor or a judge.³⁸

49. Consequently, those obliged to report suspicious transactions do not have to pay close attention to whether their clients are paying taxes or not. More worrisome is the fact that the "suspicious transaction" reporting system does not seem to encompass the fundamental fiscal dimension of the broader illicit financial flows problem: its repercussions for the well-being of the majority of the population around the world. In other words, the "know your client" principle currently excludes the requirement to assess compliance with tax obligations and status at home or abroad. For the Independent Expert, that gap needs to be closed in the Panamanian legal system, and stronger regulations and accountability mechanisms should be put in place. Currently, ongoing criminal investigations in the country against those who created, promoted, administrated and benefited from the rigged system that was revealed by the "Panama Papers" have been limited to a few lawyers. They are not prosecuted for their role in facilitating tax evasion or related actions in Panama, but for their alleged participation in money laundering and other crimes perpetrated abroad.³⁹

50. Certainly, the Independent Expert is mindful that establishing criminal sanctions for tax evasion should be part of a holistic strategy. Tax evasion is a complex phenomenon involving all relevant dimensions of the economy, notably the banking and real estate sectors, the various financial and non-financial intermediaries, accounting and law firms, and free trade zones, with regard to both their national and international activities. Nonetheless, in his view, the financial and banking sector in particular ought to be more directly and effectively integrated into the agenda of curbing illicit funds in Panama. The financial intermediation sector is thriving and represents approximately 7.7 per cent of

-panama-issues-policy-statement-regarding-its-compliance-with-fiscal-transparency.

³⁷ See <https://dgi.mef.gob.pa/Tributación-I/C-Firmados.html>.

³⁸ See Fiscal Code, arts. 752 and 1,312.

³⁹ See references to the vast investigations under the name "Lava Jato" conducted by the Public Prosecutor's Office (Ministério Público Federal) in Brazil, considered the biggest corruption case investigated in the country and with broad ramifications in several countries in Latin America. Available at www.mpf.mp.br/para-o-cidadao/caso-lava-jato/entenda-o-caso.

gross domestic product (GDP),⁴⁰ with 90 banks in operation, most of them licensed to carry out general activities domestically and internationally. The National Banking System reported 4 per cent growth in assets between 2015 and 2016. In 2016, the financial intermediation sector grew 6.6 per cent, according to estimates by the National Statistics and Census Institute.⁴¹

51. For the Independent Expert, such figures require a close assessment of the roles that the banking and financial institutions play in the flows of funds that corporate vehicles facilitate. While it is true that many financial transactions performed by companies formally created in Panama take place in foreign jurisdictions, given that more than 40 per cent of the financial assets in the Panamanian financial sector are lent abroad, it will be crucial for any national strategy towards curbing illicit financial flows to incorporate the banking sector. The Committee of Independent Experts established by the Government presented essential recommendations, which are still under consideration. However, the recommendations will not be sufficient unless they are complemented by measures to ensure efficient and robust due diligence mechanisms in the banking sector.

52. The overall involvement of financial institutions in abusive tax planning strategies for transnational corporations worldwide is confirmed by the increasing number of cases in which individual financial institutions have been investigated or have received penalties for a host of infractions, the most widespread of which was helping wealthy clients and corporations engage in tax fraud.⁴² Many of the cases revealed by the “Panama Papers” point in that direction.

53. The Independent Expert encourages the Superintendency of Banks to broaden the scope and nature of information that is publicly available by publishing the complete file, including any investigations of, and sanctions imposed upon, the institutions it supervises, as well as the reasons for such investigations and sanctions. That step may also boost confidence in the accountability of all actors regardless of their economic standing.

54. Panama needs to strengthen the fiscal dimension of due diligence, particularly in the banking sector: beyond the volume of the tax actually evaded from the Panamanian State, given the territoriality principle upon which its tax system is based, there are extraterritorial obligations not to facilitate adverse fiscal impacts in other jurisdictions. In addition, the reputational costs of the “Panama Papers” should also lead to a national debate on the kinds and purpose of investments to be attracted to the country. The report of the Independent Commission of Experts posed similar questions in the context of tax base erosion, transfer of profits and capital investment.

55. Moreover, in order to effectively implement reforms towards enhanced financial and fiscal transparency in the country, governance must be strengthened. Clear and vigorous conflict of interest legislation must be put in place so that the autonomy and independence of sectoral regulators, supervisors and decision makers are ensured. While the Independent Expert was informed that a draft law to regulate that issue had been discussed in Congress, the legislation should ensure effective inclusion of the relevant principles applicable in the field, such as separation of powers, legality, publicity of administrative acts, fairness and efficiency.

IV. Economic growth, inequality and human rights

56. From a human rights perspective, economic growth without substantial progress towards equality is a strong indicator of the need for more effective and better designed laws, policies and programmes. Steady economic growth in a country with a world-class

⁴⁰ See HRI/CORE/PAN/2017, para. 141.

⁴¹ Ministry of Economy and Finance, Directorate of Economic and Social Analysis, “Economic and Social Report 2016”, p. 34. Available in Spanish only at www.mef.gob.pa/es/informes/Documents/Informe%20Economico%20y%20social%20-%20anual%202016.pdf.

⁴² James Henry, “Let’s tax anonymous wealth!” in *Global Tax Fairness*, Thomas Pogge and Krishen Mehta, eds. (Oxford, Oxford University Press, 2016).

financial and banking sector and a thriving service platform should bring about concerted efforts to reduce economic, social and political inequalities, to overcome poverty and marginalization and to achieve rapid progress toward the full realization of economic, social and cultural rights for all residents, notably those population groups most in need.

57. In that context, it is essential to bear in mind some critical social and demographic indicators. With a population of around 4,580,000 inhabitants in 2016,⁴³ and decreases in population growth to around 1.55 per cent per annum, the Government rightly recognizes that it has a valuable opportunity to address poverty and regional inequalities.⁴⁴ The population in Panama is primarily urban, with 65.1 per cent living in cities,⁴⁵ particularly in Panama and Colón. Around 60.2 per cent of single-parent households are headed by women, indicating that poverty reduction strategies must target women as a priority group.⁴⁶

58. As at March 2016, 9.9 per cent of the population, or around 450,000 people, were living in extreme poverty or with insufficient income to cover their minimum nutritional requirements,⁴⁷ while 22.1 per cent of the population were living in “general” poverty.⁴⁸

59. In absolute terms, growth has led to reduction of poverty, especially since 2004. Between 2001 and 2016, there was a significant reduction in the unemployment rate, from 14 to 5.5 per cent.⁴⁹ Some positive net figures show a significant increase in public expenditure in the social sector as a proportion of total public expenditure, from 44.3 per cent in 2000 to 59.1 per cent in 2015.⁵⁰ In 2015, the highest share of total social expenditure (36.3 per cent) was allocated to the health sector, taking into account the investment made in drinking water and basic sanitation programmes.⁵¹ The lowest allocation was to the housing sector, with only 2.7 per cent of public investment.⁵²

60. Between 2008 and 2016, data indicates a steady reduction in both general and extreme poverty, even if it was not commensurate with the economic expansion. More worrisome, inequalities across regions persisted: in 2016, some 2.8 per cent of urban residents were living in extreme poverty, while the corresponding figure for rural residents was 24.8 per cent, nine times higher. The 2016 figures for general poverty are also striking: in urban areas, the rate was 11.1 per cent, while in rural areas, it was 45.2 per cent, four times higher.⁵³

61. Poverty disproportionately affects the indigenous population, even though it represents 12.3 per cent of the total population, or approximately 418,000 inhabitants. The main groups are the Ngäbe (62.3 per cent of the indigenous population), the Kuna (19.3 per cent) and the Emberá (7.5 per cent).⁵⁴ High levels of poverty persist in the indigenous *comarcas* (towns or areas) and in those provinces with a high proportion of people residing in rural areas that are not easily accessible or where indigenous communities are present.⁵⁵ In the indigenous *comarcas*, poverty is above 70 per cent and extreme poverty is as high as 40 per cent, 4 times the national average. In that context, the Plan for the Comprehensive Development of the Indigenous Peoples of Panama should be implemented in line with international human rights standards and principles on the rights of indigenous peoples.

⁴³ See HRI/CORE/PAN/2017, para. 4.

⁴⁴ *Ibid.*, para. 12.

⁴⁵ *Ibid.*, para. 71.

⁴⁶ *Ibid.*, para. 72.

⁴⁷ *Ibid.*, para. 88. See also Ministry of Economy and Finance, “Economic and Social Report 2016”, p. 85.

⁴⁸ Ministry of Economy and Finance, “Economic and Social Report” 2016, p. 85. References to “extreme” and “general” poverty reflect measurements made by the Government of Panama. No definition of “general” poverty is provided in the report.

⁴⁹ See HRI/CORE/PAN/2017, para. 126.

⁵⁰ *Ibid.*, para. 164.

⁵¹ *Ibid.*, para. 166.

⁵² *Ibid.*, para. 170.

⁵³ Ministry of Economy and Finance, “Economic and Social Report 2016”, p. 85.

⁵⁴ See HRI/CORE/PAN/2017, para. 22.

⁵⁵ *Ibid.*, para. 80.

62. Panama takes pride in the strength of its economic model geared towards services,⁵⁶ and in the impressive 7.9 per cent average annual growth achieved between 2011 and 2015,⁵⁷ more than double the average for Latin America and the Caribbean and among the world's highest over that same period. Economic growth has benefited from the fact that the administration of the Panama Canal is in national hands. The country profits from its geographic advantage as a hub for services, logistics, transportation and communications. The Economic Commission for Latin America and the Caribbean (ECLAC) estimates 5.9 per cent economic growth for Panama in 2017, three times higher than the rest of the region.⁵⁸ An average of between 3.8 and 5.3 per cent growth is estimated for the years to come.⁵⁹

63. According to the Global Competitiveness Report 2016–2017, Panama was the largest upward mover in the overall Global Competitiveness Index during that period, and led the region in macroeconomic environment, goods market efficiency, financial market development, and business sophistication. It moved up the Index rankings from fiftieth in 2015–2016 to forty-second in 2016–2017.⁶⁰

64. Such a positive overview in growth and competitiveness does not coincide well with critical indicators from a human rights perspective. In fact, it is highly problematic to find high growth levels and at the same time, persistent inequality. In 2015, the Gini coefficient for income was higher in Panama than in many countries in the region, at 0.48.⁶¹ One could fall into the trap of considering that to be a defect that will correct itself over time, were it not for the fact that analysis indicates that the economic policy choices seem to continue favouring wealth consolidation and growth in the hands of very few. It is worth pointing out that Panama has one of the lowest tax to GDP ratios in Latin America, at 16.2 per cent, whereas the regional average stood at 22.5 per cent in 2015. While all the countries in the region have increased that ratio between 1990 and 2015, it has remained largely, and regrettably, unchanged in Panama.⁶² That may be explained by a number of factors, including policies that may not be geared towards eliminating the structural and systemic aspects that sustain inequalities, especially persistent exclusion of and discrimination against some sectors of the population and some regions in the country.

65. The Government's Strategic Plan 2015–2019⁶³ acknowledges that development in recent years has been based on a social, economic and institutional structure with multiple imbalances and gaps. It also explicitly aims at enhancing social inclusion, an objective that the Independent Expert fully supports. Furthermore, in his view, imbalances and loopholes in taxation impede better wealth distribution to create a more inclusive, fair and productive society.

66. Tax policy is a powerful tool that Governments can use to address exclusion and inequality, and to ensure that no group hoards the benefits of economic growth for itself. More importantly, taxation must also be understood as an essential element in the implementation of international human rights obligations, notably in balancing disparities. For example, in the flourishing area of high-end real estate and so-called "horizontal" properties (high-rise condominiums) in the country, especially in Panama City, legislative debate is currently ongoing on lowering the tax on properties. While some developers have argued that the current tax is too high and the valuation too "subjective", the Government

⁵⁶ For reference, 83 per cent of GDP in 2015 came from services (logistics and transportation, banking, insurance and telecommunications).

⁵⁷ See HRI/CORE/PAN/2017, para. 145.

⁵⁸ Ministry of Economy and Finance, "Economic and Social Report 2016", p. 55.

⁵⁹ See The Economist Intelligence Unit, Panama Forecast, 1 September 2017.

⁶⁰ Klaus Schwab, ed., *Global Competitiveness Report 2016–2017* (Geneva, World Economic Forum, 2016), p. 20.

⁶¹ See HRI/CORE/PAN/2017, para. 91.

⁶² OECD, ECLAC, CIAT, IDB, *Revenue Statistics in Latin America and the Caribbean 2017* (Paris, OECD Publishing, 2017). Available at www.keepeek.com/Digital-Asset-Management/oecd/taxation/revenue-statistics-in-latin-america-and-the-caribbean-2017_rev_lat_car-2017-en-fr#page46, p. 45.

⁶³ See www.mef.gob.pa/es/Documents/PEG%20PLAN%20ESTRATEGICO%20DE%20GOBIERNO%202015-2019.pdf.

rightly considers that a discontinuation of that tax would be detrimental to the overall tax base. Since 2010, construction, including of residential housing, has been the economic activity that has made the greatest contribution to the country's total GDP, on account of increased investment in public and private infrastructure, including residential housing.⁶⁴

67. The national budget should be rationalized, with better planned and regulated public investment in social areas, which is sorely needed especially in the poor and marginalized areas, and among rural, indigenous and urban poor communities. The economic advantages of Panama ought to be garnered to benefit its people. Budget planning and programming may consider multi-year needs, accountability mechanisms and updated checks and balances for the types of investments that can ensure the reduction of inequity as a top priority.

68. In August 2017, the Government presented its National Strategic Plan 2030, which is aimed at aligning the national vision and policy priorities with the 2030 Agenda for Sustainable Development. The Plan defines the vision for Panama in 2030 as a State with high development in the human, economic, social and technological areas, with justice, inclusion, equality of opportunity, intercultural understanding and sustainable natural resources. The foundation of the Sustainable Development Goals is the enjoyment of all human rights without discrimination, and the pledge that no one will be left behind has clearly pointed to areas where Panama is capable of making substantial progress.

69. The Independent Expert commends Panama for being the first country in the region to develop a plan of action in keeping with the Sustainable Development Goals and calls on the Government in particular to make every effort to ensure that Goal 10 and its strong human rights-based call to reduce inequality be at the core of the implementation of its Strategic Plan. Specifically, the Independent Expert underscores the fact that some of the targets of Goal 10 are to adopt policies, especially fiscal, wage and protection policies, and to improve the regulation and monitoring of global financial markets and institutions and strengthen the implementation of such regulations.

V. Infrastructure projects and human rights

70. Another critical dimension of assessing economic growth from a human rights perspective is a focus on investment and infrastructure and agro-industry projects, which are often co-financed by multilateral development banks and private financial institutions. The economic capacity of Panama, its easy access to credit, and the priority it gives to providing services for international markets have led, in the Independent Expert's view, to an uneven emphasis on a series of projects, without conducting comprehensive human rights and environmental impact assessments prior to carrying them out. For example, the Independent Expert was made aware of the consequences of hydroelectric power plants in the Province of Chiriquí, particularly those known as "La Cuchilla", "Chuspa" and "Chan 75." In some of those cases, the volume of water used, the type of concession contracts concluded with the companies, and the impact on the water courses of the rivers in the areas affected suggest not only a direct impact on access to water for domestic and personal use, but also a longer-term impact on the environment, waterways, ecosystems and the living conditions of entire communities. The Independent Expert also received information about displacement caused by land conflicts and illicit sales in Kusapín, and about the displacement of people of African descent due to a tourism project in Pedro González.

71. In the context of infrastructure projects, the complex situation of the Barro Blanco hydroelectric power plant project was also brought to the fore and was discussed with government officials and civil society organizations. For years, several issues related to that plant have been a matter of concern that has been considered by a number of domestic entities and by the Inter-American Commission on Human Rights, as well as the topic of an urgent appeal by some special procedures in June 2016.⁶⁵ The Government responded

⁶⁴ See HRI/CORE/PAN/2017, paras. 142–146.

⁶⁵ Joint urgent appeal by the Special Rapporteur on human rights and the environment and the Special

pointing out the importance it attributes to dialogue and the peaceful resolution of the concerns, as well as its proactive engagement in ensuring that an agreement with the communities was reached in a participatory way, and that it should be implemented. It has been noted that, as the infrastructure project is already close to completion, there is an essential aspect of reparation and compensation. In other cases, the human rights standard of free, prior and informed consent should be ensured before any project can be developed, and it must be respected by the Government and by public and private lenders.

72. In that regard, the State is bound by international human rights law, which particularly protects the most vulnerable groups, and pertinent bilateral investment treaties, which shelter investors' rights.⁶⁶

73. The Independent Expert was also made aware that Executive Decree No. 62 of 30 March 2017 established a regime to regulate all not-for-profit organizations, which was aimed at addressing, among other things, concerns about possible links with dubious funding in relation to political parties. According to some organizations, however, the decree seems to impose excessive ambiguities and create discretionary powers in the regulation of organizations specifically focused on the protection and promotion of human rights or associations working to defend the rights of communities in the area of infrastructure projects. The consequence, even if unintended, would be to minimize civic space critical for human rights work.⁶⁷ The Independent Expert wishes to underline that freedom of association, freedom of expression and the essential work of human rights defenders must be protected, and that any decree or regulation by the State with regard to civil society organizations working on human rights must not limit or reduce their space for monitoring and advocacy about legitimate concerns, which help to strengthen democratic mechanisms and institutions. Regulation to enhance the transparency of funding for political parties is important. However, measures should not be so broad as to have a negative impact on civic space for human rights work.

VI. Conclusions and recommendations

74. **Undoubtedly, financial and fiscal transparency is a central goal worldwide. To ignore the interwoven national and global dimensions and implications of illicit financial flows when assessing any country situation would render the assessment incomplete. Panama can and must continue to play its part to enhance its overall approach to transparency, as the rest of the countries in the world ought to do.**

75. **The domestic and international regulatory changes that were accelerated by the so-called "Panama Papers" show that Panama is making efforts to enhance transparency and accountability in its financial service platform. Yet, given that a transparency agenda anchored in international human rights law needs to be truly effective also from a fiscal perspective, financial and non-financial entities, as well as professionals involved in activities subjected to supervision, have to be considered key stakeholders in the Government's efforts to combat tax evasion and tax fraud. If tax evasion, tax fraud and providing assistance for tax evasion and tax fraud were considered, under certain serious circumstances, to constitute crimes, financial intermediaries and professionals working in the financial sector would be required to**

Rapporteur on the rights of indigenous peoples (ref: UA PAN 1/2016, dated 23 June 2016). Response from the Government of Panama dated 5 August 2016. Both documents are available from <https://spcommreports.ohchr.org/>.

⁶⁶ For reference, see Inter-American Court of Human Rights, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, 29 March 2006.

⁶⁷ Joint communication by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on the situation of human rights defenders (ref: OL/PAN/1/2017, dated 22 May 2017). Response from the Government of Panama dated 25 July 2017. Both documents are available from <https://spcommreports.ohchr.org/>.

report suspicious transactions based on tax considerations. Moreover, they would be accountable if they failed to comply with that requirement.

76. In particular, more robust banking regulations need to be established, including stricter and more systematic due diligence processes so that the above-mentioned institutions contribute to preventing tax evasion and tax avoidance by national or foreign individuals, legal entities or other legal arrangements, in line with the stronger controls that are currently being adopted in the banking sector in various jurisdictions. The Independent Expert is mindful of the potential challenges in doing so, but he is convinced that further delay in enhancing controls will backfire in the long term, and that Panama is currently well positioned to achieve structural changes and remain competitive, efficient and fully transparent at the same time.

77. As noted by an expert on transparency issues in Panama, contrary to the prescribed thinking, the “Panama Papers” did not drive off depositors in the banks operating in Panama. According to the Superintendency of Banks, the total assets of the banking centre, as of November 2016, were US\$ 119 billion dollars, 1.7 per cent more than in March 2016, before the “Panama Papers” incident.⁶⁸ That calls into question whether the transparency agenda has either been ineffective or, conversely, whether further transparency would actually consolidate the Panamanian financial platform. Either way, it appears that the time is right to deepen financial transparency in Panama.

78. Panama should promote a robust transparency agenda not only at home, but also in bilateral and multilateral forums to ensure that its banking and financial service sector does not face unfair competition by both State and non-State actors who still refuse to embrace measures aimed at ensuring global tax justice. All States ought to apply clear regulations that make it illegal to intentionally, incorrectly or inaccurately state the price, quantity, quality or other aspect of trade in goods and services in order to move capital or profits to another jurisdiction or to manipulate, evade or avoid any form of taxation. Genuine reciprocity and good faith from all countries in compliance with tax exchange information treaties should be ensured, as should assistance to developing States that may still be currently ill-equipped to participate on an equal footing in the system of automatic exchange of tax information.

79. However, the Independent Expert wishes to stress that enhanced fiscal and financial transparency in Panama must be understood and addressed also as a pathway towards compliance with its international human rights obligations. In other words, measures and policies in the economic, financial and fiscal sectors should figure explicitly and prominently as a component of the country’s human rights vision and strategy. Continued economic growth must be harnessed towards improving living conditions for everyone. Effective mechanisms should ensure that growth plays a role in reducing socioeconomic inequality as experienced by the poor in urban and rural areas, and by indigenous peoples. Furthermore, inequality must be firmly combated, notably by putting in place the required tax reforms, as well as regulation and policies for its financial sector. Panama must make sure that its primary efforts are geared towards human development and the realization of human rights, and that its thriving platform of services contributes to that overarching purpose.

80. Panama has had one of the highest economic growth rates in the world in the last decade, and has made steady progress in its overall reduction of poverty. However, systemic and worrisome inequalities persist, particularly in relation to people in rural areas, indigenous peoples and the urban poor, who continue to face extreme poverty. Positive economic periods and a thriving financial sector should be considered a unique opportunity for the country to ensure that structural changes,

⁶⁸ See Carlos Barsallo, “Panama’s reputation: rising again from the embers”, 24 August 2017. Available from www.icsa.org.uk/knowledge/governance-and-compliance/features/will-panamas-reputation-rise-again-from-the-embers.

especially in fiscal policy, as well as long-term and well-targeted social investment and a robust human rights focus take centre stage, with a concerted agenda across sectors to ensure the realization of economic, social and cultural rights for all.

81. Infrastructure projects often have direct impacts on the human rights of communities and indigenous peoples, leading to displacement, destitution and lack of access to adequate housing, food, waterways or ancestral lands. Without proper consultation, participation and ensuring prior informed consent, those projects are bound to lead to serious human rights violations, or to situations that could have been prevented, often affecting the poor and disenfranchised. Panama is currently moving ahead with a series of infrastructure projects, and both public and private investment in that area is on an upward trend. The Independent Expert warns that, if projects are moved ahead without proper human rights impact assessments and without ensuring genuine participation of affected individuals, including prior, informed consent by indigenous people, the projects could potentially trigger social tension or unrest in the years to come and increase the risk of human rights abuses.

82. Given the global adverse human rights effects of illicit financial flows, often depriving States of essential resources to ensure the realization of human rights, in the present report the Independent Expert has outlined both general recommendations that apply to all countries and jurisdictions, notably Panama, as well as particular recommendations for consideration in Panama only.

83. States, banks, insurance companies, transnational corporations and accounting and law firms can contribute to enhanced transparency worldwide by implementing the following four main recommendations:

(a) Abolish shell companies and anonymous accounts by imposing a legal requirement for public disclosure of ultimate beneficial ownership information of all business entities, including companies, trusts, charities and foundations, created under its jurisdiction;

(b) Increase engagement in discussions and initiatives towards ensuring automatic exchange of tax-related information worldwide;

(c) Consider and set in motion initiatives conducive to public country-by-country reporting of transnational corporations, mandatory by law, to submit comprehensive reports about their assets, profits, revenue, taxes paid and number of employees, as well as their profits and losses in every jurisdiction where they operate, rather than presenting a consolidated balance;⁶⁹

(d) In order to curtail transfer mispricing, use a clear benchmark of publicly quoted commodity prices in commodity transactions, particularly those that take place between related parties. A public international database should be built on reliable comparable prices, which would enable tax authorities, including those in developing countries, to be better equipped to deal with potential abuses in that area.⁷⁰

84. The Independent Expert recommends that Panama introduce the following specific measures:

(a) Make tax evasion and providing assistance for tax evasion a criminal offence under the Criminal Code, not solely an administrative or fiscal contravention;

(b) Add tax fraud to the list of suspicious transactions that financial and non-financial entities and professionals must report to the competent authorities;

(c) Establish clear and robust due diligence mechanisms in the banking sector in order to discourage bank clients from undertaking activities that violate tax laws and to bring such violations to the attention of the pertinent public authorities.

⁶⁹ For a detailed discussion, see James Henry, "Let's tax anonymous wealth!" in *Global Tax Fairness*.

⁷⁰ United Nations Conference on Trade and Development, "Trade and Development Report 2014" (New York and Geneva, United Nations, 2014), p. 195.

In particular, banks can and should contribute to the prevention of tax evasion and tax avoidance at the national and international levels;

(d) Adopt enhanced legislation to ensure full autonomy and independence of sectoral regulators, supervisors and decision makers involved in financial and fiscal matters;

(e) Ensure that the bank regulator broadens the scope and nature of the information that is publicly available on its investigations of, and sanctions imposed upon, the institutions it supervises and the reasons for such investigations and sanctions;

(f) Continue to sign bilateral tax information exchange agreements aiming at covering all countries with which Panama has meaningful economic ties;

(g) Enhance effective controls of accounting firms, some of which may deliberately obscure links between offices or staff under various jurisdictions with the aim of “protecting” clients from regulatory enquiries and legal risks;

(h) Take effective measures to ensure progressive tax policies and to rationalize the budget, both in terms of revenues and of outputs and investments, with the aim of reducing socioeconomic inequalities and poverty, and to ensure redistribution of the benefits of economic growth;

(i) Carry out all infrastructure projects with prior, informed consent by the indigenous peoples or other communities that may be directly affected, and ensure that those affected enjoy genuine participation in the decision-making based on adequate and timely information;

(j) Make bilateral investment treaties and direct foreign investments in the country subject to social and environmental impact assessments prior to their adoption or ratification;

(k) Compensate communities that have already been negatively impacted by infrastructure projects and ensure they receive reparation based on human rights;

(l) Submit pending reports to the treaty body monitoring mechanisms, particularly its third periodic report to the Committee on Economic, Social and Cultural Rights, which has been pending since 2004.
