

**This is an electronic reprint of the original article.
This reprint *may differ* from the original in pagination and typographic detail.**

Author(s): Eskelinen, Teppo; Ylönen, Matti

Title: Panama and the WTO: new constitutionalism of trade policy and global tax governance

Year: 2017

Version:

Please cite the original version:

Eskelinen, T., & Ylönen, M. (2017). Panama and the WTO: new constitutionalism of trade policy and global tax governance. *Review of International Political Economy*, 24(4), 629-656. <https://doi.org/10.1080/09692290.2017.1321569>

All material supplied via JYX is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of the repository collections is not permitted, except that material may be duplicated by you for your research use or educational purposes in electronic or print form. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone who is not an authorised user.

Panama and the WTO: new constitutionalism of trade policy and global tax governance

Teppo Eskelinen & Matti Ylönen

To cite this article: Teppo Eskelinen & Matti Ylönen (2017) Panama and the WTO: new constitutionalism of trade policy and global tax governance, *Review of International Political Economy*, 24:4, 629-656, DOI: [10.1080/09692290.2017.1321569](https://doi.org/10.1080/09692290.2017.1321569)

To link to this article: <https://doi.org/10.1080/09692290.2017.1321569>



© 2017 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 05 May 2017.



Submit your article to this journal [↗](#)



Article views: 920



View related articles [↗](#)



View Crossmark data [↗](#)



Panama and the WTO: new constitutionalism of trade policy and global tax governance

Teppo Eskelinen^a and Matti Ylönen^{b,c}*

^aDepartment of Social Sciences and Philosophy, University of Jyväskylä, Jyväskylä, Finland; ^bDepartment of Political and Economic Studies, University of Helsinki, Helsinki, Finland; ^cDepartment of Economics, Aalto University School of Business, Helsinki, Finland

ABSTRACT

Tax havens and tax flight have lately received increasing attention, while interest toward multilateral trade policies has somewhat diminished. We argue that more attention needs to be paid exactly to the interrelations between trade and tax policies. Drawing from two case studies on Panama's trade disputes, we show how World Trade Organization (WTO) rules can be used both to resist attempts to sanction secrecy structures and to promote measures against tax flight. The theory of new constitutionalism can help to explain how trade treaties can 'lock in' tax policies. However, our case studies show that trade policy not only 'locks in' democratic policy-making, but also enables tax havens to use their commercialized sovereignty to resist anti-secrecy measures. What is being 'locked in' are the policy tools, not necessarily the policies. The changing relationship between trade and tax policies can also create new and unexpected tools for tackling tax evasion, underlining the importance of epistemic arbitrage in the context of new constitutionalism. In principle, political actors with sufficient technical and juridical knowledge can shape global tax governance to various directions regardless of their formal position in the world political hierarchies. This should be taken into account when trade treaties are being negotiated or revised.

KEYWORDS

Trade policy; tax havens; new constitutionalism; Panama; WTO; tax policy.

*Corresponding author. Email: matti.v.ylonen@gmail.com

This article was originally published with errors. This version has been corrected. Please see Corrigendum (<https://doi.org/10.1080/09692290.2017.1332547>)

© 2017 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

1. INTRODUCTION: TAXATION AND TAX HAVENS ON THE INTERNATIONAL AGENDA

In this article, we analyze the policy implications of the increasing convergence and overlap of trade policy and tax policy. Specifically, we show how trade policy tools can be used to resist initiatives against tax evasion. This will be done by analyzing two case studies on trade disputes initiated by Panama, in the context of other recent changes in the international tax and trade policies. We argue that, first, there is a need for a more detailed analysis of the trade-tax nexus, and second, that a given position of international capital can be 'locked in' by the active use of trade policy *tools* than enable tax havens to resist tax policy initiatives. Third, this convergence of trade and tax governance not only locks in policies but can also open up new and unintended avenues to challenge the power of global capital. This highlights the importance of epistemic arbitrage of policy professionals. Moreover, it shows that it is a more complex phenomenon than is sometimes thought. We will use the theory of 'new constitutionalism' as a starting point and further show how our findings lead to some implications on the need to reconsider the theory.

Tax havens and tax evasion have indeed become topical fields within global policy. In April 2016, the International Consortium of Investigative Journalists began publishing exposés on 11.5 million leaked documents containing information on more than 214,000 offshore companies founded with the help of a Panamanian law firm and corporate service provider, Mossack Fonseca. In addition to individual investors, the scandal involved a great number of major banks from every part of the world. These banks had received assistance from Mossack Fonseca in opening tax haven accounts for their clients. Several politicians in different countries had to resign. Far from being an isolated event, the Panama papers leak was a continuation in a series of recent tax information leaks from Liechtenstein, Switzerland and Luxembourg. Public debates and pressure (Dallyn 2016) have been followed by increased academic attention, which in turn has significantly improved understanding of the mechanisms, actors and structures of tax avoidance and tax evasion.

The nascent literature on global tax governance has focused mostly on tax-specific initiatives, and until very recently, the causes of tax competition have been neglected in the international political economy literature (Rixen 2011, 3). The 1998 OECD *Harmful Tax Competition* initiative has been the most important single event for generating global tax governance research (e.g. Kudrle 2008; Sanders 2002; Sharman 2006; Webb 2004). Since then, several other initiatives have followed, most notably the OECD-led *Base Erosion, Profit Shifting* (BEPS) project that began in 2013 (OECD 2013; see also Eccleston and Smith 2016). Subsequent anti-

tax haven and transparency initiatives launched by the G20 group, European Union (EU) and the United States have also generated interest. These include the Foreign Account Tax Compliance Act by the United States, the OECD-led template for Automatic Information Exchange in tax matters, and several recent EU directives, such as the directive for the exchange of information on national tax agreements negotiated by states with large corporations (Grinberg 2016).¹ Typically, the existing governance research covering this field has provided analyses on policy efforts in the framework of tax-specific work of OECD, EU and the United States. A key question is whether it pays sufficient attention to the major institutional and structural interdependencies: trade policies in particular.

The recent EU state aid cases against tax incentives granted by Ireland and the Netherlands to Apple and Starbucks (EC 2014a, EC 2014b) have drawn some public attention to the overlaps between trade-related goals and tax policies in the field of subsidies. This theme generated attention in the international tax law scholarship around the turn of the millennium (Bratton and McCahery, 2001; Pinto 1998; Schön 1999) but less so within the tax governance literature. In addition, in the early 2000s, the *Harmful Tax Competition* initiative provided inspiration for a body of academic literature discussing international tax regulation also from the viewpoint of the General Agreement on Trade and Tariffs (GATT) and World Trade Organization (WTO) treaties (Avi-Yonah 2001; Brauner 2005; McDaniel 2000; 2004; Slemrod and Avi-Yonah 2001; see also Killian 2006, 1085). These studies found that trade treaties both fostered and hindered policy options for curbing harmful tax exemptions and tax competition.

However, the aforementioned studies did not seem to provoke further research as the general interest toward trade policy issues waned. This neglect of trade-tax policy linkages has also been highlighted in the aftermath of Panama Papers. While there has been at least some policy-level discussion on tax-related aspects in the US–Panama Free Trade Agreement (FTA) of 2007 (Kessier 2016), similar developments have not been seen in the academia. This is unfortunate, as the dynamics between trade policies and tax policies have undergone significant changes since the early 2000s. With the notable exceptions of Farrell (2013) and Bastin (2014), we have not been able to find meaningful analyses from recent years on how trade policy affects anti-tax avoidance initiatives. This is hardly surprising, however, since global tax governance only emerged as a serious research topic in international relations about ten years ago (Dietsch and Rixen 2016, 1). Moreover, the latest research on the interrelations between trade and taxation focuses often on the effects of trade policy on domestic taxes such as the VAT (Seelkopf, Liese and Schmitt 2016), rather than on tax avoidance.

Here we aim to show how trade treaties and related arbitration procedures can affect the efforts to tackle international tax flight. We begin in [Section 2](#) with a discussion on the expansion of trade policy to include policy fields beyond its historical scope. [Section 3](#) focuses on the rise of international tax avoidance and tax evasion to the global governance agenda, and how the existing academic literature has addressed trade policy related preconditions for tackling tax flight. We then proceed to our case study of Panama in [Section 4](#). The case study discusses the FTA and its potential impact on the international and United States led efforts to tackle tax evasion, and it also analyses Panama's use of trade dispute settlements to protect its secrecy. Finally, the penultimate [Section 5](#) discusses theoretical contributions related to the trade-tax nexus. We conclude by analyzing how these analytical frameworks should be updated, and to what extent can the conclusions from the case studies be generalized.

2. THE EXPANSION OF TRADE POLICY AND THE POLITICS OF 'CONSTITUTIONALISM'

The recent history of trade policy has been a history of expansion, reorientation and constant negotiation of the political scope of 'trade' and 'trade-related'. The GATT focused almost entirely on tariff issues for most of its history before the inception of the WTO. Yet already the 1980s saw the development of new areas of negotiation as intellectual property issues emerged to the trade policy field. After the inception of the WTO, new policy issues have been recurrently pushed into the trade policy frame. In several cases, the linkages to traditional trade policies are questionable: procurement, public services, competition, investment protection and so on have no immediate link to tariff policy. Such thematic expansion leads unavoidably to overlap of policy fields, which was very visible already with trade in services, which includes financial services.

This expansion has never occurred without opposition (Deere 2008; Verger and Bonal 2006). Even so, trade policy has evidently become something of a general global policy field. Indeed, with the notorious exception of agriculture, the most heated debates in trade policy during the WTO era have dealt with issues that do not directly involve tariffs on goods. Furthermore, the key political struggles have often been fought over the inclusion of particular issues to the trade policy field rather than the actual content of agreements, with intellectual property rights being a case in point (Borowiak 2004; Sell 2001). The outcomes of the negotiations between trade policy and other policy fields are twofold. First, new extensions of trade policy often means that trade policy overrules existing policies in other policy areas. Second, policy lock-ins generated by trade agreements can affect policy efforts in ways that were

unforeseeable when the agreements were originally negotiated. In some areas, this negotiation with other policy fields has received considerable attention (such as, again, intellectual property), yet other important fields, such as tax policy, have received insufficient attention.

The expansion of trade policy can be seen as an outcome of ad hoc 'forum shifting' (Braithwaite and Drahos 2000; Sell 2010): when given political players push for given political goals, they seek arenas in which the existing practices, rules of conduct and power relations are most suitable for advancing the desired policy goals, given that it is in their power to influence the choice of arena.² Trade and tax policies are particularly vulnerable for these kinds of practices because of their importance to major corporations and their lobbyists. It is quite well documented, for instance, how the GATT was explicitly chosen as the most suitable arena for pushing the liberalization of trade in services (Raghavan 1990). Similarly, in tax issues, trade policy is likely to be the preferred policy field for tax havens³, compared to other international fora.

However, we need to go deeper than this. Here, it is useful to analyze trade policy as an expression of 'new constitutionalism' (Raghavan 1990; Schneiderman 2000). The concept was coined for theorizing the globalization of a given market discipline, which restrained the capacity of nation-states to control the powers of international capital. As such power is highly dependent on the laws and other institutions of nation-state, the emphasis of the theory was on the creation of 'disciplinary neoliberalism' and its politico-legal dimension, in contrast to the general 'liberalization' of finance (Gill 1998a, Gill 2002). This disciplinary neoliberalism shares some key characteristics with constitutions at the national level in entrenching policies, procedures and rights, and in being very difficult to reverse even by majority vote, therefore, the term 'constitutional'. Future governments are thus inhibited from reconsidering economic policy as it is insulated it from the domain of traditional politics. Trade agreements can be interpreted from this perspective as transnational quasi-constitutions, protecting the interests of corporate capital and transnational investors by creating global uniform and binding rules for this purpose (Clarkson 2002). As the field of trade policy has expanded, trade agreements have taken ever more pronouncedly such quasi-constitutional role in the global economy.

The domestic forms of such 'new constitutionalism' can take different forms. The *regulatory chill effect* creates pressure on the domestic policy-makers to consider only measures that are known to conform with the 'constitutional' agreements, while the *lock-in effect* effectively binds governments to the current level of liberalization (Krajewski 2011). Thus the former self-disciplines politicians and regulators, while the latter leads into actual sanctions by supranational political bodies. Domestically important policies can be sanctioned and outlawed by dispute settlement

bodies (DSBs), when a trading party actively seeks to undermine these domestic policies. This can lead to a regulatory chill, as policy-makers become wary of using politically efficient means for achieving given policy goals.

Researchers have pointed out examples of ‘policy lock-in’ in virtually all kinds of trade negotiations, with possibly the most evident case being negotiation on trade in services such as GATS (Robertson 2003, Sreenivasan 2005). Russell Williams sees the very essence of ‘new constitutionalism’ to be an attempt to ‘strike when the iron is hot’: while support for given practices might decline over time, deliberate policy lock-in hinders the attempts to push through changes at a later point domestically (Williams 2002, 80). While some policy issues might remain open after signing the agreements, they quickly take the form of judicial matters instead of traditional political disputes. There are also examples of attempts to push for comprehensive deals that do not allow withdrawal. As one researcher observed on the GATS negotiations: ‘teams from OECD nations deliberately tried to “bamboozle” opposing countries [...] The attitude of the developed countries negotiation teams was “sign now, define later”’ (Raghavan 1990, 108).

Yet curiously, this theorizing almost invariably associates democratic politics with national sovereignty, as popular sovereignty is taken as a manifestation of democratic powers (Schneiderman 2000). Nonetheless the opposite can be the main concern in taxation issues. In discussions on tax havens, for instance, a commonly noted problem has been the capacity of small states to commercialize their sovereignty (Palan 2002) by using their national sovereignty to create legal ‘innovations’ demanded by the tax avoidance industry. Therefore, in contrast to much of the new constitutionalism literature, progressive tax policy does not necessarily equal protecting national jurisdictions from transnational policy lock-ins. This is true especially in an era when the Big 4 auditing companies are helping secrecy jurisdictions to design their tax laws and large corporations can easily discern their internal wealth chains from value chains (Christensen and Murphy 2004; Otusanya 2011; Seabrooke and Wigan 2014; Seabrooke and Wigan *in press*; Sikka *in press*; Sikka and Hampton 2005, Sikka and Willmott 2010). Rather, progressive trade policy should be seen as a tool used by sovereign nations to push other sovereigns to adhere with effective tax information exchange and other similar initiatives.

In other words, the new constitutionalism of trade policy can set the limits within which both popular sovereignty and commercialized sovereignty can operate. The question is, then, how can trade policy be effectively used in taxation issues. The political core of trade policy in such cases does not appear to be introducing (binding) *rules* but rather effective *tools*, which can be used at will to affect global policies on other

policy fields. What is more, the ability to use these tools requires sophisticated expertise from fields that have so far been marginalized in international tax discussions, which highlights the role of epistemic arbitrage in policy making. This issue is further complicated by the fact that global trade policy consists of several overlapping, yet imperative, trade policy systems.

Next, we will move on to discuss the overlap and the convergence of trade and tax policies based on this theoretical background. The discussion on the history of policy convergence and recent case studies will demonstrate how the dominant economic forces are ‘insulated from democratic rule and popular accountability’ (Gill 1998b, 23), yet in a manner which calls for some reconsideration of the form of lock-in as it is typically described by the new constitutionalist theory.

3. TRADE AND TAXES: A MIXED HISTORY OF POLICY CONVERGENCE

Tax issues have become more prominent in the trade agenda with the emergence of trade in services. As services naturally include financial services, and tax avoidance increasingly happens through intangible rights, trade agreements might facilitate illicit financial activities. Defining investment broadly in the agreements to include complex financial instruments, mere expectations of gain, and so on further exacerbates the problem. Moreover, the concept of state aid has recently expanded at least in the EU, encompassing not only direct subsidies to local companies but also different forms of ‘tax competition’ or tax wars. These changes force to reconsider the complementarity of the two regimes.

The first interventions of trade policy into tax issues broadened the definition of tax-related export subsidies to include ‘the full or partial exemption, remission or deferral [of tax] specifically related to exports’ in the 1979 GATT Subsidies/Countervailing Measures Agreement (McDaniel 2000, 1628). The pre-1985 version of GATT does not appear to have been invoked frequently in tax-related disputes. The notable exception is the challenge by the European Community and Canada to the US Domestic International Sales Corporation (DISC) regime. A panel of experts established by the GATT Council deemed ‘that DISC conferred a tax benefit related to exports’. The Treasury aggressively promoted the use of DISCs by US corporations and issued annual reports showing that exports had increased as a result of the DISC regime. This evidence made it rather easy for the panel to conclude that DISC constituted an ‘export subsidy’ (McDaniel 2000, 1627). The same panel concluded that the French exemption of income from export sales likewise was a subsidy under GATT. The key to this seemingly surprising result was that France, Belgium, and the Netherlands were applying their exemption systems to

transactions that originated in their respective countries, not just to transactions that took place wholly outside their countries (McDaniel 2000, 1628).

The realization of tax holidays as potentially trade-distorting acts was the first clear instance of the conflict between these two policy domains. The prominence of the trade-in-services negotiations in the Uruguay Round, and the growing presence of foreign direct investment, highlighted how taxation of factor incomes can constitute a fiscal barrier to trade (Slemrod and Avi-Yonah 2001, 533). The GATT Subsidies Code defines 'subsidy' as including cases where government revenue that is otherwise due is foregone or not collected. To be actionable under the GATT, a subsidy must be 'specific to an enterprise or an industry or group of enterprise or industries' (Avi-Yonah 2001, 1684-1685).

Subsequently, new rounds of GATT created the WTO and expanded significantly its scope in tax affairs. The first step under the WTO processes is to establish that a challenged provision is a subsidy. A 'prohibited subsidy' is contingent on export performance or requires the use of domestic rather than imported goods, i.e. an export subsidy. In turn, the term export subsidy includes 'full or partial exemption, remission or deferral, specifically related to exports, of direct taxes', and the allowance of 'special deductions' directly related to exports or export performance (Avi-Yonah 2001, 1630).

The EC has moved quite aggressively to challenge special tax provisions that it believes conflict with Article 92(1) and its own tests interpreting that article. In 1998, it adopted a formal set of guidelines which, if violated, would prohibit all preferential tax provisions that adversely affect trade and competition among EU states (Avi-Yonah 2001, 1634). These guidelines coincided with the aforementioned OECD's *Harmful Tax Practices* initiative but have not received equal attention in the global governance research, even though it marked the beginning of a significant shift in the definition of state aid in the EU. Originally restrained to direct subsidies, the soft law approach adopted by the EC and supported by the 1998 Code of Conduct of Business Practices has gradually expanded to tax issues. One milestone in this development were the 2014 landmark decisions that prohibited the tax incentives that Ireland and the Netherlands had granted to Apple and Starbucks as market-distorting state aid (EC 2014a; 2014b).

Transfer pricing and the taxation of TNCs pose the biggest challenge to current trade regimes, as identifying and measuring 'market-based' prices for exports, imports, and even for intra-firm financing is extremely difficult. There are several potential problems. First, it is sometimes difficult to determine whose income is identified and measured. The definitions of resident and nonresident taxpayers differ. Second, the arm's length principle championed by OECD and bilateral tax treaties that are

usually based on it provide rules for dividing incomes within companies, but their application is far from straightforward (Clausing 2003; Durst and Culbertson 2003; Eden 2016; Picciotto 1992; 2016), and the new initiatives by OECD and individual countries have fallen short from abolishing artificial profit shifting. As a result, corporations get large freedoms to decide where they want to show profit (Ylönen and Teivainen 2015). Considering all this, EC's decision to consider transfer-pricing related tax incentives as *de facto* subsidies was in many ways understandable (Braumer 2005, 279).

Typically, trade agreements permit a wide range of exceptions, but these exceptions need to be explicitly specified in the contract. Thus problems arise when required policies have not been foreseen in the trade negotiations. There are examples of trade agreements where one party of the agreement has knowingly under-regulated some aspect of its economy, and the other party has later unsuccessfully challenged this under-regulation in WTO.⁴ Therefore, one could expect that a country with intentionally under-regulated financial services could find interventions against these practices as a violation of the trade agreement. Furthermore, the use of investor-state dispute settlements has grown in place of conventional inter-state disputes. This increases the likelihood that financial actors use arbitration panels to protect themselves against anti-tax avoidance policies.

To further complicate the issue, Bastin (2014) has suggested that WTO rules could also be used to advocate for more stringent control of transfer-pricing rules. In key role here is the Committee on Customs Valuations (CCV) of the WTO and its sister committee in the World Customs Organization, namely the Technical Committee on Customs Valuations (TCCV). Both committees are engaged in transfer pricing related work. According to Bastin, the most important outcome from the CCV's and TCCV's work on transfer pricing to date is the TCCV's Commentary 23. This Commentary points to the Article 1(2)(a) of the WTO's Customs Valuation Agreement⁵, which states that the 'circumstances surrounding the sale' should be used to assist the determination of whether the relationship between the parties influenced the price (Bastin 2014, 69). This article could potentially be used to tackle aggressive corporate tax avoidance. Moreover, Bastin (2014, 76) highlights the Article XXIII(1)(b) of GATT. It dictates that

- (1) if any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (...)
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement (...)

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

In principle, this article could also be used to challenge tax-driven transfer-pricing decisions. However, effective application of these articles and commentaries would require both sufficient knowledge on international trade *and* tax law, and the political will and vision to employ this knowledge. The concept of epistemic arbitrage by Seabrooke (2014, 50) can be useful in understanding this dynamic. Epistemic arbitrage refers to the ways in which ‘particular professionals are able to exploit differences in professional knowledge pools for strategic advantage by positioning particular forms of knowledge as the most appropriate to deal with particular problems’. When successful, ‘those engaging in epistemic arbitrage—the arbitrageurs—can become epistemic “arbiters” who decide how to address transnational problems and who can address them’ (Seabrooke 2014, 50). While the significance of expertise has been noted for example in reference to the capacity of civil society organizations to influence trade policy (Trommer 2014), increasing convergence of trade and tax policies creates a demand for new kinds of experts or teams of experts that can operate simultaneously in both domains. Thus the successful utilization of the lock-in of policy tools depends increasingly on how well states or interest groups are able to tap in to these epistemic communities. Related to this, the next section will discuss how Panama was able to invoke WTO rules to defend its tax regime.

4. THE CASE OF PANAMA

As noted in the beginning of this article, Panama has been active in linking tax issues to the broader trade agenda. Of particular interest are the two WTO arbitration cases that Panama has initiated in recent years. The first case dealt with anti-money laundering efforts by Colombia, and the second one tried to overhaul Argentinian attempts to enforce an international ‘black list’ of tax havens. Both cases can be deemed as wins for Panama, although the results of the latter case were mixed. A point of further interest is how these cases have influenced trade policy related discussions in the United States amidst the negotiations for the US–Panama FTA and the Tax Information Exchange Agreement (TIEA) that was negotiated around the same time.

A country with a population of less than four million people, Panama is home to more than 350,000 secretive International Business Companies, second only to Hong Kong and the British Virgin Islands. Panama

has been an active promoter for secretive and tax-evading trusts and foundations, as well as being a major player in insurance, boat and shipping registration (Financial Secrecy Index 2015). This offshore interface (Christensen 2011) and the accompanying ancillary legal and tax services have made Panama a prominent destination for tax-driven financial flows. It occupies the 15th place in the 2015 Financial Secrecy Index, which compares jurisdictions based both on the infrastructure they offer for concealing investments, as well as their importance in the world economy.⁶

The history of Panamanian financial services dates back to 1903, when the United States supported a revolution in the area that had been a province of Colombia. A year after this W. H. Taft, who was the US Secretary of War and commissioner of the projected canal, drafted a legislation that formed the basis of the Panamanian financial system. In the same year, the predecessor of Citibank started business in Panama (Naylor 2004, 186). The Panamanian Flag of Convenience registry began operation in 1919, when Panama helped Standard Oil to avoid US taxes by starting to register foreign vessels. Financial flows followed, as Wall Street interests pushed Panama to introduce secrecy-oriented business incorporation laws in 1927 (Robinson 2003; Shaxson 2011) and trust legislation in 1941 (Aguilar-Alfu 2012). As late as in the 1960s, Panama was one of the only 11 financial centers listed by the US Federal Reserve (quoted in Naylor 2004, xi), highlighting its pioneering role. This can be contrasted with some 70 centers the IMF listed in the late 1990s (Errico and Musalem 1999).

The OECD's *Harmful Tax Practices* initiative began in 1998. Panama did not commit to reforms based on the OECD's blacklist of non-compliant jurisdictions (Sharman 2006, 15). What is more, it was also one of the 14 jurisdictions that formed the International Tax and Investment Organization ITIO in March 2001 to counter OECD anti-tax-avoidance efforts (Sharman 2006, 59).⁷ In the post-financial crisis environment, Panama also reacted aggressively to the OECD-led blacklisting effort, for example by denying Spanish companies access from bidding on the lucrative contracts in the expansion of the Panama Canal (Panama Investor 2008).

At the time of writing, Panama has 14 double tax agreements (DTAs) and nine TIEAs in force and more pending (International Bar Association 2016). The DTA partner countries involve major economies such as the Czech Republic, France, Israel, Mexico, Portugal, Spain and the United Kingdom, but also Barbados, Luxembourg and the United Arab Emirates. With the exception of Canada and the United States, Panama has signed all of its TIEAs with a group of Nordic countries that negotiated these agreements jointly after the 2007–2009 financial crisis, offering many tax havens a convenient way to escape the second coming of the OECD's blacklists.⁸ Moreover, both the Canadian and the US TIEA

contained a clause that allowed Panama to deny an information request ‘where the disclosure of the information requested would be contrary to the public policy of the requested Party’.⁹ Finally, Panama has also been one of the few tax havens to effectively opt out from the OECD’s ongoing effort to expand automatic exchange of tax information, even though the OECD model still retains several loopholes and thus leaves room for continuing a secrecy-based development strategy (see, e.g. Bachus 2015; Cardiel 2016; Rose 2016).

Panama’s refusal to engage in effective international tax cooperation has been accompanied with its use of trade policies to restrict attempts by other countries to curtail tax flight and financial crime. Panama has been a member of the WTO since 1997. During that time, it has been complainant in seven disputes, a respondent in one dispute and a third party in eight cases. Since October 2012, Panama also has a new trade agreement in force with the United States, replacing US unilateral preferential trade treatment under the Caribbean Basin Economic Recovery Act, the Caribbean Basin Trade Partnership Act and the Generalized System of Preferences (GSP) (Hornbeck, 2012). Panama has typically signed cooperation agreements only under pressure and even then, compliance has often remained half-hearted.

We focus on two particular cases in which Panama was the complainant, out of the total of five issues that Panama has brought to the WTO (one issue consisting of three similar cases related to banana trade with the EU). Case 453 is related directly to anti-tax avoidance initiatives applied by Argentina. Case 366 dealt with Colombian efforts to enforce anti-money laundering measures. We will present these two cases in [Subsections 4.1](#) and [4.2](#). The cases are similar to each other in their political significance: using trade agreements to avoid being subject to effective policies against tax flight. Yet they utilize different domains of trade agreements: trade in goods covered by the GATT in 1994 in the case of Colombia, and trade in financial services covered by the GATS in the case of Argentina.

4.1. The case against Argentina’s anti-tax haven efforts

The case against Argentina started in December 2012, when Panama brought a complaint to the WTO regarding a range of tax, investment, and services measures that Argentina had imposed against a number of countries, which it classified ‘non-cooperative’. The non-cooperative country status was assigned to countries that refused to sign an agreement with Argentina on the exchange of tax information, or initiate the necessary negotiations (Panel report¹⁰ 7.182, referring to Argentine legal code 589/2013). The measures included ‘less favorable tax treatment in the collection of profits taxes, discriminatory tax treatment on funds

entering from the listed countries, discrimination in the valuation of transactions with persons from the listed countries, and discriminatory criteria with respect to tax deductions' (Zagaris 2015, 40), as well as the criteria for entering the Argentine reinsurance market. The contested legislation consisted of eight separate measures (Panel report 2.13, 2.17, 2.19-2.20, 2.21-2.22, 2.26-2.27, 2.35, 2.37, 2.39-2.40).

Panama argued that these measures illegally discriminated against foreign service providers. According to the challenge, Argentina restricted market access for reinsurance and retrocession services from the listed countries and imposed authorization requirements 'for the purchase of foreign exchange and the repatriation of direct investments by entities in the listed countries'. Panama considered these measures a violation of Argentina's WTO commitments as well as the organization's core principles (Zagaris 2015, 40). Specifically, Panama challenged the consistency of the measures with Article II:1 of the GATS.

In a significant passage, Argentina informed that it had now removed any references to 'countries with low or no taxation', including Panama, from the decrees (Zagaris 2015, 40). This effectively aligned Argentina's decrees with the fiscal transparency coordination criteria of the OECD. Despite the loopholes in the OECD's information exchange models, Panama was not convinced. It deemed the changes 'superficial' and 'cosmetic'. In way of a response, WTO's DSB decided to establish a panel to settle the dispute on 25 June 2013. The panel report was circulated in September later that year, and the final appellate body report was published in 14 April 2016.

In its response to the DSB, Argentina argued that the measures were 'defensive tax measures', and were in line with the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Panel report 7.527), as well as with G20 guidelines. According to Argentina, the measures were designed to prevent tax evasion, tax avoidance and fraud (Panel report 7.527, 7.534). Argentina further argued that Article XIV(c) of the GATS allows actions to prevent deceptive and fraudulent practices, and as its measures aimed at countering harmful tax practices, they were arguably consistent with the GATS (Panel report 7.534-7.535). Furthermore, Argentina argued that paragraph 2(a) of GATS Annex on Financial Services justified some of the measures, as it allows protecting 'financial consumers from distortions and abusive situations'.

In its complaint, Panama argued that GATS aimed solely at securing non-discrimination between producers of (financial) services, suggesting that Panama saw trade policy, and particularly GATS, as tools to continue resisting international tax cooperation. It argued this position clearly in a submission to the appellate body after the panel decision, which itself was positive for Panama. Panama appeared to understand

the rationale behind the imposed measures, but argued that they went beyond the means necessary to secure compliance with laws and regulations on fraudulent transactions (Panama's appellants' submission 5.100, referred to in Appellate body's report 6.214). Panama maintained that the policy statements derived from the OECD and G-20 reports were general, abstract, and non-country-specific (Panama's appellant's submission 4.37, appellate body's report 6.149). Furthermore, Panama emphasized non-discrimination and equally favorable treatment, and saw any political sensibilities as a secondary concern. (Appellate body's report 6.62).

Noteworthy, the panel accepted Argentina's argument that transactions with entities of non-cooperative countries enable tax evasion because of the secrecy laws in these countries (Panel report 7.655). The Panel argued that most of the contested measures contributed to the safeguarding Argentina's tax collection system and to the prevention of money laundering (Panel report 7.713, 7.717). It also found support for Argentina's claim on the importance of accessing tax information in several documents by the G20, OECD and the Global Forum (Panel report 7.509-7.513). It even considered the measures to have very little restrictive impact on international trade, with the exception of one specific measure (Panel report 7.727). The panel found that Panama was unable to identify any 'alternative measures reasonably available for Argentina less trade-restrictive but with the same objectives' (Bridges weekly, 21).

The panel did however dismiss Argentina's claim that general GATS exceptions allow using measures that violate GATS obligations. As argued by Panama, paragraph 2(a) should be invoked only when the measure in question qualifies as 'domestic regulation', such as a 'supplier's technical standard, qualification or license' (Panel report 7.828). Practically, the decision delineated the legitimate policy space available in implementing measures against tax evasion, and the extent to which GATS exceptions can be invoked. The legal reason given for the effective lock-in promoted by the panel was mostly based on the concept of 'likeness' (Panel report 7.185-7.186). GATS stipulates that similar treatment should be accorded to 'like' services from *any* origin. Interestingly, the requirements for 'like' treatment include also service suppliers. In addition to like treatment of 'service suppliers' of different origins, a 'service supplier' is defined in extremely broad terms (GATS XXVIII b, g). Thus, the panel reasoned that Argentina treated services *and service suppliers* from non-cooperative countries differently than those from cooperative countries (Panel report 3.1.a-h). In the same vein, some of Argentina's measures were seen to accord less favorable treatment to Panamanian services than like domestic services (Panel report 3.1 b-d).

The panel also noted that Argentina used origin as a basis for distinguishing service suppliers on which it imposed the contested measures. The key point appeared to be, whether Argentina's measures are

accorded *exclusively* on the basis of origin. Superficially, of course, the distinction used in Argentina's measures was based exclusively on origin, since the problems arose directly from the tax haven regime of Panama. Eventually, 'like services' were defined as 'services which are in a competitive relationship' (Panel report 7.159), and the burden of proof to show that tax avoidance affects the competitive relationship of service providers was put on Argentina (Panel report 7.179). The panel eventually found the evidence provided by Argentina insufficient.

The case highlights the diminishing policy space for effective work against tax evasion when a tax-haven country manages to use epistemic arbitrage through WTO. The recognition of Argentina's purposes and the lack of alternative means did not allow using the exceptions stipulated in GATS. The Panel explicitly stated that all measures imposed by Argentina fall under the scope of GATS. Therefore, anti-tax evasion policies can become trade policy issues also in the future. While some of Panama's claims were rejected, all eight measures were seen as inconsistent with GATS II:1 (Panel report 8.2.a), as they do not accord similar treatment to like services from co-operative countries (Panel report 8.2.b). The appellate body further reversed some of the Panel's findings, but this does not remove the fact that all WTO organs considered the case to fall within the scope of GATS. This turns trade agreements into policy tools for tax havens, and potentially also for countries aiming to oppose them.

4.2. The case against Colombia's anti-tax haven efforts

Another case in which Panama used trade treaties to challenge anti-money laundering efforts was the case of Colombia in 2009. This case once again demonstrates how a country can be forced to prioritize trade agreement commitments over anti-money laundering policies, even when their impact on trade is questionable.

Colombia is a prime example of a country suffering from the effects of money laundering facilitated in great extent by Panama (Panel report 4.142¹¹). According to estimates, over 80 per cent of Colombia's trade with Panama is contraband trade. Problems are further exacerbated by the lack of control in Panama's free trade zone Colon. It has been identified as a focal point for illicit trade (Panel report 4.60) and as a key point for the laundering of Colombian narco-trafficking money. Panama's reported exports were threefold in comparison to Colombian imports from Panama, which indicates under-invoicing and smuggling. Thus Colombia was faced with an important domestic problem, which it needed to address (Panel report 4.81).

The uncooperativeness of Panamanian authorities emptied Colombian attempts to find common solutions (Panel report 4.85). The response rate

to Colombian assistance requests in customs co-operation was 0.65 per cent in 2001–2005 (Panel report 4.173). Therefore, Colombia decided to introduce new measures, requiring certain Panamanian imports such as footwear and textiles to enter through designated ports of entry (the airport of Bogota and the seaport of Barranquilla). These ports were modern, well-staffed and close to relevant markets, and had dedicated personnel for contraband concerns (Panel report 4.5; 7.217). In addition, Colombia established ‘indicative prices’ for certain products for dealing with price distortions (Panel report 2.11). The policies were a rational response to a well-established problem: they represented an effective use of scarce means to counter a specific problem, and their trade-distortive effect was designed to be minimal, or non-existent, (Panel report 4.171).¹²

Panama challenged these policies, claiming that the indicative prices system discriminated internal tax in excess to taxes on like domestic products, making it inconsistent with Article III:2 of the GATT 1994 (Panel report 4.18), as well as with parts of the Customs Valuation Agreements (Panel report 4.44). Furthermore, Panama argued that restraining the ports of entry imposed quantitative restrictions that were applied in a discriminatory way (Panel report 4.33, 4.40), violating the Article XIII:1 of the GATT 1994 (Panel report 4.32). In its response, Colombia maintained its position that customs duties based on indicative prices should be seen as a deposit rather than a payment (Panel report 4.100), and that Colombia has the right to use these indicative prices in examining whether declared values of goods are truthful or accurate (Panel report 4.105). Moreover, Colombia claimed that Panama had failed to provide any evidence proving that the referenced measures did indeed restrict trade (Panel report 4.63).

In its decision, the Panel (WT/DS/366/9) found the indicative prices measure inconsistent with the Agreement on customs valuation of the GATT (Panel report 8.1, 8.2) and the ports of entry requirement inconsistent with Article I.1, V:2, V:6 and XI:1 of the GATT 1994. The panel rejected Colombia’s defense that the ports of entry measure was justified under Article XX(d) of the GATT 1994 for securing compliance with Colombia’s customs legislation (Panel report 8.7), and saw the indicative prices as discriminatory payments rather than deposits (Panel report 7.87). The panel recognized that the measures were designed to secure compliance with Colombian legislation and noted the importance of combating under-invoicing and money laundering (Panel report 7.543, 7.566). Yet it found that Colombia had not proved that the ports of entry measure contributed to these goals (Panel report 7.585, 7.588, 7.618). The panel referred merely to the ‘undoubtedly’ increased transaction costs for Panama. Colombia appears to have been penalized for simultaneously using several tools in its anti-money laundering efforts, as it had

to assume the burden of proof. It would have been far easier to demonstrate the marginal contribution of a single policy tool.

As a result, Colombia was forced to revise its policies. Furthermore, it was expected to make the revisions within months, and thus to prioritize fast compliance with the ruling over normal political and legislative procedures. Colombia requested a 15-month implementation period so that it could explore legislative alternatives and their WTO-consistency for complying with the Panel decision while continuing its anti-tax evasion efforts (Arbitrator's report, 13–15). Colombia suggested the increased number of ports of entry required new legislation in order to continue its anti-smuggling efforts. Once again, Panama managed to use the WTO framework to force fast compliance at the expense of political sensibilities (Arbitrator's report, 111), even though some previous arbitrators had noted that new legislations were based on the need to safeguard public morals and order (Arbitrator's report, 29). Panama saw the need to address the underlying problems of customs fraud and contraband irrelevant in determining the pace of compliance. Panama thus saw the implementation as separate from the removal of 'underlying economic or social conditions' (Panama's submission, para 6, referred to in Arbitrator's report, 37).

Panama argued that there was no 'unfettered right to any method of implementation', and that it only accepted the withdrawal of the indicative prices and ports of entry measures (41). The claim was based on the idea that any means to replace the 'payment' system in indicative prices with a compulsory 'guarantee' system, and restraining the ports of entry, would violate the same GATT articles (Agreement on customs valuation and Article XI). Clearly, Panama aimed to ensure that the WTO process would block any attempts to replace the measures with similar ones.

Several issues stand out in the challenge and in the decisions of the Panel and the arbitrator. First, there was no existing precedent of such a case. Second, the status of being a developing country did not deter Panama from entering the process. Third, Panama launched the case on behalf of its offshore, not onshore, firms. What is more, the panel did not require Panama to demonstrate that anti-money laundering rules had a negative impact on trade. All these issues ought to have led to further concern, that Panama (or other tax havens with similar characteristics) could use FTAs to block progressive taxation policy by branding them as inconsistent with trade treaties. For example the US-Panama FTA has raised concerns that it provides Panama measures for similar legal struggles against progressive tax legislation. While this concern has mostly been voiced by the civil society (Tucker 2011), even the US administration was hesitant to enter the FTA before signing a TIEA with Panama (Hornbeck 2012, 2–3).

5. RETHINKING THE TRADE-TAX NEXUS

Trade, investment, and tax policies have traditionally been seen as complementary (Slemrod and Avi-Yonah 2001, 533), and the supranational dimension of the WTO or other trade treaties has not been thought to affect the operation of the international tax regime. When tax and trade policies have been discussed together, they have usually been compared to each other instead of analyzing the ways in which these two spheres overlap (Rixen 2008, 178). While this arrangement did not cause any serious problems for long periods of time, the conflict between the international trade and tax regimes has now become more pronounced (Bastin 2014; Brauner 2005, 256; EC 2014a; 2014b).

What is changing, to begin with, is the comprehensiveness and regulative form of the policy domains. The WTO aims to harmonize domestic legislation, operating in a virtual international economic space as an interface between the various legal systems. In general, WTO does not directly modify or relate to any specific domestic regulation, but rather dictates standards with which member countries align their laws. Trade treaties are based on pooling together sovereignty for a common cause, which can either restrict or support international cooperation against tax avoidance and evasion. In this sense, the pooling process differs markedly from the pooling of sovereignty witnessed in the field of tax policy, which is more typically geared to combating international tax wars (Christensen and Shaxson 2016) between states than it is to accelerating them (Genschel and Rixen 2015).

The trade policy regime, which was for a long time moving towards more coherence, has reached something of an impasse. It is now evolving again through a myriad of regional and bilateral treaties, and thus functions as a platform for sporadic harmonization. In the case of tax policy, on the other hand, there have been frequent attempts to form ever more comprehensive policies, in part because there is a strong push for multilateral solutions, manifested already in the development of multilateral tax information exchange. This shifting dynamic also both intensifies negotiations between the two policy domains, and creates more opportunities for policies and business practices that seek to benefit from the overlaps. In earlier decades, the fragmented international tax regime could operate relatively independently from the coordinated trade regime. Now, the increasingly patched trade policy regime can, in surprising ways, affect efforts to build a more coordinated tax policy regime, instead of being the policy domain dictating global uniformity in policies.

The increasing overlaps between trade and tax agendas create also challenges for the prevailing theories in IR and global political economy that have been used to explain these kinds of phenomena. In particular, this calls for reassessment of the traditional theories of new

constitutionalism. This theory has correctly pointed out that policies advocated in trade deals to be very resistant to political change, and that the ‘power of transnational capital depends on the form and character of state institutions’ (Gill 2008, 116). However, our case studies show that this lock-in should in some cases be seen rather as a tool for given governments to push their agenda, instead of as a strict and pre-negotiated limitation on the existing policy space, or even a ‘regulatory chill’. While lock-in effect might be very real in the sense of effective insulation from democratic politics, the case studies demonstrate that the ways that policies are locked in can be unanticipated when the treaties are signed. The new constitutional theory generally does a good job in picturing the balance of power between capital and the political realm, but it typically assumes that global uniform treaties limit the policy space especially of smaller national states (Gill 2008, 138–142). Yet it appears that the power of capital might enable even miniscule nations means to affect or direct the power of mobile international capital. The ‘constitutional’ power in trade policy needs to be understood not as a straightforward lock-in, but rather locking in policy tools, which can be utilized by experts to different ends.

Even though these notions might appear as purely theoretical in the cases discussed at length above, in other instances a similar trade-tax convergence can create tools for pushing for more progressive agendas. As an example, we pointed out that the existing trade treaties could create grounds for challenging aggressive transfer pricing regimes and policies. Moreover, we highlighted how the state aid regulation in the EU has developed rather sporadically to a point where tax concessions granted for companies like Starbucks and Apple are commonly seen as illegal subsidies, even though the majority of the revenues to these Irish and Luxembourgian subsidiaries come from other countries.

These notions point to the significance of the role of arbitration specialists not only in traditional trade issues (Schneiderman 2000), but also as gatekeepers in trade disputes whose outcomes can either promote or hinder policies against tax avoidance, tax evasion and tax havens. Looking at the myriad of different ways trade policies have influenced or can influence tax policies through WTO, EU and other channels, it would be a grave oversimplification to say that these developments would have outright separated ‘the “economic” from the “political” and “locked in” already-adopted free market policies through use of legal guarantees and sanctions to favour private determination of economic policy’ (Gill 1998b, 25). Rather, the intertwining of tax and trade policies gives more power to the agents that understand the connections between these policy spheres and can either exploit them or recruit the necessary expertise for doing that. These agents can either be states or advocacy groups that are able to make states to adopt their agenda. Thus while the outcome of

the processes described above can indeed be in line with what is called neoliberal, the politics are not outright 'disciplinary' (Gill 2008, 137–138), but rather open a space for the experts to maneuver. In such a contested space, the existing policy tools can well be locked-in in a very constitutional manner, but the political outcomes are not completely closed or predetermined. This can be highlighted also by the evolution of the EU state aid regime: in absence of clear policy coordination from the European Council, the civil servants in the European Commission have gradually expanded the state aid regime to include also tax avoidance issues.

Even though Panama has a population of less than 4 million people, it has had the required expertise and the will to come up with ways to harness WTO rules for promotion of its political goals. This expertise appears to be significant in the cases described above, implying that geopolitical hegemony (Cox 1983) is not sufficient in analyzing political possibilities and limitations to maneuver in the context of global policy. Rather, the cases are an example of epistemic arbitrage (Seabrooke 2014) where the holders of particular kind of specialized information become gatekeepers in policy-making. However, the examples highlighted earlier by Bastin demonstrate that some other small or big state could do the same by employing different GATS articles for curbing international tax avoidance and evasion. What is more, the EC has also resorted to plenty of improvisation in its gradual shift that has resulted in seeing some aggressive corporate tax practices as state aid. In this case, the shift has been a result of unwillingness of the European Council to provide political guidance, which has increased the role of soft law and improvisation in EC's alignments.

As we noted briefly in the Section 2, this fragmentation can also greatly affect the commercialization of sovereignty (Palan 2002). Whereas existing research has highlighted the importance of tax legislation and tax advisory firms in attempts to lure investors and companies to tax havens (Fichtner 2016; Hakelberg 2016; Sikka and Hampton 2005; Sikka 2008), the Panama case studies demonstrate that the ways in which trade policies are enforced can also be a major factor. Secrecy jurisdictions have typically been quick to copy new financial 'innovations' from each other, and there is no reason to expect that the aggressive use of trade policies would be an exception.

Much depends also on how major onshore states see the trade-tax nexus. Traditionally, the United States has expressed the view that trade agreements should not impact the national tax system(s). The rationale behind this is that the interaction of tax systems should remain the subject of bilateral tax treaties. However, the EU has moved more aggressively to bring trade and tax rules into closer harmonization for a long time (McDaniel 2000, 1621). One potentially complicating factor is also that both the United States and the EU host significant tax havens.

Moreover, as noted in section two, trade policies can, in some cases, also help to curtail international tax avoidance. In the case studies we demonstrated how a 'traditional tax haven' focusing on banking and financial secrecy practices was able to use trade policies to dodge attempts for better tax regulation.

What lies in the future? Brauner suggests, that the international trade and tax regimes should be co-ordinated, even though they cannot be simply reconciled. It is easy to second this call. According to Brauner, such coordination would benefit from the establishment of an international tax organization, separate from the WTO. Such an organization should be tasked with the responsibility of making the evolving international tax regime more compatible with the international trade regime (Brauner 2005, 254). The 'disconnect' between the trade and tax regimes is seen as detrimental to the international tax regime (Brauner 2005, 258). Most countries (including the United States) do not coordinate their trade and tax regimes. As best expressed by one US scholar, '[t]his country's tax framework is about as poorly adapted to GATT as is imaginable' (Brauner 2005, 262). Recently, similar calls for international tax organization (which in itself is an old idea) have been also voiced by prominent scholars of international tax governance, such as Tanzi (2016).

Our contributions in this article are in part forward-looking. To the best of our knowledge, only Panama has used the WTO complaint route to put a curb on attempts to enforce anti-tax abuse rules. It remains to be seen when and how other tax havens will follow its example. Given the fast pace of mimicking of financial innovations in the offshore industry, it would be surprising if other tax havens remained idle while Panama vigorously defends its tax regime.

We note that further research could be conducted in at least four fields. First, the existing WTO treaties may have an impact on recent international policy measures for the regulation of international tax matters. Second, since the early 2000s, the focus of trade policy discussions has shifted from the WTO to regional and bilateral treaties. This new and more dispersed body of regulation can also have diverse impacts on international tax regulation. And third, further studies could be done on the relationship between the international tax regime and other policy areas. As for example, most of the debt conditionalities imposed by the World Bank, the IMF, and more recently by the EU typically include a myriad of tax-related provisions. Given the large number of these programs during the past 35 years, their impact on the international tax regime must also be considerable. Fourth, motifs behind Panama's actions merit further research: why and how Panama ended up choosing WTO as a platform to defend its secrecy regime?

In addition to the broad analysis of global tax governance and the role of FTAs, we suggest that the theory of new constitutionalism should also

accommodate notions rising from the analysis presented above. Specifically, 'locking in' policies should not be seen as only restricting democratic sovereignty with supranational 'constitutional' means. As we have shown, the politics of new constitutionalism in trade policy can also mean locking in the power of globalized capital by providing political tools for 'commercialized sovereigns' to resist attempts to universalize and harmonize progressive schemes within other policy fields. Thus the study of the intersections of trade and tax policy also calls for further theoretical reconsideration.

ACKNOWLEDGMENTS

We wish to acknowledge the comments received in the conference organized by the International Studies Association (Baltimore, MA). Matti Ylönen gratefully acknowledges the financial support provided by the Academy of Finland (project 267976), the Finnish Employees' Foundation, and the Fulbright-Schuman program.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the authors.

NOTES

1. Many of these initiatives (especially the ones related to information exchange) address also other issues than just tax-haven tax avoidance.
2. Neo-realist scholars would argue that this forum shifting is made possible by overlapping 'regime complexes' (e.g. Orsini *et al.* 2013 and Keohane and Victor 2010), which enable political players to advocate similar measures under various regimes.
3. We speak interexchangeably of tax havens and secrecy jurisdictions. Developed originally by Murphy (2008, see also Meinzer 2016, 268), the latter concept is less known but more accurate, since secrecy is the most important characteristic of tax haven structures. The choice of terms is more than semantics, not least because any meaningful definition or listing of tax havens has to take into account prevailing secrecy laws and practices.
4. See e.g. NAFTA Arbitration pursuant in chapter 20 on the matter of cross-border trucking services (File No. USA-MEX-98-2008-01), Final report of the panel, §259-260.
5. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 1994.
6. In addition to small island states such as Panama, the index features also several major powers such as the United States and the United Kingdom as the City of London is also a major tax haven. The top three jurisdictions in the 2015 index are Switzerland, Hong Kong and the United States, the latter because the combination of a great importance in the world economy and

- serious defects in company ownership data, publicity and international tax information exchange.
7. An exception was the post 9/11 situation, when Panama followed many other Caribbean tax havens in agreeing to exchange tax information with the United States in late 2001 and early 2002 (Sharman 2006, 74). Moreover, ITIO later changed its name to International Trade and Investment Organisation.
 8. As a further detail, the Nordic group also involved the Faroe Islands and Greenland. The relatively small combined economic importance of these countries led some scholars to judge the OECD's blacklist exercise as white-washing (e.g. Sawyer 2011).
 9. See Agreement Between the Government of the United States of America and the Government of the Republic of Panama for Cooperation and the Exchange of Information Relating to Taxes (2010) and Agreement Between Canada and The Republic Of Panama for Tax Cooperation and the Exchange of Information Relating to Taxes (2013).
 10. We use 'Panel report' to refer to WTO (2015) and 'Appellate body's report' to refer to WTO (2016) in this subchapter. Numbers in these references refer to paragraphs in the document, not page numbers.
 11. We use 'Panel report' to refer to WTO (2009a) and 'Arbitrator's report' to refer to WTO (2009b) in this subchapter. Numbers in these references refer to paragraphs in the document, not page numbers.
 12. Apart from the location and adequate staffing of the ports, the indicative prices were based on market surveys.

NOTES ON CONTRIBUTORS

Teppo Eskelinen (PhD Jyväskylä 2009) works as a senior lecturer in social and public policy at the University of Jyväskylä. His work focuses in political philosophy, especially global justice, as well as political economy. He has published extensively on topics such as global poverty, economics and democracy, and the politics of financial risks.

Matti Ylönen is currently finalizing his doctoral dissertation in world politics, University of Helsinki, as part of a research project at the Department of Economics at Aalto University Business School. He has followed international tax and development issues in various roles since the early 2000s, and is currently visiting the United Nations University World Institute for Development Economics Research.

REFERENCES

- Aguilar-Alfu, A. (2012) 'Panama private foundations under a tax agreements regime', *Trust & Trustees* 18(6): 598–603.
- Agreement Between Canada and The Republic Of Panama for Tax Cooperation and the Exchange of Information Relating to Taxes (2013), Panama City: Government of Canada.
- Agreement Between the Government of the United States of America and the Government of the Republic of Panama for Cooperation and the Exchange of Information Relating to Taxes, (30 November 2010), Washington, DC: Government of the United States.

- Avi-Yonah, R. S. (2001) 'Treating tax issues through trade regimes', *Brookings Journal of International Law* 26: 1683–92.
- Brauner, Y. (2005) 'International trade and tax agreements may be coordinated, but not reconciled', *Virginia Tax Review* 25: 251–311.
- Bachus, J.I. (2015) 'A letter to Angel Gurría', *GreenbergTaurig*, 17 September; accessed at <http://www.eduardomorgan.com/blog/wp-content/uploads/2015/12/Letter-A.-Gurría-from-J.-Bachus.pdf>, 2 February 2017.
- Bastin, L. (2014) 'Transfer pricing and the WTO', *Journal of World Trade* 48(1): 59–80.
- Borowiak, C. (2004) 'Farmers' rights: intellectual property regimes and the struggle over seeds', *Politics & Society* 32(4): 511–43.
- Braithwaite, J. and Drahos, P. (2000) *Global Business Regulation*, Cambridge: Cambridge University Press.
- Bratton, W. A. and McCahery, J. A. (2001) 'Tax coordination and tax competition in the European Union: evaluating the code of conduct on business taxation', *Common Market Law Review* 38: 677–718.
- Cardiel, V.I. (2016) 'OCDE warns Panama over exchange of information', *La Prensa*, 14 March; accessed at http://www.prensa.com/in_english/OCDE-lanza-amenaza_21_4437516206.html, 2 February 2017.
- Christensen, J. (2011) 'The looting continues: tax havens and corruption', *Critical perspectives on international business* 7(2): 177–96.
- Christensen, J. and Murphy, R. (2004) 'The social irresponsibility of corporate tax avoidance: taking CSR to the bottom line', *Development* 47(3): 37–44.
- Christensen, J. and Shaxson, N. (2016) 'Tax competitiveness – A dangerous obsession', in T. Pogge and K. Mehta (eds) *Global Tax Fairness*. Oxford: Oxford University Press.
- Clarkson, S. (2002) *Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?* Ottawa: Canadian Centre for Policy Alternatives.
- Clausing, K. A. (2003). 'Tax-motivated transfer pricing and US intrafirm trade prices', *Journal of Public Economics* 87(9): 2207–23.
- Cox, R. (1983): 'Gramsci, hegemony and international relations: an essay in method', *Millennium – Journal of International Studies* 12(2): 162–75.
- Dallyn, S. (2016) 'An examination of the political salience of corporate tax avoidance: a case study of the tax justice network', *Accounting Forum* 1–17.
- Deere, C. (2008) *The Implementation Game. The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford: Oxford University press.
- Dietsch, P. and Rixen, T. (2016) 'Global tax governance: what it is and why it matters', in P. Dietsch and T. Rixen (eds) *Global Tax Governance: What Is Wrong with It and How to Fix It*, Colchester: ECPR Press, pp. 1–23.
- Durst, M. C. and Culbertson, R. E. (2003). 'Clearing away the sand: retrospective methods and prospective documentation in transfer pricing today', *Tax Law Review* 57: 37–84.
- Eden, L. (2016). 'The arm's length standard. making it work in a 21st-century world of multinationals and nations states', in T. Pogge and K. Mehta (eds) *Global Tax Fairness*, Oxford: Oxford University Press, pp. 153–72.
- EC (2014a) State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) – Ireland: Alleged aid to Apple, C(2014) 3606 final, 11 June 2014, Brussels: European Commission.
- EC (2014b) State aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – Netherlands: Alleged aid to Starbucks, C(2014) 3626 final, 11 June 2014 Brussels: European Commission.

- Eccleston, R. and Smith, H. (2016) 'The G20, 'BEPS and the future of international tax governance', in P. Dietsch and T. Rixen (eds) *Global Tax Governance: What Is Wrong with It and How to Fix It*, Colchester: ECPR Press, pp. 175–97.
- Errico, L. and Musalem, A. (1999) 'Offshore banking: an analysis of micro- and macro-prudential issues', IMF Working Paper WW/99/5. Washington, DC: International Monetary Fund.
- Farrell, J. E. (2013) *The Interface of International Trade Law and Taxation*. IBFD Doctoral series.
- Fichtner, J. (2016) 'The anatomy of the Cayman Islands offshore financial center: Anglo-America, Japan, and the role of hedge funds', *Review of International Political Economy* 2016: 1–30.
- Financial Secrecy Index (2015) www.financialsecrecyindex.com, 2 February 2017.
- Genschel, P. and Rixen, T. (2015) 'Settling and unsettling the transnational legal order of international taxation', in G. Shaffer and T. Halliday (eds) *Transnational Legal Orders*, New York, NY: Cambridge University Press, pp. 154–83.
- Gill, S. (1998a) 'European governance and new constitutionalism: economic monetary union and alternatives to disciplinary neoliberalism in Europe', *New Political Economy* 3(1): 5–26.
- Gill, S. (1998b) 'New constitutionalism, democratisation and global political economy', *Pacifica review: Peace, security and global change* 10(1): 23–38.
- Gill, S. (2002) 'Constitutionalizing inequality and the clash of globalizations', *International Studies Review* 4(3): 47–65.
- Gill, S. (2008) *Power and resistance in the new world order*, 2nd fully revised edition, Basingstoke: Palgrave MacMillan.
- Grinberg, I. (2016) 'Does FATCA teach broader lessons about international tax multilateralism', in P. Dietsch and T. Rixen (eds) *Global Tax Governance: What Is Wrong with It and How to Fix It*, Colchester: ECPR Press, pp. 157–74.
- Hakelberg, L. (2016) 'Coercion in international tax cooperation: identifying the prerequisites for sanction threats by a great power', *Review of International Political Economy* 23(3): 511–41
- Hornbeck, J. F. (2012) *The US-Panama Free Trade Agreement*, Congressional research service; accessed at <https://fas.org/sgp/crs/row/RL32540.pdf>, 2 February 2017.
- International Bar Association (2016) *Doing Business in Latin America*, London: International Bar Association.
- Keohane, R. O. and Victor, D. G. (2010) 'The regime complex for climate change', Harvard Kennedy School Discussion Paper 10-33, Boston, MA: Harvard Kennedy School.
- Kessier, G. (2016) 'Sanders's claim that Panama free-trade deal enabled more offshore tax scams', *Washington Post*, 9 April; accessed at <https://www.washingtonpost.com/news/fact-checker/wp/2016/04/09/sanderss-claim-that-panama-free-trade-deal-enabled-more-offshore-tax-scams/>, 2 February 2017.
- Killian, S. (2006). 'Where's the harm in tax competition? Lessons from US multinationals in Ireland', *Critical Perspectives on Accounting* 17(2006): 1067–87.
- Krajewski, M. (2011) 'Public services in the bilateral free trade agreements of the EU'; accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1964288, 2 February 2017.
- Kudrle, R. (2008) 'The OECD's harmful tax competition initiative and the tax havens: from bombshell to damp squib', *Global Economy Journal* 8(1): 1–23.
- McDaniel, P. R. (2000) 'Trade and taxation', *Brookings Journal of International Law* 26: 1621–40.

- McDaniel, P. R. (2004) 'Trade agreements and income taxation: interactions, conflicts, and resolutions', Boston College Law School Research Paper No. 29. Chestnut Hill, MA: Boston College.
- Meinzer, M. (2016) 'Towards an international yardstick for identifying tax havens and facilitating reform', in P. Dietsch and T. Rixen (eds) *Global Tax Governance. What is Wrong with It and How to Fix It*, Colchester: ECPR press, pp. 255–88.
- Murphy, R. (2008) 'Finding the secrecy world: rethinking the language of 'Offshore''; accessed at <http://www.taxresearch.org.uk/Blog/2008/08/27/finding-the-secrecy-world>, 2 February 2017.
- NAFTA (2001) 'NAFTA arbitration pursuant on chapter 20 in the matter of cross-border trucking services (File No. USA-MEX-98-2008-01)', Final report of the panel. Washington, DC: NAFTA.
- Naylor, R. T. (2004) *Hot Money and the Politics of Debt*, 3rd edition, Montreal: McGill–Queen University Press.
- OECD (2013) *Action Plan on Base Erosion and Profit Shifting*, Paris: OECD.
- Orsini, A., Morin, J.-F. and Young, O. (2013) 'Regime complexes: a buzz, a boom, or a boost for global governance', *Global Governance* 19(2013): 27–39.
- Otusanya, O. J. (2011). 'The role of multinational companies in tax evasion and tax avoidance: the case of Nigeria', *Critical Perspectives on Accounting* 22(2011): 316–22.
- Palan, R. (2002) 'Tax havens and the commercialization of state sovereignty', *International Organization* 56: 151–76.
- Panama Investor (2008) 'Panama demands to be taken off black list', *The Panama investor blog*, 10 March; accessed at http://primapanama.blogs.com/_panama_residential_level/2008/03/panama-demands.html, 2 February 2017.
- Pinto, C. (1998). 'EU and OECD to fight harmful tax competition: has the right path been undertaken', *Intertax* 26(12): 386–410.
- Picciotto, S. (1992) *International Business Taxation. A Study in the Internationalization of Business Regulation*, New York, NY: Quorum.
- Picciotto, S. (2016). 'Towards unitary taxation', in T. Pogge and K. Mehta (eds) *Global Tax Fairness*, Oxford: Oxford University Press, pp. 221–37.
- Raghavan, C. (1990) *Recolonization, GATT, the Uruguay Round and the Third World*, Penang: Third World Network.
- Rixen, T. (2008) *The Political Economy of International Tax Governance*, New York, NY: Palgrave Macmillan.
- Rixen, T. (2011) 'From double tax avoidance to tax competition: explaining the institutional trajectory of international tax governance', *Review of International Political Economy* 18(2): 197–227.
- Robertson, Susan (2003) 'WTO/GATS and the global education services industry', *Globalisation, Societies and Education* 1(3): 259–66.
- Robinson, J. (2003) *The Sink: Terror, Crime and Dirty Money in the Offshore World* London: Constable.
- Rose, C. (2016) 'The biggest tax haven of them all? The US, FATCA and the CRS', *Bloomberg International Tax Blog*, 19 March; accessed at <http://www.bna.com/biggest-tax-haven-b57982069147/>, 2 February 2017.
- Sanders, R. (2002) 'The fight against fiscal colonialism: the OECD and small jurisdictions', *The Round Table* 365: 325–48.
- Sawyer, A. (2011) 'The OECD'S tax information exchange agreements an example of (in) effective global governance?' *Journal of Applied Law and Policy* 2011: 41–54.
- Schneiderman, D. (2000) 'Investment rules and the new constitutionalism', *Law & Social Inquiry* 25(3): 757–87.

- Schön, W. (1999). 'Taxation and state aid law in the European Union'. *Common Market Law Review* 36: 911–36.
- Seabrooke, L. (2014) 'Epistemic arbitrage: Transnational professional knowledge in action', *Journal of Professions and Organization* 2014(1): 49–64.
- Seabrooke, D. and Wigan, D. (2014) 'The governance of Global Wealth Chains', NUPI Working Paper 839. Oslo: Norwegian Institute of International Affairs.
- Seabrooke, L. and Wigan, D. (in press) 'The governance of global wealth chains', *Review of International Political Economy* 24(1): 1–29.
- Seelkopf, L. Lierse, H. and Schmitt, C. (2016) 'Trade liberalization and the global expansion of modern taxes', *Review of International Political Economy* 23(2): 208–31.
- Sell, S. K. (2001) 'Trips and the access to medicines campaign', *Wisconsin international law journal* 3: 481–522.
- Sell, S. K. (2010) 'TRIPS was never enough: vertical forum shifting, FTAs, ACTA, and TPP', *Journal of Intellectual Property Law* 18(447): 447–78.
- Sharman, J. (2006) 'Norms, coercion and contracting in the struggle against 'harmful' tax competition'. *Australian Journal for International Affairs* 60(1): 143–69.
- Shaxson, N. (2011) *Treasure Islands: Tax Havens and the Men who Stole the World*, London: The Bodley Head.
- Sikka, P. and Hampton, M. (2005) 'The role of accountancy firms in tax avoidance: some evidence and issues', *Accounting Forum* 29(2005): 325–43.
- Sikka, P. (2008) 'Globalization and its discontents: accounting firms buy limited liability partnership legislation in Jersey', *Accounting, Auditing and Accountability Journal* 21(3): 398–426.
- Sikka, P. and Willmott, H. (2010). 'The dark side of transfer pricing: its role in tax avoidance and wealth retentiveness', *Critical Perspectives on Accounting* 21(4): 342–56.
- Sikka, P. (in press) 'Accounting and taxation: conjoined twins or separate siblings?', *Accounting forum*, 6 January; accessed at <http://doi.org/10.1016/j.acfor.2016.12.003>, 2 February 2017.
- Slemrod, J. and Avi-Yonah, R. (2001) '(How) should trade agreements deal with income tax issues', *Tax Law Review* (55): 533–54.
- Sreenivasan, G. (2005) 'Does the GATS undermine democratic control over health?', in B. Gillian and M. Darrel (eds) *Current Debates on Global Justice*, Dordrecht: Springer, pp. 269–81.
- Tanzi, V. (2016) 'Lakes, oceans, and taxes: why the world needs a world tax authority', in T. Pogge and K. Mehta (eds) *Global Tax Fairness*, Oxford: Oxford University Press, pp. 251–64.
- Tucker, T. (2011) *Memo: Stop Tax Haven Abuse Act and the Panama FTA*, Washington, DC: Public Citizen.
- Trommer, S. (2014) 'Legal opportunity in trade negotiations. International law, opportunity structures and the political economy of trade agreements', *New Political Economy* 19(1): 1–20.
- Webb, M. C. (2004) 'Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD's project on harmful tax competition', *Review of International Political Economy* 11(4): 787–827.
- Verger, A. and Bonal, X. (2006) 'Against GATS: the sense of a global struggle', *Critical education policy studies* 4(1): 48–74.
- Williams, R. A. (2002) 'Liberalizing "trade in services": ideas in international political economy', in S. McBride, L. Dobuzinskis, M. G. Cohen and J. Busumtwi-

REVIEW OF INTERNATIONAL POLITICAL ECONOMY

- Sam (eds), *Global Instability: Uncertainty and New Visions in Political Economy*, pp. 65–85.
- WTO (2009a) 'Colombia – indicative prices and restrictions on ports of entry', Report of the panel. WT/DS366/R. Geneva: WTO.
- WTO (2009b) 'Colombia – indicative prices and restrictions on ports of entry', Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. WT/DS366/13. Geneva: WTO.
- WTO (2015) 'Argentina – measures relating to trade in goods and services', Report of the Panel. WT/DS453/R. Geneva: WTO.
- WTO (2016) 'Argentina – measures relating to trade in goods and services', Report of the appellate body. WT/DS453/AB/R. Geneva: WTO.
- Zagaris, B. (2015) 'The death of tax and secrecy havens? FATCA, GATCA and what's next in global financial transparency', *A Paper Presented at the 2015 Financial Crime Conference*, New York, NY, Association of Certified Financial Crime Specialists.
- Ylönen, M. and Teivainen, T. (2015) 'The politics of intra-firm trade: corporate price planning and the double role of the Arm's Length Principle', *Paper Presented at Yale on 30th November 2015 in the Annual Conference of the Global Justice Program*.