GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report
Phase 1
Legal and Regulatory Framework

PANAMA

September 2010
(reflecting the legal and regulatory framework as at May 2010)

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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 90 jurisdictions which participate in the work of the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD Model Agreement on Exchange of Information on Tax Matters and its commentary, and in Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary as updated in 2004, which has been incorporated in the UN Model Tax Convention.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 plus Phase 2 – reviews. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to *www.oecd.org/tax/transparency***.**

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in the Republic of Panama.

2. Panama lies on one of the world's crossroads, straddling North and South America on one hand and the Atlantic and Pacific Ocean, connected by the Panama Canal, on the other. Its privileged geographical position has allowed it to develop a significant international services sector including international banking and wealth management services.

3. Panama has committed to the international standards of transparency and effective exchange of information since 2002. Until very recently however, it has had no involvement in international cooperation in tax matters and consequently its legal and regulatory framework has not been designed with such demands in mind. It signed its first Double Taxation Convention (DTC) with Mexico in March 2010. Given the political pressure that now exists for countries to implement the international standards it is actively seeking to negotiate DTCs with other jurisdictions.

4. Putting mechanisms in place that allow for exchange of information is an important first step for Panama. However, it addresses only one aspect of the standards and it is essential that additional steps are now taken to ensure that relevant information is available, that the appropriate authorities have access to it and that Panama can engage in effective exchange of information for tax purposes.

5. This report highlights significant problems in the areas of:

- Availability of ownership information particularly in relation to joint stock corporations;

- Availability of accounting information in respect of entities that are not in receipt of Panamanian source income;

- Uncertainties regarding the Panamanian authorities powers to obtain information for exchange purposes;

- Availability of sanctions for failure to keep or produce information for exchange purposes;

- Reluctance to enter into tax information exchange agreements (TIEAs) rather than DTCs as a way to exchange information.

6. Panama has already made some adjustments to its domestic legislation, to allow it to access and exchange information in accordance with the terms of a DTC, in an effort to align this with its international obligations. It now needs to enhance these efforts as the adjustments made do not go far enough to fully reflect the complexities of international cooperation or allow it to exchange information pursuant to a TIEA. Further changes in legislation are needed to make sure that information is available and that it is accessible to the Panamanian authorities.

7. As elements which are crucial to achieving effective exchange of information are not yet in place in Panama, it is recommended that Panama does not move to a Phase 2 Review until it has acted on the recommendations contained in the Summary of Factors and Recommendations to improve its legal and regulatory framework. Panama's position will be reviewed when it provides a detailed written report to the Peer Review Group within 12 months of the adoption of this report.

Introduction

Information and methodology used for the peer review of Panama

8. This assessment of the legal and regulatory framework of Panama was based on the international standards for transparency and exchange of information as described in the Global Forum's *Terms of Reference*, and was prepared using the Global Forum's *Methodology for Peer reviews and Non-Member Reviews*. The assessment was based on the laws, regulations, and exchange-of-information mechanisms in force or effect as at May 2010, other materials supplied by Panama, and information supplied by partner jurisdictions

9. The *Terms of Reference* break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Panama's legal and regulatory framework against these elements and each of the enumerated aspects. In respect of each essential element a determination is made that either; (i) the element is in place, (ii) the element is in place but certain aspects of the legal implementation of the element need improvement, or (iii) the element is not in place. These determinations are accompanied by recommendations for improvement where relevant.

10. The assessment was conducted by an assessment team which consisted of two expert assessors: David Smith, Senior Intelligence Manager, Centre for Exchange of Intelligence, HM Revenue & Customs and Yanga Mputa, International Tax Specialist Large Business Centre, South African Revenue Service; and one representative of the Global Forum Secretariat; Dónal Godfrey. The assessment team assessed the legal and regulatory framework for transparency and exchange of information and relevant exchange-of-information mechanisms in Panama.

Overview of Panama

General information on the legal system and taxation system

11. The Republic of Panama is located on the Isthmus of Central America. It occupies an area of around 75 000 square kilometres and has a population of about 3.3 million. It is a founding member of the United Nations.

12. Panama is a constitutional republic with a democratically elected president who is both Chief of State and head of government. The country has a unicameral legislative assembly, also elected by popular vote, and a fully independent judiciary. The legal system is based on the civil law tradition, although some features of its commercial legislation are influenced by legal institutions of common law (*e.g.*, legislation on trusts). The hierarchy of laws is constituted by:

- The Constitution of the Republic of Panama
- Laws, including treaties approved by a formal law
- Decrees
- Resolutions, Agreements and other administrative Acts

13. Since its independence in 1903 Panama has oriented itself towards the establishment of a juridical framework that facilitates the carrying on of business and especially towards the promotion and rendering of services. The service sector constitutes the main part of the economy accounting for around 80% of Gross Domestic Product. Services include operating the Panama Canal, financial services and tourism. A major project to expand the Panama Canal began in 2007 and will be completed in 2014 at a cost of USD 5.3 billion. Created in 1948, the Colon Free Zone on Panama's Atlantic coast is the largest and oldest free zone in the Western Hemisphere. Panama also has the largest ship registry in the world by number of ships and gross tonnage.

14. Panama has become a centre for international services for a variety of reasons related to its geographical position between Central and South America, economic characteristics, such as use of the US dollar as its currency, and incentives granted by commercial or tax legislation. The use of the US dollar has especially favoured the emergence of an international banking centre in Panama. The banking system is the largest in the Central American region with consolidated assets representing more than three times Panama's GDP. Other financial sectors are small by comparison.

15. Closely associated with banking activities are wealth management services which are provided to both domestic and foreign clients. These include the creation of companies and trusts to hold and administer assets which typically require the involvement of lawyers and accountants as well as banks and trust companies.

16. Panama has a well developed income tax system which is based on the principle of territoriality (Article 694 of the *Fiscal Code*). In general,

this means that income which is considered to be derived from Panamanian sources is taxable while income from foreign sources is not. Income tax is applied to the net income from Panamanian sources of individuals, corporations and other entities such as trusts and private foundations.[1] There is a system of definitive withholding concerning payments of income from Panamanian sources to beneficiaries residing abroad.

17. In addition to the general principle of territoriality, Executive Decree 170 of October 27, 1993 describes in more detail three categories of income: domestic, foreign or exempt; and includes a list of activities giving rise to income under each of these headings. Included in the foreign source income category and therefore not taxable, is income from re-invoicing activities conducted from an office in Panama, provided that the goods do not enter Panama or only transit through its national ports or airports. Income derived from the international operation of ships under the Panamanian flag is also classified as foreign earnings and not subject to tax.

18. Foreign source income is not exempt from tax in Panama; it is simply not subject to tax as a result of the territoriality principle. Tax exempt income, on the other hand, is income which, although Panamanian sourced, is exempted from tax. Such exemptions are often given for the purpose of promoting certain economic sectors or activities. They include income exempted by special laws such as the Colon Free Zone which is subject to a special system of tax where profits from the re-exportation of goods are not subject to tax. It also includes income from leasing ships or aircraft engaged in international trade and interest income on savings accounts and time deposits maintained in banks established in Panama.

19. Substantial revisions to the taxation of dividends were enacted by Law No. 8 of 2010. Any legal entity that is required to obtain a business license is obliged to withhold tax at a rate of 10% from dividends on shares or participation quotas derived from Panamanian source income. Where income is derived from foreign sources or export activities the rate of withholding is 5%. The withholding tax must be applied by all types of companies doing business in Panama including companies established in Free Zones. However, for Free Zone companies the withholding rate is 5% irrespective of whether the dividends derive from local or foreign sources. Exemptions apply to licensed multinational headquarter companies, certain companies operating in the Panama-Pacific Special Economic Area and companies whose operations are completed, used or take place abroad with no links to the Panamanian market.

1 Corporations and legal entities pay tax at a rate of 27.5% on net income from 1 January 2010. The rate will reduce to 25% on 1 January 2011.

Overview of commercial laws and other relevant factors for exchange of information

20. Panama does not have any agreements in force to exchange information for tax purposes to the internationally agreed standard. Traditionally, it had little interest in entering into such agreements as it did not see the need for them in the context of its territorial tax system. It has mutual legal assistance treaties (MLATs) with a number of countries aimed at combating money laundering originating from drug trafficking and other serious crimes. Tax matters are typically excluded from the definition of offences under these treaties, unless, in the case of the MLAT with the United States, it can be shown that the income on which tax was evaded derived from an activity that is otherwise included in the definition of an offence. For example, assistance could be given in a case of a criminal tax prosecution involving unreported income from drug trafficking because drug trafficking is a prescribed offence.

21. Panama initially made a commitment to the international standards of transparency and exchange of information in 2002 and reaffirmed that commitment in March 2009. Over the past year, it has put in place an active programme of negotiating Double Taxation Conventions (DTCs). It signed its first DTC with Mexico in March 2010.

22. Legal entities or arrangements available for use in business and wealth management include corporations (*sociedad anónima*), limited liability companies (*sociedad de responsabilidad limitada*) and various types of partnerships. Private interest foundations and trusts may also be created.

23. Corporations (*sociedad anónima*) are the most widely used entity and Panama is a significant centre for corporate formation. Some private calculations estimate that it is the home to more than 400 000 corporations and private foundations. In the past three years more than 100 000 corporations have been added to the Public Register.[2]

Overview of the financial sector and relevant professions

24. Banking activities constitute the most significant component of the financial services sector. At the end of February 2010, there were 73 banks, including 2 state-owned banks, 42 general license private banks, and 31 international license banks. In addition, there were 15 representative offices of foreign banks.

2 See paragraph 43.

25. Other components of the financial services sector include the securities industry, insurance, financial companies, cooperatives, and savings and credit institutions.

26. The regulatory agencies involved in the oversight of the financial services sector are:

- the Superintendence of Banks (SdB) for Banks and Trust Companies;
- the National Securities Commission (CNV) for the Securities Market entities including wealth management companies;
- Directorate of Financial Companies for Finance Companies;
- the Superintendence of Insurance and Reinsurance (SSRP) for Insurance and Reinsurance Companies;
- the Panamanian Autonomous Institute for Cooperatives (IPACOOP) for cooperative institutions (including credit cooperatives),
- *Banco Hipotecario Nacional* (BHN) for savings and credit unions.

These agencies are responsible for the supervision of anti-money laundering compliance in their respective sectors.

27. Lawyers play a leading role in the provision of international financial and wealth management services. Only lawyers admitted to practice in Panama can provide incorporation services and all corporations must have a resident agent which must be a lawyer. Private interest foundations are also required to have resident agents. There are approximately 9 000 lawyers and company service providers in Panama.

28. Lawyers and accountants are not required to belong to a professional association in order to practice. There are ethical rules for lawyers established by law and subject to investigation and sanction by the Supreme Court although there have been very few sanctions in practice. Accountants are also subject to ethical rules established in Cabinet Decree 26 of May, 1994.

29. Lawyers are required to maintain confidentiality in connection with the owners of companies for which they provide incorporation services or act as resident agents. The Foundations Law and Trusts Law also include confidentiality provisions

30. Trust companies are regulated in Panama and are required by law to implement measures to prevent money laundering including identifying their clients.

Recent developments

31. Panama amended its legislation in March 2010 to allow it to exchange information with jurisdictions with which it has a DTC. The effect of the amendment is to override the confidentiality requirements which would otherwise apply to information held by the Directorate General of Revenue (DGI) where a request for exchange of information is made pursuant to a DTC. More recently it has indicated that it will move to eliminate its domestic tax interest requirement. Panama also plans to enact legislation shortly to ensure that the owners of bearer shares can be identified by its authorities.

Compliance with the Standards

A. Availability of Information

Overview

32. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as accounting information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority may not be able to obtain and provide it when requested. This section of the report assesses the adequacy of Panama's legal and regulatory framework for the availability of information.

33. The report identifies significant shortcomings in the availability of ownership information particularly in relation to the Panamanian joint stock corporations (*sociedad anónima*). This is by far the most commonly adopted form of legal entity in Panama. Shortcomings also occur in relation to private interest foundations which are less widely used.

34. Joint stock corporations are required to maintain a stock register with the names of all stockholders, except in the case of shares issued to bearer.[3] Any transfers in ownership of registered shares must be recorded in the register. However, the stockholders included in the corporation's register may be nominees and it is unclear that the requirement to keep the register up to date, or at all, can be effectively enforced as there are no

3 See paragraph 61.

specific sanctions for failure to do so. This is a particular problem in the case of corporations that are only in receipt of foreign source income. As these corporations are not subject to tax in Panama they are not subject to the potential penalties that would apply for failure to disclose information to the tax authorities either.

35. Panamanian law also requires that every joint stock corporation has a resident agent which must be a lawyer. Resident agents are obliged to "know their client". However, they are only required to know the immediate or legal owners of corporations which are incorporated for institutional clients such as other law firms or accounting firms. Moreover, in these cases there appears to be no requirement for resident agents to monitor changes in ownership. The existence of bearer shares would, in any case, severely limit their ability to do so. Panama has indicated that is planning to take measures to ensure that the holders of bearer shares can be identified.

36. The report also identifies a general problem in relation to nominees as there is no mechanism for ensuring that information is available that identifies the person on whose behalf a nominee is acting.

37. Another general shortcoming is that accounting information may not be available in a range of cases because there is no requirement to keep it. The Panamanian Commercial Code provides that merchants are required to keep accounting records for five years. This requirement applies irrespective of the type of entity involved, *e.g.* company or partnership. However, a company or partnership organized under the laws of Panama that does not operate within the country is not subject to the Commercial Code and is therefore not included in its record keeping requirements. As such entities do not earn income from a source in Panama they are not subject to the record keeping requirements in the Fiscal Code either.

38. Accordingly, there is a cohort of companies for which neither accounting nor ownership information may be available. The Panamanian authorities have been unable to provide an estimate of the number of companies involved but it could be considerable given Panama's prominence as a centre for company formation.

39. Trusts and private interest foundations may also be excluded from the record keeping requirements of the Commercial Code as these will often not be merchants. Foundations are prohibited from engaging in commercial activities in an habitual manner.

40. The Trusts Law and Foundations Law both contain provisions relating to accounting requirements but these do not specify the type of accounting records to be kept or the period for which they should be kept. Foundations may also opt out of the requirement.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

Companies (ToR[4] A.1.1)

41. The laws of Panama provide for the creation of the following types of companies:

- *Sociedad Anónima* (SA) - Joint-stock corporations composed of shareholders whose liability is limited to the value of their shares. Law No. 32 of 1927 and its amendments govern the establishment of SAs.

- *Sociedad de Responsabilidad Limitada* (SRL) - Limited liability companies composed of members (quota holders) whose liability is limited to their capital contribution. SRLs are governed by Law No. 4 of 2009**.**

42. Pursuant to Law No. 5 of 2nd July 1997, companies that are organised under a foreign law may opt to be redomiciled or continued in Panama by registering with the Public Registry and attaching the appropriate documentation. Non-resident companies may also maintain offices or agencies and conduct business in Panama.

Sociedad Anónima (SA)

43. SAs are the most commonly used Panamanian companies by both resident and foreign investors. More than 100 000 corporations have been added to the Public Registry over the past three years (see following table).

Inscriptions of new corporations in the Public Registry of Panama

Year	Number of Inscriptions
2007	38 090

4 Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information

2008	47 063
2009	36 711

44. SAs are established by means of a public deed which is subject to registration in the Public Registry. This identifies the name and domicile of each of the subscribers, the number of shares they agree to underwrite as well as the number and nominal value of the SAs shares. The names and address of the Directors and other officials must appear in the deed together with the name and address of the resident agent. The transformation, dissolution, capital increase or reduction of an SA and changes in its articles of association must be executed by means of a public deed which is also subject to registration in the Public Registry. The Commercial Registry only accepts documents that are protocolised in public deeds subscribed by lawyers**.** Accordingly, only lawyers are authorized to incorporate companies.

45. Information concerning the issuance of additional shares following incorporation or the transfer of shares issued on incorporation is not provided to the Public Registry. This information is maintained by the company. The company is obliged by Article No. 36 of Law No. 32 of 1927 to keep a stock register containing (except in the case of shares issued to bearer) the names of all the persons who are stockholders of the corporation showing their place of residence, the number of shares held by them respectively, the time when they became owners and the amount paid on the shares. There is no requirement to have information regarding the ultimate owners in the case of a chain of ownership or to keep the register in Panama if the articles of incorporation or by-laws permit it to be kept elsewhere. There are no specific sanctions if the register is not kept or is not kept up to date.

46. An SA must have a resident agent in Panama which must be a lawyer or law firm in Panama. Pursuant to Executive Decree No. 468 of 1994 (which outlines the responsibilities and obligations of resident agents) any lawyer or firm of lawyers acting as resident agent of an SA is obliged to "*know its client*" and keep sufficient information for the client to be identified to the competent authorities when required to do so. Article 1 of the Decree states that *"All lawyers and law firms who act as resident agent of a Panamanian corporation, are under the duty to know its client and to keep enough information to identify him, before the competent authorities whenever they so request*." Article 2 states that *"This information will be supplied only at request of an officer of the Attorney General's Office or the Judicial Body with competence to deal with drug trafficking crimes or the laundering of money resulting from this criminal activity by reason of*

proceedings already initiated in Panama or under the authority of Mutual Legal Assistance Treaties." Article 3 provides that the supply of information in the circumstances described in Article 2 will not be considered a breach of the lawyer's professional secrecy obligations or a failure of professional ethics for the purposes of Article 170 of the Penal Code.

47. The decree does not provide any guidance as to the scope and level of knowledge which the resident agent is required to have regarding its clients, or the steps that must be taken to verify information obtained or how long information must be retained for. The Panamanian authorities have stated that, in practice, resident agents distinguish between professional services or institutional correspondents (*e.g.* banks, law firms, trust companies, accounting firms) and end-user clients. In the first case only the legal owners must be known and there is no requirement to monitor changes in ownership. In the case of end-user clients they state that a resident agent requires the client to provide the identity of the beneficial owners of a company and that in these cases resident agents are bound to monitor changes in beneficial ownership. In a 2009 follow up report to its 2006 mutual evaluation of Panama, however the Caribbean Financial Action Task Force reported: "*Lawyers must only identify the immediate client for whom they incorporate a company, and this requirement has not been enforced*." Moreover, the report states: "*There is no evidence that judicial and other authorities have been successful at identifying the beneficial owner of companies under investigation*".[5] The report concluded that Panama was Non-Compliant with FATF Recommendation 33 concerning the Transparency of legal persons and arrangements.

Sociedad de Responsabilidad Limitada (SRL)

48. The formation of an SRL and any amendments to its articles of association must also be executed by means of a public deed which is subject to registration in the Public Registry (Article 5 of Law No. 4 of 2009). This Law replaces entirely Law No. 24 of 1996 which originally created and regulated this type of entity. Once registered in the Public Registry the SRL acquires its own legal personality. The capital of the company can be in any currency and is divided into quotas. The names and address of the quota holders must appear in the public deed and any changes must be recorded in the *Public Registry* (Articles No. 5 and 26 of Law No. 4 of 2009). A minimum of two quota holders is required who may be nominees. Each member is entitled to a certificate which evidences the

5 See Panama: Follow-Up Report To Mutual Evaluation Approved 2006, February 2009. (Full text available at http://www.cfatf-gafic.org/downloadables/Panama_1st_Follow-Up_Report_(Final)_English.pdf).

authorized capital, the name of the member and the value of the member's participation or quota.

49. An SRL is not permitted to issue bearer shares and must have a resident agent. As any transfers of a member's interest must be recorded in the Public Registry, information on the legal owners of SRLs is publicly available. Although there is no specific criminal or administrative penalty for failure to comply with the requirement to notify the public registry of changes in ownership, the Panamanian authorities have indicated that failure to do so would result in the loss of the SRL's legal capacity.

Foreign Companies

50. Chapter X of Law No. 32 of 1927 deals with foreign companies carrying on business in Panama. A non-resident company may maintain offices or agencies and conduct business in Panama (other than retail trade), provided that it files the following documents with the Mercantile Registry:

- a Panamanian deed containing the articles of incorporation;
- a copy of the last balance sheet and a statement of the amount of capital engaged or to be engaged in business in Panama; and
- a certificate issued by a Panamanian consul or by a consul of a friendly nation, stating that the company is organized according to the laws of its place of incorporation.

51. The registration requirements for foreign companies do not require that the company provide information concerning the identity of the company's shareholders or members.

Regulated Activities

52. Companies or other entities carrying on regulated services activities (banking, insurance and trust companies) must provide details of their legal and beneficial owners to the relevant regulatory authorities (Superintendence of Banks and Superintendence of Insurance and Reinsurance) in order to obtain a license to carry on such activities (Law No. 9 of 1998, Law No. 59 of 1996 and Executive Decree 16 of 1984 in Article 13). Changes in ownership must also be reported while banks and trust companies are prohibited from issuing bearer shares. Pursuant to Article 15 of Executive Decree 16 of 1984, the shares issued by trust companies must be in a nominative form. Licensed banks are similarly prohibited from issuing bearer shares by Article 5 of the Agreement 3-2001

of the Superintendence of Banks. Moreover, Article 2 of Agreement 1-2004 of the Superintendence of Banks establishes that the transfer of shares of banks and of economic groups that banks form a part of, as well as all amendments to the participation of the shareholders in the capital of these banks requires previous authorization from the Superintendence of Banks.

53. Pursuant to securities legislation (Decree Law No. 1 of 1999) only persons that have obtained a license from the National Securities Commission (CNV) are entitled to exercise the business of broker-dealer or investment advisor in Panama. Shares of companies carrying on a broker-dealer business must be issued in registered form (Article 29) and the beneficial owners of shares that control more than 25% of the voting rights must be identified to the CNV. Prior permission of the CNV is required for any transfer of shares affecting the control of a broker-dealer business.

54. Where foreign companies carry out regulated activities they must provide details of ownership on the same basis as domestic companies**.**

Anti-money Laundering Law

55. Article 1 of Law No. 42 of 2 October 2000 (which establishes measures for the prevention of the crime of money laundering) obliges "*banks, trust companies, exchange and settlement houses and natural or legal persons which engage in exchange and settlement of money, whether or not as their principal activity, financial institutions, savings and loan co-operatives, stock exchanges, stockbrokers, dealers in securities and investment managers*" to "*adequately identify their clients*". For this purpose they must require proper references or recommendations from their clients, and relevant certification of the incorporation and existence of companies, as well as identification of officers, managers, agents and legal representatives of such companies, so that they can adequately document and establish the true owner or direct and indirect beneficiary. Significantly, the activities covered do not include acting as a resident agent or acting in the incorporation of a company

Tax Law

56. Pursuant to resolution No. 201- 4306 dated 28 Dec. 2001 all SAs registered and incorporated in Panama, whether they operate inside or outside the country, require to be registered in the Official Register of Taxpayers in order to ensure that the following years annual license fees are correctly applied to the corporation. This duty is independent of the fact that the entity's income may not be taxable because it is not in receipt of Panamanian source income. The registration requirement does not require

that the company provides information concerning the identity of the company's shareholders or members. The following information must be provided:

- Identification of the Taxpayer (company's name and commercial name);
- Address (street, avenue, road, name of building, postal address, telephone number, jurisdiction, district and province);
- Economic Activities (principal and secondary);
- Type of juridical entity (corporation, limited liability company, etc.);
- Identification of the Legal Representative (ID number, complete name);

57. The requirement to register with the tax authorities for the purposes of the annual license applies also to private interest foundations and has been extended to SRLs by virtue of Law No. 8 of 2010.

58. As the Panamanian tax system is based on the principle of territoriality Panamanian companies which do not earn income from a source in Panama are not subject to the reporting requirements in the Fiscal Code, irrespective of the type of company involved. Where a company operates within the country and generates income from a source in Panama it is required to file a tax return but not to report information on its ownership at the time the return is filed. Information on ownership of the company can be requested by the General Directorate of Revenue (DGI) to establish the veracity of the tax return and other declarations of the company. Companies that pay dividends are also required to report details of the shareholders in receipt of such payments. The DGI is entitled to ask for shareholder information in cases where a foreign company is being audited. However, there is no independent requirement in the Fiscal Code that a company must maintain particular types of ownership information.

59. Colon Free Zone[6] and other free zone companies are exempt from tax on profits from sales to customers outside Panama or within the free

6 The Colon Free Zone is located next to the city of Colon on the Atlantic entrance to the Panama Canal. It consists of a closed and segregated Customs area for carrying out commercial and wholesale operations and is subject to a special tax system. Traditionally, the operations carried out in the zone consisted of the importation of goods from abroad duty free, assembly and repackaging followed by their export sale. The zone processes more than USD 16 billion in imports and re-exports annually and employs around 28 000 people. Currently there are around 2 500 enterprises operating in the zone.

zones. If goods are sold into the domestic market the profits are subject to Panamanian tax in the normal way. Companies operating in free zones must keep separate accounts for local sales and foreign sales and must file estimated tax returns for income derived from local domestic activities. The DGI's powers to compel free zone companies to provide information are the same as those for other taxpayers.

Nominees

60. There are no specific regulations regarding the establishment of nominee shareholdings. With registered shares, the name of the owner appears on the stock certificate and on the stock register of the corporation. Article 27 (6) of Law No. 32 of 1927 provides that if shares are represented by a certificate issued in the name of the owner it should contain the name of the owner. Article 36 requires all SAs to keep a register showing the names of all of the persons who are stockholders of the corporation. These provisions appear to require only that the nominal shareholder is listed in the share register, regardless of whether that shareholder is a nominee. In the case of SRLs the names of the quota holders must be registered in the public registry but these may also be nominees. There appears to be no requirement for nominees to have, or make available, information about the person on whose behalf shares are registered.

Bearer shares *(ToR A.1.2)*

61. Law No. 32 of 1927 allows for shares to be issued in registered or bearer form. In the case of bearer shares the stock register is required to show the number of such shares issued, the date of issue and that the shares are fully paid and non-assessable (Article 36). Bearer shares may only be issued if fully paid and non assessable (Article 28). The transfer of bearer shares requires only the delivery of the certificate (Article 30). Once issued a holder of a certificate of shares issued to bearer can exchange the certificate for a certificate of the same number of shares issued in his name and the holder of a certificate of shares issued in the name of the owner can exchange it for a certificate of a like number of shares issued to the bearer (Article 31). Panama has indicated that it plans to introduce measures within months to ensure that the owners of bearer shares can be identified to the authorities in Panama. The proposed legislation was not available to the assessment team at the time the assessment was undertaken.

62. Companies with income from Panamanian sources are obliged to withhold tax at 10% from dividend distributions in respect of shares in

nominative form.[7] The rate of withholding is 20% where the shares are issued to bearer. However, the anonymity of the shareholder is preserved as no return is required to be made by the shareholder in respect of this dividend income and the withholding rate is not reduced by disclosure.

Partnerships *(ToR A.1.3)*

63. The statutory provisions relating to the formation and governance of partnerships under Panama's laws are contained in Chapter II of Title VIII of the Commercial Code. The following types of partnerships are provided for:

- *Sociedad colectiva* (general partnership)
- *Sociedad en comandita simple* (limited partnership)
- *Sociedad en comandita por acciones* (partnership limited by shares)

64. The procedures for establishing a partnership are broadly the same irrespective of the type of partnership involved. All partnerships must be registered in the Mercantile registry, which is a section of the Public Registry. The Articles of Incorporation must contain the following information (Article 293 of the Commercial Code):

- The name and domicile of each of the partners;
- The name of the partnership;
- The capital of the partnership, specifying the amount subscribed and paid in by each partners;
- Details of how the partnership will be managed;
- Details of voting rights;

65. The identity of the partners in a partnership (legal owners) including ongoing changes is a matter of public record, accordingly. There is no requirement to disclose the ultimate owners of partnerships where a partner is a company. There is no requirement either for a partnership to have a resident agent.

7 See paragraph 19.

66. In addition to the partnerships referred to above, three other types of partnership arrangements are possible but these are not widely used for international business. These are:

- *Asociación accidental o cuentas en participación* (informal partnership);
- *Agrupación de Interés Económico* (Economic Interest Grouping); and
- *Sociedad Civil* (Professional partnership)

67. The informal partnership is a written agreement whereby two or more individuals or legal entities (*asociados*) take an interest in one or more specified temporary ventures. The agreement is not subject to registration and the informal partnership does not have a separate business name or legal personality of its own. The Panamanian authorities have indicated that informal partnership and Economic Interest Grouping must make disclosures of ownership in their formation documents in order to ensure enforceability between its members**.**

Foreign Partnerships

68. There is no specific regulation regarding foreign partnerships.

Tax Law

69. As Panama operates a territorial tax system a partnership that does not earn income from a source in Panama is not subject to the reporting requirements of the Fiscal Code, irrespective of the type of partnership involved. Where a partnership operates within the country and generates income from a source in Panama it is required to file a tax return but not to report information on its ownership at the time the return is filed. Information on the identity of partners including the identity of partners in foreign partnerships can be requested by the DGI when an audit is carried out to establish the veracity of the tax return and other declarations of the partnership. However, there is no independent requirement in the Fiscal Code that a partnership must maintain particular types of ownership information.

Trusts *(ToR A.1.4)*

70. The statutory provisions relating to the creation and governance of trusts in Panama are contained in Law No. 1 of 5 January 1984 (Trusts Law).

71. Article 1 of the Trusts Law defines a trust as a juridical act by which a person named the "Settlor" transfers property to a person called the "Trustee" or "Fiduciary" for its administration or disposition in favour of a "Beneficiary" that may also be the "Settlor". Pursuant to Article 4 of the Trusts Law the intention to set up a trust must be expressly stated in writing. Consequently, oral or implied trusts are not provided for under Panama's laws.

72. Article 9 of the Trusts Act specifies the terms that the Trust Deed must contain:

- The complete and clear designation of the Settlor, the Trustee and the Beneficiary. When future Beneficiaries or different classes of Beneficiaries are contemplated, sufficient circumstances shall be expressed for their identification.
- Sufficient designation of substitute Trustees or Beneficiaries, should there be any such.
- The description of the assets or patrimony or share of same over which the Trust is constituted.
- The express declaration of the will to constitute a Trust.
- The faculties and obligations of the Trustee.
- The prohibitions and limitations imposed on the Trustee in the exercise of the Trust.
- The rules of accumulation, distributions or disposition of the assets, revenues and profits of the assets of the Trust.
- The place in which the Trust is constituted and the date of Constitution.
- The designation of a Resident Agent in the Republic of Panama who shall be a practising Attorney or law firm, who shall authenticate the Trust Deed.
- The domicile of the Trust in the Republic of Panama.

- The express declaration that the Trust is constituted in accordance with the laws of the Republic of Panama.

- The Trust Deed may also contain such clauses as the Settlor or the Trustee might wish to include and which are not contrary to the morality, the laws or Public order.

73. When the Trust is constituted by means of a private document, the signature of the Settlor and the Trustee, or of their Attorneys-in-Fact for its constitution, must be authenticated by a Notary Public. A declaration whereby the trustee declares to have received assets to be held in trust without the need to name the settlor is not possible in Panama, although it is possible for corporate settlors to create a trust.

74. Any natural or juridical person can act as trustee under the Trusts Law, and public entity officials may also transfer or retain assets in trust. However, persons engaged in a trust business require a license, excepting official bank and public entity officials. Executive Decree No. 16 of 1984 regulates persons carrying on a trust business.

75. The term trustee is not defined in the Trust Law. However, Executive Decree No. 16 of 1984 defines a trustee as the natural or judicial person to whom property is transferred in order for the trustors will to be carried out.

76. The Trusts Law does not require identification of protectors or enforcers. Nevertheless, the Panamanian authorities have stated that it would be necessary for the Trustee to fully identify them in order to properly administer the Trust. Article 9 of Law No. 1 of 1984 allows the incorporation into the Trust Deed of clauses the settlor and the trustee deem necessary to include, consequently, in trusts whose operation demands it, the figure of protector is included through a Council, a Committee or a Commission, whose members, responsibilities and obligations would form part of the contract.

77. Trusts established on real estate property in Panama must be created by public deed and only affect third persons, in relation to that property, from the date of registration of the trust deed in the public register. In all other cases trusts become effective as regards third parties once the signatures of the settlor and trustee, or their attorneys, have been authenticated by a Panamanian notary (Articles 11and 13 of the Trusts Law).

Anti-money Laundering Law

78. Trust service providers (fiduciary enterprises) are included within the scope Article 1 of Law No. 42 of 2000, and are therefore obliged to apply to the anti money laundering measures established by that law. They are subject to comprehensive regulation and inspection by the Superintendence of Banks by virtue of Executive Decree 16 of 1984 even if the trust company is not affiliated to a financial institution. In Agreement 12 -2005, which complements Law No. 42 of 2000, the Superintendence of Banks has established due diligence requirements for trust service providers in respect of their customers and resources.

Tax Law

79. In the case of a trust it is the trustee who is liable for any taxes or charges payable in respect of trust assets. Where, accordingly, a trust is in receipt of Panamanian source income, the trustee would be required to register with the tax authorities (Law No.1 of 5 January 1987). A trustee holding only foreign assets in trust is not liable to tax and is not required to register with the tax authorities.

80. Moreover, Article 35 of the Trust Law provides that trust income and assets will be exempted from taxes, contributions, charges or levies provided that the trust involves:

i. assets located abroad;

ii. money deposited by natural or juridical persons whose income does not derive from Panamanian source or is not taxable in Panama; or

iii. shares or securities of any kind, issued by companies whose income is not derived from Panamanian source even when such money shares or securities are deposited in the Republic of Panama.

81. There are no requirements in the Fiscal Code that oblige a trust to have particular types of information available for tax purposes, *e.g*. on settlors or beneficiaries.

Foreign trusts

82. There is no prohibition on residents of Panama acting as trustee in relation of trusts formed under foreign laws. These trusts would generally

be governed by the laws of the jurisdictions under which they are created. They would have to register for tax purposes only where the trust earns Panamanian source income. However, any Panamanian trustee which carries on a trust business and acts as a trustee for foreign trusts would require to be licensed and would be required to apply the anti money laundering measures established by Law No. 42 of 2000 and Agreement 12-2005.

83. Trusts created in accordance with a foreign law may migrate to Panama provided that the settlor and the trustee or the trustee alone, if authorised by the trust instrument, make a declaration of that intent, and by observing the formalities established in the Trusts Law for the creation of a trust.

Foundations *(ToR A.1.5)*

84. The Panamanian private foundation is governed by Law No. 25 of 1995 (Foundations Law). The law does not contain a definition of a foundation similar to the definition of a trust contained in Trusts Law. In general terms, the creation of a foundation involves the endowment by a founder of assets to the foundation exclusively for the purposes expressed in the foundation charter. The founder may be a natural person, a juridical person or a nominee of them.

85. Article 3 of the Foundations Law provides that "*private foundations shall not be profit oriented*." However, "*they may engage in commercial activities in a non habitual manner (…) provided that the result or economic product (…) is exclusively used exclusively towards the foundations objectives*." Otherwise a foundation can be created for any lawful purpose such as the maintenance and welfare of the founder or his family or for a charitable purpose. It can own the shares, bank accounts and real estate and engage in activities to increase the value of its assets.

86. Private foundations may be formed either by a private document signed by the founder, whose signature must be authenticated by the public notary in the place of its constitution or directly before the public notary in the place of its constitution (Article 4 of the Foundations Law). Whatever the method of constitution, the formalities for the creation of foundations set out by the Law must be fulfilled. The foundation's charter as well as any amendments thereto, must be registered in the Public Registry. Information which the charter must contain includes; details of the appointment, including the address, of the member or members of the foundation's board, which may include the founder, and the name and address of the foundation's agent resident in Panama, who must be a lawyer, or a firm of lawyers, who shall endorse the charter before its deposition in the Public

Registry. The manner of designating beneficiaries must also be stated (Articles 5 of the Foundations Law).

87. These are less onerous requirements than those obtaining in the case of trusts for which a complete and clear designation of the settlor, trustee and beneficiaries is required. However, information on the members of the foundation's board is available in the public registry

88. Registration of the charter in the Public Registry gives the foundation legal personality (Article 9 of the Foundations Law). It also constitutes publication to third parties.

89. Article 34 of the Foundations Law provides that the operations of foundations shall be subject to all the legal provisions contained in Executive Decree No. 468 of 1994 and any other law designed to combat money laundering related to the proceeds of drug trafficking. Executive Decree No. 468 imposes on lawyers, acting as resident agents, an obligation to "know their clients".[8]

Anti-money Laundering Law

90. Resident agents are not included in Law No. 42 of 2 October 2000 (which establishes measures for the prevention of the crime of money laundering).

Tax Law

91. Where a private interest foundation generates taxable income in Panama it is required to register with the tax authorities and to file a tax return. There are no requirements in the Fiscal Code that oblige a foundation to have particular types of information available for tax purposes, *e.g.* on founders or beneficiaries though information on founders or beneficiaries could be requested in the case of a tax audit.

92. However, private interest foundations cannot habitually engage in commercial activities in Panama. Moreover, Article 27 of the Foundations Law provides that the transfer of assets to a foundation and any income from such assets shall be exempt from tax provided that such assets are:

i. assets located abroad;

ii. money deposited by natural or juridical persons whose income does not derive from Panamanian source or is not taxable in Panama; or

8 See paragraph 46.

iii. shares or securities of any kind, issued by companies whose income is not derived from Panamanian source even when such money shares or securities are deposited in the Republic of Panama.

Enforcement provisions to ensure availability of information *(ToR A.1.6)*

93. Law No. 32 of 1927 which governs the establishment of SAs requires all SAs to keep a stock register but does not prescribe penalties for any failure to do so or for a failure to keep it up to date. The information in the stock register may be required for all audits carried out by the DGI and failure to supply this information leaves the company liable to the penalties provided for in Article 756 of the Fiscal Code.[9] As Panama has a territorial tax system, however, there is a cohort of companies which may not be subject to audit because they are not in receipt of Panamanian source income. In this case there appears to be no way of ensuring the availability on information on shareholders in SAs even if the SA has not issued bearer shares.

94. SAs, SRLs, and private interest foundations are required to have a resident agent. A Resident Agent who is in non-compliance with "*know your client"* provisions could be disbarred by the Supreme Court due to breach of the Code of Ethics (Law 9 of 1984). However, the requirement for resident agents to know their clients seems not to be enforced.[10]

95. The identity of the subscribing shareholders in an SA, the quota holders in an SRL, the partners in a partnership and the members of foundation councils is a matter of public record. There are no specific criminal or administrative penalties for failing to comply with the requirement to notify the Public Registry of changes in ownership in the case of SRLs, general partnerships, limited partnerships or partnerships limited by shares. The Panamanian authorities have indicated, however, that failure to notify changes in ownership would result in the relevant entity losing its legal status.

96. Trust service providers are included in Law 42 of 2000 (Anti-Money Laundering). This establishes fines for non compliance from USD 5 000 up to USD 1 000 000 without excluding the measures stipulated in the Penal Code or in other laws, decrees or existing regulations in Panama.

9 See paragraph 129.

10 See paragraph 47.

Other administrative sanctions could include cancellation of the respective license.

97. The effectiveness of the enforcement provisions which are in place in Panama will be considered as part of the Phase 2 review.

Other relevant entities and arrangement

98. Panamanian law considers an investment fund or society to be a legal entity, separate from its unit holders. As such it pays income tax in a manner equivalent to a corporation. Income arising from foreign sources is excluded from taxation. They may be constituted as legal persons, such as companies, as trusts or as a contractual arrangement. Further, they may be either registered or private investment funds. The latter are limited to 50 investors with a minimum subscription of USD 100 000. Investment societies made up of less than 20 investors whose units are not offered to the public are excluded from the scope of the legislation.

99. Funds may have investment managers or custodians that are required to adequately identify their clients under Article 1 of Law No. 42 of 2000. Registered investment funds are required to have custodians, which must be authorised by the CNV, to hold their assets. Investment managers are also required to be authorised by the CNV but a fund may also manage its own assets. Panama has reported that there are currently only 11 investment societies in operation. No other relevant entities and arrangements fall to be considered.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Information on the owners of bearer shares is not available.	Panama should take all necessary steps to ensure that its competent authorities can identify the owners of bearer shares.
There is no requirement for nominees to have, or make available, information about the person on whose behalf shares are registered.	Where shares or securities are registered in the name of a person the competent authorities should have power to require that person to state whether he/she holds the shares as a nominee and if so to identify the person on whose behalf the shares are registered.

Although "know your client" rules apply to resident agents for companies and foundations, in accordance with Executive decree No. 468 of 1994, it is not clear what information these rules require to be kept .	The "know your client" rules for resident agents should be amended to ensure that ownership information held by resident agents identifies the owners of companies and the founders, members of the foundation council and beneficiaries of foundations.
Unless a *Sociedad Anónima* is subject to audit by the tax authorities there appears to be no mechanism to ensure that the stock register is kept up to date, or at all.	Penalties for failing to maintain stock registers up to date should be prescribed for all *Sociedad Anónima.*

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

General requirements (ToR A.2.1)

100. The Panamanian Commercial Code provides that merchants are required to keep accounting records which show clearly and precisely its commercial operations, its assets, liabilities and properties (Article 71 of the Commercial Code). This requirement applies irrespective of the type of entity involved, *e.g.* company or partnership. It also applies to companies operating in free zones and other special economic zones.

101. With regard to free zone companies Article 105 of Executive Decree No.170 of 1993 provides that individuals or entities operating in free zones must keep separate accounting records of their domestic and export operations. The DGI has the power to review these accounting records.

102. The books that every merchant is required to keep pursuant to the Commercial Code are the General Ledger and General Journal. Commercial companies are also required to keep a Minute Registry Book and a Share and Shareholder Registry Book or a Registry of the Quotas or Contributions of Assets or Social Participation (Article 73 of the Commercial Code).

103. Penalties are provided for failing to maintain up to date records ranging from USD 100 to USD 500 for each month that the records are not

updated. Accounting records are considered up to date if they are made monthly in the compulsory records, within sixty days of the corresponding month (Article 87 of the Commercial Code). The tax authorities are responsible for enforcing this requirement.

104. Local and foreign companies and partnerships that undertake business in Panama have the obligation to keep their accounting records in Panama. A company or partnership organized under the laws of Panama that does not operate within the country and does not generate Panama source income is not subject to the Commercial Code and is therefore not bound by the Code's record keeping requirements. As such entities do not earn income from a source in Panama they are not subject to the record keeping requirements in the Fiscal Code either.

105. Trusts and foundations are not included in the scope of Article 73 unless they can be considered to be merchants. In this context the term "merchant" means a person with legal capacity who carries out acts of trade in an habitual and professional manner in his own name or the name of others (Article 28 of the Commercial Code). As foundations are prohibited from habitually engaging in commercial activities and trusts often just hold assets as opposed to engaging in commercial activities they will often be outside the scope of Article 73.

106. As regards trusts, however, Article 15 of Law 1 of 1984 establishes that the trust's assets constitute a separate estate from the personal assets of the trustee for all legal effects and Article 28 establishes that the trustee shall render a report of its management to the settlor or to the existing beneficiaries, as indicated in the instrument or at least once a year. It follows that a trust instrument cannot provide that there is no requirement to keep accounting records.

107. Similarly, Article 19 of the Foundations Law provides for the establishment of a foundation board which, unless otherwise stated in the charter or rules, has as one of its general obligations "to inform the beneficiaries of the state of its assets, as laid down in its charter or rules". Article 20 of the Foundations Law provides that the foundation council must provide an accounting of its activities to the beneficiaries and the supervisory body, when applicable, unless otherwise provided for in the charter or regulations. If the foundation charter or its regulations contain no provisions in this regard the rendering of accounts must be done annually. Contrary to case of trusts, however, it would appear that the foundations charter could provide that there is no requirement to keep accounting records.

Tax Law

108. The Fiscal Code does not create any separate requirements related to the maintenance of accounting records other than those described above. However, Resolution 201-1990 regulates the form of presentation of accounting and financial statement records.

Underlying documentation (ToR A.2.2)

109. There is no general requirement that merchants maintain particular underlying documentation (*e.g.* invoices, contracts) in support of the accounting records. However, the Commercial Code provides that accounting records must be kept with precision and clearness in a chronological order (Article 77) and that the accounting of every merchant must be undertaken by a licensed accountant or authorised Public Accountant (Article 87). Further, Article 93 provides that the auxiliary records, receipts and documentation which support the mercantile operations must be kept until the running of the statute of limitation of every action which may arise there from.

110. The Trusts Law and Foundations Law are silent on the nature of the accounting records that require to be kept and there does not appear to be any requirement to maintain underlying documentation.

5-year record retention standard (ToR A.2.3)

111. All merchants are required to retain their compulsory commercial account books throughout their professional life and for five years following the closure of their business (Article 93 of the Commercial Code).

112. The Trusts Law and Foundations Law are silent on the period for which records should be retained. In the case of trusts however, where a trust corporation is used it must comply with due diligence requirements for anti-money laundering purposes towards its customers and their resources which includes developing a financial profile and determining the source and origin of funds contributed to the trust. Documents obtained through the due diligence process on the customer and his resources must be retained for not less than five years counted from the end of the contract relation with the customer (Article 7 of Agreement 12-2005 of the Superintendence of Banks) While significant these requirements are not the same as those required under the standard set out in A2.1 and A2.2 of the Terms of Reference.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Only companies and partnerships operating in Panama are required to maintain accounting records.	The record keeping requirements in the Commercial Code should apply to all companies, limited partnerships and partnerships limited by shares registered in Panama irrespective of whether they carry on business in Panama.
The Trusts Law and Foundations Law are silent on the type of records which are required to be kept and their retention period.	The record keeping requirements for trusts and foundations should be clarified to ensure that reliable accounting records are kept and retained for a period of five years.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

113. In accordance with Article 4 of Agreement No.12-2005 (which sets out measures to prevent the improper use of banking and trust services) all banks must comply with due diligence towards their customers and their resources which among other things includes:

- Developing a written customer profile (including the customer's name, nationality and domicile, type, number, volume, frequency and habitualness of banking and trust operations and, in the case of juridical persons, certifications such that they can properly identify and document the real owner or final beneficiary of the account whether direct or indirect);

- Keeping the documentation and follow up of the customers accounts and transactions to know the habitual and reasonable activities of the accounts as well as to identify unusual transactions;

- Reviewing every six months the operations of customers that hold personal or commercial accounts performed habitually and in cash for amounts in excess of PAB 10 000.

- Keeping a record of unusual operations and keeping on file all the related documents whether they relate to the unusual operation or not.

Determination and factors underlying recommendations

Determination
The element is in place.

B. Access to Information

Overview

114. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Panama's legal and regulatory framework gives to the authorities access powers that cover the right types of persons and information and whether rights and safeguards would be compatible with effective exchange of information

115. The report identifies potentially serious deficiencies in the Panamanian authorities' powers to obtain information for exchange purposes. The most serious of these is the prima facie existence of a domestic tax interest requirement. The presence of a domestic tax interest requirement can be a particularly significant impediment to exchange of information where a jurisdiction bases its income tax system on the territoriality principle because income arising from foreign sources is not taxable. An extension from this is that the jurisdiction's authorities have no domestic tax interest where a person or entity is only in receipt of foreign source income. In the case of Panama, a significant number of companies and private foundations are likely to be in this position.

116. Another potentially serious deficiency arises from the professional secrecy provisions that protect lawyers even when they are not acting as legal representatives. This may impede the Panamanian authorities' access to information, particularly ownership information in the case of companies and private foundations which are required to have resident agents which must be lawyers. The resident agent may be the only person in Panama with any information on the ownership of companies that do not have local operations, It is essential that information to be collected is clearly identified and it is also essential the tax authorities have access to this information in the event that a request for exchange of information is made.

117. The Report also highlights difficulties in establishing a correlation between the existing sanctions for refusal to provide information in response to a request from the tax authorities and their effectiveness in ensuring that information is accessible for exchange purposes.

118. Panama has committed to the international standard of effective exchange of information. Fundamental to this commitment is the power to obtain information for the administration and enforcement of the tax laws of an exchange partner. Until very recently, however, Panama has had no involvement in international cooperation in tax matters and consequently its legal and regulatory framework has not been designed with such demands in mind. It has now started to negotiate DTCs, and has also made adjustments to its domestic legislation. Significantly, Panamanian officials have also indicated that legislation will be proposed to eliminate its domestic tax interest requirement. These are encouraging steps but they may not be enough to fully reflect all of the complexities of international cooperation. It is important, therefore, that Panama undertakes a comprehensive review of its access powers and competing confidentiality provisions to eliminate any uncertainties about the scope of these powers and ensure that they will allow for effective exchange of information in practice.

B.1. Competent Authority's ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

119. The Directorate General of Revenue (DGI) is the government agency in charge of administering the Fiscal Code and collecting taxes. The statutory powers of the General Directorate of Revenue (DGI) to obtain information are of a general nature. The same generic power applies irrespective of who information is to be obtained from, *e.g*. an individual, company, bank or other governmental agency, whether the information sought requires to be kept or the nature of the information sought. Power to obtain information is conferred by Article 20 of Cabinet Decree 109 of 7 May, 1970 as modified in Article 31 of the Law No. 8 of 15 March, 2010 which provides as follows:

"*The Directorate General of Revenue is authorized and empowered to request and obtain from the public and private entities and third parties in general, without exception, all information necessary and inherent to the determination of tax obligations, the events of taxes or exemptions, their amounts and sources of income, remittances, deductions, expenses, reserves, expenses, among others, related to the taxation, and information about those responsible for such obligations or rights holders of tax exemptions. In all cases this information is confidential and under any circumstances may make it transcend, except for purposes of the compliance with treaties signed by the Republic of Panama to avoid double taxation or in circumstances specifically provide in the law".*

120. The precise scope of the powers conferred by Article 20 is somewhat unclear. As a number of important terms such as "information and "necessary" which are used in the Article are not defined it is difficult to assess how far-reaching the powers are. In the assessment teams view there is also uncertainty about how these provisions interact with other provisions of Panamanian law, particularly as these powers have never been used to obtain information for exchange purposes.[11] The Panamanian authorities have stated the DGI has the right to interpret the law and establish the meaning of it and the tax payer has the possibility to appeal the decision through administrative and legal appeal channels. They have further stated that this power has been exercised since 2005 without any difficulty and that no argument or legal action has been taken to challenge it.

Ownership and identity information (ToR B.1.1)

121. Panama has indicated that there are no restrictions on the DGI's ability to obtain ownership or identity information from public and private entities or from third parties. However, there is competing secrecy legislation that may impede the DGI's access in certain cases.[12]

122. The view of the DGI is that its powers under Article 20 of Cabinet Decree 109 of May 7 of 1970 would override these secrecy provisions. However, Panama has not provided any clear legal authority on this and suggests that in the case of a dispute the matter would have to be decided by the Supreme Court of Justice.

123. The identity of the subscribing shareholders in an SA, the quota holders in an SRL, the partners in a partnership and the members of foundation councils is a matter of public record.

11 See paragraphs 131-135.

12 See paragraph 132-134.

Accounting records (ToR B.1.2)

124. Panama has the ability to obtain accounting information where it is relevant for its own tax purposes. Panama has indicated that there is no legal basis to obtain information from persons that are not operating within Panama or generating Panamanian source income.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

125. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. Panama's information gathering powers specify that the DGI is empowered to obtain all information "*necessary and inherent to the determination of tax obligations"* (Article 20 of Cabinet Decree 109 of 7 May, 1970). Panama has indicated in previous reviews by the Global Forum that it only has power to obtain information for domestic tax purposes which is consistent with the view that "*tax obligations*" in this context refers to a Panamanian tax obligation. This interpretation was confirmed with the Panamanian authorities by the review team early in the peer review process.

126. Panama's territorial tax system is an important factor in making it a centre for international services. It also has the effect of excluding from the DGI's information gathering powers entities which are engaged in international services but which are only in receipt of foreign source income because there is no domestic "tax obligation" in such cases. This is a serious deficiency in the Panamanian authorities' powers to obtain information for exchange purposes.

127. Panamanian officials have, however, drawn the assessment teams attention to a commitment letter that it sent to the OECD in 2002 which stated that in the case of a request for information exchange relating to a civil tax matter the lack of a Panamanian tax interest in the case or in obtaining the information would not preclude the provision of such information. Further, they have indicated that legislation will be proposed that will enable the DGI to obtain and exchange information necessary to comply with international treaties for exchange of information entered into by Panama.

Compulsory powers (ToR B.1.4)

128. Article 19 of Cabinet Decree 109 of May 7 of 1970 provides for the use of more invasive powers such as the power to search for and remove records. Specifically it allows the DGI's audit staff to:

- Cite responsible taxpayers and third parties in general to answer under oath, either orally or in writing, within prudential limits set, all questions put to them on revenue, sales, income, expenses and in general on all the circumstances related to his assessment under applicable laws;

- Require, within the time specified therein, the presentation of vouchers, and other supporting elements related to the taxable event;

- Audit books, records, documents and inventories to certify and demonstrate the business and transactions of those responsible;

- Require, under its responsibility, the help of the police to the proper conduct of audit assignments;

- Carry out searches, seizures and temporary requisition.

129. The sanctions for non compliance with a request to provide information seem not to distinguish between different circumstances or different types of entities. Article 756 of the Fiscal Code provides for penalties where the competent tax authority requires the submission of reports or documents of any kind related to the implementation of tax and these are not presented within a reasonable time. Without prejudice to other penalties, as appropriate, the penalties provided are a fine of USD 1 000 to USD 5 000 for the first time a request for information is refused, and USD 5 000 to USD 10 000 in case of re-occurrence. The establishment concerned may also be closed for 2 to 15 days, and definitive closure of the establishment may occur if a refusal to provide the information persists, in addition to sanctions in the Penal Code.

130. Article 756 makes a distinction between monetary penalties, closure of a business and sanctions provided for in the Penal Code. Taken together these appear to give the DGI adequate sanctions to ensure access to information for Panamanian tax purposes. However, it is difficult to assess the effectiveness of these penalties for exchange of information purposes, *e.g.* in a situation where a company has no physical presence in Panama and there is nothing against which to apply penalties. Further, the threshold between the various categories of penalties is unclear and it is not certain that the more extreme forms of penalty, *e.g.* definitive closure of a business would always be practical in the case of international businesses

to which requests for exchange of information are more likely to relate. A more graduated system of monetary and other penalties tailored to specific circumstances, *e.g.* where a bank or service provider such as a resident agent refuses to provide information requested should be considered.

Secrecy provisions *(ToR B.1.5)*

131. There are a number of provisions in Panamanian law relating to the secrecy of ownership, identity or accounting information. The assessment team had difficulty obtaining clear and comprehensive information from Panama's officials about some of these.

132. First, Article 170 of the Criminal Code is a broad confidentiality provision that could impact all aspects of information exchange in Panama. Explicit reference is made to Article 170 in Executive Decree No. 468 and, therefore, it appears to be particularly relevant for Panama's review. Briefly, the Article provides that, where in the course of a business, profession, employment, or the like anyone has access to secret or privileged information whose publication could cause harm or damage and who reveals the information without the authorization of the concerned party, or without any necessity of doing so to preserve a higher public interest can be sanctioned by imprisonment and a prohibition on carrying on his activities in the future.

133. The information provided by Panama in responding to the questionnaire, for the purposes of this report, makes reference to Article 170. However, Panama did not provide as part of its questionnaire material the current version of its Criminal Code. The draft report therefore contains the information concerning Article 170 that was originally provided by Panama in 2006. Very late in the report writing process the assessment team was able to obtain a copy in Spanish of the current Criminal Code which was revised in 2008. Its current Article 170 no longer deals with professional secrecy. It is unclear whether an equivalent of Article 170 is contained elsewhere in the Code, or if it has been repealed.

134. Second, professional secrecy protects lawyers even when they are not acting as legal representatives. Article 13 of the Code of Conduct of Lawyers in Panama provides that lawyers have a duty to keep the secrets and confidences of their clients, even after the contractual relationship has stopped. The Code does not distinguish between the various activities of lawyers. Furthermore the text clearly states that a lawyer cannot be forced to disclose information on a client, except with the agreement of this

client.[13] A lawyer who breaches this secrecy duty is punishable by a private reprimand or a public reprimand.

135. The exceptions to professional secrecy described above are not relevant where a request under an exchange of information arrangement is made and it is unclear whether the information gathering powers granted to the DGI would otherwise prevail over these professional secrecy requirements.

136. Third, Article 37 of the Trusts Law requires that trustees, their representatives or employees, the State bodies legally authorized to carry out inspections or collect documents relating to trust operations and their respective officers and persons involved in such operations by reason of their profession or position, must maintain secrecy with regard to these operations. However, this duty does not override the obligation to provide information that must be disclosed to official authorities and the inspections they are required to carry out by law.

137. Fourth, Article 35 of the Foundations Law requires that the members of the foundation board and control bodies, if any, and public servants or private employees who have knowledge of the activities, transactions or operations of foundations shall maintain discretion and confidentiality in respect of them at all times. However, this duty does not override the obligation to provide information that must be disclosed to official authorities and the inspections they are required to carry out by law.

138. The DGI's information gathering powers permit it to obtain information from trusts and private foundations where it is relevant for the purposes of applying Panamanian tax law.

139. Panamanian law also recognizes the principle of "banking reserve" or bank confidentiality (Chapter XIII of Decree Law No. 52 of 2008). The basic principle underpinning the legislation is that banks are not permitted to disclose information on their clients save in the case of formal requests from competent authorities as prescribed by law (Article 111 to 113). Disclosure is permitted, accordingly, in any case in which a law authorizes a government agency or administrative tribunal to gather information about a case. For example confidentiality cannot be asserted, against the authorities, where a money laundering case (tax evasion is not a predicate offence) is being investigated. Information may also be disclosed to authorities such as The Superintendence of Banks for the purpose of exercising their legal and regulatory functions. Disclosure of suspicious

13 The other, marginal, exception is when a client sues a lawyer, who can then disclose information to defend him or herself.

transactions, to the Financial Analysis Unit, is required where money laundering is suspected. In this regard, Article 3 of Law No 42 of 2 October 2000 provides that "Any information communicated to the Financial Analysis Unit of the authorities of the Republic of Panama, in compliance with this law or its implementing provisions shall not constitute a breach in professional secrecy or of the restriction on disclosure of information due to confidentiality of a contractual nature or imposed by any law or regulation,".

140. Similar provisions apply to investment advisors and investment managers under securities legislation (Decree Law No.1 of 1999). Confidentiality provisions that apply in the case on other non bank financial institutions *e.g.* insurance companies, collective investment funds, rely on Article 170 of the Criminal Code.

141. The DGI has power to gather information from third parties (including banks) for the purpose of applying Panamanian tax law. The information is requested by letter based on the powers given under Article 20 of Cabinet Decree 109 of 7 May, 1970.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
The power of Panama's tax authorities to obtain information for exchange purposes is limited to circumstances in which the information is also required for their own tax purposes (domestic tax interest).	The statutory powers given to the Directorate General of Revenue to obtain information should be amended to specifically include power to obtain information for the purposes of responding to a request for information under an international agreement that provides for the exchange of information in tax matters, even if Panama does not need the information for its own tax purposes.
It is unclear that the Directorate General of Revenue's power to obtain information overrides competing requirements prohibiting disclosure of information, particularly with respect to lawyers acting in capacity other than that of legal representative.	It should be made clear in legislation that the Directorate General of Revenue's power to obtain information to respond to a request for information under an international agreement overrides any obligation to secrecy imposed by any other legislation or other restriction on

	the disclosure of information subject to recognised exceptions such as attorney-client privilege.
The penalties available to ensure access to information for exchange purposes are not adapted to ensure access to information likely to be requested under exchange of information arrangements.	Panama should review the penalties provided for in its Fiscal Code to ensure these meet the requirement of ensuring access to information necessary to comply with its treaty obligations.

B.2. Notification requirements and rights and safeguards

The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

Not unduly prevent or delay exchange of information (ToR B.2.1)

142. The Protocol to the Model Convention developed by Panama for the purposes of its negotiations of DTCs with other jurisdictions includes a provision to the effect that the administrative procedural rules regarding taxpayers' rights provided for in the requested Contracting State remain applicable before information is transmitted to the requesting Contracting State. In Panama's case these procedures include notifying the person with regard to the request for information from the other Contracting State, and granting the opportunity for that person to file and present his position to the tax administration before it issues a response to the requesting State. The Panamanian authorities have indicated that this provision aims at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process:

143. In the draft Regulation of the DGI for the Reception, Evaluation and Response to Request of Tax Information, there is a clause in the part related to the content of the request which requires consideration to be given to "Whether there are reasons for avoiding notification of the taxpayer under examination or investigation (*e.g.* if notification may endanger the investigation)." The Panamanian authorities have indicated that the Draft Regulation is based on the OECD's Manual for Exchange of Information.

144. It was recognised in the Terms of Reference that, certain of the essential elements would require a Phase 2 review before any definitive judgment could be made as to whether the jurisdiction satisfies the

standard or not.[14] In particular, it was acknowledged that whether a jurisdiction delivers information in a timely manner, and whether the rights and safeguards afforded persons in a jurisdiction unduly prevent or delay effective exchange of information would generally require an assessment of the practical application of a jurisdiction's legal framework for exchange. Thus, the Phase 1 determination that this essential element is in place will need to be reviewed in, due course, in the light of the Phase 2 assessment.

Determination and factors underlying recommendations

Determination
The element is in place.

14 See paragraph 18 of the Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information for Tax Purposes.

C. Exchanging Information

Overview

145. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. In Panama, the legal authority to exchange information derives from double tax conventions once these become part of the Panama's domestic law. This section of the report examines whether Panama has a network of information exchange arrangements that would allow it to achieve effective exchange of information in practice.

146. As Panama does not have any agreements for exchange of information to international standards in force any discussion under this heading is largely anticipatory. Over the past year Panama has actively pursued a course of negotiating Double Taxation Conventions (DTCs) with a wide range of countries. To date, it has signed an agreement with Mexico and agreed the text of agreements with another seven countries. Panama has stated that its policy in respect of the Exchange of Information Article in these agreements is to include provisions corresponding to those in Article 26 of the OECD Model Taxation Convention.

147. Panama's policy is to negotiate DTCs rather than tax information exchange agreements (TIEAs). It has recently amended its domestic legislation to allow it to exchange information in accordance with the terms of a DTC. The amendment would not allow it to exchange information pursuant to a TIEA. Notwithstanding its current inability to exchange information pursuant to a TIEA Panama has not stated that it is unwilling to enter into TIEA negotiations with any other countries. However, a number of Global Forum members have indicated that they have approached Panama for negotiations on a TIEA without success.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

Foreseeably relevant standard (ToR C.1.1)

148. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow "fishing expeditions," *i.e*. speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance" which is included in paragraph 1 of Article 26 of the OECD Model Taxation Convention set out below:

"The competent authorities of the contracting states shall exchange such information as is forseeably relevant to the carrying out of the provisions this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the contracting states or their political subdivisions or local authorities in so far as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2."

149. Panama seeks to include this paragraph in all of its double taxation conventions. It is included in the treaty which Panama recently signed with Mexico.[15] However, a protocol contained in the Panamanian Model Double Taxation Convention states, among other things, that the assistance provided for in Article 25 (Exchange of Information) "*does not include (i) measures aimed only at the simple collection of pieces of evidence, or (ii) when it is improbable that the requested information will be relevant for controlling or administering tax matters of a given taxpayer in a Contracting State ("fishing expeditions")".* It is as yet unclear how these provisions would interact with the 'foreseeably relevant' standard, in practice.

In respect of all persons (ToR C.1.2)

150. For exchange of information to be effective it is necessary that a jurisdiction's obligation to provide information is not restricted by the residence or nationality of the person to whom the information relates or by

15 The assessment team was not provided with a copy of the agreement with Mexico. The information contained in this report on that agreement is based on the replies to the questionnaire provided by Panama for the purposes of the report.

the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for exchange of information envisages that exchange of information mechanisms will provide for exchange of information in respect of all persons.

151. Panama's policy in this respect is not to limit exchange of information to information relating to the affairs of residents or nationals of the contracting parties. None of the agreements that Panama is currently negotiating are restricted to certain persons such as those considered resident in one of the states, or precludes the application of the exchange of information provisions with respect to certain types of entities.

Exchange information held by financial institutions, nominees, agents and ownership and identity information (ToR C.1.3)

152. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Convention and the Model Agreement on Exchange of Information, which are the authoritative sources of the standards, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

153. Panama's agreement with Mexico includes paragraph 26 (5) of the OECD Model Tax Convention of the *OECD Model Tax Convention*, which provides that a contracting state may not to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Panama's policy is to include Article 26 (5) in all of its agreements.

Absence of domestic tax interest (ToR C.1.4)

154. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. An inability to provide information based on a domestic tax interest requirement is not consistent with the international standard. Contracting parties must use their information gathering measures even though invoked solely to obtain and provide information to the other contracting party

155. Panama's agreement with Mexico includes paragraph 26 (4) of the *OECD Model Tax Convention*, which provides that a contracting state may not to decline to supply information solely because it has no interest in obtaining the information for its own tax purposes. However, there are prima facie restrictions in Panama's domestic laws which limit the DGI's powers to obtain information to situations where that the information is relevant to the determination of a tax obligation in Panama. These would prevent the exchange of information in cases where the information was not publicly available or already in the possession of the Panamanian authorities. However, Panama has indicated that it will eliminate its domestic tax interest requirement.

Absence of dual criminality principles (ToR C.1.5)

156. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to an information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

157. There are no dual criminality provisions in Panama's DTC with Mexico. Panama's policy in this regard is to exchange information under its agreements irrespective of whether the conduct being investigated would constitute a crime in Panama.

Exchange of information in both civil and criminal tax matters (ToR C.1.6)

158. Information exchange may be requested both for tax administration purposes and for tax prosecution purposes. The international standard is not limited to information exchange in criminal tax matters but extends to information requested for tax administration purposes (also referred to as "civil tax matters").

159. Panama's policy is to exchange information under its agreements in civil and criminal tax matters. Panama' agreement with Mexico provides for exchange of information in both civil and criminal tax matters.

Provide information in specific form requested (ToR C.1.7)

160. There are no restrictions in the exchange of information provisions that Panama is negotiating that would prevent it from providing

information in a specific form so long as this is consistent with its own administrative practices.

In force (ToR C.1.8)

161. Exchange of information cannot take place unless a jurisdiction has exchange of information arrangements in force. Where exchange of information agreements have been signed the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

162. Panama signed its first DTC with Mexico on 24 March 2010. This has not yet been ratified by the Parliaments of the two countries. Consequently Panama does not yet have any exchange of information mechanisms in force that meet the international standard

Be given effect through domestic law (ToR C.1.9)

163. For information exchange to be effective the parties to an exchange of information arrangement need to enact any legislation necessary to comply with the terms of the arrangement. This report raises a number of issues concerning Panama's capacity to use its powers to obtain the information needed to give effect to the terms of arrangements that it is currently entering into.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Panama has no agreements in force which provide for effective exchange of information.	Panama should pursue policies to ensure it signs and brings into force agreements currently under negotiation as soon as possible.

C.2. Exchange-of-information mechanisms with all relevant partners

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

164. Ultimately, the international standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws it may indicate a lack of commitment to implement the standards.

165. Panama recently signed its first DTC with Mexico on 24 March 2010. It is also actively engaged in negotiations with a range of other countries. Negotiations for DTCs with Barbados, Belgium, France, Italy, the Netherlands, Qatar and Spain have been completed successfully. Negotiations are underway with Luxembourg and negotiations have been scheduled with the Czech Republic and Singapore. Proposals for negotiations of a DTC based on a Model developed by Panama have been made so far to the following countries: Australia, Canada, Chile, China, Korea, Greece, Hong Kong, China; Hungary, India, Ireland, Iceland, Japan, Liechtenstein, New Zealand, Norway, Portugal, Poland, Russia, South Africa, Switzerland, Turkey and the United Kingdom.[16] Arrangements to propose DTC negotiations to another 12 countries are under way.

166. Panama has not to date negotiated any tax information exchange agreements (TIEAs) with other jurisdictions. The option of negotiating DTCs is seen as the most convenient way to achieve Panama`s economic goals as a means to attract foreign investment, and for compliance with its commitments in relation to transparency and exchange of tax information. A number of Global Forum member countries, which Panama is seeking to negotiate a DTC with, have indicated that they have approached Panama to negotiate TIEAs but have so far been unsuccessful in their approaches. While Panama has not stated that it is unwilling to negotiate a TIEA with any country, it

16 Note that some of the jurisdictions listed have proposed to Panama to negotiate a TIEA rather than a DTC.

recently amended its laws to allow it to exchange information in accordance with the terms of a DTC but not a TIEA. Consequently, Panama's ability to negotiate agreements with all relevant partners, particularly those that have offered it TIEAs is severely restricted.

Determination and factors underlying recommendations

Determination	
The element is not in place.	
Factors underlying recommendations	**Recommendations**
Panama has been approached by a number of jurisdictions to negotiate TIEAs but has not done so. Further, recent amendments to its domestic law to allow for exchange of information in the case of DTCs do not extend to TIEAs or other information exchange arrangements such as a multilateral agreement.	Panama should enter into agreements for exchange of information (whether DTCs, TIEAs or multilateral instruments) with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement with it.

C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use, and safeguards (ToR C.3.1)

167. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of information exchange instruments countries with tax systems generally impose strict confidentiality requirements on information collected for tax purposes.

168. Panama seeks to include the terms of Article 26(2) of the OECD Model Convention set out below in all of its treaties to avoid double taxation and prevent tax evasion:

"Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions."

169. Once a treaty is signed by the President and is published in the Official Gazette it becomes part of Panamanian law.

All other information exchanged (ToR C.3.2)

170. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

171. Article 722 of the Fiscal Code establishes the principle of confidentiality in fiscal matters. Furthermore, Article 21 of Cabinet Decree 109/70 provides that all officers and public servants in the service of the Director General of Revenue must keep confidential all information obtained while carrying out their duties.

172. Any exchange of tax information with public bodies within the country or abroad must be approved by law. Panama has recently amended its domestic law to allow for exchange of information with jurisdictions with which it has a DTC.

Determination and factors underlying recommendations

Determination
The element is in place.

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information (ToR C.4.1)

173. The international standard allows requested parties not to supply information in response to a request in certain identified situations. Among other reasons, an information request can be declined where the requested information would disclose confidential communications protected by the attorney-client privilege. Attorney – client privilege is a feature of the legal systems of many countries.

174. However, communications between a client and an attorney or other admitted legal representative are, generally, only privileged to the extent that, the attorney or other legal representative acts in his or her capacity as an attorney or other legal representative. Where attorney – client privilege is more broadly defined it does not provide valid grounds on which to decline a request for exchange of information. To the extent, therefore, that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney to represent a company in its business affairs, exchange of information resulting from and relating to any such activity cannot be declined because of the attorney-client privilege rule.

175. Panama has stated that its treaty policy is to ensure that the parties are not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or information which is the subject of attorney client privilege or information the disclosure of which would be contrary to public policy. In Panama, however, professional secrecy protects lawyers even when they are not acting as legal representatives.[17] For example, this would protect information held by a resident agent which must be a lawyer. This creates a situation in which information could be deposited with a lawyer in order to avoid disclosure for exchange purposes. This is not consistent with the standards.

17 See paragraph 134.

Determination and factors underlying recommendations

Determination	
The element is in place but certain aspects of the legal implementation of the element need improvement	
Factors underlying recommendations	**Recommendations**
Professional secrecy protects information held by lawyers even when they are not acting as legal representatives.	Professional secrecy rules should be amended to ensure they do not prevent the disclosure of information for exchange purposes beyond the limits permitted in the international standard, particularly in cases where lawyers are acting as resident agents.

C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.

Responses within 90 days (ToR C.5.1)

176. In order for exchange of information to be effective it needs to be provided in a timeframe which allows tax authorities to apply the information to the relevant cases. If a response is provided but only after a significant lapse of time the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area must be of sufficient importance to warrant making a request.

177. A review of the practical ability of Panama's tax authorities to respond to requests in a timely manner will be conducted in the course of its Phase 2 review. This phase 1 assessment is intended to review whether there are aspects of Panama's laws or regulatory framework that appear to prevent the delivery of information in a timely manner. However, Panama is still developing its operational practices and procedures and these were not available for the assessment team to review.

Organisational process and resources (ToR C.5.2)

178. A review of Panama's organisational process and resources will be conducted in the context of its Phase 2 review.

Absence of restrictive conditions on exchange of information (ToR C.5.3)

179. Panama is still developing its operational procedures.

Determination and factors underlying recommendations

Determination
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities. *(ToR A.1)*		
The element is not in place	Information on the owners of bearer shares is not available.	Panama should take all necessary steps to ensure that its competent authorities can identify the owners of bearer shares.
	There is no requirement for nominees to have, or make available, information about the person on whose behalf shares are registered.	Where shares or securities are registered in the name of a person the competent authorities should have power to require that person to state whether he/she holds the shares as a nominee and if so to identify the person on whose behalf the shares are registered.
	Although "know your client" rules apply to resident agents for companies and foundations, in accordance with Executive Decree No. 468 of 1994, it is not clear what information these rules require to be kept.	The "know your client" rules for resident agents should be amended to ensure that ownership information held by resident agents identifies the owners of companies and the founders, members of the foundation council and beneficiaries of foundations.
	Unless a *Sociedad Anónima* is subject to audit by the tax authorities there appears to be no mechanism to ensure that the stock register is kept up to date, or at all.	Penalties for failing to maintain stock registers up to date should be prescribed for all *Sociedad Anónima* .
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements. *(ToR A.2)*		

Determination	Factors underlying recommendations	Recommendations
The element is not in place	Only companies and partnerships operating in Panama are required to maintain accounting records.	The record keeping requirements in the Commercial Code should apply to all companies, limited partnerships and partnerships limited by shares registered in Panama irrespective of whether they carry on business in Panama.
	The Trusts Law and Foundations Law are silent on the type of records which are required to be kept and their retention period.	The record keeping requirements for trusts and foundations should be clarified to ensure that reliable accounting records are kept and retained for a period of five years.
Banking information should be available for all account-holders. *(ToR A.3)*		
The element is in place.		
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information). *(Tor B.1)*		
The element is not in place	The power of Panama's tax authorities to obtain information for exchange purposes is limited to circumstances in which the information is also required for their own tax purposes (domestic tax interest).	The statutory powers given to the Directorate General of Revenue to obtain information should be amended to specifically include power to obtain information for the purposes of responding to a request for information under an international agreement that provides for the exchange of information in tax matters, even if Panama does not need the information for its own tax purposes.
	It is unclear that the Directorate General of Revenue's power to obtain information overrides competing requirements prohibiting disclosure of information, particularly with respect to lawyers acting in capacity other than that of legal	It should be made clear in legislation that the Directorate General of Revenue's power to obtain information to respond to a request for information under an international agreement overrides any obligation to secrecy imposed by any other legislation or other restriction on the disclosure of information subject to recognised exceptions such as attorney-client privilege.

Determination	Factors underlying recommendations	Recommendations
	representative.	
	The penalties available to ensure access to information for exchange purposes are not adapted to ensure access to information likely to be requested under exchange of information arrangements.	Panama should review the penalties provided for in its Fiscal Code to ensure these meet the requirement of ensuring access to information necessary to comply with its treaty obligations.
The rights and safeguards (*e.g.* notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information. *(ToR B.2)*		
The element is in place.		
Exchange of information mechanisms should allow for effective exchange of information. *(ToR C.1)*		
The element is not in place.	Panama has no agreements in force which provide for effective exchange of information.	Panama should pursue policies to ensure it signs and brings into force agreements currently under negotiation as soon as possible.
The jurisdictions' network of information exchange mechanisms should cover all relevant partners. *(ToR C.2)*		
The element is not in place.	Panama has been approached by a number of jurisdictions to negotiate TIEAs but has not done so. Further, recent amendments to its domestic law to allow for exchange of information in the case of DTCs do not extend to TIEAs or other information exchange arrangements such as a multilateral agreement.	Panama should enter agreements for exchange of information (whether DTCs, TIEAs or multilateral instruments) with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement with it.
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received. *(ToR C.3)*		
The element is in place.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties. *(ToR C.4)*		

Determination	Factors underlying recommendations	Recommendations
The element is in place but certain aspects of the legal implementation of the element need improvement	Professional secrecy protects information held by lawyers even when they are not acting as legal representatives.	Professional secrecy rules should be amended to ensure they do not prevent the disclosure of information for exchange purposes beyond the limits permitted in the international standard, particularly in cases where lawyers are acting as resident agents.
The jurisdiction should provide information under its network of agreements in a timely manner. *(ToR C.5)*		
The assessment team is not in a position to evaluate whether this element is in place, as it involves issues of practice that are dealt with in the Phase 2 review.		

Annex 1: Jurisdiction's response to the review report*

The Republic of Panama (ROP) considers the Peer Review Report, which describes the situation as of May, 2010, as an orientation of Panama's advances in implementing the standards on transparency and effective exchange of information. As a snapshot in time, it is important at this juncture to provide the Global Forum with updated information on the advances ROP has made in continuing the process to implement the mentioned standards.

This Annex has the objective to express the ROP's response to the review report including an update of the ROP's advances since the Peer Review work dated as of May, 2010. Furthermore, it provides insight on the ROP's efforts since July 1st, 2009 in defining and implementing its policy to strengthen its international services platform. Finally, this Annex has the purpose of providing clarifying information with regards to some of the Peer Review's assessments, including those of the Summary of Determinations and Factors Underlying Recommendations.

1. In retrospective, up to May, 2010

Since it took office in July 1, 2009, the government of the ROP has made significant advances in the implementation of the standards on transparency and effective exchange of information. By August, 2009, the government of the ROP defined the ROP's policy to strengthen its international services platform, honoring its commitment made in 2002 to implementing international standards on transparency and effective exchange of information for tax purposes, based on the 2002 commitment letter, a commitment which the ROP considers reciprocal between the ROP and the OECD.

* This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

To implement this policy, the ROP is in the process of:

- Entering into negotiations and implementing Double Taxation Conventions, under international standards, including the mechanisms for effective exchange of information;
- Making the necessary legislative modifications to provide the legal mechanisms with which to effectively exchange information on tax matters; and
- Creating the operational infrastructure to implement ROP's policy.

The ROP developed a model Double Taxation Convention (DTC), based on the OECD 2008 standards, with certain particularities of the UN model to incorporate ROP's territorial tax system. The ROP has proposed to 28 OECD countries, and 18 other countries, to enter into negotiations of a DTC.

The ROP has a negotiating team, composed of seasoned tax specialists, and immediately launched a significant effort to effectively conclude negotiations—removing the notion of possible delays in implementing effective exchange of information.

By May, 2010, the ROP successfully concluded negotiations of DTCs with Italy, Mexico, Spain, Barbados, Netherlands, Belgium, France and Qatar—eight negotiated DTCs in nine months. By this date, the ROP had signed a convention with Mexico.

With regard to making the necessary legislative changes to effectively exchange information, the ROP approved Law 8 of March, 2010, which provides the General Revenue Directorate (DGI) with the necessary powers to exchange information for tax purposes.

2. Current, between May and September, 2010

Since May, 2010, when the Peer Review Report was closed, the ROP has continued its effort to effectively implement the standards of transparency and exchange of information. In attention to recommendations made by the OECD, the ROP enacted Law 33 of June 30, 2010 which expanded the DGI's powers to exchange information for tax purposes without regard to the lack of domestic tax interest as an obstacle to collect and exchange such tax information. Law 33 also introduced the concepts of transfer pricing, permanent establishment and fiscal resident in the Panamanian fiscal legislation—all necessary to effectively comply and implement the DTCs.

During the period May-September, 2010, the ROP successfully negotiated DTCs with five jurisdictions, four of which are OECD members. Recently, Panama signed its negotiated agreements with Barbados, Portugal and Qatar. To this date, the ROP has reached agreements with 13 countries, and has signed agreements with 4 of these countries.

With respect to implementing operating infrastructure, the ROP is receiving assistance from the United Nations Development Program (UNPD) since June, 2010 to create the International Tax Office, within the DGI.

3. Looking ahead

The ROP's commitment will continue to display results. The ROP will shortly adopt legislation establishing the obligation to comply with know your client policies. This legislation will establish the obligation to maintain information of ownership—including for bearer shares—, establish the competent authority to supervise this process, and determine sanctions for noncompliance. This legislation will be submitted to our Legislative Assembly during the next legislative period, which begins January 2, 2011. Also, by this date, the International Tax Office will begin operations, as part of the DGI.

During the first quarter of 2011, the ROP will have reached and passed the 12 treaty threshold, and will continue to make significant efforts to expand its treaty network with significant commercial and economic partners, for the benefit of our economy. The ROP has already agreed to negotiate DTCs during the remainder of the year with three OECD jurisdictions and one non OECD country.

The ROP hopes that the Peer Review Group conducts a supplementary evaluation of its May 2010 report, considering the advances made by the ROP after this date, and the expected changes to be made by the ROP in the upcoming months. The ROP looks forward to having this supplementary evaluation be made during the first Quarter of 2011.

Annex 2: List of all exchange-of-information mechanisms in Force

	Jurisdiction	Type of EoI Arrangement	Date Signed	Date Entered Into Force
1	Mexico	Double Taxation Convention (DTC)	24.03.2010	Not Yet In Force

Negotiations for Double Taxation Conventions with Barbados, Belgium, France, Italy, Qatar, Spain, and the Netherlands have been completed and these agreements are awaiting signature.

Annex 3: List of all laws, regulations and other material received

Legislation pertaining to exchange of information on tax matters

Article 31 of Law No. 8 of 15 March 2010

Panama's Model Double Taxation Convention

Fiscal Legislation and Regulations [18]

Article 694 of the Fiscal Code of Panama (Taxable Income –Scope of Tax)

Article 710 of the Fiscal Code of Panama (filing returns and record keeping requirements for free zone entities)

Articles 718, 719, and 720 of the Fiscal Code of Panama (correcting returns)

Article 756 of the Fiscal Code of Panama (penalties for non compliance)

Articles 1323 and 1324 of the Fiscal Code of Panama (penalties for non compliance)

Cabinet Decree 109 of May 7, 1970 (Articles 17, 19 and 20 in relation to access powers)

Law No. 8 of 15 March 2010 (extracts on withholding taxes)

18 The assessment team was not provided with a complete translation of Panama's Fiscal Code

Ministry of Economy and Finance General Revenue Department Resolution No. 201-1182 (Information to Be Reported To The Director General)

Resolution No. 201-1182 of April 18 2008 (reports to be provided to General Revenue Department)

Resolution No. 201-1183 of April 18, 2008 (reports by authorized non-profit institutions)

Commercial laws dealing with registration of entities and retention of information

Corporations Law of Panama, Law No.32 of 1927

Law No.4 of 2009 (new law on SRLs replacing Law No. 24 of 1996)

Law No. 24 of 1996 (original law creating and regulating SRLs)

Superintendence of Banks: Agreement No 4-99 (Of May 11, 1999)

Executive Decree No. 468 of 19th September, 1994 (Whereby obligations and responsibilities of the Registered or Resident Agent of corporations are determined)

Code of Commerce of the Republic of Panama[19]Decree Law No. 5, of 2nd July 1997, updating provisions of the Code of Commerce

Law No. 25 of June 12, 1995 Private Interest Foundation Law of Panama,

Law No. 1 of January 5, 1984 by which Trusts are regulated in the Republic Of Panama and other measures are adopted

Superintendence of Banks: Trust License Requirements

Legislation and regulations for financial services and anti-money laundering/anti-terrorist financing measures

Law Establishing the Measures for the Prevention of Money Laundering and Financing of Terrorism No. 42, 2000

19 The assessment team was not provided with a complete translation of the Commercial Code.

Law No. 14 Money Laundering of 8 May 2007

Superintendence of Banks: Agreement No. 12–2005 (Of December 14, 2005) "Prevention of the Improper Use Of Banking And Trust Services"

Law No.50 of July 2, 2003 (inclusion of terrorism offences in the Penal Code)

Superintendence of Banks: Agreement No. 1-2004 (Acquisition or Transfers of Shares)

Superintendence of Banks: Agreement No. 3-2001 of September 5, 2001(Licensing Requirements)

Superintendence of Banks: Agreement No. 4-99 of May 11, 1999 (accounting standards)

Executive Decree No.52 (of 30 April 2008): Whereby the Sole Text of Decree Law 9 of 26 February 1998, modified by Decree Law 2 of 22 February 2008 is Adopted. (Decree Laws applying to banks)

Other Legislation

Law No. 9 of 1994 Which Regulates Legal Practice

Act No.41 of July 20, 2004 (creating a special regime for the establishment and operation of the Panama-Pacific Special Economic Area)

Code of Conduct of Lawyers in Panama issued by the National Bar Association (Articles 13, 34 and 35)