

# Whistleblowing as a New Regulatory Instrument in Global Governance: The Case of Tax Evasion

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## Introduction

The leak of the “Panama Papers” has dramatically highlighted the global importance of whistleblowing in the governance of taxation. An article in *Wired* noted that this was “the biggest leak in whistleblower history”, estimated to be 2.6 terabytes, a thousand times larger than Wikileaks’ 2010 1.73 gigabytes, and the 1971 Pentagon Papers, equivalent to less than a hundred megabytes.<sup>1</sup> A co-founder of the Occupy movement referred to this as “leaktivism’s coming of age”.<sup>2</sup> The expected impact was unprecedented, embarrassing world leaders and celebrities, and quickly leading to the resignation of ministers, reorganization of public administrations and pressures on banks involved in the scandal. While there are unique elements to the Panama Papers story, it is a mistake to think of it as a one-time chance event.

In this paper we argue that whistleblowing, far from being a series of chance events, is an increasingly institutionalized global regulatory tool. Rather than a discrete act, whistleblowing most often takes place within an emerging “whistleblowing system,” whose presence and properties have not yet been adequately analyzed. Nascent whistleblowing systems exemplify important changes in the institutional characteristics of global governance, as we not only move beyond the state system and related intergovernmental organizations, but also must study actors that are hard to fully capture through existing theories of private governance and as such are theoretically interesting. They also hold a potential to address particular serious global policy problems, such as tax evasion, in an era where there is an urgent demand for new regulatory tools in problem solving. By examining the experiences with whistleblowing in relation to tax evasion, however, we may find patterns and practices that can also inform the study on global whistleblowing in general.

In this paper, we contribute to a better understanding the significance of whistleblowing in tax evasion in two ways. The first is to focus on its character in global governance. Different forms of global governance are available, encompassing ideal types such as state, market and civil society variants, and, allowing for a broader group of actors, it has long been recognized that the

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<sup>1</sup> Greenberg, Andy “How Reporters Pulled off the Panama Papers, the Biggest Leak in Whistleblower History,” *Wired*, April 4, 2016, <http://www.wired.com/2016/04/reporters-pulled-off-panama-papers-biggest-leak-whistleblower-history/>, accessed 27 April 2016.

<sup>2</sup> White, Micah “The Panama Papers: Leaktivism’s coming of age”, *The Guardian*, April 5, 2016, <http://www.theguardian.com/news/commentisfree/2016/apr/05/panama-papers-leak-activism-leaktivism>, accessed 27 April 2016.

world is and cannot be governed by public authority alone. New forms of mixed public-private governance have emerged and we argue that this understanding can be applied to study arrangement to combat tax evasion, but it is still a complex task to understand whistleblowing in terms of governance.

Our second and related contribution is to specify the conditions under which whistleblowing becomes a regulatory instrument. We argue that emerging whistleblowing systems increasingly use coordinated regulatory instruments and not just employ a series of intermittent acts. These instruments combine a set of specific rules and norms on transparency and safety and make these available to the different actors involved in whistleblowing activity creates special pathways in the implementation of information transfer. Existing theories of regulation are helpful, especially those drawing on private regulation, but cannot fully account for the novelties of whistleblowing. An important aspect of whistleblowing's status as a regulatory instrument is the presence of mechanisms for assessing the degree to which it aligns with a public interest—a challenge since whistleblowing is often cast as disruptively violating rules. We identify such mechanisms.

In this paper, we apply our approach to whistleblowing systems as a regulatory instrument to the policy area of global taxation. Addressing the cross-border aspects of tax evasion and avoidance has become a priority of policymakers in recent years, evident for instance in the Base Erosion and Profit Shifting project (BEPS) at the OECD, the U.S. Foreign Account Tax Compliance Act (FATCA), and the EU's Directive on Administrative Cooperation in the Field of Taxation. However detecting tax evasion remains challenging. In our discussion we aim to both contribute to understanding how whistleblowing can contribute to the case of taxation, but in a broader perspective also to understanding what types of global policy problems this new regulatory instrument might be most suited for. Although whistleblowing has begun to play a visible role, especially with the Panama Papers, the potentials and limitations of this as a global regulatory instrument for addressing taxation issues has not yet been adequately considered.

In next section of the paper, we start by discussing how the literatures on global governance and regulation and how they can assist in analyzing whistleblowing. Although important guidance is offered, we argue that these strands of research do not sufficiently recognize the character of and reasons for whistleblowing's emergence as a regulatory tool that is increasingly common in particular jurisdictions and institutions and around the world. Also the specialized literature on whistleblowing has its deficiencies: It draws on particular examples of whistleblowing, but does not sufficiently analyze the general institutional patterns of the practices and place whistleblowing in the context of governance and regulation. We then seek to address these gaps by more carefully conceptualizing whistleblowing as a regulatory tool and linking it to larger changes in governance more generally. In the second half of the paper, we develop our empirical analysis of whistleblowing in taxation more specifically, and examine major examples of global whistleblowing. We conclude that whistleblowing in relation to global tax evasion is mainly managed by private actors beyond the control of states and that whistleblowing applies a number of common regulatory tools in what may eventually develop into a whistleblowing system, offering considerable promise for regulating difficult activities such as tax evasion.

## The Literatures on Global Governance, Regulation and Whistleblowing

In this section, we review the literatures relevant to the growth of whistleblowing at the international level. We first review the general character of the diffusion of governance practices in contemporary global governance before turning to the literature on regulation that helps us characterize whistleblowing as a regulatory tool. Finally, we engage with the specific and still small literature on whistleblowing and together these literatures provide clues as how to analyze whistleblowing in tax evasion.

### *Insights from the literatures on global governance*

In past decades there have been widely recognized changes in global governance that provide the context to the emergence of whistleblowing globally. In this section we focus on two types of changes in turn: the multiple forms of institutions that interact in global governance, and the multiple types of processes that are sources of global rules.

First, a key feature in the debate on global governance is the emergence of multiple forms of governing through state, market and civil society. Rather than creating centralized bureaucratic capacity in formal intergovernmental organizations, these features of governance mobilize diverse sets of actors and institutions from across the world. This has included the emergence of a diversity of private bodies that have a potential to govern as a complement or alternative to traditional public policy. Third party certifications, private codes of conduct, and involvement of critical civil society groups extend repertoire of governance and need closer examination. Civil society organizations as Transparency International and business associations as the International Chamber of Commerce have issued various whistleblowing guidelines.<sup>3</sup>

Certain standards adopted by private bodies can be aligned with the public interest.<sup>4</sup> For some skeptics, however, increased reliance on private mechanisms by definition moves policy away from the public interest, although different procedures of participation, accountability and transparency can enhance the publicness of such arrangements.<sup>5</sup> Since it is now widely recognized that governmental institutions can be captured by private interests,<sup>6</sup> and that private institutions, such as social media companies, can serve public functions, private bodies that adopt standards of, for instance, transparency may be an alternative to governmental actors. A full discussion of the literature on publicness and related concepts such as democracy or legitimacy in global governance goes beyond the scope of this paper, but the types of considerations

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<sup>3</sup> <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/whistleblowing/>.

<sup>4</sup> See for instance the ISEAL Alliance Codes of Good Practice (<http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice>) and the ISO 26000 standards on social responsibility (<http://www.iso.org/iso/home/standards/iso26000.htm>).

<sup>5</sup> Porter, Tony and Karsten Ronit, eds., (2010) *The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay?* (Albany: SUNY Press).

<sup>6</sup> The original formulation of regulatory capture is Stigler, George J. (1971) "The theory of economic regulation." *Bell Journal of Economics and Management Science* 2 (spring): 3-21

discussed above can be used to assess the relationship between whistleblowing and the public interest.<sup>7</sup>

Second, a key issue is the variety of processes that can produce rules in global governance. Some rules and norms are adopted at international levels and managed by international bodies. Treaties, for instance, remain important, as in the case of whistleblowing with the OECD's Anti-Bribery Convention,<sup>8</sup> and to govern its own internal operations the United Nations has adopted its own whistleblowing protections.<sup>9</sup> There are also other ways of rule-making. The formal aspects of some of these may primarily be based in one or two countries but nevertheless contribute to global governance because of their cross-border influence and connections, in many cases involving a significant group of countries and jurisdictions. The extra-territorial effects of national laws can be important, which can occur, for instance, when compliance with a particular jurisdiction's laws by a multinational corporation requires adjustments in its operations outside that jurisdiction. For instance, whistleblowers in US-based firms outside the US may benefit from US whistleblowing legislation if it punishes and constrains their employers.<sup>10</sup> Cross-border policy emulation, which can be encouraged by the above mechanisms but also occur without them, can contribute to the diffusion of new governance practices as well. Scholars have begun identifying the conditions under which such diffusion is likely.<sup>11</sup> In global governance, the importance of the most powerful states in the globalization of policies is therefore well recognized. In particular, since World War II the US has projected its own practices beyond its borders, through governmental action or through the practices of private actors such as business and civil society actors.<sup>12</sup> In a comparative perspective, the development of whistleblowing

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<sup>7</sup> On publicness, see Best, Jacqueline and Alexandra Gheciu (2011) *The Return of the Public in Global Governance*, Cambridge, Cambridge University Press.

<sup>8</sup> The full name is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The text is here: [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf). The Convention calls for "companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting" Section X.C.v, pp. 24-5.

<sup>9</sup> United Nations (2005) "To Strengthen UN Integrity, Annan Signs New Whistleblower Protection Policy," UN New Centre, [http://www.un.org/apps/news/story.asp?NewsID=16993#.WCdb\\_krLmY](http://www.un.org/apps/news/story.asp?NewsID=16993#.WCdb_krLmY). The current policy can be found here: <http://www.un.org/en/ethics/protection.shtml>.

<sup>10</sup> The US allows workers based outside the US to use the whistleblowing provisions of the Foreign Corrupt Practices Act and the False Claims Act. See Hyde, Richard and Ashley Savage (2015) "Whistleblowing Without Borders: The Risk and Rewards of Transnational Whistleblowing Networks," in Lewis and Vanderkerckhove *Developments in Whistleblowing Research 2015*, pp. 20-33. See also Millan, Luis (2004) "U.S. Whistleblower Law May Apply to Some Canadian Firms" *The Lawyers Weekly*, July 23, p. 7. However in the US some courts have restricted the extraterritorial reach of whistleblowing protections. See <https://www.employmentlawspotlight.com/2013/10/there-she-blows-another-court-rules-against-extraterritorial-application-of-whistleblower-protections/>.

<sup>11</sup> Simmons, Beth A. and Zachary Elkin (2004) "The Globalization of Liberalization: Policy Diffusion in the International Political Economy", *American Political Science Review*. 98(1), February, pp. 171-189

<sup>12</sup> Simmons, Beth (2001) "International Politics of Harmonization: The Case of Capital Market Regulation," *International Organization*. 55(3), Summer, pp. 589-620. Levi-Faur, David. 2005. "The Global Diffusion of Regulatory Capitalism." *The Annals of the American Academy of Political and Social Science* 2005; 598; 12-32.

systems has been most advanced in the US, and US practices have been held up as examples for other countries to emulate.<sup>13</sup>

In sum, the governance changes that this section has discussed provide the wider context for the development and global dissemination of whistleblowing as a new governance practice. While there is no world government, there are multiple actors through which governance can be globalized, when public and private actors combine their efforts, or when private actors take independent action. Furthermore, such practices may be adopted at the global level or adopted in one place and transferred to other parts of the world.

### *Insights from the literatures on regulation*

Closely related to the changes in global governance are changes in global regulation. In subsequent sections, we argue that these changes are important for the emergence of whistleblowing as a global regulatory instrument. In this section, we discuss at which level of the regulatory hierarchy rules are adopted, and at which stage of the regulatory process actors become involved.

First, an important feature in the literatures on regulation is the vertical relationship between different types of rules, driven in part by the challenge of managing increasingly complex and technical problems. Given the transboundary character of tax evasion, we need to start at the top by acknowledging the role of intergovernmental bodies which employ tools,<sup>14</sup> such as benchmarking and information campaigns, in addition to traditional legislation and international agreements.

Further down the regulatory hierarchy, private actors create forms of self-regulation to govern their own behavior or to invite other private actors to join.<sup>15</sup> Such measures within or among firms may forestall the emergence of public regulation. Non-profit non-governmental actors may also play a regulatory role at this level. The relationship between public and private regulation may take the form of a regulatory pyramid, where most routine matters are handled privately and voluntarily by business, but where a number of more serious matters are escalated, public regulators are brought in with coercive sanctions.<sup>16</sup>

A key challenge with the increased presence of private actors in regulation is how to ensure that regulatory processes are not captured by those actors that regulations are supposed to govern. Private involvement in regulation can produce rules that are sensitive to local experiences and challenges in a less costly and burdensome manner, but also provide opportunities for private actors to exploit their unique familiarity with a given issue area. To avoid this, civil society organizations but also public authorities, through the use of courts, regulatory supervision, or legislative review, may be activated.

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<sup>13</sup> See for instance Kim, Sang Beck “Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea’s Anti-Corruption Efforts,” *Northwestern Journal of International Law and Business*, Winter, 36, pp. 235-

<sup>14</sup> Reference to igo contribution on his matter W. Mattli and N. Woods (eds.) (2009). *Global Regulation*. Princeton University Press.

<sup>15</sup> Examples include the standards of the ISEAL Alliance, or the ISO 26000 standards for social responsibility.

<sup>16</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

Second, regulation encompasses different stages, which unfold over time, in a more horizontal manner. In the context of whistleblowing, it is interesting to examine how regulation is shaped from coming on the agenda as a relevant tool to how it is adopted, implemented and evaluated. For a long time, it has been recognized that policy processes leading to regulation involve several stages and in some way are ordered.<sup>17</sup> It is useful to recognize these stages because they identify linked functions that must be carried out for a policy or regulatory process to work, although these can be provided by different organizations. A general observation is, however, that particularly the stage of implementation displays some weaknesses and demand critical scrutiny.

A more recent finding is that also processes involving private actors.<sup>18</sup> Indeed, different functions in the regulatory process can be provided by different public and private organizations. For instance, standards may be formulated by one organization, compliance may be monitored by another, and enforcement may involve a mix of market pressures and threats from public authorities. There is further the possibility regulation completely relies on private actors, and can be understood in terms of multiple and interrelated stages.

These perspectives are helpful and provide important inspiration when analyzing the potential stages of whistleblowing. Whistleblowing is a fairly recent phenomenon where only fledgling institutions are in place to organize the process, and where there is no firm division of labor between relevant institutions and this makes it hard to address in a unified way.<sup>19</sup> However, the more whistleblowing is becoming a consistent practice, the more is it possible to trace recurrent trends and processes, that together can create a regulatory instrument.

In sum, changes in the role of regulation are important in enabling the emergence of whistleblowing systems. Research shows that different public and private actors alone or together can produce regulatory tools, but these interactions can vary across the regulatory process. In the next section, we bring these general insights from governance and regulation studies together with specific research on whistleblowing to build a framework for examining the emergence of whistleblowing in the combat of tax evasion.

### *Insights from the literatures on whistleblowing*

The previous sections have discussed the complexity of global governance and regulatory arrangements, and in this section we turn to the existing literatures on whistleblowing to begin to identify the degree to which whistleblowing is becoming a recognizable and institutionalized part of these complex arrangements. We start by drawing on these literatures to define whistleblowing and to note their empirical contributions to understanding the ways that whistleblowing is being globalized. We then consider their contributions to identifying ways in which whistleblowing is becoming an institutionalized aspect of global governance and regulation.

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<sup>17</sup> Reference to a few standard works on policy processes

<sup>18</sup> T. Porter and K. Ronit (2006). Self-Regulation as Policy Process: The multiple and crisscrossing stages of private rule making, *Policy Sciences*; The , Abbott and Snidal 2009, article in regulation and governance 2016

<sup>19</sup> Porter, Tony and Karsten Ronit (2015) "Implementation in International Business Self-Regulation: The Importance of Sequences and their Linkages," *Journal of Law and Society*, 42(3), September, pp. 413-33.

The academic literature includes the fields of management (how firms can manage whistleblowing policies or episodes)<sup>20</sup>; law (such as judicial decisions or the design of legal protections)<sup>21</sup>; public administration (such as personal motives and institutional conditions for whistleblowing)<sup>22</sup>; regulatory studies (such as the levels and methods of monitoring and reporting)<sup>23</sup>; and political science (such as appeals to politicians from employees).<sup>24</sup> In the literature, there are also many reports, policy or legal documents produced by governmental, business or civil society actors.

A useful definition of whistleblowing is provided by Transparency International, one of the organizations that have been most influential in the international dissemination of whistleblowing protections: “the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.”<sup>25</sup> This reference distinguishes whistleblowing from other types of unauthorized disclosures of confidential information, such as some types of destructive hacking, and further stresses that whistleblowing has a public dimension.

Empirically, the whistleblowing literature has usefully identified a number of channels for the globalization of whistleblowing. Best practices for whistleblowing systems are being identified by international bodies. The G20 has identified six best practices for whistleblowing systems in the context of its anti-corruption campaign.<sup>26</sup> They address, for instance, the creation of an institutional framework to protect potential whistleblowers from various kinds of punishment. Other practices pertain to the quality of the reporting channels, to the body tasked with responding, and to the publicizing of the system to employees to encourage legitimate whistleblowing. Identifying these best practices is useful in encouraging their dissemination.

An important vehicle for the international dissemination of whistleblowing as a regulatory instrument is its links to anti-corruption campaigns. International legal instruments that address whistleblower protections include the UN Convention against Corruption, the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation), the 1998 OECD

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<sup>20</sup> For instance Near, Janet P. and Marcia P. Miceli (2016) “After the Wrongdoing: What Managers Should Know About Whistleblowing,” *Business Horizons*, 59, pp. 105-14.

<sup>21</sup> For instance Walker, Andrew (2015) “Why Shouldn’t We Protect Internal Whistleblowers? Exploring Justifications for the Asadi Decision,” *New York University Law Review* 90, pp. 1761-1785.

<sup>22</sup> Cho, Yoon Jik and Hyun Jin Song (2015) “Determinants of Whistleblowing within Government Agencies,” *Public Personnel Management* 44(4), pp. 450-72.

<sup>23</sup> Etienne, Julien (2015) “Different Ways of Blowing the Whistle: Explaining Variations in Decentralized Enforcement in the UK and France,” *Regulation & Governance*, 9, pp. 309-24.

<sup>24</sup> Ting, Michael M (2008) “Whistleblowing,” *American Political Science Review* 102(2), May, pp. 249-267.

<sup>25</sup> Transparency International (2013) *International Principles for Whistleblower Legislation*. Berlin: Transparency International, p. 4. This quote omits a footnote which states that these activities include “perceived or potential wrongdoing”. Available at

[http://www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation).

<sup>26</sup> G20 “G20 Anti-Corruption Action Plan: Action Point 7: Protection of Whistleblowers”, <http://www.oecd.org/dataoecd/42/43/48972967.pdf>, accessed 4 April 2012. The remainder of this paragraph draws on this document.



Recommendation on Improving Ethical Conduct in Public Service, the Council of Europe Civil and Criminal Law Conventions on Corruption, the Inter-American Convention against Corruption, and the African Union Convention on Preventing and Combating Corruption. As the G20 report from this list notes, “such provisions have strengthened the international legal framework for countries to establish effective whistleblower protection laws.”<sup>27</sup>

There are numerous ways that private actors and new technologies have assisted in the globalization of whistleblowing as well. Whistleblowing NGOs and networks have promoted whistleblowing systems, as with the Government Accountability Project, Transparency International, the International Whistleblowing Research Network, and Whistleblowing-CEE.org, concerned with “whistleblower protection in the Central and Eastern Europe Region.”<sup>28</sup> Wikileaks has facilitated the leaking of hundreds of thousands of pages of US government documents. It bills itself as a media organization, although there are disputes about whether it should enjoy the protections of traditional media.<sup>29</sup>

Taken together this literature allows us to start to see the ways in which the elements of global governance and regulation identified in our previous sections are also evident in the growing presence of whistleblowing-related developments globally.

Consistent with global governance more generally, whistleblowing involves multiple public and private actors, and complex interactions between domestic and global actors and institutions. As noted above, whistleblowing rules have involved traditional treaties, more informal best practices developed by the G20, a public body, and non-governmental actors that operate globally or regionally. These arrangements assist in the dissemination of whistleblowing practices from one national jurisdiction to another, as well as creating new global rules.

An emergent regulatory hierarchy can be discerned in the presence of private arrangements within firms that are reinforced by public rules that protect whistleblowers and provide criteria for knowing if whistleblowing is in the public interest. The literature points to the way that whistleblowing can be an element of private governance within firms and industries, a way to reveal and address organizational problems that might not otherwise be visible.<sup>30</sup> These private arrangements can include protections for whistleblowers, but public protections are important in strengthening whistleblowing as a more generalized regulatory instrument. This has been a focus of most of the global public and non-governmental initiatives that were mentioned above. External sanctions can also be important complements to whistleblowing rules within organizations. Consistent with the notion of a regulatory hierarchy, these can be provided by public authorities, including regulators and courts, but as we shall see in the next section, negative publicity can also work in a similar manner.

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<sup>27</sup> G20 (2012), “G20 Anti-Corruption Action Plan.”

<sup>28</sup> <http://www.whistleblowing-cee.org/about-us/>.

<sup>29</sup> Zenor, Jason (2015) “New Media and Old Metaphor: Shielding Acts of Journalism: Open Leak Sites, National Security, and the Free Flow of Information,” *Nova Law Review* Summer, 39, pp. 365-

<sup>30</sup> Tsahuridu, Eva (2011) “Whistleblowing Management is Risk Management,” in Lewis and Vanderkerckhove *Whistleblowing and Democratic Values*, pp. 56-69.



From research on whistleblowing, we also note that whistleblowing is following certain temporal features with regard to the very institutionalization of whistleblowing. Basically, whistleblowing tends to reach political agendas when other forms of governing fail, for instance in cases when public regulation to govern the public or private sector is inadequate and certain malpractices in firms are detrimental to the firm itself and its reputation. Such cases are examined and provide the basis for the adoption of new rules and sometimes the implementation of specific whistleblower mechanisms in government but also in business and among specific civil society initiatives that design whistleblowing and define the tasks to manage.

However, the temporal view is also important in examining particular instances of whistleblowing, as for instance when whistleblowing is activated to combat tax evasion. Hence, whistleblowing is an act that may direct public attention and set new and important agendas, but whistleblowing is also an activity that embraces scrutiny and occasionally embraces certain policy recommendations. From existing experiences with whistleblowing we further know that it is coupled with different dimensions of implementation and court rulings, and, consequently, whistleblowing becomes an element in regulation.

The whistleblowing literature also has begun to identify certain mechanisms for assessing whether whistleblowing advances a public interest. This includes criteria for judging the motivation of the whistleblower. For instance, the G20 best practices refer to “good faith and on reasonable grounds”. These types of principles can be linked to sanctions that can be imposed on whistleblowers who make false claims.<sup>31</sup>

Despite the valuable insights that the existing literatures have provided into the concrete mechanisms of whistleblowing systems, their global dissemination, and how to assess their publicness, there is more work needed to analyze the existing and potential contribution of whistleblowing to global governance.

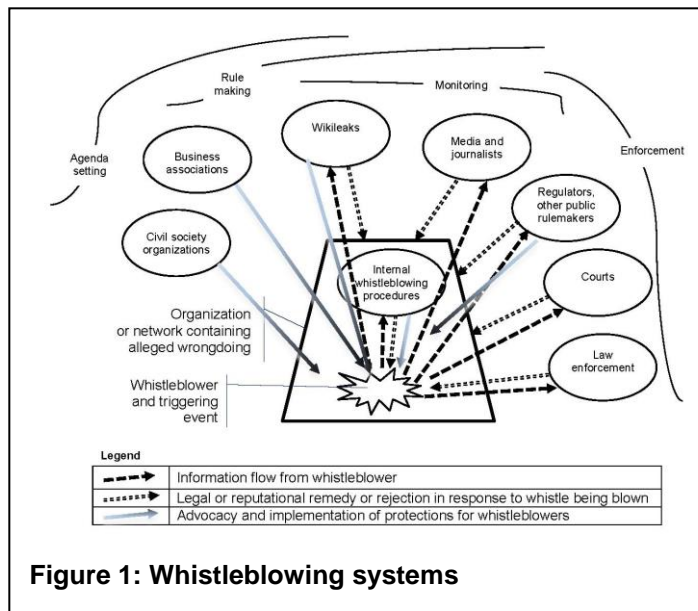
### ***Conceptualizing whistleblowing systems as global regulatory instruments***

In this section we draw out more rigorously the ways that whistleblowing *systems* use a mix of public and private authority and the mechanisms that are invoked, including the issue of how to know when whistleblowing is in the public interest. We shall see that these emergent systems possess similar characteristics to contemporary forms of global governance and regulation discussed above.

Figure 1 illustrates a typical whistleblowing system. The four-sided shape at the centre represents the organization for which the whistleblower works, which often will have its own whistleblowing mechanisms. Arrayed around this are the various bodies that together constitute a whistleblowing system. This is consistent with the new forms of governance discussed in the previous section, which can involve a variety of changing actors and rules.

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<sup>31</sup> Transparency International, *International Principles for Whistleblower Legislation*, p. 5.



There are a set of functional mechanisms that need to come together in order for a public or private regulatory instrument, including whistleblowing systems, to have any effect.<sup>32</sup> These functional mechanisms may exist in different bodies. They may either be designed comprehensively and deliberately by policy makers and officials, or they may come together in a more haphazard and unplanned way, as with the case of Wikileaks, which involved a leak from the US government, transmission through a civil society organization, and publicization through privately owned news media. Consistent with the literatures on global governance, a mix

of public and private organizations also involves a mix of transnational and national ones. For instance, an organization like Wikileaks is transnational, but the courts and law enforcement are national. We shall see that Wikileaks and, in combatting tax avoidance, the International Consortium of Investigative Journalists, are examples of such private bodies that are important for whistleblowing. In figure 1 we have loosely illustrated the different functions that are carried out by the various bodies involved. For instance, media and journalists are primarily involved in monitoring, although the reputational effects of whistleblowing can function as an enforcement mechanism as well.

Within a whistleblowing system there are a series of sequences that any particular act of whistleblowing involves. These can include a variety of public and private elements. The great majority of whistleblowers start by raising their concerns within the organization that employs them. Open and serious responsiveness on the part of managers can then harness whistleblowing as a mechanism for identifying internal problems and addressing them, a form of self-regulation. This especially has a private character if the employer is a business, but even in the case of a governmental organization there is a similar hierarchy between internal procedures and the formal external laws that can be brought to bear on the organization. Whether public or private, if the whistleblower's employer organization fails to address the whistleblower's concerns there is the possibility that he or she will go outside the organization, to the media or government.<sup>33</sup> Whistleblowing has a close affinity to corporate social responsibility, voluntary standards and rating schemes which rely on reputational effects to achieve their regulatory impacts.<sup>34</sup> This then

<sup>32</sup> We have identified similar types of bringing together of functions in the sequences involved in the implementation of self-regulation Porter, Tony and Karsten Ronit (2015) "Implementation in International Business Self-Regulation: The Importance of Sequences and their Linkages," *Journal of Law and Society*, 42(3), September, pp. 413-33.

<sup>33</sup> Near, Janet P. and Marcia P. Miceli (2016) "After the Wrongdoing: What Managers Should Know about Whistleblowing," *Business Horizons* 59: 105-114

<sup>34</sup> On this point see work by Vandekerckhove as reviewed by Andrade, Julio A. (2015) "Reconceptualizing Whistleblowing in a Complex World," *Journal of Business Ethics*, 128: 321-335.

is the “tiered approach”<sup>35</sup> that is similar to “responsive regulation”<sup>36</sup> in regulation theory where more severe compliance mechanisms are only activated after more voluntary ones fail. It is apparent that the elements of whistleblowing systems and their interactions with their environments that we have identified here are very consistent with the changes in global governance and regulation that were discussed in previous sections.

How then can the problem of identifying the public interest, as discussed in the section on regulation above, be addressed with regard to whistleblowing systems. There are two aspects of this issue. The first is whether whistleblowing systems, with all their private elements, are the best response to the problems they are intended to address, or if instead a more conventional form of governance would be better aligned with the public interest. Whistleblowing seems unpredictable, and it involves violations of rules and relations of authority that are associated with conventional governance. However, it is a regulatory instrument that is especially suited to ferreting out the harmful secret activities that are hidden behind these conventional structures. Conventional mechanisms for detecting such activities, such as routine audits and inspections by external officials, are likely to be extremely costly and of limited use. In a fast changing highly complex world whistleblowing can productively contribute to detection of wrongdoing in a way that conventional governance instruments cannot, or at least has not been allowed to. This echoes arguments for private involvement in regulation more generally, as discussed above.

The second aspect of the public interest issue is whether in any particular case of whistleblowing the public benefits outweigh the costs, and how best to assess this. The whistleblower may be motivated by private interests, such as getting undeserved revenge on an employer, getting a *qui tam* payment (a share of the recovered assets)<sup>37</sup>, gaining fame, or assisting the employer’s competitor or opponent. The negative consequences for the employer and those reliant on the employer for jobs or its outputs, may be immediate and material, while the public benefits may be uncertain and immaterial. There is a public interest in being able to discuss certain issues in private, without the fear that they will be circulated publicly, since this can facilitate better decision-making and is also vital to the trust that sustains social collectivities. On the other hand, governments and firms can seek to conceal information in ways that are contrary to the public interest, and in this case whistleblowing is an appropriate and valuable remedy.

We may respond to this challenge by building on the relevant scholarly literatures. We need criteria other than whether a governance instrument or action is governmental or non-governmental to assess whether it is in the public interest or not.<sup>38</sup> Governmental processes can often be captured by private interests, and private actors and institutions can produce public goods. The publicness of a process or an act then depends on the presence or absence of certain properties associated with it, rather than whether it is initiated by governmental or non-governmental actors. A useful way of assessing the public-interestedness of complex transnational institutions is to assess the degree to which they involve participation,

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<sup>35</sup> Andrade, “Reconceptualizing”.

<sup>36</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>37</sup> Broderick, Christina Orsini (2007) “Qui Tam Provisions and the Public Interest: An Empirical Analysis,” *Columbia Law Review* 107, pp. 949-, p. 955

<sup>38</sup> Best, Jacqueline and Alexandra Gheciu (2011) *The Return of the Public in Global Governance*, Cambridge, Cambridge University Press.

accountability and transparency.<sup>39</sup> However since whistleblowing often involves risky disclosure of secrets by individuals, the criteria of participation and transparency are less consistently appropriate.

It is important then to put particular emphasis on the framework within which such individual or secret acts take place. We label this the “legitimizing framework”. This could include the involvement of public authorities in the assessment of the whistleblower’s information, which can lend legitimacy to the process if the public authorities are independent of the organization on which the whistle has been blown. Alternatively, the legitimizing framework could involve “second order” private rules that specify how to assess the integrity and fairness of the whistleblowing act and its effects.<sup>40</sup> These frameworks assist with accountability. Elements of a legitimizing framework can include whether it is governed or shaped in some manner by widely agreed norms and standards even if there is not universal consensus on these; the presence of a stated public interest in the disclosure, as opposed for instance to a hack that is motivated by the hacker’s desire for notoriety; and whether the whistleblowing system has the capacity to assess whether the whistleblower met the “good faith” standard that is becoming increasingly common in whistleblowing systems, as discussed above.

These criteria can be summarized then as (a) whether the process is as transparent as possible, while protecting the whistleblower and those affected by the whistleblower’s disclosure as best as possible without losing the benefits from the whistle being blown; (b) the presence of a legitimizing framework. In the next section we shall see that the International Consortium of Investigative Journalists (ICIJ) and their handling of the Panama Papers matches these criteria for public interest whistleblowing much better than key disclosures on Wikileaks. The ICIJ is a private organization but it is governed by journalistic and ethical standards in a way that Wikileaks is not.

In this first section of our paper, then, we have identified the institutional features of emergent whistleblowing systems and these can guide our study on current firms of whistleblowing to combat global tax avoidance. These features build on public and private forms of governance and regulation that are becoming increasingly common globally. This includes the bringing together of disparate organizations and processes to create a system that provides potential whistleblowers channels for distributing information and protections against retaliation. Globally this can involve a variety of processes including, for instance, regulatory imitation and the application of rules extraterritorially. Second, these rely on a diversity of mechanisms that constitute whistleblowing systems. In the beginning, these practices use internal mechanisms within a firm or government department to change behavior, and then in some cases more public-oriented measures if the first fails, such as widely publicizing secret information or triggering

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<sup>39</sup> These three criteria are widely used, sometimes with different labels. We applied these criteria in Porter, Tony and Karsten Ronit, eds., (2010) *The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay?* (Albany: SUNY Press). This is a process approach to the public interest, rather than an outcomes approach. For a similar approach see Mattli, Walter and Ngaire Woods, eds., (2009). *The Politics of Global Regulation*: Princeton: Princeton University Press.

<sup>40</sup> Thomas Franck has pointed to such “second order” rules as important in the legitimacy of international law. See Franck, Thomas (1990) *The Power of Legitimacy among Nations*. Oxford: Oxford University Press. An example of private second order rules is the ISEAL Alliance Codes of Good Practice and the ISO 26000 standards on social responsibility, discussed earlier in this paper.

legal action by public authorities. As there already is an institutionalization of practices some of these mechanisms are described in detail. Third, we have also provided criteria for assessing whether a whistleblowing system or any particular act of whistleblowing is in the public interest or not. In the next section, we apply these insights to the case of taxation.

## **Experiences with Whistleblowing in Global Tax Avoidance**

Whistleblowing in taxation has been less well developed than in the overlapping areas of corruption and financial fraud. However, this is beginning to change, with the evolution of whistleblowing mechanisms in global tax matters exhibiting a complex mix of the three types of change we identified in previous sections of this paper: complex interactions between public and private governance and regulation; more horizontal forms of regulation in which policy and regulatory stages and functions are provided by different organizations; and a mix of public and private criteria for evaluating the public interest character of regulatory actions. The patterns in the institutionalization of whistleblowing in global taxation are similar to those associated with whistleblowing more generally, but with a lag.

These differences are evident in the US, where whistleblowing has been most institutionalized and in one way or another can inspire global initiatives. The False Claims Act, which historically has been key to “qui tam” actions, explicitly excluded tax fraud from its qui tam provisions.<sup>41</sup> In the US, there have been contrasting approaches at the state level, with New York being the first state to include tax issues in its False Claims Act, with especially aggressive provisions. In contrast, Illinois has sought to restrict qui tam suits after their widespread use in ways that were seen by critics as improper.<sup>42</sup> There dubious but well developed arguments about why tax evasion and avoidance are different than other types of fraud, including its complexity and the personal nature of tax information.<sup>43</sup> At the same time, since 2006 the Internal Revenue Service has administered a whistleblower program with rewards, and in 2011 the IRS Whistleblower Office paid out \$8 million to 97 informants, albeit a small percentage of the thousands of claims that had accumulated in the system.<sup>44</sup>

At the global level, the primary presence of public initiatives in whistleblowing in taxation has been through the extraterritorial effects of national authorities, and there is more controversy and less consensus on the global norms associated with tax whistleblowing. Figure 2 lists the main whistleblowing cases relevant to global taxation.

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<sup>41</sup> Hertel, Franziska (2013) “Qui Tam for Tax? Lessons from the States” *Columbia Law Review* 113, pp. 1897-, p. 1898.

<sup>42</sup> Ventry, Dennis J. Jr. (2014) “The Increasing Importance of Whistleblower Provisions in US Tax Administration: Not just Whistling Dixie: The case for Tax Whistleblowers in the States,” *Villanova Law Review* 59, pp. 425-

<sup>43</sup> Hertel and Ventry challenge these arguments. As the use of whistleblowing has grown in financial markets, which involve complexity and personal information, these arguments become even less credible.

<sup>44</sup> The IRS Whistleblower Office, and the rewards it was authorized to pay, were established by the Tax Relief and Health Care Act of 2006. See Hertel, “Qui Tam for Tax?” p. 1908-10.

**Figure 2: Major whistleblowing cases relevant to global tax enforcement**

<b>Case</b>	<b>Nature of Case</b>	<b>Impact</b>
<b>Birkenfield</b>	<ul style="list-style-type: none"> <li>• Recovery of \$780 million and thousands of names</li> <li>• \$5.5 billion collected from IRS Offshore Voluntary Disclosure Program from fear of the leak</li> </ul>	<ul style="list-style-type: none"> <li>• Closure of Swiss banking programs</li> <li>• contributions to the winding down of Swiss bank secrecy</li> </ul>
<b>Elmer</b>	<ul style="list-style-type: none"> <li>• Reveal of offshore bank account details of 2000 “high net worth individuals” and corporations</li> <li>• Also released details of Julius Baer in the Cayman Islands and its role in alleged tax evasion</li> </ul>	<ul style="list-style-type: none"> <li>• No action on the part of the Swiss courts</li> <li>• Elmer is tried for violating Swiss banking secrecy law</li> </ul>
<b>Swiss Leaks</b>	<ul style="list-style-type: none"> <li>• Identified many private accounts with the Swiss branch of the HBSC</li> <li>• Also revealed how arrangements were made to avoid paying tax</li> </ul>	<ul style="list-style-type: none"> <li>• Huge pressure on bank as well as Swiss authorities</li> <li>• Shows how tax evasion involves several parties</li> </ul>
<b>Luxembourg Leaks</b>	<ul style="list-style-type: none"> <li>• Disclosure of secret deals between global corporations and Luxembourg tax authorities on rates and money transfers <ul style="list-style-type: none"> <li>◦ Deals helped exempt corporations from paying tax in other countries of the European Union.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Great embarrassment to local government and corporations</li> <li>• Led to a crisis for Luxembourg and European cooperation</li> <li>• Secured a bad reputation for global firms involved</li> <li>• Showed the real threat that prosecution poses to whistleblowers</li> </ul>
<b>Panama Papers</b>	<ul style="list-style-type: none"> <li>• Showed that there is a large group of wealthy individuals in the business community and in government who try to evade paying tax</li> </ul>	<ul style="list-style-type: none"> <li>• Demonstrates that governments and international agencies are not equipped to monitor and sanction non-compliance, and that law firms are important in the process of tax evasion</li> </ul>
<b>Football Leaks</b>	<ul style="list-style-type: none"> <li>• Exposed many professional football players, agents and intermediaries as well as football clubs involved in financial transactions to avoid or heavily reduce paying tax <ul style="list-style-type: none"> <li>◦ This occurred by manipulating or violating existing tax laws, as well as other private rules created by the Fédération Internationale de Football Association (FIFA)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Shows how traditional public regulation is inadequate to regulate and effectively monitor the industry</li> <li>• Reputation of individual players, clubs, and football industry was damaged</li> <li>• European Investigative Collaboration (EIC) is created to disseminate information and protect various sources</li> </ul>
<b>Offshore Leaks</b>	<ul style="list-style-type: none"> <li>• Data comes from a cache of 2.5 million leaked offshore files obtained by Gerard Ryle, the director of the ICIJ</li> <li>• Leaked files provide information on cash transfers, incorporation dates, links between companies and individuals</li> <li>• The records detail the 130,000 offshore holdings of people and companies in more than 170 countries and territories</li> </ul>	<ul style="list-style-type: none"> <li>• Catalysed transformation of tax politics and amplified political will to tackle the problem of tax evasion, per EU Commissioner Algirdas Semeta</li> <li>• A searchable database of partially available data was created by the ICIJ following the leak</li> <li>• Official investigations, comprehensive policy action, and high-profile resignations have resulted</li> </ul>

A key development was the 2008 payment by German authorities of €4.2 million to a former employee of a Liechtenstein bank for stolen bank data on approximately 600 tax evaders. There were various effects as authorities in other countries used the data.<sup>45</sup> However when Germany Chancellor Merkel proposed accepting an offer of data on about 1500 Germans by a former HSBC bank employee for €2.5 million there was a storm of criticism of such a move as immoral from her own Christian Democratic Union party, although a majority of German citizens were in favour of the purchase.<sup>46</sup> One of the most successful cases has been the US IRS use of information acquired from Bradley Birkenfeld, a former employee of the Swiss bank UBS. Birkenfeld served 2.5 years in jail for his own role in the tax evasion scheme, despite request for leniency from a whistleblowing advocate who had helped write the law establishing the IRS program<sup>47</sup>, but in 2012 Birkenfeld he received \$104 million from the IRS as a reward for his information. The many effects of his information included recovery of \$780 million, and thousands of names. Worry about being included in these names contributed to more than \$5.5 billion being collected from the IRS Offshore Voluntary Disclosure Program.<sup>48</sup> These effects included the closure of Swiss banking programs and contributions to the winding down of Swiss bank secrecy. In 2016 Birkenfeld's information was being used by French authorities against French tax evaders.<sup>49</sup>

### *Organizations relevant to whistleblowing in global taxation*

Consistent with the conceptual discussion in the first part of this paper, whistleblowing in global taxation is made effective through the interaction of a number of public and private organizations at the global and national levels. At the broadest global public level are the treaties and G20 principles discussed previously, but in the relatively specialized case of whistleblowing the effects of these operate primarily in the background, to legitimize the idea of whistleblowing. There are also conventional national authorities, such as tax ministries and courts, that can act on information provided by whistleblowers. The less familiar parts of the emerging global whistleblowing systems are the global non-governmental organizations, and we focus on these in this section.

There has been a growth of more purely privately organized whistleblowing in the area of global taxation. In 2011 Rudolf Elmer, a former employee of the bank Julius Baer, provided data on 2000 accounts to Julian Assange, the founder of Wikileaks.<sup>50</sup> While Wikileaks publicized this

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<sup>45</sup> Sexton, Elisabeth (2008) "Door Shut on Tax Havens; Lowy files laid bare, Swiss Bank Turmoil," *Sydney Morning Herald*, July 18, noting Australian and US use of the data.

<sup>46</sup> Paterson, Tony (2010) "Furor over Plan to Buy Stolen Tax Data," *The Independent* February 3, p. 26.

<sup>47</sup> Hilzenrath, David S. (2009) "For American who blew Whistle, Only Reward may be a Jail Sentence," *Washington Post* August 20; *Belfast Telegraph Online* (2012) "Whistleblowing reward: United States Pays £65m to Former Convict and Swiss Banker," September 12.

<sup>48</sup> Ventry "Increasing Importance".

<sup>49</sup> Binetti, Ashley (2016) "Sounding the Alarm: US Whistleblower's Involvement in French UBS Investigation," *Whistleblowers Protection Blog*, February 25, at <http://www.whistleblowersblog.org/2016/02/articles/news/sounding-the-alarm-u-s-whistleblowers-involvement-in-french-ubs-investigation/>, accessed 23 June 2016. This blog is a rich source of information on tax whistleblowing. See <http://www.whistleblowersblog.org/articles/tax-whistleblowers/>.

<sup>50</sup> Lynn, Matthew (2011) "It's Hardly a Trade Secret: Offshore Banks must Adapt or Die in the Wikileaks Era," *Sydney Morning Herald* January 26, p. 6; Pickover, Ella (2011) "WikiLeaks to Expose Famous, Rich Tax Evaders,"



leak, it has not subsequently been a major vehicle for tax whistleblowers,<sup>51</sup> and other have taken over. This testifies to a certain institutionalization and specialization of whistleblowing in taxation. These initiatives and organizations detail mechanisms for whistleblowing and define how public goals can be achieved. These organizations emerge at very different levels, from addressing economic crime, corruption and tax evasion in broad terms (Transparency International), over combatting tax evasion at a more specific policy level (International Consortium of Investigative Journalists, to handling tax evasion issues in particular industries (Football Leaks and European Investigative Collaboration).

An important organization is Transparency International (TI), established in 1993 with a focus on combatting corruption, and it has kept this focus and added many other issues to its policy portfolio. Tax evasion is closely associated with corruption because corruption involves spending and receiving money that are hidden to the tax authorities in as well as across borders. TI has documented the problems associated with tax evasion in different countries around the world, and it has organized various meetings and made proposals to rectify legislation.<sup>52</sup> The organization is heavily involved in formulating whistleblower policies for states to implement in the belief that governments are ultimately responsible for defending the rights of its citizens.<sup>53</sup> Although the organization shares some of its principles with other civil society organizations, there is not always full agreement among these organizations on the strategies, and the Tax Justice Network (TJN) maintains that TI is too much concerned about the strong corruption in developing countries, which admittedly exist, and less focused on the offshore financial system.<sup>54</sup> There are some differences in the approaches of civil society organizations to global problems and hence also to issues of tax evasion and how to combat it.

Independent measures are taken by the organization to establish rules and norms that help whistleblowers and “Transparency International’s Advocacy and Legal Advice Centres (ALACs) provide free and confidential legal advice to witnesses and victims of corruption.”<sup>55</sup> TI has been able to enter into a dialogue with business and other interested parties and been a key force in adopting the “Business Principles for Countering Bribery”.<sup>56</sup> These principles is a piece of self-regulation which sets certain standards for the involved firms and which they must implement in their corporate strategies. A number of the clauses also pertain to whistleblowing, and,

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January 18, p. 19. In 2015 Elmer was fined 16,800 Swiss francs for violating Swiss secrecy laws. See Associate Press (2015) “Rudolf Elmer, former Swiss Banker, fined \$20,000 for Giving Wikileaks Tax Data,” *CBCNews*, January 19, at <http://www.cbc.ca/news/business/rudolf-elmer-former-swiss-banker-fined-20-000-for-giving-wikileaks-tax-data-1.2917850>, accessed 23 June 2016.

<sup>51</sup> The WikiLeaks information on this leak is at [https://wikileaks.org/wiki/Bank\\_Julius\\_Baer](https://wikileaks.org/wiki/Bank_Julius_Baer). The absence of other major tax information on WikiLeaks can be confirmed by scanning its list of leaks (<https://wikileaks.org/-Leaks-.html>) and by Google searching “WikiLeak” and “tax”, which primarily returns information on the Julius Baer leak.

<sup>52</sup> Transparency International (2015). *Tax Systems: A Channel for Corruption – or a Way to Fight it?* Working Paper 15. TI: Berlin

<sup>53</sup> Transparency International (2009). *Recommended Draft Principles for Whistleblowing Legislation*. TI: Berlin.

<sup>54</sup> See, for instance, the TJN’s evaluation of corruption. <http://www.taxjustice.net/topics/inequality-democracy/corruption/>

<sup>55</sup> <https://www.transparency.org/getinvolved/report/>

<sup>56</sup> Transparency International (2013). *Business Principles for Countering Bribery. A Multi-Stakeholder Initiative led by Transparency International*. Berlin: Transparency International.

accordingly “the enterprise [should provide] secure and accessible channels through which employees and others should feel able to raise concerns and report violations (“whistleblowing”) in confidence and without risk of reprisal”.<sup>57</sup> In this case, it is not only a civil society organizations that has defined rules for whistleblowing but corporations that have committed themselves to recognize whistleblowing as a potential tool of regulation to combat various malpractices and accept the rights of its employees to engage in such activities.

Another private organization, the International Consortium of Investigative Journalists (ICIJ), has played an increasingly prominent role, culminating in the Panama paper leaks of 2016. The ICIJ is an offspring of the Center for Public Integrity, which has received funding from the Soros Foundation. Interestingly, following the Panama papers leak, Wikileaks attacked the ICIJ, for instance with a Twitter stating “Washington DC based Ford, Soros funded soft-power tax-dodge ‘ICIJ’ has a WikiLeaks problem.”<sup>58</sup> In part the dispute was fueled by different visions of how information should be managed. As Twitter user “Free Assange” noted “We free thinking citizens prefer the @wikileaks model of transparency journalism. We are fed up with media gatekeepers selective ‘truths’.”<sup>59</sup> Or as WikiLeaks noted “Should we release all 11 million #PanamaPapers so everyone can search through them like our other publications?”<sup>60</sup>

The ICIJ is important not only because it has become the leading private vehicle for facilitating global whistleblowing on tax issues, but because it illustrates properties of the evolving private and technological aspects of the global institutionalization of tax-related whistleblowing. In contrast to WikiLeaks, which involves a kind of crowd-sourced regulatory effect, the ICIJ mobilizes more conventional journalistic and professional mechanisms to foster trust and credibility. Both WikiLeaks and the ICIJ are heavily shaped by changes in the media of information processing and communications. We now examine the ICIJ in more detail.

The ICIJ has established itself as a kind of watchdog organization monitoring many different policy fields, issues and authorities. The ICIJ unites different features and builds on knowledge typical of a professional organization, in this case backed by certain groups of journalists, and functions as a kind of think-tank. Yet, at the same time, it has close cooperation with international media as an integral part of its strategy to influence agenda-setting at domestic and international levels and thus employs a range of the same tools as do social movements active in, for instance, environment and human rights. However, it does not refer to collaboration with different social movements that have an interest in the same policy fields and might be potential allies, but keenly seeks to position its work within the traditions of journalism, and, as such, it is a member of the Global Investigative Journalism Network (GIJN).

The ICIJ is positioned in the midst of the technological cross-currents that are buffeting the world of journalism but also facilitating the growth of whistleblowing as a regulatory instrument. The ICIJ was formed in 1997 as a branch of the Center for Public Integrity, with the goal of focusing on international investigations. As a *New York Times* article noted, it grew, but:

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<sup>57</sup> *Business Principles*, p. 10.

<sup>58</sup> <https://twitter.com/wikileaks/status/717454569861611520>.

<sup>59</sup> <https://twitter.com/assangecase/status/716779267485335553>

<sup>60</sup> <https://twitter.com/wikileaks/status/716772373408718849>

Also it deliberately moved away from the journalistic model of its parent organization, in search of a more effective way to investigate and distribute stories across borders at a relatively low cost. The model, in which the consortium coordinates teams of reporters around the world to work collaboratively on a single big source base, has been increasingly successful... With the Panama Papers, the consortium assembled its largest team to date, carefully coordinating with almost 400 journalists from 70 countries to pore over a single enormous leak of documents.<sup>61</sup>

The ICIJ has been involved in various leak events, including the Swiss, Luxembourg, and Panama Papers cases (see Figure 2). T

The ICIJ has developed a system of security mechanisms to protect whistleblowers in the early stages where contacts are being made between whistleblowers and the organization.<sup>62</sup> These are extended in various ways through the process, and shows that self-regulation covers more than the principles guiding the work of the journalists, of which more below, but also embrace many logistical issues. Obviously, there are both important pull and push factors present in the current development of whistleblowing.

Interestingly the various activities of the ICIJ rest on various rules of self-regulation, which the organization has defined for itself. This is important as a “legitimizing framework” for the leaked material it receives. The ICIJ refers to the Code of Ethics of the Society of Professional Journalists, and to additional principles defined by the Center for Public Integrity for the Center and for the Consortium,<sup>63</sup> and it also mentions principles on its website in relation to its general work and in relation to concrete projects.

It is a complex entity. Although the consortium can be studied as a kind of corporation it is at the same time a professional association of journalists. There is some similarity with the Reporters Without Borders (RSF). There are also rules for journalists in general, formulated by the International Federation of Journalists (IFJ) - but obviously they are more general in character and do not have the same role as the professional norms subscribed to by the specialized ICIJ.

Joining the ICIJ is completely voluntary and can be decided by relevant journalists meeting certain criteria, and by the ICIJ itself, and joining implies that members must respect the code as an integral part of the organization. Essentially, this is a pattern that is found in associations with codes of self-regulation that members are compelled to observe.

The code is an important regulatory instrument. The specific rules of the ICIJ provides whistleblowers and other people involved in the whole process of obtaining and disclosing information, with a maximum degree of anonymity.

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<sup>61</sup> Fandos, Nicholas (2016) “Watchdog that Shepherded Panama Papers no Constrained by Finances,” *New York Times* June 5, <http://www.nytimes.com/2016/06/06/business/media/watchdog-that-shepherded-panama-papers-now-constrained-by-finances.html>

<sup>62</sup> <https://www.icij.org/securedrop>

<sup>63</sup> <https://www.publicintegrity.org/about/our-work/editorial-policies>

Finally, whistleblowing and whistleblowing organizations are in some cases related to particular sectors of the economy and special industries. Starting in December 2016 under a new platform or repository called “Football Leaks” a significant number of documents, totalling 1.9 terabytes, has been released, in fact the biggest leak ever in the world of sports.<sup>64</sup> The documents including contracts and agreements show how both a large number of professional football players, various agents and intermediaries as well as football clubs have been involved in different kinds of financial transactions to avoid or heavily reduce paying tax by manipulating with or violating existing tax laws. Also other private rules have been violated. It is clear that traditional public regulation has been inadequate to regulate the industry, and that the industry has not been effectively monitored, but it is now clear that also the attempts by the Fédération Internationale de Football Association (FIFA), to set up various transfer rules to regulate the football market, have been violated. Therefore, the leaks and associated stories have been harmful to the reputation of individual players, to clubs and to the football industry and its organizations in general. Stories about the Football Leaks detailing specific cases have appeared in a number of European countries and pointed to the lack of relevant regulation and the deliberate attempts to avoid taxation by using all kinds of tricks and manipulations.

The background of Football Leaks is to some degree veiled,<sup>65</sup> showing that the institutionalization of such initiatives are often fragile and take time to evolve, searching for appropriate ways to disseminate information, yet protecting the various sources, but there is today an organization behind the initiative, namely the European Investigative Collaboration (EIC). The aim is not to specialize in football and sports and the organization has a much broader agenda, including many other fields and issues than tax evasion, and, in this respect, there are some similarities with the ICIJ in the US. The EIC pools resources in joint investigation and dissemination of results and evaluation of documents provided by, for instance whistleblowers and other sources. Therefore, the investigative activity does not only use material from various informants, including anonymous sources, but also encourages whistleblowing activity. As argued by the EIC, this form of cooperation must be seen in a broader institutional context: “Due to their structure and methodology, collaborative networks are one of the few mechanisms able to keep up with the globalized power structures (i.e. governments, corporations), thus becoming the only way forward for investigative journalism” (EIC, 2016).

Assisted by the German periodical Der Spiegel, this organization, or rather network, began life in 2015, and over a year journalists and newspapers from different countries have joined the initiative. There is both open and restricted membership of the EIC. In order not to jeopardize the professional work of individual researchers and journalists, they can be members of several networks, but only one media per country is admitted, thereby guaranteeing the partners and funders exclusive commercial rights to the material and to the publication of results. As mentioned, leaks can severely damage the reputation of people and organizations in the football industry, but it is up to the judicial systems in the countries involved to take further action, if laws have been violated and if tax fraud can be documented. In this way, Football Leaks and the European Investigation Collaboration are highly specialized whistleblowing organizations that

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<sup>64</sup> <https://footballleaks2015.wordpress.com/>

<sup>65</sup> <https://www.pastemagazine.com/articles/2015/12/football-has-its-own-version-of-wikileaks-now.html>

do not operate in complete isolation of other forms of governance, and as private bodies they provide an informational and institutional basis for, at some point, wheeling in states and intergovernmental organizations to complement the governance of tax evasion policy. Overall, the above discussion shows that in the area of taxation whistleblowing has become increasingly institutionalized, with different actors and organizations--public and private, global and national—coming together to enable it and amplify its effects. The standards associated with the ICIJ, and the contrast of these with Wikileaks, is an important example of the strengthening of a “legitimizing framework” of the type discussed in our conceptual section. The Football leaks case is an example of the further specialization and functional differentiation associated with institutionalization in the area of taxation and whistleblowing.

## **Implications and Concluding Remarks**

In this paper we have argued that whistleblowing, rather than being a series of individual acts, is an emergent and increasingly institutionalized regulatory instrument that is disseminating and strengthening globally. We argued that it displays the features that have become common in global governance and in contemporary regulation.

In general whistleblowing has become increasingly institutionalized globally, both with regard to the level of detailed institutional systems that have developed, with increasingly sophisticated and effective mechanisms for fostering and supporting whistleblowing and its impacts; and with regard to its spread globally. This global spread is evident in the growing consensus at the G20 and other international bodies about best practices on whistleblowing, as well as the introduction of whistleblowing protection in an increasing number and variety of countries.

There is a strong private self-regulatory element in these trends since most whistleblowing systems are configured to encourage internal reporting first, which then transforms it into a system that has the properties of a regulatory pyramid, with more coercive public measures only being activated when private ones fail. As well, private organizations like the ICIJ play an important role in the systems, in assisting whistleblowers to disseminate material securely, but also as a “legitimizing framework” that assists in knowing whether any particular case of whistleblowing is in the public interest or not.

In the area of taxation whistleblowing has lagged in the areas of corruption, and it is less institutionalized at the global level. However, there is growing reliance on whistleblowing in the area of taxation. This includes especially the use of leaked information by some national authorities, with this then assisting public authorities in other jurisdictions. However, the role of whistleblowing in taxation has undergone a certain development and specialization, where different actors have assumed different role. Transparency International has more generally tried to define sound practices for whistleblowing and organizations such as the International Consortium for Investigative Journalism and the European Investigative Collaboration and Football Leaks have created mechanisms to acquire and disseminate information on tax evasion, linking whistleblowers with the media and the general public in different ways. These

developments all illustrate the growing role played by private actors and the technologies that they rely upon.

Overall then, whistleblowing is an increasingly institutionalized global regulatory instrument that is beginning to spread into the area of taxation in important ways. This is very important to recognize because the problem of tax evasion, which is so difficult to detect and regulate with more conventional governance mechanisms, lends itself well to whistleblowing as a regulatory instrument. The growing strength of the global institutionalization of whistleblowing provides good reason to see its further institutionalization in the area of tax evasion to be both useful and feasible. By charting out this institutionalization, rather than focusing on the individual acts of whistleblowing, we can begin to see this potential.