

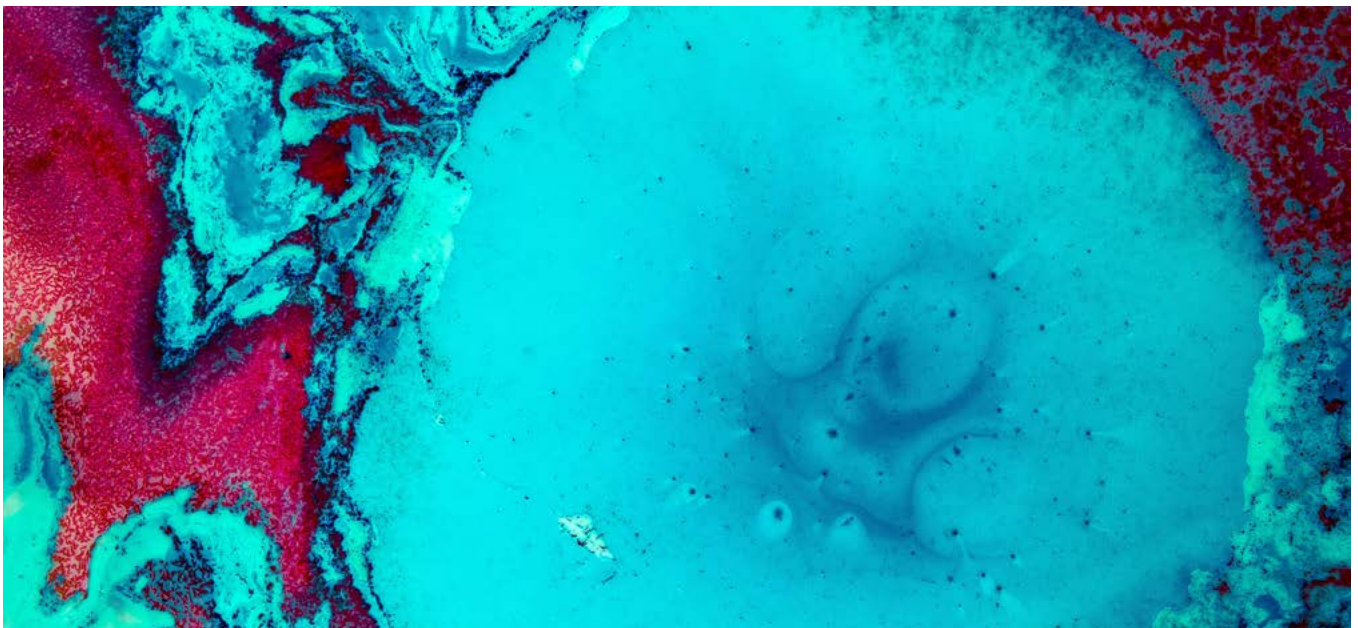
# DECOLONIZING TAX RULES: A NEW ERA FOR TAX COOPERATION IN THE GLOBAL SOUTH

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The international tax principles that we use nowadays for distributing taxing powers are based on rules designed by and for colonial powers whose businesses were expanding to colonial territories. More specifically, the residence and source principles were designed as proxies for nexus during a time when physical presence was required and permanence in a territory was granted if someone was serious about establishing a business or penetrating a market with existing products.

When it was first established, the distribution of the international tax pie was already biased towards residence countries. The determination that residence would be the main criterion to attribute taxing powers while source would be residual except in the case of real estate, already left less resources for what we call today “market jurisdictions”. However, the piece of the pie assigned to source states has shrunk significantly in the past century, especially in the last 20 years, due to technological advances and changes in the way we do business internationally.

On one side, technology has made it possible to reduce the time required to perform significant tasks. For example, in the construction business, we can now build a complex structure in less than 10% of the average time that it took to build that same structure when the rules for the construction permanent establishment were designed. On the other side, digitalization offers endless possibilities of conducting business remotely, without any need for physical presence to reach customers and clients.



As physical presence and permanence in a specific territory were, and are still, necessary to levy source taxation in the presence of a double tax treaty. Unfortunately, because of colonialism, many countries in the global South have a tax treaty with a colonial power or other jurisdictions similar to their colonizer. It is not a coincidence that Spain has the largest treaty network in Latin America, or that Caribbean countries have a long-standing treaty relationship with their colonizer. As Marla Dukharan<sup>2</sup> recently pointed out, in the case of the Caribbean, the jurisdictions traditionally qualified as “tax havens” inherited this economic model from the same colonial powers that are now shaming them for promoting financial secrecy or acting as corporate tax havens. In more than half of the cases, Caribbean jurisdictions are not sovereign and still rely on colonial powers such as the British to review the design of their tax and regulatory systems.

The legacy of this colonial context is quite tragic. On one side, the rules are no longer useful to tax modern ways of doing business, given the rapid changes in technology and the deep impact that globalization has had in the economy. On the other side, the international tax architecture created within the colonial world left countries in the global South with little possibilities of levying taxes and attracting investment. With the current rules, we are now in a position where we have to choose whether we want to attract investment and give up revenues or to raise revenue and become unattractive to mobile capital, which has become more and more volatile with the passing of time.

Given the little possibilities left for autonomous domestic revenue mobilization in a globalized world, it makes sense that global South countries would seek to implement strategies to attract investment and jobs into their territories. However, the only portion of the two-pillar solution devised mainly by global North countries that is currently being applied everywhere is the so-called global minimum tax. These model rules, also known as Pillar 2, heavily interfere with the little policy space that global South countries had for achieving a minimum level of development and wellbeing for their citizens. Once more, following the colonial trend, the global North countries -most of which already are able to provide a very decent level of welfare for their citizens- get most of the revenue, while global South countries -which are still far behind in education, health, infrastructure and other development indicators- are left to rethink tax incentives and limit their options of attracting investment and jobs.

It is therefore not a coincidence that the new rise of a global South cooperation in international tax policy is arising precisely after the effects of Pillar 2 are felt across the globe. As the October agreements were published in 2021, the African Union started working on the resolution that was tabled in the United Nations General Assembly in 2022, demanding for the creation of a UN tax convention. In 2023, as the commentary on Pillar 2 was first published, the Secretary General issued his report on international tax cooperation at the UN, which was followed by another resolution of the General Assembly voted in November, establishing an ad-hoc committee to negotiate the terms of reference for a UN convention on international tax cooperation.

The rise of this movement spearheaded by the African Union inspired other regions like Latin America and the Caribbean to pursue further cooperation in international tax policy matters. The creation of the Platform for Taxation in Latin America and the Caribbean in July, 2023, is a testament to the strength that the movement is acquiring in our latitudes. Just the fact of having a common space to discuss international tax policy developments and keep countries updated on the impact that these developments have is already a very important progress for a region that was mostly competing rather than cooperating in the international tax

scenario. In parallel, discussions at the Caricom level for the Caribbean also allowed for better flows of information and alignment, especially vis à vis the new UN ad hoc committee discussions.

The fruits of regional cooperation in the global South became more evident in the substantive meetings held by the UN ad-hoc committee, where both Latin American and Caribbean countries visibly supported each other and were able to vote the terms of reference as a block (with the exception of Argentina, which is not yet a member of the PTLAC, and Trinidad and Tobago- both abstaining rather than voting against the resolution):



UN WebTV, August 16th, 2024.

This paints a rather different scenario to the one we had when the African Union first introduced the resolution demanding to further tax cooperation in 2022. In October 2022, two resolutions tabled by the G77 and China, and the African Union, respectively, were rejected by the UN General Assembly. Those resolutions included a paragraph asking for the establishment of an intergovernmental tax body in the UN, as recommended by the FACTI panel in 2021. For this reason, the 2022 resolution that passed only mandated the Secretary General Report on the options to pursue international tax cooperation at the UN.

Furthermore, the resolution approved in 2023 passed in spite of 48 votes against, creating the ad-hoc committee and paving the way for the approval of the terms of reference for the UN tax convention. The fact that the number of votes against the resolution was significantly reduced in the vote held in August, 2024, has a lot to do with the perception that, at last, the global South is united in the pursuit of global tax justice.

It is important to note, however, that there is still much more room for improvement in the global South cooperation, starting, precisely, with Caricom countries joining the PTLAC (which is free of costs and provides several webinars on new developments in international taxation with the support of ECLAC and the South Centre). Alternatively, Caricom countries could consider coming together more often with PTLAC countries to find commonalities and discuss any difference in order to find possible common solutions.

In all cases, the new stage for international tax cooperation at the UN provides our regions with valuable opportunities to make our voices heard in the shaping of the international tax rules. The terms of reference approved last August, for example, prioritized the taxation of cross-border services in paragraph 15,<sup>3</sup> and left an open decision for Member States to choose a second early protocol among 4 topics:

- a. taxation of the digitalized economy;
- b. measures against tax-related illicit financial flows;
- c. prevention and resolution of tax disputes; and
- d. addressing tax evasion and avoidance by high-net worth individuals and ensuring their effective taxation in relevant Member States.<sup>4</sup>

The first potential synergy between Latin American and Caribbean countries lies, therefore, in exploring the different solutions for the taxation of cross-border services, as well as in determining whether all countries can support a single topic for the second early protocol as proposed in the terms of reference.

Other joint discussions could address the process and architecture of the convention, including common positions on decision-making for the drafting of the convention and protocols, the creation of a Conference of the Parties and subsidiary bodies, and possible agreements on the resolution of disputes, both arising from the convention and protocols, and also arising from the application of existing tax rules, if there was an appetite for that.



Once the stronger bonds are established within the region, further cooperation with Africa and other global South countries could be explored, as it has been the object of several joint events between the PTLAC and the African Union. In this context, the decolonization of current tax rules and of the international tax architecture seems truly feasible in the short and medium terms, as the voices of the global South could significantly influence outcomes not only at the United Nations, as has been illustrated in this article, but also at the OECD and other relevant fora.

Ultimately, the Caribbean and Latin American countries could harvest their exceptional domestic tax talent in order to propose radical solutions that would not just decolonialize the rules and architecture, but that would really address

the challenges brought by mobility and new technologies, achieving enough flexibility in the new rules so that future technologies and business models could still fit into the new tax paradigm.



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<sup>2</sup> Dukharan, M. (2024). In Pursuit of Social, Economic, and Tax Justice in the Caribbean. Historical Context and Contemporary Realities. Open Society Foundation. Available at <https://marladukharan.com/special-reports/in-pursuit-of-social-economic-and-tax-justice-in-the-caribbean-historical-context-and-contemporary-realities/>.

<sup>3</sup> Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation (2024). Chair's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation. Available at [https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR\\_L.4\\_15%20Aug%202024\\_\\_\\_\\_.pdf?\\_gl=1\\*130g1ko\\*\\_ga\\*MjE3NTUyNDE3LjE3MjU3NDIINTg.\\*\\_ga\\_](https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR_L.4_15%20Aug%202024____.pdf?_gl=1*130g1ko*_ga*MjE3NTUyNDE3LjE3MjU3NDIINTg.*_ga_)

<sup>4</sup> Ibidem, par. 16.