

The Tax Chronicle

A special edition of the FfD Chronicle



**CIVIL SOCIETY
FINANCING FOR
DEVELOPMENT**
Mechanism

The CS FfD Mechanism is an open civil society platform including several hundreds of organizations and networks from diverse regions and constituencies around the world. CS FfD Mechanism's core principle is ensuring that civil society can speak with one collective voice.

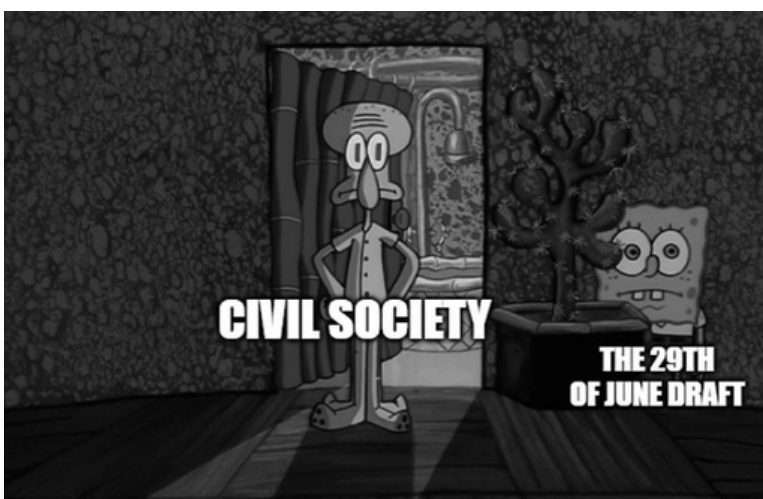
THE MYSTERIOUS 29TH OF JUNE DRAFT

Once again, an air of mystery and secrecy hovered over Conference Room 2 yesterday. A mysterious draft, known as the "June 29th draft," occupied the minds and discussions of the delegates. A draft endowed with mysterious powers, including the ability to be invisible to civil society. But what could it possibly conceal that was so important that civil society was forbidden to see it?

Dear delegates, put yourselves in our shoes for a moment, and imagine that we constantly mention documents essential to these negotiations, documents to which we would have access but you wouldn't? Wouldn't that be frustrating? And even more than that, wouldn't that be counterproductive? Well, you have to understand that this is exactly the absurd situation we have been going through with this protocol, that we have been experiencing since INC1 and that we risk experiencing again. How can we expect from us relevant contributions and comments, useful to the discussion, if we lack the necessary information to even understand the discussion itself?

This secret draft is just the tip of an iceberg of opacity fueled by secret Zoom meetings, to which we have still not been invited. Depriving civil society of these essential elements of understanding and excluding them from intersessional discussions is preventing the citizens of all the countries we represent from having all the information needed to understand this process, which will greatly impact their lives. This is also, yet again (we cannot repeat it enough), going against the spirit of transparency and inclusivity that should govern these negotiations.

Good news is you can still make amends for your mistakes... A first step would be to reveal this mysterious draft to us. A second, and perhaps most important step would be to avoid repeating the same mistake all over again. This would imply to put an end to the illegitimate practice of secret Zoom meetings and simply live up to the mandate of transparency and inclusivity given to us.



WORDS OF WISDOM ON ARTICLE 21 OF THE CONVENTION

Last week, Dr. Lyla Latif delivered a statement that deserves more attention than it got - not least because her microphone was unfortunately cut off. The Tax Chronicle is proud to bring you her statement in full, and encourages all delegates to take note!

Statement of Dr. Latif:

"As drafted, Article 21 approbates and reprobates. It affirms the Convention's allocation principles with one hand and subordinates them with the other."

Article 21, paragraph 2, provides that the rights and obligations of States Parties under agreements concluded before this Convention enters into force are not affected. Now place that against Article 30 of the Vienna Convention on the Law of Treaties. Article 30(3) provides that where the parties to an earlier treaty are also parties to a later treaty, the earlier treaty applies only to the extent that it is compatible with the later one. That is the default rule: the later treaty prevails. But Article 30(2) provides that where the later treaty specifies that it is subject to an earlier treaty, the earlier treaty prevails instead.

So going back to paragraph 2, its legal effect is now precise. Paragraph 2 is a conflict clause within the meaning of Article 30(2). Under the general law of treaties, this Convention would have arrived holding priority over every pre-existing tax treaty to the extent of incompatibility. Paragraph 2 surrenders that priority. The old treaty network prevails not because international law requires it, but because this Convention chooses it. And the convention chooses to subordinate its text to the existing DTAs, for example.

However there is also the condition that para 2 is subject to para 3 and paragraph 3 requires States Parties to take progressive and meaningful steps to align their existing agreements with the Convention, including through renegotiation, in good faith and without undue delay. So it can be argued that the subordination under paragraph 2 is only temporary, and that paragraph 3 redeems it. But it does not, for two reasons.

First, paragraph 3 is a duty to negotiate, not a duty to agree. In every renegotiation there is a party that benefits from the existing allocation, and for that party deadlock is victory. It can negotiate in perfect good faith, concede nothing, and paragraph 2 guarantees that its treaty governs throughout, indefinitely. The provision makes the status quo the sanction-free outcome and awards it to the party that wants no change.

Secondly, the alignment target is indeterminate. Paragraph 3 directs alignment with the provisions and principles of this Convention. But the operative allocation rules will sit in protocols, and under Article 20, paragraph 4, a protocol binds only the states that join it. So if we take article 5 as an example, its operative content lives in the protocols, and under Article 20(4) a protocol binds only the states that opt into it. So where there are two Convention parties, and one has not joined the relevant protocol. What does alignment require between them? You see alignment to Article 5 alone yields no determinate treaty text, because Article 5 supplies criteria, not rules and Alignment to the protocol's rules cannot be demanded, because that would impose protocol obligations on a state that never consented to them, contrary to Article 20(4) and to the elementary rule that treaties do not bind third parties. The renegotiation duty therefore points at a target that the Convention's own architecture has made optional. So we have two allocation regimes that will operate at once.

So if paragraph 2 stands as drafted, we should understand that we are adopting a protocol that operates only where no treaty exists."

TYPES OF HEADACHES

OPTIONALITY



FLEXIBLE
OPTIONALITY



OPTIONAL
FLEXIBLE
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OPT-IN OPT-OUT FLEXIBLE
OPTIONAL OPTIONALITY

