## Fifth Session, UN Tax Convention Negotiations
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## Protocol 1 - Article 10

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In order to properly frame the issue of the relationship between the Protocol and existing treaties, we need to go back to article 21 of the Framework Convention. Para 2 as properly outlined by the Committee on Fiscal Studies (CFS) provides that the rights and obligations of parties in existing agreements shall not be affected. This seems to go against article 30 of the Vienna Convention on the Law of Treaties which embodies the principle that the later treaty shall 'prevail' over the earlier treaty. However, Para 2 is contingent on the obligation that Parties shall at the same time have an obligation to renegotiate their treaties. While discussions under workstream 1 are still ongoing, there is concern that does not provide a clear hierarchy of laws and seems to , in the worst case scenario, allow for the Framework Convention to subordinate existing treaties and in the best case scenario, allow for existing treaties and the Framework Convention to exist side by side.

We are concerned because a much higher degree of specificity is required with regard to what the hierarchy of laws is between the Protocols and existing treaties. From the onset it needs to be clear that this is a multilateral protocol that is substantively supposed to modify/ amend the existing treaty network. This is not a model convention that shall then be used as a template for bilateral negotiations. This should not be the intention of the parties. Please allow us to provide options on how we can resolve this issue:

1. The Protocol should supersede existing treaties to the extent that they are not in conformity with the Framework Convention and the Protocol. This means that there would be an automatic treaty override to the extent to which the existing treaties are not in conformity with the Protocol. This approach means that if your treaty addresses the issues that Protocol 1 seeks to address, then there is no need to worry but if it doesn't then the provisions of the Protocol should prevail. This approach does not allow parties to cherry pick which tax treaties should be covered and which shouldn't.

2. The other option in line with Para 3 of article 21 of the Framework Convention is that Parties cognisant of the fact that their treaties do not conform with the Framework Convention, shall take progressive steps to renegotiate their treaties and bring them in line with the Protocol. Let us take note that as per the current text, renegotiation only begins when a State requests it.

We strongly caution against any other approach that would allow states to cherry pick treaties that shall be covered. We believe that we are moving towards a multilateral framework where even parties who have no treaties between themselves can sign onto the Protocol and adequately and effectively address the issues that they experience in the taxation of income on cross-border services. If there are delegations who genuinely do not wish to modify/ review or renegotiate their treaties at all, then we question what their goals are within this process and (why they are here). Because if you simply do not want to revisit your treaties, then don’t sign onto a process that seeks to re-invent the international tax system, particularly the vast network of tax treaties.