Fifth Session, UN Tax Convention Negotiations
August 10, 2026

Protocol 1 - Article 1, Objectives

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Ms. Co-Lead,

Thank you for giving me the floor. Regarding Article 1, we have the following remarks:

Firstly, we believe that this protocol could benefit from a clear objective, and this would logically be Article 1 . An objectives clause would be an opportunity to explain exactly what this protocol is meant to achieve, and how it links to the Framework Convention. We believe that this Protocol must be firmly anchored in the objectives and principles of the Framework Convention, and help to operationalize Article 5 on fair allocation of taxing rights in relation to cross-border services.

Furthermore, the draft mentions the option of a preamble, which we also believe would be helpful, to recap key elements of the Framework Convention and to explain the problems we want the protocol to resolve.

We note that this Protocol resembles very much a traditional double taxation treaty more than a typical UN Protocol. The form of the Protocol may seem inconsequential but actually has a significant bearing on the substance.

For instance, one of the key areas of difference between a typical DTA and this Protocol is that unlike the former, the Protocol will lead to various competing or concurrent source taxing rights. We are concerned that the typical provisions of DTAs then become increasingly complex. We do not believe that source taxing rights on automated digital services should be pegged towards a consumer being resident in the source state. We believe that residence is only relevant in relation to identifying the state that shall provide double tax relief.

Additionally, Article 1, and many other Articles in the draft, mention the term “persons”. From the context, we get the understanding that we are in fact talking about legal persons. We would suggest making a clear distinction between legal persons - meaning companies and similar - and national persons, meaning individuals. Their tax treatment will vary.

We believe this protocol must establish a genuinely universal and multilateral basis for the fair allocation of taxing rights over cross-border services. Yet we are concerned to see, in the draft, the re-emergence of precisely the elements that the Convention should allow us to move beyond: the centrality of physical presence, the transfer pricing system, and an excessive dependence on existing unfair bilateral tax treaties.

This Protocol is critical in the extent to which it sets the tone of how instruments which shall be developed in furtherance of article 5 can look like. We envision a world in which double taxation agreements are increasingly made redundant and instead, we move towards a truly multilateral, clear, consistent and coherent multilateral framework for the division of taxing rights not only for parties that have had existing imbalanced bilateral treaties between them but also for those in no treaty situations. For this reason, we are concerned with the current format and encourage moving towards a more genuinely multilateral approach.

Thank you.