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Legitimacy of Tax Rules

Subtopic 4: Decision-making processes of international initiatives on tax and their impact on legitimacy at national level (OECD, UN, soft law, public consultations, tax treaty policy reports, etc).

Author: Raquel Alamà Perales

Supervisor: Dr. F. Alfredo García Prats

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1. INTRODUCTION

Since the middle of the 20th century, the phenomenon of globalisation has reduced the size of the world in which we live, gradually bringing the borders between the different European countries closer together. With its consolidation, an International Community emerged that progressively organised itself in different aspects of pressing current affairs, the concern of which was common to all the countries that made it up. Almost a century later, Spain is a leading player in organisations such as the European Union, the OECD, the UN, the European Central Bank and the International Monetary Fund, among others.

However, its incorporation into this international community is relatively recent; it was not until after the fall of the dictatorship and the establishment of the democratic system in our country that Spain was able to take an active part, assuming its role as a member state. These international tax organisations are known for promulgating values and principles based on the consensus of the parties, democracy as the basic system, voluntariness and the freedom of the member states. This is when doubts and questions arise as to how the Spanish State participates in these international organisations, which bodies represent it and, in short, how democracy is applied in the process of representation, assumption, negotiation, ratification and interpretation in the field of international tax treaties and conventions.

The reason is not trivial, as tax matters are a transcendental field for the economy of member countries which, by submitting to these international organisations, assume commitments and policies that affect the citizens as a whole and, more specifically, their rights as taxpayers. The fight against tax fraud, money laundering, abusive behaviour or avoidance or the exchange of information between tax administrations are some of the issues that are imperative for countries in this regard. At the same time, the phenomenon of the relocation of companies, the majority of whose turnover is in European countries and the United States, leads to the introduction in the participation of these international organisations of countries considered to be emerging, where the subsidiaries and permanent establishments of these companies are usually located.

However, this participation is not synonymous with representativeness, just as principles are not synonymous with effective action policies. Nor is democracy synonymous with legitimacy and, as we shall see in this paper, the fact that there is a large number of countries participating in an international organisation does not mean that it is transparent or that the measures adopted within it are equivalent to their adequacy. The aim of these pages is to analyse the different degrees of legitimacy in international organisations in tax matters; to what extent it is present in the Spanish State's actions, as well as an analysis of how what

is agreed by consensus and which, in principle, is not binding, ends up having the status of law.

2. STRUCTURE OF THE INTERNATIONAL TAX DECISION-MAKING PROCESS

Spain is a country with a strong commitment to the activities of international organisations and is very active in terms of its participation in the international political, economic and social arena. Spain belongs to a large number of entities, bodies, associations and working groups of international organisations. Its collaboration is evident in its commitment to international cooperation, multilateral consensus and the strengthening of synergetic relations between the Kingdom of Spain and the rest of the states in the international community.

For example, Spain is a member of the Organisation of American States (OAS): Spain has been an observer member of the OAS since 2005. The organisation promotes cooperation between countries in the Western Hemisphere. It is also a member of the World Trade Organisation (WTO): Spain joined the WTO in 1995. The organisation is responsible for overseeing international trade and promoting fair trade policies. As well as the North Atlantic Treaty Organisation (NATO): Spain joined NATO in 1982. The organisation is a defensive military alliance that aims to protect member countries from external threats.

These are just some of the international organisations to which Spain belongs. It is also a member of many other organisations, such as the International Labour Organisation (ILO), the Organisation for Security and Cooperation in Europe (OSCE) and the World Health Organisation (WHO), among others. Below is an illustrative table of Spain's degree of participation in the international organisations referred to in the questionnaire, with green indicating membership or active participation or being part of the organisation, yellow indicating that it is not a member but participates and red indicating that it has no links whatsoever:

European Union	
UN	
OECD	
International Monetary Fund	
World Bank	
European Central Bank	
Inclusive Framework	
Global Forum	
G7	
G20	

2.1.- SPAIN'S MEMBERSHIP OF INTERNATIONAL ORGANISATIONS

2.1.1.- EUROPEAN UNION

Spain formally joined the former European Communities in 1986 (later the European Economic Community; today the European Union). This accession was the result of the establishment of the democratic system, following the death of the dictator Franco in 1975, which led to the political opening of the State's borders to the international community. The Kingdom of Spain applied for accession on 26 July 1977, obtaining a favourable response on 12 June 1985, which materialised with the signing of the Treaty of Accession in Madrid, which came into force on 1 January 1986.

Spain's membership of the European Union marked a turning point in the history of a country that had sought to live in an autarkic model, submitting itself to isolation from the international community with the Potsdam Declaration of 1945. Spain underwent a transformation marked by the establishment of policies advocating liberalisation and open

borders, as well as a process of economic rationalisation in contrast to the National Economic Stabilisation Plan of 1959[1] . This accession led to a period of economic prosperity in which Spain was the fastest growing power in the European Union for five years in a row[2] . But the most important milestone was undoubtedly the stabilisation of democratic ideas and institutions in a country with a politically turbulent history[3] . Both political parties and public opinion in Spain have maintained a very favourable attitude towards the European integration project since the application for accession in 1977 until today. This general consensus has been compatible with the different conceptions of European integration held by the different parties.

In June 1989, after three and a half years of membership of the European Union, Spain incorporated the peseta into the Exchange Rate Mechanism of the European Monetary System, to which France, Italy, Denmark, the Netherlands and Luxembourg had already subscribed since 1979. It was not until

1995 that the euro was born in our capital as a common currency across European borders. However, it was not introduced in Spain until January 2002[4] . At the same time, Spain was increasingly strengthening its commitment to integration and signing international agreements, so that after its annexation it signed the Schengen Agreement, in order to continue with its desire to open its borders to Europe and eliminate them between member countries.

A year later, Spain also signed the Maastricht Treaty, which coined the current name of European Union, and actively participated in the Edinburgh Summit of the same year, where it was agreed to establish the Cohesion Fund for environmental projects, transport networks and energy infrastructures. But these are not the only manifestations of Spain's active role in the construction of the European project, as the Spanish State has participated in and/or signed the Treaties of Amsterdam (1997), Nice (2001), the Constitutional Treaty of 2004 and the Treaty of Lisbon of 2009[5] . Moreover, it has been a party to negotiations for the development of European policy in many important areas such as foreign relations, the fight against terrorism, inter-community cohesion policies, cultural and linguistic policies, international judicial cooperation, information exchange, etc.

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[1] Badosa Pagés, Juan. "La adhesión de España a la CEE. (2005).

[2] Pérez, Santiago. *Historia visual del siglo XX*. Diario El País SA/Santillana SA (1998).

[3] Galiana Richart, Pedro Miguel. The national economic stabilisation plan and the Spanish development model. Diss. Universitat Internacional de Catalunya, 2017.

[4] "Spain and the European Union. *Ministry of Foreign Affairs, European Union and Cooperation*, https://www.exteriores.gob.es/es/PoliticaExterior/Paginas/EspanaUE.aspx.

[5] Ibid

As stated by our Ministry of Foreign Affairs[6] , since the beginning of its accession to the European Union, Spain has contributed to the consolidation and development of the most important current policies of the European Union, which today fall within its exclusive competence, such as the Common Agricultural Policy, the Common Fisheries Policy, the Internal Market, energy and transport policy, industrial policy, and educational, cultural and social policy. In recent years, Spain has also supported a reorientation of these policies to respond to the major challenges of the 21st century: An EU Health capable of responding to cross-border health crises, a just ecological transition for a sustainable and circular economy, environmentally responsible agricultural and fisheries policies, a strong social policy that promotes decent living conditions for all, a gender equality policy that serves as a global benchmark, a secure digital transition that leaves no one behind, and an inclusive industrial policy that fosters innovation, competitiveness and the EU's strategic autonomy.

This trajectory becomes a projection when considering Spain's role in the future, in which it will continue to be an accomplice and firm promoter of European policies in order to establish frameworks for action that show its commitment to the international community. Particularly important will be matters of international taxation, exchange of tax information, judicial cooperation and the fourth industrial revolution, technological development policies, energy sustainability, artificial intelligence, human rights and technical and scientific development. All of this, with a view to achieving full economic and monetary union, as well as capital market union; fundamental projects in the evolution and establishment of the European project. This project has been affected by events such as the global pandemic of Covid-19, the economic impact of which has been transcendental and has meant readjusting the European course. Consequently, the EU has designed a global Recovery Plan, for an amount of more than 2,000 billion euros, made up of the Next Generation EU instrument with 806.9 billion euros and the rest by the Multiannual Financial Framework (MFF) 2021-2027[7] .

In this sense, Spain is one of the main beneficiaries of the Recovery Plan, which aims to promote growth and employment for economic recovery by prioritising digital transformation and green transition. The financial perspectives for the period 2021-2027 have taken into account the circumstances described above, with an emphasis on reducing disparities between Member States and their different regions. 372.6 billion in the

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[6] The most important milestones in which Spain has participated at the European level can be found on the aforementioned website.

[7] "Recovery Plan for Europe. *European Commission*, https://commission.europa.eu/strategy-and-policy/recovery-plan-europe_es.

Multiannual Financial Framework (EU27 current prices), aims to promote economic, social and territorial cohesion, leaving no one behind. Historically, it has been the most relevant policy of the MFF and, specifically, the current allocation represents 30.76% of the total MFF, of which Spain has pre-allocated 35.4 million euros[8] .

It should also be noted that in the second half of 2023, Spain will hold the Presidency of the Council of the European Union for the fifth time. This will be a new opportunity to promote, together with the other EU partners, the ambitious and relevant agenda of the European Union and its objectives. Finally, in fiscal matters, Spain also participates actively in the implementation, consensus and application of European fiscal policies. Thus, Spain is subject to European fiscal rules with which it must comply, as well as to the fiscal targets set out in the EU's Stability and Growth Pact.

In turn, Spain participates in European tax policy decision-making[9] through its representation in the Council of the European Union and the European Parliament. Consequently, the Finance Ministers of each member country meet regularly to discuss and adopt decisions on tax matters, while in the European Parliament, Spanish MEPs participate in the drafting and approval of EU tax legislation. With regard to the implementation of these measures, Spain applies these policies within its borders in order to address current economic and fiscal challenges, such as the fight against tax fraud, tax evasion, money laundering and the improvement of the efficiency of the tax system, without forgetting the promotion of a fairer and more equitable tax system. The effect of these policies on the Spanish economy and tax system is not trivial.

2.1.2.- UN

After initially not being accepted because of the dictatorial fascist regime that ruled Spain, it finally joined the United Nations on 14 December 1955[10] , becoming the 80th member[11] . Spain's accession to the UN was achieved after a tortuous and complex political and diplomatic process dating back to the Spanish Civil War (1936-1939) and the Second World War (1939-1945) in which Francisco Franco's dictatorship supported Adolf Hitler, although officially Spain remained impartial and did not participate directly in the Second

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[8] Cit. ut supra "Spain and the European Union." *Ministry of Foreign Affairs, European Union and Cooperation*, https://www.exteriores.gob.es/es/PoliticaExterior/Paginas/EspanaUE.aspx.

[9] "Taxation: individuals, companies and cross-border transactions. "*European Union*, https://european-union.europa.eu/priorities-and-actions/actions-topic/taxation_es.

[10] "History of the United Nations | United Nations." *the United Nations*, https://www.un.org/en/about-us/history-of-the-un.

[11] The full member list is available at https://www.un.org/about-us/member-states

World War. As a result, its regime was considered undemocratic and a violator of human rights. As a result, Spain was excluded from the UN and other international organisations that emerged after the war. In the following years, faced with a bleak economic outlook, Spain sought to improve its relations with democratic countries and carry out a political transition to democracy.

In the 1950s, Spain adopted a more moderate foreign policy and began to establish diplomatic relations with other countries, including the United States and its European neighbours. Consequently, on 4 December 1950, the Spanish government sent a letter to the Secretary-General of the United Nations, requesting Spain's accession to the organisation. However, its application was rejected several times due to concerns about the human rights situation in the country and its political regime. Finally, in 1955, an agreement was reached and Spain was admitted to the UN as a member in a vote at the organisation's General Assembly. Spain's admission to the UN marked a milestone in its process of opening up to the international community and its commitment to democracy and human rights[12] .

Since then, it has been an active member of the organisation and has participated in numerous peace missions and other UN programmes and activities. As a member of the UN, Spain has the right to participate in decision-making in the UN General Assembly and the Security Council, among other UN bodies and committees. In addition, Spain has ratified several UN-sponsored international treaties and has participated in numerous initiatives to promote peace, security, human rights and sustainable development around the world, in line with the goals and values of the UN[13] .

The Spanish State participates through what is known as the Permanent Representation or Permanent Mission. The Permanent Mission of Spain to the United Nations (UN) is the diplomatic representation of the Spanish government at the UN in New York. The mission was established in 1951, shortly after the creation of the UN, and has been a key point of Spanish foreign policy ever since. The Permanent Mission of Spain to the UN aims to promote Spain's interests and values in the international arena, to represent the Spanish government at the UN and to work in collaboration with other members of the

[12] For more information on this aspect see Ángel Menéndez, M. "España y la ONU: el retorno de un exilio político". "Cuadernos de Pensamiento Político. (2001) or Pereira Castañares, JC. "Spain and the UN: from exclusion to admission". Revista "Historia y Política". (2014).

[13] Information extracted from: Villoslada, Javier. *Permanent Mission of Spain to the United Nations: Actualidad ONU*, https://www.spainun.org/.

organisation to address global challenges[14] . The mission is responsible for carrying out a variety of tasks and activities, including:

- Participate in meetings of the UN General Assembly and other UN bodies and committees.
- Defending Spain's rights and interests in the international arena and working with other UN members to promote UN values such as human rights, democracy, peace and security.
- Represent Spain in meetings and negotiations related to international treaties and agreements under the auspices of the UN.
- Work in partnership with other permanent missions and UN agencies to address global challenges, such as combating climate change, promoting sustainable development, and preventing and resolving conflicts.
- Provide information and advice to the Spanish government on international issues and developments related to the UN.

The Permanent Mission of Spain to the UN is one of the key pillars of Spanish foreign policy and plays an important role in promoting Spain's interests and values in the international arena and in addressing global challenges. The Permanent Mission of Spain to the UN acts under the legal regime of the 1961 Vienna Convention on Diplomatic Relations[15] , which establishes the basic rules and principles governing diplomatic relations between States. The Vienna Convention recognises the right of each state to establish diplomatic missions in other countries and establishes the rules governing their functioning and relations with host states. Among other things, the convention establishes the privileges and immunities of diplomats, the requirements for accreditation of diplomatic missions and the procedures for the settlement of disputes between states.

In tax matters, Spain participates through its representatives in the various UN bodies and committees dealing with tax matters, such as the Committee of Experts on International Cooperation in Tax Matters[16] . Spain also actively supports UN initiatives related to international tax cooperation, such as the exchange of tax information between

[14] Ibid

[15] Available in Spanish at: https://www.oas.org/legal/spanish/documentos/convencionviena.htm

[16] More info available at: *Committee of Experts on International Cooperation in Tax Matters*, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TaxComm_2018-

countries and the fight against tax evasion and money laundering. In turn, within our borders, it is regulated by Law 2/2014, of 25 March, on the Action and Foreign Service of the State[17] .

Spain also participates in the UN Tax Cooperation Forum, which aims to promote cooperation between countries on international taxation, as well as in the Working Group on Financing for Development, which aims to address financing for development challenges, including tax issues[18] ; as well as in the Working Group on the Taxation of Transnational Corporations, which aims to examine tax challenges related to transnational corporations and find ways to address them.

However, of particular note is the fact that Spain participates in the United Nations Model Tax Convention[19] , which is a model tax treaty that serves as a guide for countries when negotiating bilateral tax treaties. The Model Tax Convention is an initiative of the United Nations (UN) that aims to promote international cooperation in tax matters and to help prevent international tax evasion. Spain, like many other countries, has used the UN Model Tax Convention as a basis for negotiating its bilateral tax treaties with other countries[20] . Spain has also adopted various measures to prevent international tax evasion, such as the transposition into domestic law of the EU Base Erosion and Profit Shifting (BEPS) Directive[21] , which aims to tackle abusive tax practices by multinational companies.

2.1.3.- OECD: The Inclusive Framework and the Global Forum

Spain has been a member of the Organisation for Economic Co-operation and Development (OECD) since 1961[22] . The OECD is an international organisation made up of 38 member countries, whose objective is to promote policies that foster economic growth and social welfare. As a member of the OECD, Spain participates in the organisation's

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[17] Ley 2/2014, de 25 de marzo, de la Acción y del Servicio Exterior del Estado". *BOE.es*, 25 March 2022, https://www.boe.es/buscar/act.php?id=BOE-A-2014-3248.

[18] "Financing for Sustainable Development Report 2021." *Integrated National Financing Framework*, https://inff.org/es/resource/informe-de-financiacion-para-el-desarrollo-sostenible-fsdr-2021.

[19] *United Nations Model Double Taxation Convention between Developed and Developing Countries*, https://www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_UpdateSp.pdf.

[20] "United Nations - Committee of Experts on International Cooperation in Tax Matters." *the United Nations*, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-02/N2140002E.pdf.

[21] "Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market." *EUR-Lex*, https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:32016L1164.

[22] "Our global reach." *OECD*, https://www.oecd.org/about/members-and-partners/.

discussions and decisions in areas such as economics, taxation, trade and the environment[23] . In addition, Spain is committed to implementing OECD recommendations and standards in its legislation and economic policy.

Spain participates in the OECD through the Spanish Embassy in Paris, which is the Permanent Mission of Spain to the OECD, with the support and assistance of experts from the different Ministerial Departments, in the specific working groups, as their counterparts do. In tax matters, Spain's participation in the **Inclusive Framework** on BEPS (Base Erosion and International Double Taxation), since the signing of the Convention in 2017, is noteworthy. Spain has actively participated in the OECD's Inclusive Framework on Base Erosion and Profit Shifting (BEPS) since its creation in 2016. The Inclusive Framework is a forum for discussion and cooperation in which more than 140 countries, including Spain, work together to implement the measures to combat tax evasion and aggressive tax avoidance adopted under the OECD/G20 BEPS project.

Specifically, Spain has participated in the different stages of the BEPS project, including in the development and design phase of the measures, as well as in the implementation and monitoring phase. In addition, Spain has adopted a series of national measures to implement the recommendations of the BEPS project, including the adoption of the rules on the limitation of the deduction of financial expenses and the implementation of the automatic exchange of financial account information standard (CRS). Under the Inclusive Framework, Spain has also collaborated with other countries in the preparation of reports and analyses on international tax issues, and has participated in meetings and working groups to discuss and develop new measures and policies in the fight against tax evasion and aggressive tax avoidance. In conclusion, Spain has actively participated in the OECD's Inclusive Framework on Base Erosion and Profit Shifting, working together with other countries to implement measures to combat tax evasion and aggressive tax avoidance.

In turn, Spain has participated in the OECD's **Global Forum** on Transparency and Exchange of Information for Tax Purposes since its creation in 2009. The Global Forum is an international working group that promotes tax transparency and the exchange of tax information between countries, with the aim of combating tax evasion and aggressive tax avoidance worldwide[24] .

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[23] "Spain and the OECD. *Ministry of Foreign Affairs, European Union and Cooperation*, https://www.exteriores.gob.es/RepresentacionesPermanentes/ocde/es/Organismo/Paginas/Espa%C3%B1a-y-la-OCDE-.aspx.

[24] "Who we are." OECD, https://www.oecd.org/tax/transparency/who-we-are/

Spain has been an active member of the Global Forum and has participated in periodic peer reviews and reporting on the implementation of tax information exchange and transparency standards. It has also cooperated with other countries in the exchange of tax information and in the fight against tax evasion and aggressive tax avoidance. In addition, it has entered into bilateral and multilateral tax information exchange agreements with other countries and has implemented standards and measures to strengthen tax transparency and tax information exchange, including the adoption of the automatic exchange of financial account information (CRS) standard.

In summary, Spain has participated in the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes since its creation in 2009, working together with other countries to promote tax transparency and the exchange of tax information in the fight against tax evasion and aggressive tax avoidance worldwide.

In addition, the OECD's "Pillar 1" and "Pillar 2" initiatives seek to reform international taxation to adapt it to the digital economy and reduce tax base erosion and profit shifting by multinational companies. These initiatives imply significant changes in the way companies are taxed internationally. Spain has actively participated in the negotiations on OECD "Pillar 1" and "Pillar 2" and has supported their implementation at the European level. In particular, Spain has supported the introduction of a global minimum tax in Pillar 2 to avoid harmful tax competition between countries and has advocated a fairer allocation of corporate profits in Pillar 1.

Regarding the implementation of these initiatives in Spain, the Spanish government has announced its intention to adapt its tax legislation to the new international standards that emerge from the OECD negotiations and which have already been partially introduced. The Ministry of Finance and Public Administration has indicated that Spain will seek a coordinated solution at the European level to avoid double taxation and protect the competitiveness of Spanish companies[25] .

2.1.4.- INTERNATIONAL MONETARY FUND

Spain is an active member of the International Monetary Fund (IMF). The IMF is an international organisation dedicated to promoting international monetary cooperation, facilitating international trade, fostering economic stability, and providing financial assistance to countries facing economic crises. Spain became a founding member of the IMF in 1945,

[25] "Spain backs EU position on taxation of the digital economy in the OECD. "El País, https://elpais.com/economia/2021-07-05/espana-se-suma-al-consenso-para-crear-un-impuesto-minimo-global-a-las-empresas.html.

and has been an active member of the organisation ever since[26] . As a member of the IMF, Spain is entitled to participate in the organisation's meetings and decisions, and also has access to the financial and technical resources that the IMF offers to its members[27] .

Spain has received financial assistance from the IMF on several occasions, including during the 2008 global financial crisis and in the 1980s. As part of this assistance, the IMF has recommended measures to reduce Spain's fiscal deficit and public debt, as well as to improve the efficiency and transparency of the fiscal system. Spain is subject to the organisation's general fiscal policies and recommendations. The IMF provides advice and technical support to its members on a wide range of fiscal issues, including public debt management, tax reform, public investment, fiscal consolidation and monetary policy.

Its fiscal and economic policies in the 2008 crisis were heavily criticised for their harshness and austerity. In particular, it was argued that IMF recommendations and programmes to address the crisis in some developing countries, especially in Eastern Europe and Latin America, often included austerity measures and cuts in social spending, which had negative effects on the economy and the most vulnerable population, and that the IMF's strategy had to be revised[28] . The IMF was also criticised for underestimating the severity of the crisis and for not providing sufficient financial assistance to some developing countries in need .[29]

On the other hand, others argued that the IMF did what it could within its institutional and financial constraints to help countries affected by the crisis, and that many of the austerity measures and structural reforms that the IMF recommended were necessary to stabilise public finances and restore market confidence[30] . In any case, the 2008 financial crisis was an unprecedented challenge for the global economy, and the response of international organisations, including the IMF, was the subject of debate and evaluation in the years that followed.

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[26] Fernández Ordóñez, Miguel. "Spain in the International Monetary Fund and the World Bank: Fifty Years of Relationship". (2008).

[27] "Spain and the IMF." *International Monetary Fund*, https://www.imf.org/en/Countries/ESP.

[28] "Motion for a European Parliament resolution. *Report on the strategic review of the International Monetary Fund - A6-0022/2006 - European Parliament*, https://www.europarl.europa.eu/doceo/document/A-6-2006-0022_ES.html.

[29] Kopelovich, Mark. "*The International Monetary Fund in the Global Economy: Banks, bonds, and bailouts.* Cambridge: Cambridge University Press. (2010).

[30] Blanchard, Oliver: "The crisis: Basic Mechanisms, and Appropriate Policies". Journal of International Commerce, Economics and Policy (2009).

2.1.5.- WORLD BANK

Spain has been a member of the World Bank since its founding in 1944 and has been an active member of the organisation ever since, along with 188 other countries[31] . As a member, Spain contributes financially to the World Bank and participates in decisions on the Bank's policies and programmes, including the approval of loans and projects. In addition, Spain has been a recipient of World Bank loans and technical assistance to support its economic and social development.

Spain's participation in the World Bank takes place through its representation at meetings of the Board of Governors, the Bank's main decision-making body. Each member country of the Bank has a Governor, who is usually the Minister of Finance or the Governor of the country's Central Bank. Spain's governor at the World Bank is currently the Minister of Economy and Enterprise, and in his absence, the Secretary of State for Economy and Business Support. In addition, Spain has an Executive Director at the World Bank, who sits on the Bank's Executive Board and is responsible for overseeing the day-to-day management and operations of the Bank. The executive director is appointed by a group of member countries representing Spain and other countries in the region[32] .

The World Bank is composed of several institutions, including the International Development Association (IDA) and the International Finance Corporation (IFC). IDA is the arm of the World Bank that provides loans and technical assistance to poorer countries, while the IFC focuses on the private sector and provides financing to companies and projects in developing countries. In addition, the World Bank has a number of divisions and departments specialising in areas such as finance and taxation.

2.1.6.- THE EUROPEAN CENTRAL BANK

Spain has been a member of the European Central Bank (ECB) since its foundation in 1998. As a member of the ECB, Spain participates in decision-making on the monetary policies of the Eurozone and collaborates with the other member countries to ensure the stability of the single currency, the euro. Spain has one member on the ECB's Governing Council, which is the institution's main decision-making body. The Spanish member of the ECB's Governing Council is the Governor of the Banco de España, who is responsible for representing Spain's interests in the Governing Council and for contributing to decision-making on monetary policy in the euro area.

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[31] "Member Countries." *World Bank*, https://www.worldbank.org/en/about/leadership/members.

[32] "Spain: an overview." *World Bank*, 13 November 2020, https://www.bancomundial.org/es/country/spain/overview.

In addition, Spain has a member on the ECB's Supervisory Board, which is responsible for overseeing the financial stability of the Eurozone and ensuring the soundness of the region's banks and financial institutions. Spain's participation in the ECB is essential to guarantee the financial and economic stability of the Eurozone, and to collaborate with the rest of the member countries in achieving the European Union's objectives in terms of growth, employment and economic welfare.

2.1.7.- THE G7

Spain is not a member of the G7 or "Group of Seven". The G7 is a group of countries composed of the United States, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Spain is not a member of this group, although on some occasions it has been invited to participate in G7 meetings and summits as an observer. In addition, since 1999 Spain has participated in the G20, another group that includes the G7 countries and other emerging and developing countries. As for Spain's participation in G7 summits, at the Biarritz summit in 2019, the Spanish Prime Minister, Pedro Sánchez, was invited to attend as a special guest along with other leaders of non-G7 countries, such as Australia, India, Chile and South Africa[33] .

The G7 was created in 1975 as a forum of countries with highly industrialised and strong economies. As mentioned above, at that time, Spain was under the dictatorial regime of Francisco Franco and was not considered a democratic country or a strong economy. After Franco's death in 1975, Spain began a process of democratisation and economic modernisation that enabled it to join the European Union in 1986 and become one of the largest and most advanced economies in Europe. Despite this, Spain has not been included in the G7, although there has been occasional speculation about the possibility of its inclusion. The decision to invite a country to join the G7 depends largely on the opinion of the group's current members and the perception that the country in question has a strong economy and a relevant position on the international stage.

G7 membership is formally established by the founding member countries in agreements set out at the group's inaugural summit in Rambouillet, France, in 1975. On that occasion, the leaders of the six founding countries (the United States, the United Kingdom, France, Germany, Italy and Japan) agreed to meet regularly to discuss issues of common economic, political and international security interest. Since then, these six countries have been considered permanent members of the G7. The group was temporarily expanded in 1976 to include Canada, and since then all seven countries have been considered official

[33] "La Moncloa. 25/08/2019. Pedro Sánchez attends the closing dinner of the G7 leaders' meeting in Biarritz [President/Activity]." *La Moncloa*, 25 August 2019, https://www.lamoncloa.gob.es/presidente/actividades/Paginas/2019/25082019_g7.aspx.

members of the G7. Over the years, there have been some changes in the group's membership, such as the inclusion of Russia in 1998, which led to the group becoming the G8. However, Russia was suspended from the G8 in 2014 due to the crisis in Ukraine, and the group reverted to its original seven-country format.

In any case, the composition of the G7 has been the subject of debate in recent years, and some have proposed broadening its membership to include other important countries in the global economy.

2.1.8.- THE G20

The G-20 or "Group of Twenty" was created in 1999 by the G7 countries plus the European Union, Saudi Arabia, Argentina, Australia, Brazil, China, South Korea, India, Indonesia, Mexico, South Africa and Turkey[34] . The G20 is an international forum that brings together the leaders of the world's major economies to promote economic and financial cooperation among its members and to address global challenges affecting the world economy. Together, these countries account for approximately 80% of world trade and 85% of world gross domestic product (GDP)[35] .

The G20 meets regularly to discuss global economic and financial issues, and its agenda includes issues such as fiscal policy, financial regulation, trade, climate change and sustainable development. At these meetings, leaders of member countries seek joint agreements and solutions to address global economic and financial challenges, especially in the interests of coordinating financial policies, crisis management and reducing abuses and harmful activities against the financial system. In 2008, in the context of the global crisis, the G20 was established as a Summit of Heads of State, displacing the G7 and G8+5 as the organisation within which global economic discussions take place.

However, Spain is not a member of the G-20, although it has participated in the Group's Extraordinary Summits and in certain ordinary meetings, which is why Spain is considered a permanent guest of this international organisation, whose first official intervention took place at the Washington Extraordinary Summit in November 2008. Spain subsequently attended another Extraordinary Summit in London a year later, in April 2009. It was after these interventions that Spain consolidated its position within this organisation and, in general, in the economic and political panorama of the international community.

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[34] "G-20 and OECD. *Ministry of Foreign Affairs, European Union and Cooperation*, https://www.exteriores.gob.es/gl/PoliticaExterior/Paginas/G20OCDE.aspx.

[35] Ibid

2.2.- THE ACCESSION PROCEDURE OF THE SPANISH STATE:

2.2.1.- Competent body

Title III, Chapter Three of the Spanish Constitution (EC) of 1978 reserves its content for International Treaties. Specifically, articles 93 to 96 of the constitutional text establish the procedure for Spain's accession to international organisations through the conclusion of a Treaty or Agreement, depending on the subject matter and whether the Treaty requires the Spanish State to delegate its powers to the international organisation in question. In this section, therefore, we will set out how Spain's accession procedure is regulated by its legislation.

Article 93[36] of the Spanish Constitution establishes a distinction between treaties transferring the exercise of competences to international organisations and treaties under Article 94 EC[37] . When a treaty requires a transfer of competences from the Spanish State to the international organisation in question, it requires a special procedure for its authorisation: the organic law. This type of law is used in our country to regulate

In Spain, competence to decide on membership of an international organisation depends on the sphere in which the organisation operates. In general terms, the Spanish Constitution establishes that competence in international relations corresponds to the State, represented by the Government. This is because the competence to establish the Spanish State's foreign policy belongs exclusively to the State according to Article 149.1.3 EC in *"international relations and, in particular, the following matters: relations with foreign States and participation in international organisations, without prejudice to the power of the Autonomous Communities to establish relations with foreign entities within the scope of their competences".*

As for the ratification of international treaties, Article 94 of the Constitution establishes that it is the King's responsibility[38] , after authorisation by the Cortes Generales,

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[36] *"An organic law may authorise the conclusion of treaties conferring on an international organisation or institution the exercise of powers derived from the Constitution. The Cortes Generales or the Government, as the case may be, shall be responsible for guaranteeing compliance with these treaties and with the resolutions issued by the international or supranational bodies that have been assigned powers".*

[37] Serrano, José Manuel, and Ángeles González. "Sinopsis artículo 93 - Constitución Española." *Congreso de los Diputados*, https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=93&tipo=2.

[38] This is due to the constitutional provision of Article 63.2 of the Constitution *"it is incumbent upon the King to express the consent of the State to be bound internationally by treaties, in accordance with the Constitution and the laws".*

to ratify international treaties. However, the competence lies exclusively with the Government, since the King is a merely representative figure who reigns but does not govern, and his reference in the Spanish legal system must be understood in this sense. Within the Government, the Council of Ministers is competent to approve the conclusion of international agreements and treaties according to the Third Final Provision of Law 40/2015, on the Legal Regime of the Public Sector, which amends Article 5 of Law 50/1997, of 27 November, on the Government. This article states: *"1. The Council of Ministers, as a collegiate body of the Government, is responsible for exercising the following functions [...] d) To agree on the negotiation and signing of international treaties, as well as their provisional application. e) To refer international treaties to the Cortes Generales under the terms provided for in Articles 94 and 96.2 of the Constitution [...]"*.

In turn, articles 3 to 6 of Law 25/2014, of 27 November, on Treaties and other International Agreements (LTAI), organise the activity of the State in relation to international treaties and agreements, based on the Council of Ministers, the Ministry of Foreign Affairs and Cooperation and the Ministry that may be competent by reason of the matter affected by the international treaty to be signed by the State, which in this case would be the Ministry of Finance and Public Administration. In the opinion of the Professor of Administrative Law, Julio González García[39] *, these are "precepts which are essentially based on international treaties (I would even go so far as to say that they are essentially based on bilateral treaties) and which have omitted the part referring to international agreements signed within the framework of international organisations - to which the very wording of the regulation refers - not even for the purposes of making them known or adopting hypothetical measures for their reception in our domestic law"*.

The LTAI is a law whose few novelties introduced are based on the creation of an Interministerial Coordination Commission for Treaties and other International Agreements, through its Article 6, among others. It is especially because of this fact that its lack of innovation has been heavily criticised. This can be seen in the fact that Article 3 is a reiteration of Article 5 of Law 50/1997 of 27 November 1997 on the Government, with regard to the competences of the Council of Ministers in matters of International Agreements and Treaties. This copy and paste is particularly objectionable when this casuistry implies the lack of provisions on how the internal procedure of the General State Administration should be regulated when it intends to approve an international treaty[40] .

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[39] González García, Julio. "TRATADOS INTERNACIONALES Y EL GOBIERNO: COMPETENCIAS ADMINISTRATIVAS." *Global Politics and Law*, 4 4 2022, https://globalpoliticsandlaw.com/blog/2022/04/04/tratados-internacionales-com.

[40] Ibid

This is because it wreaks havoc with the *"democratisation of the State and citizen participation and the consequences it has on the system of distribution of competences between the State and the Autonomous Communities*"[41] . As we shall see, this has led to a debate on the legitimacy of the Spanish state's accession to and subscription of certain international treaties on fiscal matters, although there is no criticism that the government is competent to carry out this activity.

Therefore, in the field of organisations with tax-related tasks, such as the Organisation for Economic Co-operation and Development (OECD) or the Financial Action Task Force (FATF), the Spanish government, through the Ministry of Finance and Public Administrations, is responsible for deciding on membership. In any case, membership of an international organisation must be approved by the Congress of Deputies, which has the final say in the ratification of international treaties, including those that refer to membership of international organisations.

In turn, it is worth mentioning the competences of the Ministry of Foreign Affairs and Cooperation contemplated by Law 2/2014, of 25 March, on State Action and Foreign Service, which regulates the structure and functioning of the foreign service and establishes the competences of the Ministry of Foreign Affairs and Cooperation. With regard to membership of international organisations in the fiscal sphere, the Ministry of Finance and Public Administrations is responsible for this, as established in Royal Decree 682/2021, of 3 August, which develops the basic organisational structure of the Ministry of Finance and Public Administration and amends Royal Decree 139/2020, of 28 January, which establishes the basic organisational structure of ministerial departments.

Specifically, **Article 1.1** states that: *"The Ministry of Finance and Public Function is the department of the General State Administration responsible for proposing and executing the Government's policy on public finance, budgets and expenditure and public enterprises, in addition to the other competences and powers conferred on it by the legal system".* Within the organisation chart of the Ministry of Finance and Public Administration, the Directorate General of Taxation is responsible, according to **Article 5.1.d),** for *"the negotiation and application of agreements to avoid double taxation, those concerning the tax regulations contained in international treaties and work relating to the Organisation for Economic Cooperation and Development and the European Union in the tax sphere"*.

[41] Op cit.

In turn, according to section e) of the aforementioned article, the Directorate General for Taxation is responsible for: *"The study and preparation of measures relating to international tax treaties and special tax agreements, in coordination with other bodies of the Administration, and support actions relating to relations with the European Union and other international organisations to which Spain is a party"*. The second paragraph of Article 5 subdivides the Directorate General for Taxation into sub-directorates, so that depending on the subject matter of the treaty, the sub-directorates may carry out financial policies for action under tax treaties and conventions, but only the Subdirectorate General for Tax Policy is competent to carry out these negotiations.

This is also supported by the General Tax Law which establishes in Article 92 that international cooperation and participation in international organisations related to tax matters is a competence of the Tax Agency (AEAT). Specifically, Article 92(e) states: *"Collaboration with other tax administrations, both Spanish and foreign, and participation in international organisations related to tax matters, under the terms to be determined by regulation".*

In any event, membership of an international organisation is usually a process that requires the negotiation and approval of an international agreement, which must be ratified by Spain before membership becomes effective. In the field of organisations with tax-related tasks, the competence to decide on Spain's membership of these organisations lies with the Spanish government. Law 2/2014 of 25 March 2014, which authorises the ratification of various international agreements and conventions, as well as accession to certain international organisations in tax matters, establishes the powers of the Spanish Government to decide on Spain's accession to international organisations in tax matters and the procedures for the ratification of the corresponding agreements and conventions.

Furthermore, the Spanish Constitution of 1978 establishes in Article 97 that *"the Government is responsible for directing domestic and foreign policy, civil and military administration and the defence of the State". In the exercise of this competence, the Government has the power to negotiate and ratify international treaties, as well as to decide on Spain's accession to international organisations"*. On the other hand, Article 94 of the Constitution establishes that *"authorisation for the ratification of international treaties that affect territorial integrity or the fundamental rights and duties established in the Constitution shall correspond to the Congress of Deputies".* In this sense, in some cases, accession to an international organisation may require the authorisation of the Congress of Deputies if it is considered to affect territorial integrity or the fundamental rights and duties established in the Constitution.

Is the legitimacy of the competent body in question?

In Spain, there is no generalised discussion on who should be competent to decide on Spain's membership of international organisations. The Spanish Constitution establishes that competence in foreign policy matters corresponds to the government, and this attribution has been widely accepted and applied in the country's political and legal practice. However, in some specific cases there may be debates or discussions about joining an international organisation, especially when it is considered that this decision may have important implications for the country.

In such cases, different opinions and positions on the issue may arise, and discussions and debates may take place in the competent bodies to analyse the implications of the proposed membership and decide whether or not it is in Spain's interest. In general, however, the competence to decide on membership of international organisations is considered a prerogative of the government, and it is assumed that the executive has the responsibility to assess and take decisions that best reflect Spain's interests in the international arena.

A recent example of debate in Spain about joining an international organisation took place in 2020, when the Spanish government announced its intention to join the Pacific Alliance, an economic and trade integration organisation that includes Chile, Colombia, Mexico and Peru. The announcement generated a public debate in Spain about the potential benefits and risks of joining this organisation, especially in the context of the economic and social crisis caused by the COVID-19 pandemic. Some analysts and economic experts expressed doubts about the advisability of joining the Pacific Alliance at that time, arguing that Spain should focus on strengthening its domestic economy and maintaining its presence in the EU.

Advocates of Pacific Alliance membership included some members of the government and political parties, who argued that this measure could help diversify Spain's trade relations and reduce its dependence on the European market at a time of economic uncertainty. For example, the Minister of Foreign Affairs, Arancha González Laya, expressed her support for joining the Pacific Alliance and stressed the importance of strengthening

Spain's trade relations with Latin America[42] . Some political parties such as Ciudadanos and the Popular Party also expressed their support for the measure.

Others[43] argued that the Pacific Alliance could be an opportunity to diversify Spain's trade relations and to increase its presence in Latin America, which could benefit the Spanish economy in the long run. Ultimately, the government decided not to go ahead with accession to the Pacific Alliance due to the lack of political and social consensus in the country on the appropriateness of such a move at the time. In the case of the OECD's Inclusive Framework, there have been experts who have expressed their opinion on whether or not Spain should join this agreement. Some of the arguments in favour of accession refer to the fact that the Inclusive Framework could help to improve the efficiency and transparency of the Spanish tax administration, contributing good practices and experience from other member countries. In addition, it could improve Spain's position in the international arena by increasing its involvement in the fight against tax evasion and aggressive tax planning.

On the other hand, some experts have expressed concerns about Spain's accession to the Inclusive Framework, arguing that it could limit Spain's ability to make sovereign tax decisions and that it could oblige Spain to share confidential information with other member countries. Moreover, it could generate additional costs for the Spanish tax administration and for companies that have to adapt to the rules of the agreement. Among the experts who have expressed their views on this issue are some academics and representatives of tax and accountancy associations, as well as some economists and public policy analysts. Some of them have presented their opinions in the media or in specialised publications, and some have been consulted by the government or political parties to provide their point of view.

The power to decide on Spain's membership of international organisations lies with the Government, which must first inform the Congress of Deputies and obtain its authorisation in the event that membership entails significant political, economic or military commitments. In any case, the final decision on membership rests with the Executive. In the specific case of the OECD's Inclusive Framework, it is a non-binding agreement that does

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[42] El País. "El Gobierno quiere que España entre la Alianza del Pacífico" (The government wants Spain to join the Pacific Alliance). 17 July 2020. https://elpais.com/economia/2020-07-17/el-gobierno-quiere-que-espana-entre-en-la-alianza-del-pacifico.html

[43] El Confidencial. "La Alianza del Pacífico no da la talla: por qué España no debe unirse a esta organización". 27 July 2020. https://www.elconfidencial.com/economia/2020-07-27/alianza-pacifico-espana-organizacion-comercial_2702922/

not entail binding political, economic or military commitments, so it is not necessary for accession to be authorised by the Congress of Deputies. Therefore, the final decision on accession rests with the executive.

As can be seen, the debate does not revolve around whether the Government, the Ministry of Finance or the Directorate General of Taxation is competent or not, since it seems that this competence is presupposed and legitimised in the Government as the highest authority of the State and its representation in itself.

2.2.3.- Procedure[44]

In Article 93, the Spanish Constitution opted to distinguish treaties transferring the exercise of powers to international organisations from the other treaties envisaged in Article 94 and established a special procedure for granting authorisation, the organic law. It also provided in a very generic way for the application of the law derived from these international organisations. Treaties on the transfer of competences (Art. 93) differ from other treaties in which competences are also transferred in that in Art. 93 treaties, the legal acts of the International Organs are capable of producing direct and immediate effects in the internal order, as is the case with the treaties of the European Union, while in other cases the obligation is not direct, but rather for the States which must adopt the necessary measures to apply or execute them. For this reason, the North Atlantic Treaty did not require an organic law, as the Permanent Commission of the Council of State ruled, while the creation of the International Criminal Tribunal in the former Yugoslavia and, of course, the treaties of European integration did require an organic law.

The execution of a treaty implies that States have to take the relevant measures at the domestic level to ensure the observance of the agreed obligations. If the obligation assumed is contained in the treaty itself in such a precise manner that it can be directly applied, then the obligation or treaty is said to be self-executing and requires no other means than the formal publication of the treaty. It is often the case, however, that the treaty does not contain direct obligations, but imposes obligations on states to implement them by means of laws or regulations in order to fill the legal vacuum by, for example, not determining jurisdiction, not specifying the requirements for the exercise of a particular right, etc.

The last clause of this provision (Art. 93) refers precisely to this question, which not only affects these treaties, but all international treaties in general. This provision is drafted with a narrow view of the problem of the execution of treaties. It only has its sights

[44] Serrano, José Manuel, and Ángeles González. "Sinopsis artículo 93 - Constitución Española." Congreso de los Diputados, https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=93&tipo=2.

set on secondary Community law. It has thus been said that this provision is flawed by defect, since it is not only applicable to the treaties of Art. 93, but it is also flawed by excess, since it is not always necessary, for the effectiveness of the treaty, to adopt legislative or regulatory measures. It must be said that in the case of treaties with obligations that are not self-executing, whether they are ex art. 93 or 94, the normative measures must be adopted by the Cortes Generales if they are of a legislative nature or rank, or by the Government in another case. The treaties of the European Union are primary law, directly applicable as far as possible. Secondary legislation emanating from the bodies of the European Union may be directly applicable in the case of regulations and decisions, as soon as they have been published in the Official Journal of the European Union, or require transposition in the case of directives.

It is precisely this derived right to which the precept refers with the expression of resolutions emanating from the international bodies that are the holders of the assignment. However, it could be applied to cases other than the law of the European Union bodies. In any case, secondary legislation may require its transposition by law or regulation, depending on the case. The Court of Justice of the European Union has maintained the doctrine of direct application of directives and decisions without the need for a transposition rule when these rules are sufficiently precise to be applied.

It is possible to grant a legislative delegation in favour of the Government, subject, of course, to Article 82.3 of the Constitution, as has already been done to facilitate the adaptation of Spanish law to the Community acquis (Law 47/1985, of 27 December 1985, on the Bases of delegation to the Government for the application of European Community law, which, notwithstanding the above, was repealed by Law 8/1994, of 19 May 1994, which develops the Joint Commission for the European Union).

The Rules of Procedure of the Congress of Deputies of 10 February 1982 (art. 154) and the Rules of Procedure of the Senate of 11 January 1994 (arts. 144 et seq.) are the rules that develop this constitutional precept, as far as authorisation is concerned. In reality, there is no real difference in the procedure between authorisation by organic law and pure and simple authorisation, except, of course, for the requirement of an absolute majority in the final vote on the whole bill in the case of the authorisation provided for in this article. In Congress, Article 156 of the Rules of Procedure is applicable, which establishes that authorisation shall be subject to the common legislative procedure, with the following aspects: proposals shall be called proposals comparable to amendments to the whole (if they seek the refusal or postponement of authorisation, or if they raise reservations and these are not admitted, as occurs in bilateral agreements) or to the articles (when the reservation is admitted, the deletion, addition or modification of the reservations or

declarations that the government intends to formulate is proposed, or when reservations or declarations provided for in the treaty are raised). As far as the Senate is concerned, its procedure is a faithful reflection of the different legislative procedure, which means that a proposal for non-ratification must be considered as a veto proposal, and proposals for reservations are not admitted if the treaty does not so provide.

Accordingly, Article 94[45] regulates international treaties that require the express authorisation of the Congress of Deputies. An international treaty is nothing other than a legal transaction with its own characteristics, due to the category of the subjects involved, States and other subjects of the International Community. Ratification, which means confirmation, has its origins in the power of the sovereign to approve what has been done by his representatives or mandataries who have been given full powers. Since the French Revolution, the power to ratify certain treaties which, until then, had resided in the sovereign, the sovereign having the ius representationis omnimodae, has been limited, in certain cases, by the necessary intervention of the organ of popular representation. The conclusion in this strict sense is the manifestation of the will, which in our Constitution is the competence of the Head of State. But parliamentary intervention is required, which must authorise the consent of the treaties of Article 93 by Organic Law or of Article 94 by means of the procedure provided for in Article 74 of the Constitution.

Whatever the name of the treaty (convention, treaty, protocol, agreement, etc.) and the form in which consent is given (ratification, signature, exchange of notes, accession, etc.), the intervention of the Cortes is required in the cases provided for in Article 94.1 and 94.2. The Spanish Constitution has opted for a positive list system to determine those treaties that require parliamentary authorisation, and this issue is expressed in Article 94. In principle, this power to classify a treaty as one that requires an organic law or authorisation corresponds to the Government, which, apart from being subject to the mandatory report of the Council of State, can be audited in this classification by the Cortes and the Constitutional Court.

The Cortes can also intervene in the qualification of the treaty and modify it in the sense of processing it through Article 93 or Article 94, as some parliamentary groups tried to do on the occasion of accession to the North Atlantic Treaty. In the case of a treaty submitted for information under Article 94.2, the Congress, through the Bureau, can re-qualify it and process it after authorisation for its subsequent approval or validation, as it

[45] Serrano, José Manuel, and Ángeles González. "Synopsis article 94 - Spanish Constitution." Congreso de los Diputados, https://app.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=94&tipo=2.

considers that the treaty in question requires authorisation under Article 94 and not merely information.

In the case, which is more theoretical than real, of the Government concluding a treaty without the intervention of the Cortes and the latter requalifying and processing the treaty by means of Article 94 and also denying subsequent validation, there would be no other solution than denunciation, if this is permitted by the treaty, or the filing of an appeal of unconstitutionality that would only deal with the qualification (Art. 32 LOTC). It would also be possible to raise a conflict of powers between the Government and the Cortes. The raising of this question of competences or attributions, or the lodging of the appeal, seems to correspond to the Cortes, in order to prevent a treaty concluded in a manner contrary to the Constitution from producing effects in the internal order.

We can summarise the characteristics of the authorisation:

- Parliamentary authorisation is a prior act and a prerequisite for the State to give its consent, but it does not oblige the State to give its consent. The expression of consent is the responsibility of the Head of State. The authorisation is for the whole of the agreement or block of agreements. The Courts cannot modify a part of the treaty; they are only allowed to make reservations permitted by the treaty or interpretative declarations also provided for in the treaty, because these acts are unilateral and not conventional.

- The authorisation covers the text of the treaty and all accompanying instruments, but it often happens that the development of the treaty involves a series of interpretative agreements, as in the case of framework agreements that create joint commissions to monitor the treaty. A similar situation applies to the regime of unilateral acts (declarations) dependent on a treaty. The general rule should be that all acts or agreements deriving from a treaty are subject to authorisation by the Houses, except in the case where the Houses themselves have given their express authorisation for such declarations or subsequent acts not to be resubmitted to Parliament and are deemed to have been approved in advance. Practice has not been uniform in this area, and in 1990 the Executive made a declaration without referral to the Courts of the Statute of the International Court of Justice, which provided for such a declaration in Article 36(2).
- Parliamentary authorisation, except in the case of Article 93, does not in its own sense have the nature of a law, but it can be understood that it could establish a kind of legislative delegation to the Government so that the latter, in accordance with the

directives laid down by the Houses or with a conventional model, could negotiate and authorise treaties without these again being subject to the express authorisation of the Cortes. From a legal point of view, the alternative seems possible under Article 82 of the Constitution, which only prohibits delegation for organic laws. However, apart from cases and matters of little political significance, it does not seem easy to admit the possibility of a broad delegation.

In the process of granting authorisation, only the government has the initiative, an initiative limited temporarily in the event that the passage of time could imply the manifestation of the state's consent and it is a treaty covered by Article 94. The parliamentary development of the authorisation requires the knowledge of the plenary of the Chambers, because Article 75.3 of the Constitution prevents the delegation of international issues to committees. Normally, treaties are processed within the period foreseen in the regulations, sixty days in Congress, and only in exceptional cases is an extension of this period requested.

Finally, we must refer to the possibility of the provisional application of a treaty, that is to say, its temporary validity before receiving authorisation from the Chambers, and therefore, before the manifestation of consent. This practice, which occurs with some frequency in Spain, has led the doctrine to consider the need to establish certain limitations on the use of this technique. Thus, it is worth highlighting the requirement that the cases must be exceptionally urgent, that they must not produce irreversible situations and that the process of parliamentary authorisation must be initiated immediately.

Treaties may contain obligations that can be directly enforced (self-executing) and publication in the BOE will therefore be sufficient for their rules to enter into force. However, treaties often establish rules that cannot be directly enforced and which require action by States that must adopt legislative or regulatory measures for their implementation. This obligation is not only, as might be deduced from the Constitution for Article 93 treaties, but also for Article 94 treaties.

In relation to treaties that can be stipulated without the intervention of the Cortes, there are only two clarifications to be made: firstly, the information must be immediate, immediately after the stipulation; secondly, the Bureau of Congress can reclassify the treaty, converting it into a treaty of number 1 of article 94, which would require ratification of the consent of the Cortes Generales. The authorisation contained in this article is developed in the Rules of Procedure of Congress and the Senate. Although the Constitution refers in

these cases to authorisation and does not use the word "law", such authorisation must be considered as a formal law.

In reality, whether or not the authorisation is considered a law (the Rules of Procedure of the Chambers only use the word "authorisation"), the important thing is that it produces the effects of Article 96 and follows the common legislative procedure in its processing (Art. 156 of the Rules of Procedure of Congress) with the following special features: a request from the Government sending the Government's agreement, the text of the treaty and the reservations and declarations that the Government intends to make, all within a period of 90 days, extendable to 180 (Art. 155 of the Rules of Procedure of Congress); processing as a law with the special features in relation to the agreements referred to in Article 156 of the aforementioned Rules of Procedure, and processing in the Senate in accordance with Article 144 of its Rules of Procedure. However, the fundamental difference with the legislative procedure is found in the case of discrepancies between Congress and the Senate. In this case, both Article 145 of the Senate's Rules of Procedure and Article 158 of the Rules of Procedure of the Congress establish that the discrepancies will be dealt with by the Joint Committee provided for in Article 74.2 of the Constitution. This Commission must present a text that will be voted on by both Houses. If either of them does not approve it, the final decision rests with Congress by absolute majority.

Notwithstanding all of the above, it is important to bear in mind STC 155/2005, of 9 June, by which the Constitutional Court partially upheld the appeal of unconstitutionality filed against Law 13/1999, of 21 April, on Spain's accession to various International Monetary Fund Agreements. In it, the High Court points out that article 74.2 of the Constitution establishes a specific parliamentary procedure, distinct from the ordinary legislative procedure, characterised by the fact that the Senate's position is strengthened. This procedure, the Constitutional Court adds, is the only valid one for granting the authorisation envisaged in article 94.1 of the Constitution, and at the same time, such authorisation must be its sole purpose, being inappropriate for the formation of other parliamentary wills, for which the ordinary mechanisms will be used.

2.3.- THE DECISION-MAKING PROCESS OF INTERNATIONAL ORGANISATIONS AND THE DEBATE IN SPAIN

The decision-making process in international organisations that develop international tax rules varies depending on the organisation and the particular project being developed. However, in general, the processes usually follow the following steps:

- **Research and consultation:** International tax standard-setting organisations often have teams of tax experts who conduct research and consultation with different stakeholders, such as governments, businesses, civil society organisations and other experts. This stage is crucial to understand the needs and challenges of different stakeholders.

- **Drafting: Once** research and consultations have been compiled, drafts of the tax rules to be established are prepared. These drafts may be subject to review and revision before they are adopted.

- **Public consultation:** International organisations often subject draft tax standards to public consultation, so that different stakeholders can provide feedback on them. This can help to identify potential problems or limitations in the standards and improve their quality.

- **Approval: Once** all the opinions received during the public consultation have been considered, the tax rules are approved. This approval can be carried out by different bodies of the international organisation, depending on its structure and functioning.

- **Implementation:** Once approved, tax standards must be implemented by the member countries of the international organisation and/or by the companies that are affected by them. In some cases, international organisations may provide technical and financial support to countries to enable them to implement the standards.

By way of illustration, we will now focus on describing the decision-making process in the OECD and UN organisations, both of which are the most important organisations in the tax field.

The OECD's decision-making process in the tax area usually involves a committee of experts, which conducts a technical analysis of the issue at hand. The committee then submits a report with its findings and recommendations to a working group, which may be a specific BEPS working group or the OECD's Committee on Fiscal Affairs. If the working group considers it necessary, it may request the opinion of other OECD technical committees. These groups may be composed of technical experts from OECD member countries and other partner jurisdictions.

Once the working group has reviewed the report and agreed on recommendations, it is presented to OECD member countries for discussion and adoption. The adoption of an international tax standard in the OECD generally involves the signing of a multilateral agreement by member countries. A consultation process is initiated, in which information is gathered on countries' tax practices and areas where new standards or updates to existing ones may be needed are identified. An interim report is produced with initial proposals, which is subject to public consultation and feedback from stakeholders such as business, civil society groups, academia and other international organisations.

The interim report is reviewed and updated based on the comments received and a final report is prepared and submitted to the OECD Tax Committee. The OECD Tax Committee, which is composed of tax representatives from OECD member countries and other partner jurisdictions, evaluates and discusses the final report and decides whether it should be approved. If the final report is approved, it is submitted to OECD member countries and other partner jurisdictions for implementation in their national legislation.

At the UN, the decision-making process in tax matters may vary depending on the UN body involved in the drafting of the legislation in question. For example, in the UN Commission on Economic and Social Affairs (ECOSOC), different working groups and specialised committees have been set up to deal with international tax issues. These working groups are usually composed of technical experts and government representatives from UN member countries and other relevant international organisations. The international tax standard-setting process at the UN usually involves the following steps:

1. Priority issues are identified and a working group or specialised committee is established to address them.
2. A public consultation process is launched to gather information on countries' tax practices and identify areas where new rules or updates to existing rules may be needed.
3. An interim report is produced with initial proposals, which is subject to public consultation and feedback from stakeholders such as business, civil society groups, academic institutions and other international bodies.
4. The interim report is reviewed and updated based on comments received and a final report is prepared and submitted to the relevant UN body.
5. The relevant UN body, which can be ECOSOC or any other specialised UN body, evaluates and discusses the final report and decides whether it should be adopted.
6. If the final report is approved, it is submitted to UN member states for implementation in their national legislation.

Is the legitimacy of the procedure in question?

There are debates and discussions in Spain about the legitimacy of the decision-making process followed by international organisations in the elaboration of international tax rules. Criticism of these international organisations mainly revolves around the following premises:

A. **Lack of representativeness: the** representativeness of these organisations has been questioned, arguing that decision-making is concentrated in a limited number of countries or actors and that others do not have a significant qualified voice in the decision-making process. In turn, the disparity of countries and powers whose economies are at different stages makes it difficult for emerging countries to have a real say and they are the most disadvantaged when implementing the fiscal policies agreed within these organisations.

B. **Lack of transparency:** It has been pointed out that the decision-making process in these organisations is opaque and that there is a bias towards the interests of big business and the most powerful countries.

C. **Lack of legitimacy: it** has been argued that the lack of transparency and representativeness of these organisations limits their legitimacy and that measures should be taken to increase the participation and representation of all countries and actors involved, especially civil society.

D. **Lack of effectiveness: the** effectiveness of the international tax rules developed by these organisations has been questioned, arguing that they may not be appropriate for all situations and may have negative consequences in some countries or sectors[46] .

Some positions argue that international organisations are undemocratic because they do not have a direct mandate from citizens and taxpayers -the subjects on which these policies are applied-, so their decision-making process may not adequately reflect the interests of the countries and people affected by these decisions. However, this would be an indirect democracy in Spain, since national sovereignty resides in the Parliament, whose

[46] An example of this is the increase in corporate profits despite tax increases. This position was strongly criticised in: Astor, Daniela, and Fernán Gómez. "Tech giants pay less tax in Spain despite earning more." El País, 24 March 2019, https://elpais.com/economia/2019/03/23/actualidad/1553356818_774885.html.

election is based on the vote of the citizens. However, the existing social debate on the Spanish electoral law and the current configuration of democratic institutions call into question their legitimacy and whether they truly represent the interests of taxpayers or the interests of the Treasury.

This is the case of some civil society organisations[47] and political parties, which have questioned the legitimacy of the decision-making process of international tax bodies. Several organisations such as Oxfam, Tax Justice Network, Global Alliance for Tax Justice, among others, have been calling for years for greater transparency and citizen participation in the elaboration of international tax rules. These organisations argue that these bodies are not democratic and that their decisions do not adequately reflect the interests and needs of the countries and people affected by them, especially countries with weaker economies, a high level of public debt or developing or emerging countries. In most cases, these organisations are dominated by a small group of countries or powerful actors - see G7 or G20 - with the result that other countries or actors have little or no voice in the decision-making process.

This has led to questions about the legitimacy of these organisations, as their decisions do not necessarily reflect the interests and needs of all parties involved, or even of society as a whole, and the state is seen as complicit in abusive fiscal behaviour[48] .

In addition, the lack of transparency in decision-making has also contributed to the lack of legitimacy of some international organisations responsible for international tax rule-making. When the decision-making process is not transparent, it is difficult for stakeholders to know the details of decisions and to understand how they were made. This can lead to the perception that decisions were taken on the basis of particular interests rather than the general interest. In addition, there is a lack of updating and information to the public regarding the decisions that are taken and, as we will see, the authorities representing the countries in the working committees are not subject to a public mandate and appointment, but rather the government body acts in an internal procedure that does not see the public light.

By way of example, some left-wing political parties in Spain have criticised Spain's participation in international tax rule-making in the OECD and the G20, arguing that these

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[47] For example: Oxfam Intermón. "The impact of international tax policies on tax justice". 2019.

[48] Velayos, Fernando. "The significance of Luxleaks in the fight for tax transparency." El Diario, 16 November 2014, https://www.eldiario.es/agendapublica/proyecto_europeo/significado-luxleaks-lucha-transparencia-tributaria_1_4513422.html

organisations are controlled by the interests of countries with largely consolidated economies and large business corporations. In 2020, then Spanish presidential candidate Pablo Iglesias criticised Spain's participation in the OECD and claimed that the organisation promotes policies that favour large corporations and harm citizens and small businesses[49] . In 2018, then Podemos deputy Rafael Mayoral stated that the OECD is an organisation that "*defends the interests of large corporations"* and that its policies are aimed at *"favouring tax evasion by large companies"*[50] .

Particularly relevant were the statements of the then Secretary General of Podemos, Pablo Iglesias, who criticised Spain's adherence to the OECD's Framework for Action against Base Erosion and Profit Shifting (BEPS), arguing that this framework is not sufficient to end tax evasion and that Spain should adopt more radical measures to combat this problem[51] .

On the other hand, some argue that international bodies have experts and representatives from different countries, which allows for more objective and impartial decision-making, as well as the ability to coordinate and collaborate on complex and global issues, such as the fight against tax evasion or the establishment of international tax standards[52] . In general, the discussion on the legitimacy of the decision-making process in international bodies is a complex and varied issue, involving different perspectives and opinions. Ultimately, legitimacy will depend on the perception of citizens and national authorities; on the ability of international organisations to address the needs and concerns of society; and on the countries subject to their policies.

As noted above, the lack of transparency of these international tax standard-setting organisations has been criticised. In particular, the opacity of decision-making in some

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[49] Público, *"Podemos denounces the lack of transparency of the OECD and its role in the tax avoidance of large companies"*, (9 October 2020); Eldiario.es. "*Podemos charges against Sánchez's agreement with the OECD for the tax privileges of large companies"*, (7 October 2020).

[50] Europa Press. *"Mayoral (Podemos) calls for investigation of tax havens to 'recover what was stolen'"*, (23 January 2018).

[51] These statements were made in an intervention in the session of control of the Government in the Congress of Deputies on 13 March 2019. From minute 1:08:40: https://www.congreso.es/web/guest/actividadparlamentaria/sesionesplenarias/detalle?date=2019-03-13&legislatura=13&codSesion=47

[52] For example, Angel Gurría, former Secretary-General of the OECD: In various statements and speeches, Gurría has stressed the importance of international tax rules to promote tax transparency and fairness around the world. According to Gurría, the OECD is a legitimate organisation representing the interests of its member countries, working to ensure effective and fair tax co-operation between countries.

international organisations such as the OECD[53] and the G20 has been criticised. In the Spanish context, it has been pointed out that the lack of transparency in these international organisations can have significant consequences on the country's tax policy and on the distribution of the tax burden between companies and citizens. For this reason, some groups and organisations have called for greater transparency in decision-making and greater participation of civil society in the international tax rule-making process.

As a result, some international organisations have brought the legitimacy debate within their own headquarters. Thus, at the United Nations Conference on Trade and Development (UNCTAD), the lack of representativeness and transparency in the decision-making of some international organisations responsible for international tax rule-making has been discussed. UNCTAD's annual Trade and Development Report 2019[54] mentions the need to improve transparency and the inclusion of civil society in decision-making processes. At the OECD Tax Forum, the need to improve the representativeness and inclusion of civil society in decision-making has been discussed. At the OECD Tax Forum meeting in 2019, it was agreed that work should be done on improving inclusiveness and transparency in OECD decision-making and on the need to involve civil society in decision-making processes.

Within the European Commission, the need for increased transparency and citizen participation in tax decision-making has been discussed. In 2020, the European Commission published a communication[55] highlighting the need for greater transparency and citizen participation in tax decision-making processes. In this regard, some international initiatives, such as the OECD's BEPS (Base Erosion and Profit Shifting) initiative, have included certain transparency and participation mechanisms to address these concerns.

Some countries, such as Norway and the Netherlands, have shown support for greater transparency and participation in international tax rule-making. For example, Norway has established an initiative called "Tax for Development", which seeks to promote greater transparency in international tax agreements and to encourage the participation of developing countries in tax decision-making. However, there are still criticisms about the effectiveness of these measures and the need for further work on strengthening transparency and citizen participation in international tax rule making.

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[53] Attac Spain. "*The OECD's opacity in the fight against tax avoidance"*. 2019.

[54] "Trade and Development Report 2019." UNCTAD, https://unctad.org/es/publication/informe-sobre-el-comercio-y-el-desarrollo-2019.

[55] New tax transparency rules for digital platforms, 1 December 2020, https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2253.

3. SPAIN'S REPRESENTATIVES IN INTERNATIONAL ORGANISATIONS WITH FISCAL POWERS.

As noted in previous sections, foreign policy is the responsibility of the Government and is regulated in the constitutional text -articles 97 and 149.1.3 EC-, as well as in Law 2/2014, of 25 March, on State Action and the Foreign Service. This same law, in its Tenth Additional Provision, specifies the appointment and dismissal of the staff of the Permanent Representation of Spain to the European Union: *"The appointment and dismissal of the staff of the Permanent Representation of Spain to the European Union shall be carried out in accordance with the provisions of Article 4 of Royal Decree 260/1986, of 17 January, which created the Permanent Representation of Spain to the European Communities".*

In other words, the exercise of foreign policy is fundamentally exercised by the Spanish Government with the ratification of international treaties in the Congress of Deputies. This is reflected in Law 50/1997 of 27 November 1997 on the Government. Article 1.1 states that *"The Government directs domestic and foreign policy, civil and military administration and the defence of the State. It exercises the executive function and regulatory power in accordance with the Constitution and the laws.* The Government is made up of members who meet in the Council of Ministers or in Government Delegate Commissions. All of this is regulated by the LTAI, as mentioned above.

Therefore, the competent body for appointing Spanish delegates to international organisations is the Council of Ministers, as well as for deciding: *"d) To agree on the negotiation and signing of international treaties, as well as their provisional application".*[56] However, in tax matters, this law is complemented by the aforementioned Royal Decree 682/2021, of 3 August, which gives the Directorate General for Taxation the power to *"negotiate and apply agreements to avoid double taxation, those concerning the tax regulations contained in international treaties and work relating to the Organisation for Economic Cooperation and Development and the European Union in the tax sphere".* Therefore, the appointment in this area is made by the Minister of Finance, Maria Jesús Montero Cuadrado, as she is the current Minister, following a proposal by the current Director of the Directorate General for Taxation, María José Garde Garde[57] .

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[56] Article 5.1.d) of Law 50/1997 of 27 November 1997 on the Government.

[57] Appointed by: A-2018-10263 Royal Decree 923/2018, of 20 July, by which María José Garde Garde is appointed Director General of Taxes". BOE.es, 20 July 2022, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-10263.

In addition, within the Directorate General for Taxation, the Subdirectorate for International Taxation[58] exercises the powers outlined in Article 5.1.d) of Royal Decree 682/2021, among other bodies depending on the subject assigned to each Subdirectorate. Therefore, the different subdirectorates divided by subject, according to the sections of Article 5.2 of this Royal Decree, assist the Subdirectorate for International Taxation when the latter undertakes the negotiation of a treaty or agreement in the international sphere. Notwithstanding the above, the Ministry of Foreign Affairs is usually a co-protagonist in these procedures and is also authorised to sign international treaties and agreements. All of this is in line with Article 58.4 of Law 40/2015: *"The Directorates General are organised into Sub-Directorates General for the distribution of the competences entrusted to them, the performance of their own activities and the assignment of objectives and responsibilities. Without prejudice to the foregoing, Sub-Directorates General may be directly attached to other higher-level management bodies or to higher bodies of the Ministry".*

Spain's delegates/representatives in international organisations with taxation competences vary depending on the organisation in question and may change over time. However, at present, some of Spain's representatives in international organisations with tax competence are as follows: In the OECD, Spain's main representative is the Director General of Taxation of the Ministry of Finance. There are also other members of the Directorate General for Taxation and the Ministry of Foreign Affairs team who represent Spain in different OECD Working Groups related to taxation.

In the Inclusive Framework on BEPS (Base Erosion and Profit Shifting), the representative of Spain is the Director General of Taxation of the Ministry of Finance. Other members of the Directorate General for Taxation team also participate in the meetings and working groups of the Inclusive Framework. In the European Union, Spain is represented in tax matters by the Director General of Taxation and the Director General of European Affairs of the Ministry of Foreign Affairs. There are also other team members from the Ministry of Finance and other government departments working on European tax issues.

At the UN, Spain also has representatives on tax matters. In particular, Spain is represented in the UN Committee of Experts on International Cooperation in Tax Matters (CECAFI), which is an intergovernmental forum dealing with international cooperation in tax matters. Spain's representative on the CECAFI is the Director General of Taxes of the Ministry of Finance, and is accompanied by other members of the Directorate General of Taxes team. In addition, Spain is also represented in the Working Group on Taxation of the

[58] According to Article 5.2.i) of Royal Decree 682/2021 of 3 August.

UN Economic and Social Council, which is an intergovernmental body dealing with economic and social issues.

In the Working Group on Taxation, Spain is represented by the Director General of Taxation and the Director General of European Affairs of the Ministry of Foreign Affairs, together with other tax experts from the public and private sector. It is important to note that Spain's representation at the UN on tax matters may vary over time, depending on the priorities and needs of the Spanish government.

In the case of Spain, the appointment of delegates to OECD meetings and working groups on tax matters, as well as to other international organisations, is the responsibility of the Ministry of Foreign Affairs, European Union and Cooperation. The process of appointing delegates is carried out by the Ministry of Foreign Affairs in coordination with the Ministry of Finance. Generally, the appointed delegates are experts in tax matters and have experience in the international arena.

As for the appointment of delegates to specific OECD working parties, such as the Working Party on Fiscal Affairs (Working Party No. 6), they are appointed by the OECD Committee on Fiscal Affairs, in which Spain has a seat. Delegates are appointed for a fixed term and can be renewed at the end of that term if deemed necessary. It is important to mention that, although the appointment of delegates is a government competence, they act as representatives of the country in international meetings and working groups and not as personal representatives. This means that the delegates must follow the guidelines and objectives set by the Spanish government on tax matters and must report regularly on the results of the meetings and working groups in which they participate.

3.1.- DELEGATION OF POWERS AND RESPONSIBILITY

In Spain, the delegates who represent the country in the negotiation of double taxation treaties are appointed by the Ministry of Foreign Affairs, European Union and Cooperation. The selection process for delegates is based on experience and technical competence in tax and fiscal matters, as well as knowledge of international regulations and the tax policies of other countries.

In general, the delegates are usually civil servants from the Spanish tax administration, belonging to the State Tax Administration Agency (AEAT) or the Directorate General of Taxes of the Ministry of Finance and Public Administrations. They may also be experts in tax law or representatives of Spanish companies with experience in international business management and in the application of international tax agreements. In any case,

the appointed delegates must have the approval of the Council of Ministers prior to their participation in the negotiation of double tax treaties. In general, delegates are appointed by a decree or resolution of the Council of Ministers, which designates the representatives who will participate in the negotiation of the DTA with the country concerned. This act establishes the functions and responsibilities of the delegates, as well as the instructions for conducting the negotiation.

Once appointed, the delegates must follow the instructions received from the Ministry of Finance and Public Administrations and act at all times in the interest of the Spanish State. They must also comply with the obligations and responsibilities established in Spanish legislation and international agreements on tax matters.

The responsibility of delegates representing Spain in the negotiation of double taxation treaties and the possible sanctions they may receive in the event of non-compliance are regulated in different regulations. Firstly, Article 6 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, establishes: "*1. Administrative bodies may direct the activities of their hierarchically dependent bodies by means of instructions and service orders. When a specific provision so establishes, or when it is deemed appropriate due to the addressees or the effects that may be produced, the instructions and service orders shall be published in the corresponding official gazette, without prejudice to their dissemination in accordance with the provisions of Law 19/2013, of 9 December, on transparency, access to public information and good governance. 2. Failure to comply with instructions or service orders shall not in itself affect the validity of the acts issued by administrative bodies, without prejudice to any disciplinary liability that may be incurred".* This, in turn, is consistent with Article 55.9 of the same law: *"It is the responsibility of the higher bodies to establish the action plans of the organisation under their responsibility and of the management bodies to develop and implement them".*

The appointment, dismissal and accreditation of Foreign Service personnel is regulated in Article 57 of the Foreign Service Action Act:

1. Posts whose holders must be accredited as diplomatic or consular staff shall be filled by the procedure of free appointment, by civil servants, or by the procedures for the filling of such posts by reason of their belonging to a corps with functions attributed exclusively to it.

2. Appointment shall be made by the department of dependence, on the basis of criteria of professional competence and experience in accordance with its specific regulations and with the principles of equality, merit and ability. Their removal shall also be the responsibility of the corresponding department.

3. Accreditation of Foreign Service personnel to the receiving State or to the international organisation, as the case may be, shall be the responsibility of the Minister of Foreign Affairs and Cooperation.

However, these specific mandates for delegates are not usually published in the BOE and, if they are published in the "Council of Ministers" section of the Moncloa website[59] , there is no publication as such. Rather, as a result of the legal provisions, the competent bodies and authorities believe that they have sufficient legitimacy to carry out the negotiation of a treaty or convention, despite the fact that there is a clear lack of transparency, which dynamites any legal justification because it does not stand on its own, if there is no publication of the process. As a result, the content of the mandate of the Spanish State's representatives in international organisations is not known, nor is it clear when Spain agrees to negotiate bilateral provisions on tax matters, nor is it clear what the role of the officials who carry out these actions is.

Spain's delegate to international tax organisations is responsible for representing Spain in negotiations and decisions related to international taxation in these organisations. This involves participating in meetings and discussions on tax and economic issues, negotiating tax agreements and treaties with other countries, and collaborating with other members of the organisation in the development of international tax policies and rules. In addition, the Spanish delegate is also responsible for reporting to the Spanish government on relevant developments and decisions in the organisation, and for co-ordinating Spain's position with that of other member countries on international tax issues. However, there is no duty to provide explanations in Parliament and this channel of information between the government and the delegate is usually relegated to the private sphere where there is no public exposure of the tasks of these delegates.

As we have seen, both Law 40/2015 and Article 56 of the Law on State Action and Foreign Service provide for the responsibility of these delegates and/or representatives. Let us look at the case of the latter law:

1. The Inspectorate of the Services of the Foreign Service shall be under the authority of each ministerial department. In certain cases, it may be entrusted to the Inspectorate General of the Ministry of Finance and Public Administrations, without prejudice to the application of its specific regulations. Regulations shall determine the form and cases in which such entrustment may be carried out.

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[59] "La Moncloa. 27/12/2022. Referencia del Consejo de Ministros [Council of Ministers/References]." La Moncloa, 27 December 2022, https://www.lamoncloa.gob.es/consejodeministros/referencias/Paginas/2022/refc20221227.aspx.

Without prejudice to the reporting line to the Head of Mission, disciplinary authority shall be exercised by the department to which the public servant reports.

Here we can see how the competence of these appointments is blurred between the Ministry of Foreign Affairs and the Ministry of Finance, so that, on occasions, members of the Ministry of Foreign Affairs are chosen to sign agreements on tax matters when, due to the subject matter, these people would not be competent because they do not have the necessary technical knowledge.

3.2.-APPOINTMENT AND MANDATE OF REPRESENTATIVES OF INTERNATIONAL TAX ORGANISATIONS.

The appointment of representatives of international tax organisations varies according to the organisation in question. In general, in the case of the OECD, for example, representatives are appointed by the member governments of the organisation themselves. As for the veto power or majority mechanism, this also depends on the organisation. In the UN, for example, there is the veto power in the Security Council, which gives the five permanent members (the United States, Russia, China, the United Kingdom and France) the right to veto any resolution they consider contrary to their interests. In the case of the G-7, as an informal organisation, there is no formal veto mechanism, but the opinion of the most influential members can carry great weight in decision-making.

In the case of the Inclusive Framework, decisions are made by consensus among members, so there is no formal veto power in place. However, consensus can be difficult to reach and some members may exert more influence on decision-making than others because of their economic or political weight in the organisation. International tax organisations, such as the OECD, the IMF or the World Bank, generally work under a mandate given by the member countries that make up the organisation. This mandate can take different forms, such as international agreements, resolutions or conventions, which set out the specific areas in which the organisation has powers and responsibilities to act.

In the case of the OECD, its mandate is to develop standards and guidelines in various tax areas, such as the fight against tax evasion, international tax co-operation or the development of measures to prevent base erosion and profit shifting (BEPS). These standards are developed through a consensus process among OECD member countries and other participants. The IMF and the World Bank have broader mandates that include, in addition to fiscal policy, areas such as financial stability, economic development and poverty reduction.

In the case of the IMF, its mandate is to promote international economic and financial stability, including advice and technical assistance to member countries. In the case of the World Bank, its mandate is to support the economic and social development of developing countries, including the financing of projects in different areas. In terms of the differences between international tax organisations, each has a specific focus and mandate, although there are areas of overlap. The OECD, for example, focuses on tax policy and international cooperation in this area, while the IMF and the World Bank have broader mandates that include economic development and financial stability.

In the case of the UN, the authority to set tax rules is more limited than in the case of the OECD. Although the UN has a Committee on Fiscal Affairs, its mandate is limited to *"serving as an inclusive and effective intergovernmental forum for technical cooperation on international tax matters and as a source of advice for developing and other countries in tax policy making and tax capacity building"*[60] . The Commission can develop recommendations and guidelines, but these are not binding and their adoption depends on the approval of Member States. In general, it can be said that international tax organisations such as the OECD have a broader mandate and power to set tax rules, while in the case of the UN their role is more limited and focused on technical cooperation and tax policy advice.

In the case of the G-7, leaders meet annually to discuss economic issues and policy cooperation in various areas, including taxation. The G-7 has agreed on measures to combat tax evasion and aggressive tax planning, such as the automatic exchange of tax information and the adoption of international tax standards. However, any specific action would require the approval of individual member countries. For its part, the G20 has a broader focus on economic and financial issues, and has addressed taxation as part of its agenda on several occasions. In particular, the G20 has agreed on measures to tackle tax evasion and tax avoidance, including the promotion of tax transparency and the exchange of information between countries. As in the case of the G-7, any specific measures would require the approval of individual member countries.

3.3.- THE DECISION-MAKING PROCESS AT THE INTERNATIONAL LEVEL

The process of tax policy development in international tax organisations may vary depending on the organisation and its specific mandate, but generally includes a number of stages. Generally speaking, the process of tax policy development in these organisations may involve the organisation's initiative or a response to a request from member countries.

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[60] UN. "What is Financing for Sustainable Development? Financing for Sustainable Development Office." the United Nations, https://www.un.org/development/desa/financing/es/about/what-financing-sustainable-development.

These organisations usually follow a process of initiative, discussion, participation, decision-making and follow-up of results.

The initiative process refers to how the tax policy issue to be addressed by the organisation is identified. In some organisations, the issue may be initiated by a member of the organisation or a group of members, while in others it may be initiated by the secretariat or technical staff. Once the issue has been initiated, the discussion process begins. This involves discussion and analysis of the issue by members of the organisation, as well as the collection of relevant information and data. The discussion process may include holding meetings and conferences, publishing reports and studies, and consulting with external experts and stakeholders.

The involvement of members in the decision-making process varies from organisation to organisation. In some organisations, a consensus of all members is required to approve a tax policy measure, while in others decisions are taken by simple or qualified majority. The decision-making process may also include the adoption of interim measures or pilot testing prior to the adoption of final measures. Once tax policy measures have been adopted, the results are monitored to assess their effectiveness and to make adjustments if necessary. Accordingly, international tax organisations often use a consultative and collaborative decision-making process involving experts and representatives of member countries. Tax policy recommendations are usually presented to member countries for consideration and countries are expected to take action to implement them. The following are some of the typical stages of the fiscal policy development process in some of the international tax organisations:

- **OECD:** The OECD has a wide range of working groups and committees dedicated to tax policy. These groups may work on specific initiatives or may respond to requests from member countries. In general, the tax policy development process at the OECD involves the identification of tax policy challenges, data collection and research, analysis of best practices and the development of tax policy recommendations. These recommendations are presented to member countries at high-level meetings.

- **IMF:** The process of fiscal policy development at the IMF involves conducting a comprehensive assessment of a particular country's economic and fiscal situation. The IMF conducts a detailed assessment of the country's economy, including its fiscal situation, and provides specific recommendations to improve the country's fiscal policy. These recommendations are presented in the context of the IMF's surveillance programme.

- **UN:** The UN has several agencies and programmes that focus on fiscal policy. The tax policy development process at the UN involves research and analysis of global fiscal problems, identification of common country challenges and the development of tax policy recommendations to address these challenges. These recommendations are presented to member countries at the UN General Assembly.

- **G-7 and G-20:** The G-7 and G-20 groups include the finance ministers and central bank governors of member countries. The process of fiscal policy development in these groups involves informal discussions and high-level meetings to address global fiscal issues and coordinate member countries' fiscal policies. Discussions may include identifying common fiscal policy challenges, exchanging information and discussing fiscal policy solutions.

Differences in tax policy development processes can be seen between international tax organisations such as the OECD, the IMF and the World Bank. For example, the OECD tends to focus on fiscal policies for developed countries and uses a more research-based approach and the development of best practices at the national level. The IMF, on the other hand, tends to focus on macroeconomic stability and fiscal policy for developing countries, and uses a more prescriptive approach, often in the form of conditional lending. The World Bank, on the other hand, focuses on poverty reduction and economic development, and uses a more country-oriented approach to fiscal policy implementation.

In terms of decision-making processes, in the OECD, member countries have an important role in fiscal policy-making through reporting and participation in working groups, although the OECD Secretariat has primary responsibility for policy development and decision-making. At the IMF, the Executive Board, composed of representatives of member countries, is responsible for approving fiscal policies and lending programmes. At the World Bank, the Board of Directors, also composed of representatives of member countries, is responsible for approving fiscal policies and lending programmes.

3.3.1.- THE ROLE OF THE G7 AND THE G20

As has been stated, Spain is not a direct member of the G-7 or the G-20. The G-7 and G-20 are groups of countries that meet regularly to discuss global economic and financial issues. The G-7 is composed of the seven most industrialised countries in the world: the United States, Canada, the United Kingdom, France, Germany, Italy and Japan, while the G-20 includes the members of the G-7 plus thirteen other major countries from around the world, including China, India, Brazil, Mexico and South Korea. These groups play

an important role in global economic and fiscal policy-making, and their political agreements can have important legal and political consequences for Spain and other countries. For example, G20 agreements on measures to combat tax evasion may have important implications for the tax policies of Spain and other countries, as well as for multinational companies.

In general, international tax organisations, such as the IMF, the World Bank, the OECD and the United Nations, aim to promote international cooperation on tax matters and to improve the efficiency and fairness of tax systems around the world. These organisations work closely with governments and other interest groups to develop tax policies and recommendations, and their work can influence national policy-making around the world. Political agreements reached in international tax organisations such as the G-7 or the G-20 do not have a direct effect on Spanish law, as they are not binding. However, these agreements can have a significant impact on Spain's economic and fiscal policy, as these organisations influence policy formulation and decision-making at the international level.

For example, the agreements reached in the G20 on tax coordination and the fight against tax evasion have influenced Spanish tax policy and have led to the adoption of measures to strengthen transparency and cooperation in tax matters. Likewise, Spain's participation in these organisations allows it to have a voice in the discussion of tax issues at the international level and to defend its national interests in this area.

3.3.2.- THE INCLUSIVE FRAMEWORK

The Inclusive Framework is a multilateral forum established by the Organisation for Economic Co-operation and Development (OECD) in 2016, which seeks to engage countries around the world in the development of international tax standards and to promote co-operation and co-ordination among them. The Inclusive Framework aims to enable the participation of countries that are not members of the OECD, and more than 140 countries have joined.

The Inclusive Framework plays an important role in international tax standard setting, discussing issues relevant to international taxation and promoting globally agreed solutions. For example, the Inclusive Framework has worked on the implementation of the BEPS (Base Erosion and Profit Shifting) Action Plan, which aims to prevent tax evasion by multinational companies and tax avoidance. Spain participates in the Inclusive Framework, and has been active in its meetings and work. In the framework of the BEPS Plan, Spain has led the initiative to establish a digital tax at European level, and has worked on the

development of measures to prevent tax avoidance in relation to intellectual property and patents.

The legal and political consequences of the policy agreements reached in the Inclusive Framework for Spain may be diverse, depending on the nature and scope of such agreements. In general, these agreements may lead to changes in Spain's tax legislation and regulations to ensure conformity with agreed international standards, and may affect Spanish companies and citizens who carry out economic activities and transactions internationally.

3.3.3.- DEBATE ON THE LEGITIMACY OF INTERNATIONAL ORGANISATIONS.

The degree of participation and representativeness of member countries in these processes, as well as transparency and fairness in the elaboration of international norms and standards, are commonly discussed. In particular, some quarters may argue that decision-making processes in international bodies do not ensure a balanced participation of countries, and that this may affect the legitimacy of the norms and standards that are developed. Others may argue that decision-making processes in international bodies are necessary to ensure the coherence and effectiveness of fiscal policies at the global level.

An example of a debate on the legitimacy of decision-making processes in international organisations could be the one that took place in the Spanish Congress of Deputies in September 2020[61] , when the ratification of the Multilateral Convention on the Application of Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), developed by the OECD, was discussed. During the debate, some MEPs questioned the legitimacy of the OECD as an international organisation to set global tax rules and called for more democratic control over decision-making in this area. Other MEPs, on the contrary, defended the need to participate in international bodies to contribute to the design of international tax rules and to combat tax evasion.

This debate reflects the existence of different positions on the legitimacy of decision-making processes in international organisations, such as the OECD, and how Spain's participation in these organisations may affect its tax policy and democracy. During the debate in the Spanish Congress of Deputies in September 2020 on the ratification of the Multilateral Convention on the Application of Tax Treaty Related Measures to Prevent Base

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[61] "Diario de Sesiones de la Comisión de Asuntos Exteriores." *Congreso de los Diputados*, 24 September 2020, https://www.congreso.es/public_oficiales/L14/CONG/DS/CO/DSCD-14-CO-155.PDF.

Erosion and Profit Shifting (BEPS), some MPs expressed their views on the legitimacy of the OECD and decision-making processes in international organisations.

For example, the Member of Parliament for Unidas Podemos, Alberto Montero[62] , stated that "the OECD does not represent citizens or states, but the interests of large multinationals" and that the adoption of the measures proposed in the BEPS was done without due democratic control. On the other hand, the member of the Partido Popular, Ana Madrazo[63] , defended the need to participate in international organisations and stressed the importance of having global tax rules to combat tax evasion and guarantee equality between companies. Another example of debate on the legitimacy of decision-making processes in international bodies was given in relation to Spain's accession to the OECD's Inclusive Framework in 2018.

Sergio Pascual, a member of the parliamentary group Unidos Podemos, questioned the legitimacy of the OECD, stating that *"the OECD is not a democratic organisation, but rather an organisation of countries that have a lot of economic power and that does not represent the majority of countries in the world"*. Pascual also pointed out that the OECD is not transparent in its decision-making process and that the proposals adopted in this area favour large multinational companies to the detriment of citizens' interests. On the other hand, the deputy of the Partido Popular parliamentary group, Juan Bravo, defended Spain's adhesion to the Inclusive Framework and stressed the importance of participating in international organisations in order to be able to influence the decisions that are taken at a global level in tax matters.

The Spanish government has on several occasions defended Spain's participation in international organisations and stressed the importance of collaborating with other countries in the development of international tax rules. In the specific case of the OECD's Inclusive Framework, the Government argued that Spain's membership would allow the country to participate in the design of international rules and decision-making in tax matters, and that this would be beneficial both for the country and for the international community as a whole. Furthermore, the Government has stressed that Spain's participation in these international bodies is subject to the principles of transparency and democracy, and that it is carried out in coordination with the rest of the countries of the European Union. In this respect, the Government has affirmed that Spain's participation in these bodies contributes to strengthening the country's position in the international arena and to guaranteeing the coherence and effectiveness of fiscal policies at the global level.

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[62] Ibid

[63] Op cit.

Another important debate that has taken place in Spain in relation to international tax bodies is that of the legitimacy of these bodies and the tax rules they draw up. On the one hand, some critics have questioned the legitimacy of these bodies, arguing that their decision-making is influenced by the most powerful countries and that the rules they draw up do not always reflect the interests of the least developed countries or the most vulnerable companies and citizens. On the other hand, advocates of international tax collaboration have argued that participation in international bodies allows countries to influence the development of international tax rules, and that this can help ensure greater transparency and cooperation between countries.

Overall, this is a complex and evolving debate, discussing issues such as representativeness and transparency in international decision-making, the need for greater cooperation and coordination between countries, and the protection of the rights and interests of citizens and businesses at the international level. Some well-known personalities who have expressed their criticism in this regard include Spanish economist and politician Ana Patricia Botín, who has argued that the lack of democracy in international decision-making can have negative consequences for the most vulnerable countries. More specifically, in an interview with the newspaper El País in November 2018[64] Ana Patricia Botín, president of Banco Santander, stated that *"decisions on taxation cannot be left only in the hands of international bodies"*. In the same interview, she also said that *"tax rules should be more transparent".* One can also mention Spanish politician Juan Carlos Monedero, who has been critical of the influence that lobbyists have on international tax rule-making[65] .

In July 2021, the Spanish Congress of Deputies held an appearance of the Minister of Finance and Public Function, in which various issues related to international taxation and the fight against tax evasion were discussed. At the hearing, the Minister announced the Government's intention to approve a set of measures to prevent tax avoidance by large multinational companies, including the implementation of a global minimum tax and the strengthening of the fight against tax havens. Also in September 2021, the Spanish Congress of Deputies approved a Proposición no de Ley presented by the Socialist Parliamentary Group, urging the Government to promote measures to ensure that large

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[64] "Botín charges against technology companies and demands that they pay their "fair share" of taxes." Cinco Días, 7 November 2018, https://cincodias.elpais.com/cincodias/2018/11/07/companias/1541585876_534947.html.

[65] Lanzafame, Sergio. "Counter-summit kicked off with strong criticism of the G-20." El Cronista, 19 November 2018, https://www.cronista.com/internacionales/Arranco-la-contracumbre-con-fuertes-criticas-al-G-20-20181119-0030.html.

multinational companies pay a fair amount of tax in the countries in which they operate, and to promote international coordination to combat tax evasion and tax avoidance.

4. HARD-LAW: THE POSITION OF SPANISH LAW

Spain is a system that has been described by the doctrine[66] as moderate monist, insofar as it recognises the primacy of international law over domestic law, albeit with certain limitations and nuances in which there is no discrepancy between the validity of the international norm and the validity of the domestic legal system, due to the principle of coherence. Article 96.1 of the Spanish Constitution of 1978 establishes that: *"international treaties validly concluded, once officially published in Spain, shall form part of the internal legal order".* In other words, there is no automatic and direct application of international law deriving from treaties in Spain. This is reflected in our Civil Code[67] in Article 1.5: *"The legal rules in international treaties shall not be directly applicable in Spain until they have become part of the domestic legal system through their publication in the Official State Gazette"*.

However, the rules of international law can have direct effect in the Spanish domestic legal system[68] , provided that the principle of hierarchy of norms is complied with and they are published in the Official Gazette of the Spanish State (BOE). In other words, the rules of the Treaties are obligations for the Spanish State when they enter into force in its legal system after their publication, acquiring the character of a direct and fully effective source[69] . Consequently, the international law contained in the treaties creates rights and obligations which are enforceable by individuals and can be invoked before judicial and administrative

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[66] However, the doctrinal debate has been particularly disruptive with regard to assuming a single position as peaceful. See evidence of this debate in: Sánchez Navarro, Ángel. "El control de convencionalidad en España y la jerarquía normativa de los tratados internacionales en el ordenamiento jurídico español". In: Revista de Estudios Políticos, n. 126, 2004, pp. 127-155. Carrillo Bonaire, Juan Antonio. "Los tratados internacionales en la Constitución española". In: Revista de Estudios Políticos, n. 83, 1994, pp. 29-57. Bassols Coma, Martín. "La recepción de los tratados internacionales en el ordenamiento jurídico español. In: Anuario de Derecho Internacional, n. 15, 1999, pp. 157-186. Fernández Liesa, Carlos. "La recepción de los tratados internacionales en el ordenamiento jurídico español". In: Anuario Mexicano de Derecho Internacional, n. 1, 2001, pp. 307-332.

[67] "A-1889-4763 Royal Decree of 24 July 1889 publishing the Civil Code." BOE.es, https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763.

[68] Especially in the case of international regulations governing matters such as fundamental rights or the environment. This has been established by our Constitutional Court in reiterated doctrine such as STC 53/2005, of 14 March; STC 199/2003, of 27 October and STC 20/2004, of 12 February.

[69] García, Javier, and Tiedra González. "Recepción de los Tratados Internacionales en España (artículo 96 Constitución)." Constitutional Law, 15 February 2015, https://www.derechoconstitucional.es/2015/02/recepcion-tratados-internacionales-articulo-96-constitucion.html.

bodies[70] . However, after their publication and ratification by the Congress of Deputies, they do not automatically become national law, but are admitted as superior norms by domestic legislation.

After the publication of the treaty in the BOE, any modification, repeal or variation in the norm must be republished in the Boletín and, periodically, the General Technical Secretariat publishes a kind of Resolution in which the treaties signed by Spain are accounted for. These modifications to treaties cannot be carried out unilaterally by the Spanish state, but rather, as established in Article 96.1 EC: *"Their provisions may only be repealed, modified or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law".* Consequently, international law takes precedence over Spanish national law.

The absence of publication of a treaty in force does not mean that it does not acquire legal effects. However, these will not be full in the Spanish State; they will not create rights or obligations for citizens, nor can the State Administration excuse itself in its own non-compliance or ignorance in order not to apply a treaty that Spain has signed; which, when the case arises, could lead to the Administration incurring patrimonial responsibility[71] .

4.1- THE DEFINITION OF AN INTERNATIONAL TREATY

The definition of International Treaty is found in the Spanish legal system in Law 25/2014, of 27 November, on Treaties and other International Agreements. Specifically, it is found in Article 2 under the heading "Definitions": "For *the purposes of this Law: a) "international treaty" means an agreement concluded in writing between Spain and one or more other subjects of international law, and governed by international law, whether it is contained in a single instrument or in two or more related instruments and whatever its name may be*.

This definition is consistent with Article 2 of the Vienna Convention on Treaties (VCLT)[72] , which defines a "treaty" as *"an international agreement concluded in writing between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".*

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[70] Ibid.

[71] Op cit.

[72] *Vienna Convention on Treaties*, 27 January 1980, https://www.oas.org/36ag/espanol/doc_referencia/convencion_viena.pdf.

4.2- THE INTERACTION OF INTERNATIONAL TAX TREATIES AND SPANISH LAW

As noted above, the interaction between tax treaties and Spanish domestic law is governed by the principle of the primacy of international law over domestic law. However, this recognition is not explicitly or directly recognised in our legal system, but is indirectly - but undoubtedly - stated in the Constitution in Article 96.1[73] . International tax treaties and conventions are incorporated into our legal system while maintaining their international nature; they are incorporated into Spanish law by publication in the Official State Gazette, so that their primacy over Spanish domestic law is based on their own merits and does not depend on constitutional recognition . [74]

The Spanish State, by virtue of its membership in the International Community, is subject to a series of obligations and commitments to the agreements and treaties to which it voluntarily submits, accepting their primacy. Article 96.1 EC establishes that a treaty cannot be modified, repealed or suspended unilaterally by a Spanish law, but only the parties and States that participated in the creation, negotiation and signature of the treaty can take such actions. Hence, the relationship between Spanish law and international law is not governed by the principle of hierarchy of norms that does govern the Spanish legal system, in accordance with the principle emanating from Article 9 of the Spanish Constitution. This principle establishes that discrepancies between a lower-ranking norm and a higher-ranking norm cannot contravene each other.

Discrepancies between the Spanish Constitution and treaties are resolved by means of mechanisms contemplated in the international order itself, such as reservations, when there are conflicting situations between the treaty and domestic law. In turn, our Constitution provides for the possibility of exercising prior control of constitutionality when there is doubt as to the conformity of a treaty to which the Spanish State intends to give its consent. This is regulated in Article 95.2 of the Spanish Constitution and is the exclusive competence of the Constitutional Court.

The same applies to international double taxation treaties. These treaties are not multilateral treaties like the Framework Convention or the OECD and UN Inclusive Framework respectively, but bilateral international normative instruments concluded between two signatory countries that freely and voluntarily express their wish to enter into an agreement to avoid international double taxation for taxpayers in both countries. The same

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[73] "9.4. La jerarquía de los Tratados en el Derecho español." Derecho UNED, https://derechouned.com/libro/internacional/3700-jerarquia-de-los-tratados-en-el-derecho-espanol.

[74] Ibid

provisions apply as for Treaties, since they have the same status and, therefore, the principle of primacy applies[75] . Thus, the Kingdom of Spain has signed 103 treaties to avoid double taxation, of which 99 are in force and the rest are at different stages of processing[76] . In turn, the renegotiation that has been carried out with different countries such as Austria, Belgium, Canada, China, Finland, India, Japan, Mexico, the United Kingdom and Romania should be highlighted[77] .

This renegotiation has been the subject of debate in the legislature. The effects of signing new tax treaties or amending old ones have been debated in the Spanish Parliament. As we have pointed out, tax treaties are international agreements between two countries to avoid double taxation and prevent tax evasion, and in Spain these agreements must be ratified by Parliament, in accordance with Article 94 EC. In recent years, several tax treaties have been discussed in Parliament, especially with countries considered tax havens, such as the agreement with Andorra in 2015 or the agreement with Panama in 2016. These agreements have been the subject of debate and criticism from some political parties and civil society organisations that consider them insufficient to combat tax evasion. There has also been debate about the need to amend some existing tax treaties to prevent tax evasion by multinational companies.

The Andorra convention signed in 2015 was criticised by some political parties and civil society organisations, which considered that it was not sufficient to combat tax evasion[78] , since the promised automation in the exchange of banking information between the Principality and Spain was delayed for a long time. This debate arose as a result of the numerous cases of corruption that occurred after the signing of this agreement and which, to this day, is still ongoing due to the phenomenon of "flight" of capital from new sectors of virtual entertainment and social networks: the "youtubers" and "influencers"[79] . Consequently,

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[75] See in this sense Article 5 of Law 35/2006, of 28 November, on Personal Income Tax and partially amending the laws on Corporate Income Tax, Non-Resident Income Tax and Wealth Tax: *"The provisions of this Law shall be understood without prejudice to the provisions of international treaties and conventions that have become part of domestic law, in accordance with Article 96 of the Spanish Constitution".*

[76]As stated in "Convenios de doble imposición. Ministerio de Hacienda y Función Pública, https://www.hacienda.gob.es/es-ES/Normativa%20y%20doctrina/Normativa/CDI/Paginas/cdi.aspx.

[77] Ibid

[78] La Rioja. "Andorra to clamp down on tax information until 2018." LaRioja.es, 11 April 2019, https://www.larioja.com/nacional/201501/09/andorra-pondra-trabas-informacion-20150109011426-v.html?ref=https%3A%2F%2Fwww.google.com%2F

[79] "End of the migration of youtubers to Andorra? Toughen the requirements." Okdiario, 29 January 2023,
https://okdiario.com/economia/fin-migracion-youtubers-andorra-requisitos-mas-duros-lograr-residencia-fiscal-10362231.

in 2018 the agreement with Andorra was amended and updated in 2021, and a new agreement was signed with Gibraltar to improve tax transparency and prevent tax avoidance.

By way of illustration, we highlight the intervention of Mr Nuet Pujals, Member of the Izquierda Plural Group, at the 276th Plenary Session held on Thursday 25 June 2015, regarding the vote on the Double Taxation Agreement with the Principality of Andorra[80] :

"We also have another problem with regard to the exchange of information. As you know, there has been a public dispute between the Principality of Andorra, some banking institutions, the Kingdom of Spain and its judiciary insofar as legal proceedings have been initiated against certain persons. In these two aspects there are a number of exceptions where the trap lies; in the exceptions there is the possibility that information problems still persist and that there are still artists and sportsmen and women who use the Principality of Andorra as a tax shelter to evade taxes in the Kingdom of Spain. I repeat, there have been improvements, and at the moment the collaboration is much better, the mechanisms are clearer, but there are still exceptions which, according to the agreement, will be subject to negotiation and interpretation. Therefore, due to a lack of clarity, there could be conflicts in the future and this could generate the kind of headlines that we have seen in recent weeks".

The same scornful fate befell the Double Taxation Avoidance Agreement between Spain and Panama, which was harshly criticised after the publication of the "Panama Papers" case[81] . In this regard, the intervention[82] by Mr Julián López Milla, member of the Socialist Parliamentary Group, stands out: *"If the Panamanian authorities have complied with the provisions of this agreement, we could ask the minister what the tax administration has done with the information it has received under this agreement. And if he answers that the Panamanian authorities have not complied, we could ask him why compliance with the provisions of the agreement has not been demanded. In that case, if the Spanish Government considers that the Panamanian authorities have not complied, we would like to know whether it is going to consider including Panama again on the list of tax havens, as, for*

[80] "Journal of Plenary and Permanent Deputation Sessions." Journal of Plenary and Permanent Deputation Sessions, 25 June 2015, https://www.congreso.es/public_oficiales/L10/CONG/DS/PL/DSCD-10-PL-293.PDF.

[81] "The before, now and possible aftermath of offshore jurisdictions: The "Panama papers" effect." The Law, 15 April 2016, https://elderecho.com/el-antes-el-ahora-y-el-posible-despues-de-las-jurisdicciones-offshore-el-efecto-de-los-panama-papers.

[82] Congreso de los Diputados, Comisiones, núm. 57, de 20/04/2016." congreso.es, 11 April 2019, https://www.congreso.es/es/web/guest/publicaciones-organo?p_p_id=publicaciones&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_publicaciones_mode=mostrarTextoIntegro&_publicaciones_legislatura=XI&_publicaciones_texto=&_publicaciones_id_texto=DSCD-11-CO-57.

example, the French Government has just done, which in December sent a document to the Panamanian authorities warning them that if they did not comply with the provisions of the agreement, it would include Panama again on the list of tax havens. The truth is that we know more about what the French government has done than what the Spanish government has done, which is paradoxical".

As can be seen, the transparency of the government and the Ministry of Finance has been questioned several times and, consequently, the legitimacy of the competent bodies to sign international tax treaties and conventions has been called into question.

At the same time, there is a trend of international pressure to review and amend tax treaties with countries considered tax havens due to a growing global concern about tax evasion and avoidance. Tax havens are territories that offer a very favourable tax regime to companies and individuals, which may allow them to reduce their tax burden or even evade taxes in their home countries. In this regard, the OECD and other international organisations have carried out initiatives to combat tax evasion and tax avoidance, including the promotion of tax transparency and cooperation between countries, and have published a list of tax havens that do not comply with international standards of tax transparency and cooperation, an issue that has been aggravated by the "Panama Papers" and "Falciani List" cases.

4.3.- THE POWERS OF PARLIAMENT WITH RESPECT TO TAX TREATIES.

4.3.1.-Transposition

The political and legal diversity between the international and domestic legal systems makes it necessary for the signatory countries of international tax treaties and international double taxation conventions to transpose the agreed agreements. Thus, transposition implies *"material diversity", which also leads to cases of transposition. It would consist in "transferring a legal relationship from a foreign legal system in which this relationship has been established to another legal system which does not know this institution or which, knowing it, has a different one"*[83] . Consequently, the fact that the Spanish legal system does not recognise a specific institution or defines it differently cannot be sufficient grounds to undermine the effectiveness of the international rule. However, when the Spanish State recognises an international norm and publishes it in its Official State Gazette, Spain admits its primacy, its conformity and even its legal equivalence.

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[83] Lewald quoted in "13.5. Adaptation and transposition. Derecho UNED, https://derechouned.com/libro/internacional-privado/4931-la-adaptacion.

Thus, equivalence is established after a comparative analysis of the conflicting rights, so that the resolution is satisfactory for both countries[84] . After analysing and explaining the debate on international tax treaties, the question arises as to whether the Congress of Deputies - the lower house of the Spanish Parliament - is capable of exercising control measures that paralyse the transposition of tax treaties into national law once they have been negotiated and signed. In this respect, the answer is yes, since Article 94.1 EC provides: *"The consent of the State to be bound by treaties or conventions shall require the prior authorisation of the Cortes Generales in the following cases: d) Treaties or conventions involving financial obligations for the Treasury".*

Therefore, despite the Government's exclusive competence to promote the State's foreign policy and the fact that it is the competent body for proposing, negotiating and signing treaties and agreements on international tax matters, through the Ministries of Foreign Affairs and Public Finance; the Permanent Delegation or the Directorate General for Taxation through the Subdirectorate for International Tax Policy and the technical team, the Government must submit the agreement it intends to sign to the Congress of Deputies and the Senate for debate and a parliamentary vote. Therefore, despite the fact that the Executive has given its consent in the first instance and signed the agreement after having carried out all the negotiations, the transposition of the convention and/or treaty depends exclusively on the Congress of Deputies in the last instance, since if the vote does not go ahead, neither will the agreed agreement.

In short, Article 94.1.d) of the Spanish Constitution of 1978 establishes that one of the exclusive competences of the Congress of Deputies is to authorise the ratification of international treaties that contain stipulations contrary to the Constitution or that affect its development, and it can also require that, prior to ratification, a constitutional review be carried out -Article 95 EC-. Therefore, in the event that an international tax treaty contains stipulations contrary to the Constitution or affecting its development, the Congress of Deputies could paralyse the transposition of the treaty into national legislation until the corresponding constitutional review is carried out or the treaty is amended to bring it into line with the Constitution.

Notwithstanding the above, there has been no precedent in Spain where the transposition of an international tax treaty has been paralysed or suspended. The main consequence of not transposing a tax convention or treaty into Spanish law is that it will not

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[84] Ibid. *"The transposition would consist of recognising the validity and effect vis-à-vis third parties of guarantees constituted abroad and under a foreign law, seeking in the Spanish legal system a type of guarantee that fulfils an equivalent function".*

have effect in our legal system. However, this answer is qualified depending on the specific case and the international organisation in question. For example, the Base Erosion Scheme or Pillar 2 are instruments of international law classified as soft-law. In other words, they are neither binding nor coercive on the countries that decide to submit to them.

However, like Spain, many states have delegated powers to the European Union, thereby acquiring obligations to transpose the regulations issued within the European Union. It is well known that the direct transposition of regulations is obligatory. Although Directives do not have this taxation character[85] , the European Union adopted the policy promulgated by the OECD through a Directive[86] , an instrument of mandatory transposition, albeit through the enactment of the laws and internal regulations agreed by each Member State, but within a certain period of time. Thus, if Spain does not transpose this Directive by the deadline - the end of 2023 - Spain could be sanctioned for non-compliance. In this way, and as we will explain in greater detail later, the soft-law mechanisms acquire a double standard that, far from being non-binding rules or policies, end up being an economic anchor for the States that decide to submit to soft-law.

4.3.2.-Rescission

On the other hand, the question also arises whether a tax treaty can be terminated by a signatory party. The answer must again be in the affirmative: the power to terminate a tax treaty lies with the government, as the representative of the state and in charge of foreign policy. Moreover, the idea should prevail that treaties are agreed and sustained on the basis of the will of the parties. Therefore, as soon as one of the wills expressed in the agreement is not present, a country can unilaterally decide to stop applying the double taxation treaty, precisely because of the principle of freedom and will of the parties.

The process for terminating an international tax treaty in Spain depends on the specific agreement and the terms set out in the treaty. In general, international tax treaties usually have specific provisions on how they can be terminated or amended[87] . Agreements generally require a written notice to the other party, stating the intention to terminate or amend the Convention. The process may vary depending on the specific agreement, so it is

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[85] "EUR-Lex - l14527 - EN." EUR-Lex, 16 March 2022, https://eur-lex.europa.eu/ES/legal-content/summary/european-union-directives.html.

[86] "CONSULTA PÚBLICA PREVIA SOBRE LA TRANSPOSICIÓN AL DERECHO ESPAÑOL DE LA DIRECTIVA (UE) 2022/2523 DEL CONSEJO DE 15 DE DICIEMBRE." Ministerio de Hacienda y Función Pública, 6 March 2023, https://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/transposicion-directiva-2022-2523-pilar-2.pdf.

[87] See Article 27 of the Convention for the Avoidance of Double Taxation between the Kingdom of Spain and the Principality of Andorra.

important to carefully review the terms of the agreement. Some agreements provide for a termination or withdrawal clause; this is sometimes referred to as "denunciation".

However, the consequences that can result are, among others, that other agreements with that state may lapse; that a diplomatic and political crisis may arise between the two countries; that relations between the two countries may deteriorate; in the case of a multilateral agreement, it may indirectly lead to a series of economic vetoes, sanctions, etc. Again, however, it depends on the specific case and the issue at hand, as mentioned above. This is applicable by analogy to termination, although it contains an aggravating nuance in that termination implies that a country unilaterally ceases to apply a convention, when there have been a number of consequences:

- Double taxation: If a country terminates a tax treaty with another country, this can result in double taxation. This means that a company or individual may be taxed in both countries on the same income, which could significantly increase their tax burden.

- Increased tax complexity: Without a tax treaty, companies and individuals will have to deal with the domestic tax laws of both countries, which can be more complicated and costly than operating under a tax treaty. Terminating a tax treaty can have negative consequences for tax residents and businesses operating in both countries. It is important for countries to carefully assess the implications before making a decision to terminate a tax treaty.

- Reduced foreign investment: If international investors perceive that a country is willing to terminate tax treaties, it may make these investors feel less confident about investing in that country.

- Potential for international tax disputes: If one country terminates a tax treaty, it may result in international tax disputes with the other country, which could lead to diplomatic tensions.

Therefore, and in accordance with Article 97 of the Spanish Constitution, the Government is responsible for directing foreign policy and defence policy, as the highest State body in charge of it. Therefore, it is the Government that is responsible for negotiating, signing and ratifying international agreements, including tax treaties, and, in turn, for terminating them. However, as this is a matter covered by Article 94.1.d) EC, in order to terminate a convention or treaty, this termination must be validated by the Cortes Generales, since the refusal to continue to apply an international tax convention or treaty is a form of

expression of the Spanish State's will, which must first pass through the Spanish Upper and Lower Houses. Therefore, in the event that the government decides to terminate a tax treaty, it must follow the procedure normally provided for in the treaty itself and in the country's domestic laws. This normally involves notifying the intention to terminate the treaty to the other party and, in some cases, following certain deadlines and procedures set out in the treaty itself.

Spain has modified, amended or made reservations to tax treaties and conventions, as noted above, but has never terminated an international double taxation avoidance treaty with its 103 partners, nor has it considered abandoning any international multilateral tax treaty.

4.3.3.-Modification of clauses: transition and retroactivity

Countries that decide to be bound by a double taxation treaty may agree by consensus to introduce changes or amendments in order to adapt the treaty to the tax reality that requires action by the tax authorities. As in the previous case, tax treaties and conventions usually include an amendment or modification clause, as well as a transitional clause for when the treaty has entered into force *ex novo* or when a new modification is introduced into the treaty. For example, Article 30 of the *"Multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*"[88] : *"The provisions in this Convention are without prejudice to subsequent modifications to a Covered Tax Agreement which may be agreed between the Contracting Jurisdictions of the Covered Tax Agreement".*

Sometimes there is no modification clause as such, but as mentioned above, through "denunciation" clauses, the other signatory state can be notified of the will to modify certain aspects of the treaty, without this implying that the treaty will no longer apply in its entirety. As for the transitional clauses, whether or not they are included depends on the specific text of the modified convention. These clauses may establish a transition period during which the old and new provisions will apply simultaneously, with the aim of minimising the negative effects for the parties involved.

However, thanks to termination clauses, certain aspects of the parameters agreed in the clause may cease to have legal effect. For example, the termination clause of the Double

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[88] OECD. "MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING." OECD, https://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Tributaria/CDI/Documentacion/Convenio%20multilateral_EN.PDF.

Taxation Avoidance Agreement signed by the Kingdom of Spain and South Korea[89] . The legal effects of such modifications are another manifestation of the will of the signatory countries to freely submit to these agreements.

Once again, we must emphasise the role of Parliament in this type of matter: not only is it empowered to ratify the tax treaties that the Government brings to the Chamber after they have been signed, but Parliament also exercises a control action in which it has the power to present proposals to amend the tax treaties and conventions that the Government has signed and intends to introduce into the Spanish legal system in order for them to be fully effective. To this end, the Congress of Deputies has the power to present Propositions not for Law, a figure included in the Rules of Procedure of Congress in articles 193 to 195[90] . This is a parliamentary initiative in which the Congress of Deputies, faced with an issue or question for debate, urges the Government to follow a specific policy or make some kind of intervention. However, these proposals cannot be made individually by a single deputy, but require the presence of one or more parliamentary groups.

Despite their approval, these proposals are not binding in terms of government action, but they are representative in nature, characteristic of the Parliament from which they emanate. In addition, these proposals have the power to establish the bases and principles of certain policies for action by public bodies, show the general opinion of the Congress of Deputies on a given issue, among others. On the basis of these, the modification or introduction of an amendment to tax treaties and conventions can be requested. For example, we point out the Proposición no de Ley presented to the Bureau of the Congress of Deputies by the Plural Parliamentary Group, at the request of the Bloque Nacionalista Galego (BNG) Member of Parliament Néstor Rego Candamil, to avoid double taxation and unfair tax treatment of returned emigrants, for debate in Plenary[91] .

In turn, the amendment of certain provisions and clauses of the agreement raises a question: can the new clauses be applied retroactively? The answer must be no in this case. In general, tax treaties apply from the date of entry into force, and any subsequent changes

[89] See Article 29 of the "TEXTO SINTÉTICO DEL CONVENIO MULTILATERAL Y DEL CONVENIO ENTRE EL REINO DE ESPAÑA Y LA REPÚBLICA DE COREA PARA AVITAR LA DOBLE IMPOSICIÓN". Ministerio de Hacienda y Función Pública, https://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Tributaria/CDI/Textos-Sinteticos/CDI-TS-Corea-SP.pdf.

[90] "TITLE X. Non-legislative proposals (Arts. 193-195)". Congress of Deputies, https://www.congreso.es/es/cem/t10.

[91] "Boletín Oficial de las Cortes Generales Serie D: General." Boletín Oficial de las Cortes Generales Serie D: General, 25 March 2022, p. 26 https://www.congreso.es/public_oficiales/L14/CONG/BOCG/D/BOCG-14-D-426.PDF.

will only apply from that date. However, it depends on the convention and treaty in question. In Spain, applying these retroactive effects is not possible when we are talking about absolute retroactivity. That is, when the amended clause to be retroactively applied affects tax situations that are already consolidated.

In this regard, our Constitutional Court, in Ruling no. 126/1987 of 16 July 1987[92] , considered that this type of retroactivity is unconstitutional and cannot be applied. As a general rule, according to Articles 10 and 11 of the LGT, tax rules shall not have retroactive effect and shall apply to taxes without a tax period accrued from their entry into force and to other taxes whose tax period starts from that moment[93] . However, in Spain, improper or medium degree retroactivity[94] is possible, in which the period of accrual of a tax occurs under the validity of a tax treaty or rather of a provision of the same that is applicable to it, but this same tax continues to accrue and whose effects have not been exhausted when the new clause of the treaty or a new treaty itself enters into force.

In these cases, the safeguarding of the principle of legal certainty must take precedence. Especially in a matter that is so susceptible to causing harm to taxpayers' rights. Therefore, conventions and treaties do not usually have retroactive application clauses and, in case they do, they are applied to very specific and determined circumstances, under a time limit and never to the detriment of the taxpayer; giving priority to the principle of in dubio pro contribuyente (in dubio pro contribuyente). Therefore, tax treaties apply from the date of entry into force, and any subsequent changes will only apply from that date. In some cases, transitional provisions may allow for a transition period during which the old and new treaty provisions will apply simultaneously. These transitional clauses are agreed and applied when changes occur.

4.4.- THE APPLICATION OF INTERNATIONAL CONVENTIONS IN SPAIN.

International conventions are implemented in Spain through a process called ratification. Ratification is a legal act by which a State expresses its consent to be bound by the terms of an international treaty or convention. In Spain, ratification of international conventions is carried out by the executive power and is formalised by the signing of the treaty or convention and its subsequent approval by the Congress of Deputies. Once a

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[92] "Sistema HJ - Resolution: SENTENCIA 126/1987." Constitutional case law search engine, http://hj.tribunalconstitucional.es/eu/Resolucion/Show/858.

[93] "The tax rules." Fiscal Impuestos, https://www.fiscal-impuestos.com/3.Las-normas-tributarias.html.

[94] "La posible retroactividad de las modificaciones fiscales en el Proyecto de Ley de Presupuestos para 2020: medidas a tomar". Devesa & Calvo Abogados, https://www.devesaycalvo.es/la-posible-retroactividad-de-las-modificaciones-fiscales-en-el-proyecto-de-ley-de-presupuestos-para-2020-medidas-a-tomar/.

convention has been ratified and has entered into force, it becomes part of Spanish domestic law and must be applied and respected by all authorities and citizens in Spanish territory.

In the case of tax treaties, these are implemented through the tax and customs authorities, which are responsible for ensuring that taxes are levied and collected in accordance with the terms of the treaty. It is important to note that, in the event of a conflict between Spanish domestic law and the terms of an international treaty, the terms of the treaty will prevail, provided that the treaty has a higher rank than domestic law. In this sense, Spanish courts may refer to international conventions as a source of applicable law in cases of tax disputes between taxpayers and the tax administration.

This is because according to Article 96 of the Spanish Constitution, *"validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order".* Moreover, international treaties and conventions are directly applicable in Spain, without the need for their incorporation through a national law. The application of tax treaties is regulated by the State Tax Administration Agency (AEAT), which is responsible for the application and management of international tax treaties. The Ministry of Foreign Affairs has published a guide on the application of international tax treaties in Spain[95] , in this regard. In any case, it is important to bear in mind that the application of international conventions and their relationship with domestic law may vary depending on the specific treaty or convention and the circumstances in which it is applied.

However, once an agreement or treaty is agreed and enters into force in Spain after its publication in the Official State Gazette, it will be applied with primacy over the General Tax Law, the specific law of our country that governs the Spanish tax system in general; at the same time, agreements and treaties are applied over the special laws that regulate each tax. For example, Article 5 of the Personal Income Tax Law states that: *"The provisions of this Law shall be understood without prejudice to the provisions of international treaties and conventions that have become part of the domestic legal system, in accordance with Article 96 of the Spanish Constitution".*

In general, the procedure for applying international conventions in Spain is similar for all of them, although there may be certain particularities depending on the matter regulated

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[95] "GUIDE TO BILATERAL TREATIES WITH STATES." Ministry of Foreign Affairs, European Union and Cooperation, https://www.exteriores.gob.es/es/ServiciosAlCiudadano/PublicacionesOficiales/GUIA%20TRATADOS%20CON%20ESTADOS.pdf.

by each convention. In principle, international treaties and conventions that have been ratified by Spain form part of the Spanish legal system and are directly applicable in Spanish territory, provided that they are in force at the time of their application. This implies that, in principle, the rules contained in international conventions are directly and bindingly applicable in Spain.

However, in some cases, treaties may provide for certain specific procedures for their implementation. For example, some tax treaties may establish a procedure for the exchange of information[96] between the tax authorities of the signatory countries to ensure that the rules contained in the treaty are correctly applied. Similarly, some social security treaties may establish specific procedures for co-ordination between the social security systems of the signatory countries. In any case, the application of international agreements in Spain is mainly governed by the provisions contained in the Spanish Constitution and in the Spanish laws regulating the matter. However, it should be noted that the application of international agreements in Spain is also governed by the rules and guidelines established by the international organisations involved in the negotiation and ratification of these agreements, such as the UN and the OECD, among others.

Therefore, the importance of applying an international treaty agreed by the UN or the OECD means that the European Union sometimes includes these consensual agreements in its Directives. As a result, simple publication in the Official State Gazette is no longer sufficient, but our State, being a member of the European Union, is subject to obligations to transpose these instruments into its national legislation, while the agreement of bilateral tax treaties only requires publication in the Official State Gazette. Normally, the importance of the agreed act lies in the very consideration of our constitutional text, which provides for the requirement of parliamentary confirmation of the conventions and treaties assumed by the Spanish Government, in Article 94. However, it is usually the government that establishes the urgency of parliamentary review, or MPs who can request the presence of the relevant ministers in parliament.

4.4.1.- DOUBLE TAXATION TREATIES AND THE MUTUAL AGREEMENT PROCEDURE.

The mutual agreement procedure provided for in Article 25 of the OECD Model Convention and the DTC are two different but complementary mechanisms that seek to avoid international double taxation and to resolve tax disputes that may arise between the Contracting States. The DTC establishes the criteria for the allocation of taxing powers

[96] See the case of the agreement between the Kingdom of Spain and Andorra.

between the Contracting States, in order to avoid the same income or assets being taxed by both States, and establishes the mechanisms for the elimination or reduction of double taxation. This convention also establishes the procedures for consultation and the settlement of disputes between the contracting states.

On the other hand, the mutual agreement procedure is a specific tax dispute resolution mechanism provided for in Article 25 of the OECD Model Convention, which aims to resolve differences of interpretation or application of double taxation treaties that may arise between the Contracting States. This procedure is based on collaboration and dialogue between the tax authorities of the States involved, and is aimed at reaching an amicable solution and avoiding double taxation[97] . In short, while the DTAA sets out the rules for the avoidance of double taxation and the procedures for consultation and dispute resolution between the Contracting States, the MAP is a specific tax dispute resolution mechanism provided for in the OECD Model Convention[98] and which is applied when specific disputes arise in the application of DTAAs.

In Spain, the competent body for signing international tax treaties and mutual agreement procedures is the Ministry of Foreign Affairs, European Union and Cooperation, in collaboration with the Ministry of Finance and Public Administrations. The Ministry of Foreign Affairs is responsible for leading the negotiation and signing of international tax treaties, as well as maintaining relations with other countries in international tax matters, as is the Directorate General of Taxation. Both share this competence and there is no express designation of which matters are authorised for each specific body. It is a co-direction.

For its part, the Ministry of Finance and Public Administrations is responsible for the application of international tax treaties, including the mutual agreement procedures provided for therein. It is also responsible for the negotiation of tax treaties and international treaties, as established in previous sections of this paper. It should be noted that in Spain, the application of international tax treaties and mutual agreement procedures are in the hands of the State Tax Administration Agency (AEAT), which reports to the Ministry of Finance and Public Administrations. The AEAT is in charge of applying the rules established in the international tax treaties and of managing the mutual agreement procedures that may arise within the framework of these treaties.

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[97] "MANUAL FOR THE APPLICATION OF THE PROVISIONS RELATING TO THE EXCHANGE OF INFORMATION FOR TAX PURPOSES: Approved by the C.". OECD, https://www.oecd.org/ctp/exchange-of-tax-information/41814482.pdf.

[98] "Tax policy analysis - Tax treaties." OECD, https://www.oecd.org/tax/treaties/.

In summary, although international tax treaties and mutual agreement procedures are the joint responsibility of the Ministry of Foreign Affairs and the Ministry of Finance and Public Administrations, in Spain it is the State Tax Administration Agency that is responsible for applying them. Therefore, the body competent to sign international tax treaties and to hear mutual agreement procedures is the Tax Agency. With regard to the latter, it has been competent since 1 January 2016, following the amendment of the Mutual Agreement Procedures (MAP)[99] .

Thus, by means of the First Final Provision. Section One, of Royal Decree 634/2015, of 10 July, approving the Corporate Income Tax Regulations[100] , amended Article 2 of the Regulations on amicable procedures in matters of direct taxation approved by Royal Decree 1794/2008, of 3 November, which regulates the competent authority to exercise the functions regulated in those Regulations[101] . As a consequence of this change, as of 1 January 2016, the competence for the processing and resolution of amicable procedures relating to transfer pricing (including those relating to the attribution of profits to permanent establishments) will be carried out by the State Tax Administration Agency (AEAT)[102] , and specifically, by the National International Taxation Office (ONFI) integrated within the Financial and Tax Inspection Department, as regards these matters[103] :

A. where the case is one of those provided for in the articles on business profits (usually Article 7) and associated enterprises (usually Article 9) of the applicable Double Taxation Conventions, whether it has been brought under the respective Double Taxation Convention or under the dispute resolution mechanisms referred to in Council Directive (EU) 2017/1852, of 10 October 2017 on the mechanisms for resolving tax disputes in the European Union, as transposed by the Regulation on

[99] Amicable procedures provided for in the Double Taxation Conventions concluded by Spain (usually Article 25) and in Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Arbitration Convention), done in Brussels on 23 July 1990 and in Council Directive (EU) 2017/1852 of 10 October 2017 on the mechanisms for resolving tax disputes in the European Union, transposed by the Regulation on amicable procedures in the field of direct taxation, approved by Royal Decree 1794/2008, of 3 November, and amended by Royal Decree 399/2021, of 8 June.

[100] "A-2015-7771 Real Decreto 634/2015, de 10 de julio, por el que se aprueba el Reglamento del Impuesto sobre Sociedades." BOE.es, 10 July 2022, https://www.boe.es/buscar/act.php?id=BOE-A-2015-7771.

[101] "Note on the competent authorities in Spain for the purposes of mutual agreement procedures." Tax Agency, 26 September 2022, https://sede.agenciatributaria.gob.es/Sede/otros-procedimientos-tributarios/otros/procedimiento-amistoso-competencia-aeat_/nota-sobre-autoridades-competentes-espana-amistosos.html.

[102] Ibid.

[103] Op cit.

amicable procedures in the field of direct taxation, approved by Royal Decree 1794/2008 of 3 November 2008, as amended by Royal Decree 399/2021 of 8 June, or

B. where the request is based on the European Arbitration Convention.

In turn, the Subdirectorate for International Taxation, a body belonging to the Directorate General for Taxation, will be responsible for matters such as conflicts of residence, questions of qualification of the permanent establishment or the interpretation of any clause of the double taxation treaties, and will remain in the Directorate General for Taxation, where it has been exercised to date. Therefore, questions and requests relating to these cases. Therefore, the competent body to sign international agreements and to hear amicable proceedings may not be the same depending on the case and the subject matter of the dispute, but at the same time it may be.

4.4.2.- THE INTERPRETATION OF INTERNATIONAL TAX TREATIES

In Spain, the competence to interpret international tax treaties lies with the Directorate General of Taxes, which is the body of the Tax Administration in charge of interpreting tax rules and issuing binding rulings and consultations on tax matters[104] . The interpretation of international tax treaties by the Directorate General for Taxation is based on international rules of treaty interpretation, such as the Vienna Convention on the Law of Treaties. In addition, the Directorate General for Taxation can rely on national and international case law and administrative and legal doctrine in tax matters to support its interpretations. In the event of a dispute over the interpretation of an international tax treaty, taxpayers can resort to the administrative route, by filing a binding consultation with the Directorate General for Taxation, or through the judicial route, by challenging the corresponding tax assessment before the competent courts.

Therefore, in Spain, the competence to interpret international tax treaties extends to all issues related to international taxation, including interpretation, application, qualification, anti-abuse provisions and transfer pricing. The Directorate General of Taxation is responsible for interpreting tax rules, and in particular international tax treaties, in relation to any issue arising in the field of international taxation. This includes the interpretation of provisions relating to tax residence, income and wealth taxation, property taxation, indirect taxation and any other issue related to international taxation.

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[104] BOE. "RESOLUTION 4/2004, of 30 July, of the Directorate General for Taxes, delegating powers in the area of written tax consultations to the Deputy Directors General of the Directorate General." Ministry of Finance and Public Function, https://www.hacienda.gob.es/DocLeyes/onlinelt/7958.htm.

In addition, the Directorate General for Taxation has the power to issue binding rulings and consultations on tax matters, including matters related to international tax treaties, which are binding on both the Tax Administration and the taxpayers who have submitted the consultations. In the event of a dispute over the interpretation of an international tax treaty, taxpayers may resort to administrative channels, by filing a binding enquiry with the Directorate General for Taxation, or through judicial channels, by challenging the corresponding tax assessment before the competent courts. In both cases, the interpretation of the international tax treaty will be subject to analysis and resolution by the competent tax authority.

In this regard, it should be noted that there is a difference between the unilateral interpretation of tax treaties and the agreed interpretation of tax treaties through the mutual agreement procedures provided for in the tax treaties. Unilateral interpretation of tax treaties refers to each country's interpretation of the terms of the tax treaty in question in accordance with its own domestic legislation and case law. Each country can interpret the tax treaty autonomously, without the need for prior agreement with the other country or countries involved. On the other hand, the concerted interpretation of tax treaties through the mutual agreement procedures (MAPs) involves cooperation between the countries involved to resolve any problems arising in the application or interpretation of the tax treaty. MAPs are procedures that allow taxpayers and the tax authorities of the countries involved to discuss and resolve any discrepancies that may arise in the interpretation or application of the tax treaty in question.

This interpretation is done in accordance with the Vienna Convention on the Law of Treaties, which sets out the general rules of interpretation of international treaties, including international tax treaties. In particular, the Vienna Convention sets out the general principles of treaty interpretation, which include the obligation to interpret the terms of the treaty in good faith and in their context, as well as having regard to its object and purpose. With regard to the mutual agreement procedures under tax treaties, these are governed by the OECD Model Tax Treaties and the Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as the OECD Guidelines on Mutual Agreement Procedures Concerning the Application of Tax Treaties.

Therefore, MAPs are conducted by the tax authorities of the countries involved and are designed to resolve tax disputes in an efficient and amicable manner, avoiding double taxation and promoting international tax cooperation. In MAPs, the tax authorities of the countries involved work together to reach a mutually satisfactory solution to the tax issues in dispute. In conclusion, unilateral interpretation of tax treaties refers to the interpretation

carried out by each country autonomously, while concerted interpretation of tax treaties through MAPs involves cooperation between the countries involved to resolve any problems in the application or interpretation of the tax treaty.

5. SOFT-LAW

5.1.- CONCEPT AND NATURE

In Spain, there is no specific definition of "soft law" in its current legislation. However, the Royal Spanish Academy (RAE) defines soft-law from two perspectives: private international and public international. Thus, soft-law is considered in the first meaning as *"A set of rules or regulations not in force that can be considered by legal operators in matters of a preferably dispositive nature and that include recommendations, opinions, codes of conduct, principles, etc. They also influence legislative development and can be used as specific references in judicial or arbitration proceedings"*[105] . From a public international law perspective, they are *"legal acts which, without having binding force, contain the inspiring guidelines for a future regulation of a matter, opening the way to a subsequent process of normative formation*"[106] .

As a result of these definitions, it can be deduced that the main character of soft-law is its non-coercive binding nature, as well as the consensual element resulting from the exercise of the will of the different countries; *and it is not possible to offer a univocal concept of this expression, given that it has been used to refer to legal conducts or acts of a different nature or degree of obligatory nature*[107] . In general, in Spanish legal practice and politics, the term "soft-law" is used to refer to norms whose purpose is to propose recommendations, guidelines or policies for action based on interpretative criteria, which are not binding for legal operators.

Thus, although there is no precise definition of "soft law" in Spain, it is commonly used to refer to those norms that do not have a binding character and that simply establish recommendations, guidelines or interpretative criteria. This latter conception of soft-law is based on the adoption of a dichotomous criterion that distinguishes between two different

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[105] "Definition of soft law - Pan-Hispanic Dictionary of Legal Spanish - RAE." Pan-Hispanic Dictionary of Legal Spanish, https://dpej.rae.es/lema/soft-law.

[106] Ibid.

[107] Escudero Moratalla, José Francisco, and Daniel Corchete Figueres. "SOFT LAW Y ORGANIZACIÓN DE LA ADMINISTRACIÓN DE JUSTICIA." https://www.upsj.org/, https://www.upsj.org/soft-law-organizacion-la-administracion-justicia/.

types of international public law norm[108] : the norms established in international treaties and those that make up the standard of international customary law, which can become binding under a series of certain circumstances; *and resolutions, opinions and recommendations that are not assigned this character*[109] .

In turn, soft-law is not a type of law that is subject to parliamentary activity as primary legislation, and is normally excluded from parliamentary debate and public consultation. Such law is found especially at the international level, where the UN and the OECD stand out. In the context of international law, soft-law aims to institute a standard of conduct, but it is not directly enforceable. However, there are other mechanisms capable of reversing this condition and establishing themselves as hard-law.

5.2.- CLASSIFICATION

In Spain there is no formal classification of the different types of soft law, but some categories can be identified according to the criteria used to distinguish them:

- **Non-binding soft law**: includes circulars, consultations, recommendations, guidelines and other instruments of an informative or guidance nature that do not have binding legal effects, although they may be useful as criteria for interpreting the applicable regulations. This category includes some circulars and consultations issued by the Tax Agency, recommendations and guidelines issued by regulatory and supervisory bodies, best practice guides and other documents of an informative or guidance nature that have no binding legal effect.

- **Soft law with limited binding effects:** includes some agreements, conventions or administrative decisions that may have binding legal effects in certain situations or for certain subjects, but do not have a general or universal scope. These are agreements and conventions between private parties, administrative decisions and rulings that have effects on a specific subject or situation, public-private partnership contracts and other instruments that may have binding legal effects in a limited area or for a limited number of subjects.

- **Soft law with broad binding effects:** includes international agreements, collective agreements, codes of good practice and other instruments that have binding legal

[108] "Soft law and its role in international law." Atico Group34, 10 July 2020, https://protecciondatos-lopd.com/empresas/soft-law-derecho-blando/.

[109] Ibid.

effects on a wide range of subjects and can, in some cases, be considered as sources of law. For example, international agreements and collective agreements that establish rules of conduct and obligations for a wide range of subjects, codes of good practice issued by professional associations and other instruments that have binding legal effects for a significant number of subjects.

It is important to stress that this classification is merely indicative and is not intended to be exhaustive or definitive, as in practice there may be different types of soft law that do not necessarily fit these classification criteria. Moreover, the distinction between soft law and mandatory law is not always clear-cut and may depend on the interpretation made in each specific case. In Spain, soft law is implicitly recognised in tax legislation and in administrative and judicial practice. Specifically, Article 3 of the General Tax Law states that the Spanish tax system is based on the principles of justice, equality and economic capacity, and that the application and interpretation of tax rules must be consistent with these principles and with the legal system in general.

All of this is based on Article 1.2 of the LGT, which establishes that: *"This law also establishes the general legal principles and rules governing the actions of the tax administration by application in Spain of the regulations on mutual assistance between the Member States of the European Union or within the framework of conventions to avoid double taxation or other international conventions".* Thus, the influence of this soft-law within our borders is recognised ... .

On the other hand, the case law of the Supreme Court[110] and of other courts and judicial bodies has recognised the importance of interpretative criteria and administrative guidance in the interpretation and application of tax rules, although it has established that these criteria cannot be contrary to the legal system or to fundamental constitutional and tax principles. Therefore, although soft law is not expressly recognised in Spanish tax legislation, it is considered a relevant element in the interpretation and application of tax rules and in administrative and judicial practice, provided that the principles and rules of the legal system in general are respected.

5.3.- SOFT LAW AND INTERNATIONAL TREATIES

The main difference between soft law and an international treaty is that the former is not binding, while the latter is. In Spain, an international treaty has the status of law or primacy over domestic legislation and, therefore, compliance with it is mandatory for all citizens and authorities. International treaties are agreements between two or more countries

[110] See the judgments of the Supreme Court of 29 October 1998 and 24 April 2003.

that establish rules and principles to regulate relations between them in various fields, such as trade, culture or taxation. In other words, international treaties have a higher normative status than ordinary laws, whereas soft law lacks this feature. Soft law and international treaties are two different sources of the Spanish legal system and are therefore governed by different rules and principles.

In addition, international treaties are agreements concluded between two or more States and have a higher normative rank than ordinary laws in the Spanish legal system, as established in Article 96 of the Spanish Constitution. Treaties are binding and oblige the States that have signed them to comply with the obligations and commitments they establish. Soft law, on the other hand, is not binding and does not impose obligations on taxpayers or tax authorities. Their function is to guide or suggest certain criteria for the interpretation or application of tax rules, but they are not binding in themselves. In practice, however, soft law is often taken into account by tax authorities and taxpayers when making tax decisions.

5.3.1.- LEGAL SITUATION OF SOFT-LAW: APPROVAL, MODIFICATION AND LEGAL TREATMENT IN SPAIN.

The competence to agree on amendments to the OECD Model Convention rests with the OECD's Committee on Fiscal Affairs[111] . This committee is composed of representatives of OECD member countries and aims to develop and promote efficient and equitable tax and fiscal policies at the international level. The Committee on Fiscal Affairs is responsible for regularly reviewing and updating the OECD Model Convention and proposing amendments to bring it into line with current needs and challenges in international taxation. To this end, the Committee collects and analyses information and experiences from member countries, as well as from international tax experts and organisations. Once amendments to the Model Convention have been agreed, they must be adopted by OECD member countries in order to enter into force. In addition, amendments can also be adopted by non-OECD member countries, either through bilateral or multilateral agreements.

The procedure for agreeing amendments to the OECD Model Convention is set out throughout the OECD Convention on Mutual Administrative Assistance in Tax Matters, which states that amendments can be proposed by any OECD Member State or by the OECD Committee on Fiscal Affairs - depending on which annex and which part of the Convention we are in.

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[111] "THE MODIFICATION OF THE OECD MODEL CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION". General Council of Economists, https://www.economistas.es/Contenido/REAF/gestor/4-SERRANO.pdf.

Once a proposed amendment has been submitted, a process of consultation and negotiation takes place among OECD member states to reach consensus on the text of the amendment. This process may include meetings and discussions between the countries concerned, as well as the submission of comments and suggestions by the parties involved. When consensus is finally reached on the text of the amendment, it is formally adopted. This is done by approval of the text by the OECD Committee on Fiscal Affairs and subsequent ratification by OECD Member States in accordance with their own internal rules and procedures. Once the amendments have been adopted, they are incorporated into the OECD Model Convention and apply from the date set out in the text of the amendment itself.

The competence to agree changes to the commentary to the OECD Model Convention rests with the Committee on Fiscal Affairs of the Organisation for Economic Co-operation and Development (OECD). The Committee on Fiscal Affairs is responsible for overseeing and updating the OECD Model Convention commentary, which provides additional guidance and clarification on the interpretation and application of the articles of the model convention. This commentary is an important tool for OECD and non-OECD countries in the negotiation and application of international tax treaties.

The Committee on Fiscal Affairs is composed of representatives of OECD member countries and aims to develop and promote efficient and equitable tax and fiscal policies at the international level. In addition to overseeing the commentary to the OECD Model Convention, the committee is also tasked with regularly reviewing and updating the model convention itself. Ultimately, the competence to agree on changes to the commentary to the OECD Model Convention is closely related to the competence to agree on amendments to the Model Convention itself, and ultimately rests with the OECD Committee on Fiscal Affairs.

As far as the Spanish legislator is concerned, soft law is considered as a source of interpretation of the legal system and is used in the interpretation and application of tax rules. However, unlike international treaties, soft law does not have a specific legal status and its application is not mandatory. As regards its specific treatment, the Spanish legislator has not established a specific consultation procedure for soft law. However, in some cases, consultations with experts in the field may take place before decisions involving the interpretation and application of soft law are taken. In general, the role of soft law in the Spanish legal system is a matter of debate, as some consider that its use may generate legal uncertainty as it does not have a defined legal status, while others consider it a useful tool for the interpretation and application of tax rules in a changing and complex context.

Soft-law has been criticised for a number of reasons, among which the following can be summarised: Firstly, due to the lack of enforceability. In contrast to binding law, soft-law norms do not have binding force per se. Therefore, states and economic actors can choose to follow or ignore these rules, which can lead to legal uncertainty and inconsistency in their application. Secondly, because of their variable interpretation: As soft-law rules are neither precise nor detailed, they can be interpreted in different ways by different actors. This can lead to ambiguity and legal uncertainty, especially in the case of rules that are not clearly defined or are ambiguous.

In turn, there is concern about the lack of predictability; soft-law rules are often created to address specific problems that may change over time. Therefore, these rules may be inappropriate or ineffective in future situations, which may create uncertainty as to how they will be applied in the future. In addition, it highlights the potential lack of clarity about their role in the legal order: Soft-law rules are often not clearly defined as to their relationship to binding rules. This can create uncertainty about their role in the legal system and how they should be applied in relation to other rules. In this regard, the Court of Justice of the European Union has expressed its disagreement in CJEU of 15 October 2015, Case C-137/14[112] . In this judgment, the CJEU stated that *"legal certainty implies that the rules of law must be clear, precise and foreseeable, which cannot be guaranteed in the case of unwritten or unpublished rules"*.

In general, while the use of soft-law can be useful in policy and decision-making, its use in place of binding rules can create legal uncertainty and inconsistency in its application. It is therefore important to take these factors into account when using soft-law rules and to ensure that they are used consistently and effectively within the legal system.

Another example of an authority that has expressed concern about the legal uncertainty generated by the use of soft-law is the Council of Europe. In its 2019 report on the application of the principle of legality in the digital age[113] , the Council of Europe noted that *"the overuse of soft-law rules, such as guidance and recommendations, may generate legal uncertainty and, consequently, affect the protection of human rights and legal certainty"*. It also emphasised the importance of ensuring that soft-law standards are clear,

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[112] "Judgment of the Court (Second Chamber) of 15 October 2015. European Commission v Federal Republic of Germany." *EUR-Lex*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0137.

[113] *REPORT on monitoring the application of European Union law 2017, 2018 and 2019 | A9-0270/2020 | European Parliament*, 17 December 2020, https://www.europarl.europa.eu/doceo/document/A-9-2020-0270_ES.html.

precise and predictable, and that adequate mechanisms are in place for their monitoring and evaluation.

In turn, one of the most recent examples of a statement by a Spanish authority in relation to the use of soft-law and legal certainty refers to the report of the Council of State of 2020 on the Proposed Law on Measures to Prevent and Combat Tax Fraud[114] . In this report, the Council of State expressed its concern about the excessive use of soft-law measures in the proposal, such as the use of administrative circulars and resolutions, instead of more precise and clear regulation. The Council of State stressed that this situation may lead to legal uncertainty and negatively affect citizens' rights. Furthermore, it recommended that the use of soft-law should be reduced and that more precise and concrete regulation should be used to ensure legal certainty in tax matters.

With regard to the Commentaries to the OECD CM, in Spain, the legal status of the commentaries to the OECD Model Convention is not clearly defined. In general, it is considered that the comments are not binding and do not have the same legal force as the Convention itself. However, they may be taken into account by tax authorities when interpreting and applying tax treaties, and their content may be relevant in dispute resolution procedures.

Some authors consider that commentaries have an intermediate legal status between soft law and hard law, as although they are not legally binding, they have a significant influence on the interpretation and application of tax treaties. In any case, the legal status of commentaries may vary depending on the jurisdiction and context in which they are used. The main source for the attribution of legal status to the Commentaries to the OECD Model Tax Convention is the OECD document itself, which states that the Commentaries *"are not legally binding, but are an authoritative interpretation of the OECD Model Tax Convention"*[115] . In addition, case law and international tax law literature have extensively analysed and discussed the legal status of Commentaries and other soft-law documents in the context of international tax treaties.

This reference is found in the Introduction to the Commentaries to the OECD Model Tax Convention: *"The Commentaries on the Articles of the OECD Model Tax Convention are*

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[114] Council of State. "Anteproyecto de Ley de medidas de prevención y lucha contra el fraude fiscal, de transposición de las directivas (UE) 2016/1164, del Consejo, de 12 de julio, por la que se establecen normas contra las prácticas de elusión fiscal que inciden directamente e." *BOE.es*, https://www.boe.es/buscar/doc.php?id=CE-D-2020-279.

[115] Cit. ut supra.

not legally binding, but are an authoritative interpretation of the OECD Model Tax Convention. They have been welcomed by governments, tax administrations, taxpayers, tax advisors and others interested in international tax law. The usefulness of the commentaries as a means of facilitating the understanding and application of the Model Tax Convention has been recognised by many countries outside the OECD which have adopted, adapted or used the Model as a basis for the negotiation of bilateral double tax treaties"[116] .

Therefore, the legal status of the commentaries to the OECD Model Tax Convention is not entirely clear, as they are considered a form of soft law because, in general, the commentaries do not have a binding character per se, but are widely used by OECD member countries as a guide to interpret tax treaties. In some cases, courts have used the commentaries as a source of interpretation, but this is not universally accepted. In any case, the commentaries are not international treaties and do not form part of countries' domestic law, but they are given some authority as a guide to interpreting tax treaties.

For example, the Directorate General of Taxes (DGT) in Spain has issued several binding consultations in which it refers to the Commentaries to the OECD Model Convention as a source of interpretation of tax treaties and which have a value equivalent to that of the text of the Convention itself. For example, the DGT's *binding consultation V1943-16*[117] states the following: *"The Commentaries to the OECD Model Convention are a source of interpretation of the Convention that is relevant for the purposes of the application and interpretation of the tax treaties signed by Spain with other countries, and insofar as they reflect the consensus of the OECD Member States with regard to the interpretation of the Model Convention, they have the same value as the text of the Model Convention itself*".

In turn, with respect to reservations, observations or positions of third countries in relation to international tax treaties, they may have some legal relevance, although their effect will depend on the specific circumstances of the case. In principle, reservations made by a country when signing or ratifying a treaty are intended to exclude or modify the application of one or more provisions of the treaty in relation to that country. According to the Vienna Convention on the Law of Treaties, reservations are only valid if they are compatible with the object and purpose of the treaty and do not modify the scope of application of its provisions.

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[116] Ibid.

[117] berley. "Resolución Vinculante de Dirección General de Tributos, V 1943-16 de 05 de Mayo de 2016." *Iberley*, https://www.iberley.es/resoluciones/resolucion-vinculante-dgt-v1943-16-05-05-2016-1438450.

As for the observations or positions of third countries, although they do not have the same legal status as a reservation, they may have a certain interpretative weight. The Spanish Supreme Court has pointed out on several occasions that, although the observations of third countries do not bind the interpreter of the convention, they may be taken into account as an interpretative element insofar as they reflect the generally accepted interpretation of the convention. However, the STS 1071/2020 of 3 March[118] established that: *"The interpretation of the Convention by the competent authority of the Contracting State cannot be modified by subsequent declarations or by the practice followed in the application of the Convention by the Contracting States or by the Organisation for Economic Cooperation and Development (OECD), except to the extent that it is agreed in the framework of the procedures provided for in Article 25 of the Convention".* On the other hand, it is important to bear in mind that reservations, observations or positions of third countries cannot modify the content of a convention signed by Spain, as only the signatory parties to the convention can agree on changes or amendments to it.

With regard to treaty interpretation, Spain follows a dynamic interpretation of tax treaties[119] , which means that priority is given to the purpose and object of tax treaties, as well as their context and subsequent evolution, over a purely literal interpretation. In this respect, the Commentaries to the OECD/UN Model Convention are an important source of guidance for the interpretation of tax treaties in Spain. Although these commentaries do not have a binding legal status in themselves, they are considered by the tax administration and the courts as a valuable interpretative tool. In particular, the case law of the Spanish Supreme Court[120] has recognised the relevance of the OECD CTM Commentaries in the interpretation of tax treaties, provided they are used in a manner consistent with the object and purpose of the treaties and take into account subsequent developments in international interpretation in the field.

Therefore, although the OECD/UN MC Commentaries do not have binding legal status in Spain, their relevance in the interpretation of tax treaties is recognised and valued by the tax administration and the courts, provided that they are used in a manner consistent with the object and purpose of the treaties and take into account their context and

[118] STS 1071/2020 - ECLI:EN:TS:2020:1071." Judiciary, https://www.poderjudicial.es/search/openDocument/3f832e20c3b86423.

[119] "La Interpretación de los Convenios de Doble Imposición suscritos por España y su Proyección sobre el ejemplo de las Rentas del Trabajo." Minerva, https://minerva.usc.es/xmlui/bitstream/handle/10347/27601/2019_TFM_RODRIGUEZ_interpretacion_convenios_doble_imposicion.pdf?sequence=1.

[120] Relevant judgments of the Supreme Court and the Spanish Constitutional Court, such as the STS of 12 June 2013 (rec. 281/2012) or the STC 76/2016 of 21 April.

subsequent evolution. It should be noted that the dynamic interpretation of tax treaties is not an issue exclusive to Spain, but is a matter that is discussed at international level and has been addressed in different forums, such as the OECD and the UN.

In addition, there are certain criteria that are used to determine which historical version of the Commentaries is relevant for interpreting a specific treaty in a given situation. Some of these criteria may include:

- **The date of entry into force of the treaty**: the Comments that were in force on the date the treaty was signed or ratified can be considered to be the ones that apply.
- **The date of the facts giving rise to the dispute:** in some cases, the Commentaries that were in force on the date of the facts giving rise to the dispute may be the ones that are applicable.
- **The evolution of Commentaries over time:** in some cases, it can be argued that the most recent Commentaries are the ones that are applicable, especially if there is a significant change in the OECD/UN position on the issue in question.

These criteria can be used by courts and tax authorities to determine which historical version of the Commentary is relevant in a particular situation. It is important to note that the application of these criteria will depend on the specific circumstances of the case and may vary from situation to situation. However, there is no specific source that sets out specific criteria for determining which (historical) version of the Commentaries is relevant for interpreting a specific treaty in a specific situation. The historical interpretation of a treaty and its Commentaries will depend on the context in which it is used and the objective sought to be achieved by the interpretation in question.

5.4. - QUASI-LEGISLATIVE TREATIES

The Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy is not considered an international treaty per se, but rather a non-binding political agreement. The OECD Declaration on a Two-Pillar Solution does not have a precise legal qualification in Spain as it is not an international treaty per se. Instead, it is considered a soft law document that seeks to provide guidance and common principles for member states in the implementation of pillars 1 and 2.

Although this is an agreement of great importance in the international tax sphere, its implementation and legal effect will depend on how member states decide to incorporate pillars 1 and 2 into their respective tax systems. In terms of who is competent to agree it, the Declaration was drafted and agreed by the members of the Organisation for Economic Cooperation and Development (OECD) and the Group of Twenty (G20). However,

implementation and follow-up will depend on the individual countries that decide to adopt the pillars and how they incorporate them into their national legislation.

In Spain, it would be considered soft law, as it is not an international treaty in itself. However, as it is a declaration that aims to establish a solution to address the tax challenges of the digitalisation of the economy, it could influence the negotiation of future tax agreements. As to who is competent to agree it, it would depend on the area in which it is intended to be implemented. In the case of the European Union, for example, it would be up to the European Commission and the Member States. As to who is competent to agree it in Spain, it depends on the specific measure being implemented. In general, the implementation of the Declaration would require the approval of laws and regulations by the Parliament and the Government, and the cooperation of the Tax Administration. In addition, any issues related to the interpretation and application of the Declaration could be examined by the Spanish courts.

On the other hand, the BEPS (Base Erosion and Profit Shifting) minimum standards were agreed and endorsed by the member countries of the OECD/G20 inclusive framework on BEPS in 2015 and 2016. Specifically, they were endorsed by the OECD Committee on Fiscal Affairs. This inclusive framework includes more than 135 countries, including Spain, and is a forum that allows non-OECD countries to participate in the development of international tax standards. Therefore, the competent body to approve these standards is the OECD/G20 inclusive framework on BEPS itself, composed of its member countries. To date, there has been no specific debate in Spain as to whether the person who approved the BEPS Minimum Standards was not competent to do so.

5.5.- IMPACT OF DECISIONS OF INTERNATIONAL ORGANISATIONS ON DECISIONS OF SPANISH COURTS

The impact of soft law on national judicial decisions may vary depending on the context and the interpretation of the rules in question. It is generally considered that soft law can play an important role in the interpretation and application of domestic law, as it can provide guidance and criteria for decision-making[121] . However, it is also true that soft law is not binding and its application is not without debate and controversy, especially when there are discrepancies in the interpretation of the international norms in question. Moreover, in some cases there may be tensions between domestic law and international law, which may make the application of soft law in domestic judicial decisions even more difficult.

[121] M. J. Bonell and M. J. Barrilao, "Soft law, good governance and sustainable development", in The Global Community Yearbook of International Law and Jurisprudence 2014, vol. 1 (Martinus Nijhoff Publishers, 2015), pp. 367-390.

In any event, the impact of soft law on national judicial decisions will depend to a large extent on the legal system and jurisprudence of each country, as well as on the way in which questions of international law are dealt with by national courts. In turn, it depends on the interpretation given to it by the courts and the force given to it in the legal system. In general, Spanish courts may take into account commentaries and guidelines issued by international bodies such as the OECD, but always in a subordinate manner to national legislation and the case law of the Supreme Court.

In any event, it is important to note that soft law is not binding in itself, but is an interpretative tool that can be used by courts in their interpretative work on national and international tax rules. However, as regards the impact of the MLI, by amending existing bilateral tax treaties, it can have a significant impact on their interpretation and application. By introducing new provisions, the MLI may change the allocation of taxing powers between Contracting States, as well as the tax treatment of certain situations, such as tax evasion and treaty abuse.

In terms of case law, references to the MLI may be made in court decisions dealing with the interpretation and application of tax treaties that have been amended by the MLI. However, because the MLI is a relatively new instrument, there may not yet be many court decisions that make explicit reference to it. It should be noted that, although the interpretation of the tax treaties may be influenced by the provisions of the MLI, domestic judicial decisions remain the main source of interpretation of the tax treaties in each of the Contracting States[122] . Therefore, national jurisprudence is fundamental in the application of tax treaties as amended by the MLI.

In Spain, the courts apply a dynamic interpretation of tax treaties, which means that the evolution of international tax interpretations and practices is taken into account. In this regard, courts may take into account the most recent version of relevant interpretative documents, such as the Commentaries to the OECD Model Convention or the UN Guidelines. However, it is also important to bear in mind that Spanish courts are bound by the principles and rules of domestic law, so they must ensure that any interpretation they adopt is compatible with domestic legislation and case law. As to whether there are any decisions that mention the MLI, it is likely that there are, as the MLI has been ratified by Spain and is therefore part of the applicable legal framework for international tax treaties.

In case of doubt or interpretative conflict, the version of the treaty in force at the time of the facts in dispute must be used. A paradigm is the Supreme Court Ruling of 21

[122] Yariv Brauner, 'McBEPS: The MLI - The First Multilateral Tax Treaty that Has Never Been', (2018), 46, Intertax, Issue 1, pp. 6-17, https://kluwerlawonline.com/journalarticle/Intertax/46.1/TAXI2018003

November 2012 (rec. no. 1509/2009): in this ruling, the Supreme Court states that, although the OECD's comments do not have a normative character, they can be used as an interpretative criterion for tax treaties. In turn, the Supreme Court's judgment of 28 May 2019 (rec. no. 3998/2016) stands out: in this judgment, the Supreme Court states that *"the interpretation of international tax treaties must be dynamic, taking into account the different versions of the texts, the interpretative documents that may exist and the evolution of the interpretative criteria of international organisations, such as the OECD".*

And the Ruling of the Central Economic-Administrative Tribunal of 27 February 2020 (RG 7561/2018): in this ruling, the Central Economic-Administrative Tribunal states that "in *the event of doubt or ambiguity in the interpretation of tax treaties, the version of the treaty in force at the time of the disputed facts must be used, without prejudice to taking into account any subsequent interpretations that may have been given"*.

6. CONCLUSIONS

As we have been able to observe throughout the pages of this work, there is a clear and evident lack of legitimacy from two perspectives: from the national domestic sphere and from the international panorama. Currently, the phenomenon of globalisation and the rise of harmonisation policies have led to the construction of an international legal framework that, far from being based on the inoffensive consensual character that soft law still appears to have, entails a clear interference in the legal systems of the signatory states of these treaties.

This interference is a dent in the sovereignty of the state, which in certain matters is rendered totally useless because it has decided to submit to the decisions of these international organisations. This voluntary submission is similar to the "party discipline" typical of political groups and, far from being critical and constructive through debate, it seems that the appropriateness of the measures to be implemented by these international organisations competent in fiscal matters cannot be questioned. These organisations usually boast of their democratic and transparent procedures, in which the space for dialogue and consensus is guaranteed, but at the same time, the level of secrecy and lack of publicity in some of their decision-making is paradoxical.

When we are faced with such transcendental decisions as our own tax system or the effect that these decisions and agreements have on the country's economy, the debate on the conformity of submitting "voluntarily" must be put on the table once again, since the tendency that can be seen is to automate decision-making through delegates and representatives who, in the case of Spain, may not be competent by virtue of the subject matter. At the same time, the transparency of these representatives and of the Spanish

government with regard to their appointment and mandate, which is conspicuous by its absence in the Official State Gazette or in the publications of the Ministry of Finance, is called into question.

The supposed guarantees of transparency, publicity and public accountability are analogous to the value of the Agreement that British Minister Chamberlain signed in Munich in 1938: deficient. We can only see the names of our delegates at the signing of Treaties and Conventions, once they have been published; there is no accountability of representative bodies to the national Parliament, which sometimes witnesses debates about the legitimacy of such decisions when there are controversial cases or cases of high-profile corruption.

At the same time, the lack of representation of emerging countries in the OECD and the UN stands out, especially due to the weight of countries with consolidated economies in decision-making, which pushes the needs of countries with economies in transition to a secondary position. In particular, the UN's veto mechanism further widens the gap between established and emerging countries, which is becoming anachronistic and dysfunctional in the context of today's society, more than 50 years after the Second World War. Therefore, the legitimacy of these international organisations, and the very lack of it within the Spanish system, means that the democratic system could be affected by a crisis of values.

In fact, this democratic decadence is a phenomenon that is increasingly visible in the field of taxation with regard to the recent interference in the rights of taxpayers, who have a series of legal guarantees that are not usually applied due to the importance and weight of international organisations; subjects that condition the provision of aid and funds on compliance and compliance with this type of Treaties and Conventions, in which refusal means economic and political retaliation, in an indirect manner.

This, in a scenario defined by a strong post-pandemic economic crisis - and now coetaneous to the war in Ukraine - in which states suffer from a great dependence on the International Community due to serious public debt problems, as is the case of Spain. Compliance with these measures has become a bargaining chip for the economic survival of member states, even if these measures are in themselves counterproductive and mean digging even deeper into the state's own misfortune.

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