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Legitimacy of tax rules

The Influence of Conventions on Human Rights, International Investment Agreements and the International Covenant on Economic Social and Cultural Rights on Designing, Applying, and Interpreting Tax Legislation

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INTRODUCTION

The present essay is part of the research project EUCOTAX Wintercourse 2023. The object of this work addresses the legitimacy of tax rules but taking into account international conventions on human rights and investment protection agreements in the different decision-making processes at EU, international and domestic level.

This work intends to cover the most relevant issues regarding the impact of the different international instruments on legitimacy of tax rules at international, EU and local level, like the International Covenant on Economic Social and Cultural Rights among other international instruments.

The methodology and sources used consist in research of international, European and domestic doctrine, case-law and diverse articles written by professors and experts in the subject. They are used to develop legal scientific research that intends to cover all the important points of the influence of decision-making processes concerning Convention on Human Rights, International Investment Agreements, the International Covenant on Economic Social and Cultural Rights on designing, applying and interpreting tax legislation.

The following essay is structured in epigraphs and headings, that cover accurately all the matters enshrined in the questionnaire, in order to give a better form and structure of the work and for its better understanding and cohesion of the subject covered.

Part I covers preliminary matters that introduce and explains the different international instruments and his most important features as well as the states obligations regarding the different treaties and agreements that they are part of.

Part II covers the designing, application, and interpretation of tax legislation at international and EU level.

Part III cover the subject of designing, application and interpretation of tax legislation but at a domestic level.

Finally, this work ends up with a conclusion of all the research as sum up of all the important ideas.

I. PRELIMINARY MATTERS

a. Conventions on human rights in Spain

Spain is bound to some conventions on human rights that manifest their citizens the value that human rights reserve. The core conventions that my country is bound to are the Charter of Fundamental Rights (CFR), the European Convention on Human Rights (ECHR) and the Covenant on Economic, Social and Cultural rights (the Covenant).

Firstly, the Charter of Fundamental Rights when it is applied to member states usually finds a gap that it is normally occupied by the rights' declarations that are enshrined in each national constitution. In that space, the Charter "tries to superimpose national charters with the aim of shifting, since CFR does not annul national rights and freedoms, even in the scope of application of the European Union Law".[1]

The contradictions that can arise between the CFR and the Spanish Constitution cannot be solved by applying art. 10 of the SC, because the Charter operates in a direct and autonomous manner, and because of its primacy, strikes down the disparities that could arise. The Charter "cannot be assert as a hermeneutic element of simple character of the Constitutions, but because of its insertion in the communitarian legal system transforms in secondary any other protection system"[2].

In most cases, the relevance of the CFR it is referred to secondary law, mainly decrees and directives. Thus, affects secondary law validity because of its lack of respect of the CFR. The Charter has been used as an interpretative criterion and as a reflex of national measures of its transposition in order to assure the application of the EU Law by the member states according to fundamental rights. The application of fundamental rights of the EU has not the aim of assuring the harmonisation of fundamental rights but to "assure a uniform application of other rights of the EU".[3] The CFR, in its art. 53 tries to protect not only common national traditions but the effectiveness of national constitutions.[4]

The decision to adopt the Charter was formally adopted by the European Council of Colonia of the 3rd and 4th of June 1999, with the aim of manifesting fundamental rights and freedoms to the citizens of the Union, in a visible and clear manner, as a demand of

[1] P. CRUZ VILLALÓN, <<El valor de la posición de la Carta de derechos fundamentales en la comunión constitucional europea>>, cit., pág. 94.
[2] M. REQUEJO ISIDRO, <<La Carta de los Derechos Fundamentales de la Unión Europea: ámbito de aplicación>>, en Estudios sobre la Carta de los Derechos Fundamentales de la Unión Europea. Santiago de Compostela: Universidad, 2004, págs. 211 y sgs.
[3] J. KOKOTT y C. SOBOTTA, The Charter of Fundamental Rights of the European Union after Lisbon, cit., pág. 7.
[4] E. GONZÁLEZ y R. RUBIO, España Constitucional (1978-2018). Trayectorias y perspectivas vol.I, pág. 831-833.

the current evolution of the European Union, linked to the creation of a space characterised by freedom, security and justice; and to the citizenship of the EU.

The political motivation of the Charter is clear. A fact that has been affirm by the Commission is that the main cause of the necessity of the Charter was that the Union entered a new phase of integration with a major political determination.[5]

On other hand, the European Convention on Human Rights has a singular character and a constitutional dimension. The Convention is a treaty celebrated between states that has a specific nature that differentiates from other classic type treaties in the fact that guarantees collectively rights and fundamental freedoms and creates objective obligations that have a collective guarantee.

In the Spanish internal legal system, the relevance and singular nature of the ECHR are undeniable. The Spanish Constitutional Court in its sentence 245/1991, 16 December, in the case Barberà, Messegué y Jabardo, the Convention not only is part of our domestic law according to article 96.1 of the SC but also, according to article 10.2 SC the norms related to fundamental rights and public freedoms enshrined in the SC have to be interpreted according to international treaties and agreements about the same matter ratified by Spain.

Among these treaties, the Convention has a special place (legal fact 3 of the sentence 245/1991, 16 December). It is important to highlight two characteristics of the fundamental rights and freedoms enshrined in the ECHR:

Firstly, they are outlined by undetermined legal concepts, which are settle later when they are applied to specific cases.

Secondly, the Convention mainly protects civil and political rights (the so-called human rights of first generation), although some of them (like for example, the right to unionization) have an undeniable social-economic dimension. [6]

a. Union´s competence on human rights protection

The EU has the competence of promoting human rights in the cross border action although the Union receives several critics regarding its practice. There are several international instruments that the Union have invoked in a systematic manner in this matter: the International Charter of Fundamental Rights, the ECHR and some of its

[5] I. LIROLA DELGADO. La protección de los Derechos Humanos en la Unión Europea. Reflexiones a la luz de la Carta de Derechos Fundamentales de la Unión Europea. Agenda Internacional. Nº 20. (2004) PP.93-111.
[6] J.A. CARILLO SALCEDO. El Convenio Europeo de Derechos Humanos. 2003. Madrid

additional protocols, and the rest of the international agreements that are adopted in the heart of the United Nations, among others.

The EU oversees concluding international treaties for the protection of human rights, as also its correlation and contribution to the development of customary norms in this subject. There is a functional succession of powers from the Union to its member states, that should not be understand as a substitution of the member states but as a cohabitation of the Union with them, from which will derive a joint and solidary responsibility for its compliance.

The ECHR has been a privileged normative text in the High Court of Justice of the EU case-law for the identification of fundamental rights under the category of general principles in the communitarian legal system since the seventies.[7] The legal status of the Charter is characterised by a remission to national legislation of member states that regulate its exercise. This remission affects mostly social and economic rights, which is the category of rights which have been the most problematic and criticized rights.

The content of these rights, according to this remission to Communitarian Law and to national legislation, will depend basically in the norms of each member state. The worst problems that arise when determining the scope of the rights recognised in the Charter are mainly focus in two questions which are referred in the dispositions enshrined under the title: "General Dispositions".

The first question refers to the limitations that are stablished for the exercise of Charter's rights. In relation to this question, the Charter does not stablish specific exceptions or limitations for each right - as a difference to the ECHR-. However, there is a general clause in the art. 52, par.1. This disposition uses a formula that it is inspired in the case-law of the High Court of Justice of the European Communities, according to which "it will only be possible to stablish limitations, respecting the proportionality principle, when they are necessary and the effectively respond to the general interest objectives recognised by the Union or to the necessity of the protection of fundamental rights of freedoms of other". It is also criticised the systematic unknowledge and vague notion of the general interest.

The second question concerns the link between the guaranteed rights of the Charter and Communitarian Law, the ECHR and the legal system of the member states, specially to national constitutions.[8]

Spain's internal order as a member of the EU could choose the form in which the ECHR will be applied to its legal system. The current form of application of the Covenant in

[7] J.R. MARÍN AÍS. La Unión Europea y el derecho internacional de los derechos humanos. Granada. 2013.
[8] I. LIROLA DELGADO. La protección de los Derechos Humanos en la Unión Europea. Reflexiones a la luz de la Carta de Derechos Fundamentales de la Unión Europea. Agenda Internacional. Nº 20. (2004) PP.93-111.

Spain it is enshrined in art. 94 of the Spanish Constitution[9] which stablishes that in order for the State to give consent, to be obliged by treaties or covenants that will imply the modification or derogation of any law or the need of legislative measures for its execution, it will require the previous authorization of the General Courts.[10]

In addition, once they are published in the Official Gazette, they will be part of the internal legal order.[11] The rights of the Covenant are directly applicable in front of the Spanish internal courts, and they must be complied with in front of them.

The current value of the core conventions on human rights in the European legal order depends in the norms in which every legal order regulates the relationship between the Domestic Law and the International Law.[12] There have been concluded many conventions related to human rights In the heart of the Council of Europe , from which are important to highlight the following:

- The European Covenant of extradition, 13 December 1957, completed by two additional protocols of 15 October 1975 and 17 March 1978.

- The European Social Charter, adopted in Turin on the 18 October 1961.

- The European Convention for the repression of terrorism, 27 January 1977.

- The Convention for the protection of the legal statute of the migrant worker, 24 November1977.

- The Convention for the protection of persons against the automatized data treatment of personal character, 28 January 1981.

- The European Convention for the prevention of torture and the penalties or degradant or inhuman treatment, 26 November 1987.

- The framework Convention for the protection of national minorities, 1 February 1995.

- The Convention for the protection of human rights and human dignity related to the application of biology and medicine, 30 April 1997.[13]

- The International Convention for the elimination of all kinds of racial discrimination.

- The Convention for the elimination of all kinds of discrimination against women.

[9] Art. 94 Spanish Constitution
[10] Instituto de estudios fiscales. (2014). Crónica tributaria. P. 138
[11] Art. 96.1 Spanish Constitution.
[12] Instituto de estudios fiscales. (2014). Crónica tributaria. P 138.
[13] J. A. CARRILLO SALCEDO. El Convenio Europeo de Derechos Humanos. Madrid. (2003).pp. 11-13.

- The international Covenant of Economic, Cultural and Social Rights.
- The Convention for Children's Rights
- The Convention for the rights of persons with disabilities
- The International Covenant of Civil and Political Rights.[14]

b. State's obligations

The states, when they ratify international instruments on human rights, they have the obligation of applying them when the institutions and organs of the Union and the member states apply the Union Law. [15] It is true that member states have freedom to choose the mechanism that they are going to use for the implementation of the texts that they have ratified. If the objective is the fulfilment of human rights, they cannot choose between reaching it or not. They can choose the means only if they are adequate and necessary to reach them, providing the corresponding justification of using those and not others.

One of these measures, is the financial or economic measure that member states will have to adopt to collect and expend the funds in an efficient, effective, equal and sustainable manner for the fulfilment of human rights sufficiently and fairly. Member states must comply with the so-called "general measures of application". These obligations can be conceptualised as every measure that needs to be adopted by a member state for respecting, protecting, and promoting human rights, recognised in the international documents that they have ratified.[16]

The state can make reservations and observations to the conventions. In the case of the ECHR allows member states – respecting the procedural limits stablished in art. 57, according to which reserves of general character are not allowed – to make reservations. Although the Convention overflows the mere reciprocity character between the contracting states and creates objective obligations that enjoy a collective guarantee. [17] At a domestic level the competence of making reservations and observations is attributed to the Government of exterior politics and in matter of international treaties.

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[14] A. BUCHARDÓ i PARRA. Programa de Doctorado en Sostenibilidad y Paz en la Era Global. Presupuesto Público y Derechos Humanos: las obligaciones financieras de los Estados en materia de derechos humanos.

[15]Instituto de estudios fiscales. (2014). Crónica tributaria. P. 157

[16] A. BUCHARDÓ i PARRA. Programa de Doctorado en Sostenibilidad y Paz en la Era Global. Presupuesto Público y Derechos Humanos: las obligaciones financieras de los Estados en materia de derechos humanos.

[17]J.A. CARRILLO SALCEDO. El Convenio Europeo de Derechos Humanos. Madrid. (2003). P. 34

The validity of the reservations and declarations of the member states are subjected to the control of the European Court of Human Rights. In this sense, the determination of their validity, as its interpretation escape form the individual, unilateral and subjective appreciation of the members that are parties of the Convention. [18]

c. International Investment Agreements

International Investment Agreements are treaties of mutual nature that have the aim of protecting international investments of the enterprises by the reduction of the political and legal uncertainty abroad. Their purpose is to minimize the political risk and to assure a wider legal security to the investor by providing knowledge. The two signing parties will agree in some obligations and guarantees for the investments that are going to be done in both countries reciprocally.

The protection is given by IIAs it applied in the post-establishment of the investment phase once the investment has been carried out according to the receptor country. Moreover, IIA tries to guarantee mainly the investments that are made between capitalists countries and third countries, in most cases applying the principle of reciprocity.[19]

However this reciprocity, declared in the proper name of the agreements, it is not translated in practice as a reality due to the fact that the investments that are made under their scope are normally of one direction, from the develop country to the third country or when the volume of investment is much superior. It is important to remember that the necessity of the protection of the investor is more urgent in the first case than in the second case. This does not mean that we are in front of a fake reciprocity.

However, although both countries assume similar obligations – reciprocal -, in one of them is more evident or remarkable its obligation of compliance as a consequence of the existent slope between both countries, when it comes to legal and economic security of the investors.[20]

In the negotiation of the bilateral agreements it usual to use a model of agreement that has been generally elaborated by the capitalists states with the aim of approaching the same protection standard to its invertors abroad. The models that are used are not the same in all countries and it can be said that each state or group of capitalist's states have

[18] J.A. CARRILLO SALCEDO. El Convenio Europeo de Derechos Humanos. Madrid. (2003). P. 35

[19] Not all bilateral agreements are reciprocal, For example, in the agreement between Indonesia and France (1973), and Yugoslavia (1974) and Corea (1975), the agreement only enshrined protection norms for the French investor, what made sense because there was any inversion in the other direction.

[20] El curso de J.P. Niboyet, <<La notion de reciprocité dans les traites diplomatiques de Droit International privé>> en R. des C. (1935-II) t. 52, 253-361, que habla en estos casos de reciprocidad <<política>>: pp. 348 y ss.

a couple of models to use them at the same time with other countries (Latin-Americans, Africans, Asian).[21]

The huge volume of IIAs made International Public Law think about the possibility of their integration to Customary International Law. The main reason of this was the uniformity of its dispositions. This question has not been definitively resolved; it has not been accepted because the sufficient existence of the necessary *opinio iuris* has not been proven. Many third countries have denied that they have agree with the legal content of IIAs that they have subscribed in multilateral negotiations.[22]

The model of the IIA adopted is really relevant due to the fact that it will influence the level of protection of the investment. If we adopt an agreement with vague and general norms the investor will not be protected properly since the is a wide scope that it is let to interpretation. On the other hand, if the content it is formed by specific and precise norms, the investor will have very clear since the beginning his rights and obligations, increasing the legal security, and making possible the proper valuation of the risks.

Furthermore, the rigidity can also be an inconvenient and can be non-suitable for all the circumstances that can arise along the years that lasts an investment. Because of this, it is important in the study of IIAs the consideration of the balance that exists between general and specific norms. In this sense, seems reasonable that restrictive norms of the investments (nationalizations, expropriations and similar measures) are very precise, specific and detailed to confer legal security and predictability.

On the other hand, the norms that are related to controversies and to the applicable law must be flexible enough to ease a satisfactory agreement between the parties. For this, as it will be desirable for the clauses of the investment agreement, it is positive to include in IIAs the general principles, without the necessity of specifying the content, interpretation, and development of them that will limit their rights, they will stop being principles to start being dispositive rules and will impede or make difficult the investments.[23]

The mechanism followed to assure this protection is by using the following clauses:

- The compulsory standards of just and fair treatment and national treatment, that guarantees the foreign actives a non-discriminatory treatment. Using these standards, and with the exception of the privileges given to third parties by regional economic integration processes, of the treaties to avoid the double imposition and the internal

[21] Dolzer y Stevens, op. Cit., p.14 y sobre los diferentes modelos utilizados por los norteamericanos Lewis, <<The United States-Poland Treaty Concerning Business and Economic Relations: New Themes and Variations in the U.S. Bilateral Investment Treaty Program>> en law and Politics in International Business (1991) vol. 22, 534-560.
[22] VIVES CHILLIDA, J.A., <<Las cuestiones relativas a la admisibilidad de la reclamación en la Sentencia Elettronica Sicula Spa (ELSI) (Estados Unidos/Italia) >> en REDI (1992-1), pp.56-57.
[23] GARCÍA RODRIGUEZ, I. La protección de las inversiones exteriores (Los acuerdos de promoción y protección reciproca de inversiones celebrados por España). Valencia. (2005). Pp. 121-123.

fiscal legislation, the Spanish investment will not receive a less favorable treatment than the local investor.

- The expropriation measures or others similar effects to the expropriation, that could only be adopted in a non-discriminatory form, because of public interest reasons and by the payment of an immediate, adequate and effective indemnity.

- Right to the free transference of the capital, benefits and other payments related to the investment.

- Guarantee of the compliance of the contractual obligations contracted by the receptor state of the investment with the investor.

- Mechanism to resolve, by international arbitrage, the possible controversies that could arise between investors, and investors and the states.

IIAs and investments are controlled by the Administration because if the state were not able to control this action, abuses will take place. In this way, these administrative controls are useful for the Administration to have economic knowledge or statistics knowledge of the operations that are produced by foreigners in their territory or its nationals and residents abroad.

In general, this control is made after the capital movement has taken place (the investment), except in the case of investments that are related with territories or countries that are consider tax havens and when we are in the case of an activity that has an impact in an area that has special regulation, in this case, it can be demanded the submission of a declaration previous to the investment. The competence of this control is conferred to the "ministry of taxes and economy".

In any case the investor must take into account the rules that are enshrined in the Royal Decree 664/1999, 23 April about abroad investments as the obligation of its declaration in the Investment Registry, and following the principles that are derived from its framework norm, the law 40/1979 (nowadays revoked by the law 19/2003, about the legal regime of capital movements and economic abroad transactions), the obligations of international treaties have to be respected, different form the communitarian ones, that has its origin in Spain.

It is important to highlight that the Royal Decree 664/1999, 23 April, about abroad investments is characterized by its concision and its assumption of the liberalization of capital movements of the Maastricht Treaty, with the only limit of the safeguard clause. It must remembered that article 56 of the CEE Treaty does not only prohibits the

restrictions to the capital movements and the payments between members states, but also between member states and third countries.[24]

The complexity between the legal relationship between the investor of an state party in an IIA and the receptor state of the investment, also being a party in the international text , makes necessary to foresee how can controversies be solved. The different level in which one and another act, suppose on the one hand that, that the investors that do not feel secure in front of national courts that works or depends on one of the parties in the investment contract, and on the other hand, that the receptor state does not accept the jurisdiction of the court of origin. [25]

Because of all of this, arbitration is the best alternative to solve conflict of interests between the investor and the receptor state. Moreover, for the investor the appeal of arbitration means that he can avoid any immunity allegation of jurisdiction and execution of the receptor state. This is the main reason why it is used the so-called mixed arbitration (between an individual and a state) as one of the possible ways of solution of controversies in investment matters.

In investment contracts can arise many legal relationships which treatment could be independent, and states do not want to solve it by arbitration. In general, this are questions that affect public or national interest and because of this are considered of the exclusive competence of national courts and with the application of the *lex fori*. These matters are normally related to subject that are rule by a territorial criterion (criminal, taxation, freedom of competence and social security, among others), as also by material imperative norms.

Nowadays, this situation has quite change and it is being accepted little by little the submission of these subjects to international arbitration. So, when it comes to controversies that arise because of tax matters, in order to know if it can be solved by arbitration the content of the IIA will be analyzed to know if the object of the dispute can be submitted to arbitration and to find out if the arbitral award is valid, so the conditions of one and other have to be studied. It is fundamental to determine clearly the scope of application of the IIA and the range of the clause relative to solving controversies.[26]

For Spanish investments, in order to reach the benefits of IIAs they need to recognize that they have their residence or nationality in Spain according to Spanish legislation. In the case of IIAs that refer to residence in Spain and nationality in other state party of the bilateral agreement may seem no reasonable to admit as a Spanish investor a national

[24] GARCIA RODRIGUEZ, I. . La protección de las inversiones exteriores (Los acuerdos de promoción y protección reciproca de inversiones celebrados por España). Valencia. (2005). Pp. 93-95..
[25] PETER, W. Arbitration and Renegotiation of International Investment Agreement: A Study with particular Reference to Resources Agreements, Dordrecht 1986 y 2º ed., title Renegotiation of International Investment Agreements, La Haya 1995.
[26] GARCIA RODRIGUEZ, I. . La protección de las inversiones exteriores (Los acuerdos de promoción y protección reciproca de inversiones celebrados por España). Valencia. (2005). Pp. 263-267.

from the other state party by the simple fact of having his residence in the Spanish territory.

In the first case because the text of the IIA confers to nationals of said state the condition of investor of that state and because the investment will be done in the state of its nationality, in the way that, if the condition of foreigner investor in the legal system of the receptor state of the investment is appointed according to the alien status of the person, we will find ourselves in a situation which is purely internal from the perspective of said state and will not need the protection of any bilateral agreement.

Another situation, which can be more delicate, it is the case of a Spanish citizenship which does not have his habitual residence in Spain, but in another state party in the IIA and that wants to invest in that country, due to the fact he cannot beneficiate of the bilateral agreement nor of the Spanish legislation (he can beneficiate of the diplomatic protection) due to the fact that he is not define as an investor of the said IIA nor the Royal Decree 664/1999.

That is to say, that while the investments of foreign residents in Spain are protected by IIA, the investments of Spanish residents in the other party state are not treated as "abroad Spanish investments", which does not mean that for this other state party the said investor is absorbed by a local investor because the most reasonable fact is that he is considered a foreign investor by his legislation. Neither could be protected by the IIA the national Spanish investor that has his habitual residence in the territory of the other state party that invests in Spain due to the fact that, although he is a foreigner investor from the Spanish perspective, he is not a national investor for the other contracting state.[27]

In our country, the protection in investments as the mechanisms associated to it, are being the object of an intense process of transformation. Spain actively participates in different forums where the reform of the investment arbitrage is debated, understanding that this has to be a coherent, foreseeable, impartial, transparent and accessible to all the enterprises, PYMES included.

Currently there are different types of IIAs in force: the Agreements signed by Spain bilaterally, the Agreement for the Reciprocal Protection and Promotion of investments (APPRIs). Agreements signed by Spain as a country which is a member of the EU, the Agreements for the Protection of Investments and other multilateral treaties. [28]

The competence to conclude IIAs in the EU its conferred to the States. Two member states can negotiate about aspects or questions that affect natural and legal persons; their scope is the one form their respective nationals. However, there is any international law norm that impedes to the contracting states of an agreement, to include nationals of third

[27] GARCIA RODRIGUEZ, I. . La protección de las inversiones exteriores (Los acuerdos de promoción y protección reciproca de inversiones celebrados por España). Valencia. (2005). Pp. 136-137.
[28] Ministerio de industria, comercio y turismo. (2022) Protección de inversiones y regulación.

countries in the personal scope of application. [29] All national (and in some cases regional) parliaments in EU countries need to approve IIAs before it can take full effect.[30]

d. **Covenant on Economic Social and Cultural Rights**

The year 1966 was key for the history of human rights and records a turning point from which we have not recovered yet. Covenants that develop the Universal Declaration of human rights are passed, and this are divided in civil and political rights and economic, social, and cultural rights. They were created because of the weakening of the initial boost of human rights that was produced by the betrayal of the governments to the universality and individuality of human rights.

The International Covenant on civil and political rights, passed on 16 December 1966, prohibits torture, death penalty to minors, slavery, detention or arbitrary imprisonment, any person has the right to effectively appeal before courts. In this same date the International Covenant on Economic, Social and Cultural Rights is passed in which, contrary to the Covenant on civil and political rights, does not have an international mechanism, for the demand of the rights that enshrined in the Covenant nor the responsibility of the state because of its violation.

In application of this instrument, each state "compromise themselves to adopt measures…to achieve progressively… the full effectiveness of the rights recognized therein…until the maxim appeals that they dispose…". This paragraph leaves legal exposed the right to work, the syndical creation, social security, alimentation, education, house, physical and mental health, the protection against hunger or the participation in cultural life. The main reason to keep these rights out of the judicial protection it is the lack of appeals, and the states tries to justify the violation of economic, social and cultural rights alleging that they lack of the economic, human and technic resources necessary for its compliance.[31]

Spain signed the Covenant the 28 September of 1976 and was ratified the 27 April 1977. The International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges states parties to take as much action as their available resources allow to progressively achieve the full realisation of the rights it guarantees (the principle of progressive realisation).[32] The nature of the obligations of the Covenant has created three types of

[29] GARCIA RODRIGUEZ, I. . La protección de las inversiones exteriores (Los acuerdos de promoción y protección recíproca de inversiones celebrados por España). Valencia. (2005). Pp.128-129
[30]European Comission. (2022) EU-Canada Comprehensive Economic and Trade Agreement.
[31] BELTRAN VERDES, E. El pacto internacional de derechos económicos, sociales y culturales. Derecho internacional de los derechos humanos: su vigencia para los estados y para los ciudadanos (2009). págs. 72-77
[32]Federal Department of Foreign Affairs FDFA. (2022). International Covenant on Economic, Social and Cultural Rights.

obligations: the obligation to respect, protect and to do the rights. At the same time, it can be seen form a traditional classification: obligations of the media and of result.

The first obligation of the state is to abstain from adopting measures that could difficult or impede the free activity of individuals, families, and groups, in the use of their resources and in the exercise of their options, directed to each the enjoyment of the rights. Some examples contrary to this obligation are the derogation or suspension of the necessary legislation for the enjoyment of a specific rights (like the derogation of the norms for the protection of the worker or the right to social security).

The second obligation, the obligation to protect, it refers to the idea of protecting the individual from other individuals (natural or legal). Specially in situations that put the individual in front of an aggressive or authoritarian element like when it comes to economical powerful interests when they are impious.

The third obligation, the obligation to achieve rights can be divided at the same in facilitate, make effective and promote rights.

The obligation to facilitate rights means that the state must initiate activities with the aim of strengthen the enjoyment of the population of the rights enshrined in the Covenant. The obligation to make effective the enjoyment of rights foresees that, when an individual or a group are unable to enjoy one of the economic, social, or cultural rights because of reasons that are out of their control, the states with the means that they have should make directly effective that right. Finally, the obligation to promote rights foresees that contracting parties should promote, maintain and establish the health of the population.

Following the second distinction contracting state have obligations of the means and of result.

In the obligations of the means the State has the compromise of adopting a determine behaviour, of action or omission, that represents and end in itself.

In the obligation of result, the State has to reach a specific result, but by means of a behaviour (also of action or omission), which form its let to the discretion of the first one.[33] In relation to tax matters, this means that the states that are part of the Covenant will elaborate and apply tax legislation as their available to achieve the full realisation of the rights that the Covenant guarantees.

Regarding the legal status of implementation of the Covenant, the Committee on Economic, Social and Cultural Rights has taken several positions in different states. The Committee states that every contracting state has the obligation to use every mean that

[33] GIALDINO, R.E. Obligaciones del Estado ante el Pacto Internacional de Derechos Económicos, Sociales y Culturales. Vo. 37. (2003) Revista IIDH. Pp. 87-108

it's at their disposal to make the rights of the Covenant effective and they must not forget the two fundamental principles that inform the internal application and observation of the treaty.

The first principle is the principle of primacy of the treaty, brought out by article 27 of the Vienna Convention about the law of treaties, that prohibits to Spain to invoke the internal dispositions of its legal system as a justification of a possible disobedience of the Covenant. By this the Committee evokes as a fact to sustain that the contracting states "must modify the internal legal system in the necessary form in order to give effectiveness to the obligations that arise from the treaties that they are part of".

The second one comes from the Universal Declaration of Human Rights, which article 8 proclaims the right of every person to "an effective appeal in front of the national competent courts, that protect them against acts that violates their fundamental rights recognised by the constitution or the law".

The Committee admits that the States can justify the lack of juridical internal resources in order to confront the eventual violation of economic, social and cultural rights, saying that they are not the appropriate means according to art. 2.1 of the Covenant, or that they are not necessary due to the existence of other used means, the Committee adverts the difficulty to prove it because "in many cases, the other "means" used can be ineffective if they are not strengthened or they are complemented by other judicial resources".[34]

Spain does not show a position that demonstrates its participation at an international level to ensure that the Covenant is respected. As an example of this fact, there is the negative by the Spanish organs to execute the reports given by the Committees of Economic Social and Cultural rights.

In the sentence of the Constitutional Court 70/2002, 7 April, which expresses in respect to a report of the Committee in which the court states that "the "observations" that have the form of reports submitted by the Committee are not judicial resolutions, because the Committee does not have jurisdictional faculties (as it can be read in arts. 42 and 42 of the Covenant), and their reports cannot substitute the authentic interpretation of the Covenant because in any moment neither the Covenant nor the Facultative Protocol confers them said competence".[35]

[34] FALEH PEREZ,C. Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de derechos humanos de naturaleza no jurisdiccional (2020), págs. 65-98

[35] Gutiérrez Espada, C. REFLEXIONES SOBRE LA EJECUCIÓN EN ESPAÑA DE LOS DICTÁMENES DE LOS COMITÉS DE CONTROL CREADOS POR LOS TRATADOS SOBRE DERECHOS HUMANOS. Los efectos jurídicos en España de las decisiones de los órganos internacionales.

Regarding the fact that the International Covenant of Economic, social, and cultural rights adopted in 1966 constitutes a true international instrument, from the moment in which the States become part of the Covenant, they accepted the legal obligations which object is to defend and promote the rights promoted by this legal text. The States which are part of the Covenant became responsible of its compliance in front of the international community. The competent organ in charge of supervising the adequate compliance of this rights and make them effective is the "Committee of Economic, Social and Cultural Rights".

This organ is differentiated from the other existing organs of Human rights in the grounds of the United Nations, in the fact that this organ is not conventional. This Committee was created after the defective action of the previous competent organs. The Committee is formed by eighteen independent experts of known prestige in the matter of Fundamental Rights that act independently form any governmental instruction. The members of the Committee are elected by the ECOSOC for a four-year mandate, and they can be reelected.

The principal function of the Committee is to supervise and police the compliance of the state obligations enshrined in the Covenant through "state reports" and to adopt "final observations" in respect to every and each one of them. The Committee also interprets the content of the Covenant, which can influence and contribute to its supervision.

Although this competence is not enshrined in the Covenant, it is helpful for the States to comply with the obligations of this legal text. This competence determines the elaboration of the so called "general observations" which the Committee started to develop in 1988.

In the matter of protection of Human Rights, the international treaties in an universal and regional level they normally use different control techniques that end in three main procedures: a) the emission of reports that the States which are part have to send to the organ in charge of the police of the application of the Covenant; b) the presentation of an interstate complaint; c) the presentation of complaints by people who are victims of the violation of the rights enshrined in the correspondent treaty.

Regarding the first one, the presentation of reports, is where the states acquire the minimum legal control of a treaty. It is the most used one and the most supported in the United Nations. It is the most respectful proceeding with the state sovereignty because of its not accusatory nature. The disadvantage with this legal control technique is that the victims cannot participate nor present the possible violations of this rights by one State.

This control mechanism its particular because of its periodical reports in which is indicated the degree of compliance of each State with the obligations enshrined in the treaties, the internal dispositions of its internal order and its development measures.

The weakness of this technique is that settles down in the fact that the State that presents the report can have a direct interest in hide or distort the information. Because of this, the procedure to correct this defect is characterized by its publicity, and in some cases, the exam of the reports can lead to the opening of an investigation if the content of the report is not satisfactory.[36]

[36]Cervera Valterra, M. (2011). EL FORTALECIMIENTO DE LAS GARANTÍAS DE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES EN EL ÁMBITO UNIVERSAL: El protocolo facultativo al pacto internacional de derechos económicos, sociales y culturales de 2008. p 83-86

II. INTERNATIONAL AND EU LEVEL

a. Designing tax legislation

The European Convention on Human Rights and the Charter of Fundamental Rights influence EU tax legislation in several forms. Applying the right to the protection of property (art. 1 ECHR) authorizes the European judge to sanction confiscatory tax measures and appreciate if the public interest demands of the community are proportionate to the necessity of the protection of the fundamental patrimonial rights of the individuals.

In tax matters, most of the legislative dispositions and regulations applied by the tax administration can be the object of control of the European Court of Human Rights according to article 1 of the Additional Protocol nº1 that guarantees the right to private property. The only limit to the application of this article is the necessity to demonstrate a "fair balance" between the demands of the public interest and the protection of the fundamental rights of the individual.

The applicability of this article 1 permits the application of other articles of the Convention, specifically article 14 which enshrined the right to enjoy the rights of the Convention without being discriminated in grounds of sex, race, religion, political opinion or any other situation. As a result of this application the taxpayer can claim the violation of article 1 in the base that in that specific case a legal provision or a regulation with discriminatory character has been applied.

However, there are some rights, like the right to a "fair process" enshrined in article 6 that will be applied or not depending on the civil or criminal nature of the fiscal contentious.[37]

Taxation and human rights are linked through the protection of the taxpayers' rights. Human rights seek to protect individuals, especially against the exercise of public power, while taxation is an interference with ownership. The exercise of public power through taxation and tax administration could come in conflict with the need to respect the rights of individual taxpayers.

In a tax dispute a taxpayer can only rely on the EU rights of the defence principle if the facts and circumstances of his case place the tax dispute in the scope of EU law, while the ECHR rights of the defence principle laid down in Article 6 ECHR only comes into

[37] Garcia Carcuel, M. El Derecho Tributario y los Derechos Humanos en Europa. Una Aproximación a la Aplicación del CEDH a la Materia Tributaria.

effect when the tax dispute involves a criminal charge. Problematically, in serious tax disputes it thus can occur that neither applies.[38]

In tax matters a proportionality principle is derived from Article 1 of the First Protocol to the Convention, which provides that: every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[39]

The European Convention on Human Rights enshrines some fundamental rights which are relevant in tax legislation, which are the following[40]:

- Art. 6 Right to a fair trial
- Art. 7 No punishment without law
- Art. 13 Right to an effective remedy
- Art. 14 Prohibition of discrimination
- Art. 1 Additional Protocol (1952) Protection of property
- Art. 2 Protocol nº4 (1963) Freedom of movement
- Art. 4 Protocol nº7 (1984) Right not to be tried or punished twice.

From all of them is important to highlight two of them: the right to a fair trial and the right to the protection of property.

The first one, to be applied in tax proceedings of condemnatory character requires the existence of a criminal charge; this is to say that a serious tax sanction has been imposed. The most important guarantees of this right in the tax proceeding are the right to remain silence and the right to have hearing in a reasonable time.[41]

[38] RICHARDSON, M. The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences. EC TAX REVIE 2017-6.
[39] Van de Vijver, A. Peer- reviewed Article. International Double (Non)- taxation: Comparative Guidance from European Legal Principles. EC TAX REVIEW. 2015-5,
[40]Instituto de estudios fiscales. (2014). Crónica tributaria. P. 146 l
[41] P 146 libro

Regarding the right to remain silence TEDH has considered in some resolutions (Bendenoun v. France, Jussila v. Finland, JB v. Switzerland, Allen vs. UK) that there can be a violation of art. 6 ECHR in certain cases where the national norms or practices oblige a person to reveal data orally that can have an incriminatory effect in the framework of a criminal or tax proceeding with condemnatory nature when a criminal charge can emerge from it.

The right to have a hearing in a reasonable time has special relevance in Spain because of the slowness of the judicial proceedings to which sometimes is added the question of unconstitutionality or a pre-trial question. This matter was deal in the case Impar LTD.c. Lituania.

The second one, it is not contemplated in the Spanish Constitution as a fundamental right. The lack of value that is given to this right it is seen as it is enshrined in the additional protocol and not in the actual covenant. The State has the possibility of not ratifying it or present important reserves. Spain signs it the 23 of February 1978 but did not ratify it until the 27 November 1990. However, in the last years this right has acquire a particular relevance.

The TEDH interprets the protection of the property in three parts: the right to the protection of goods, the expropriation of goods and the regulation of the use of the goods. Sometimes, there can be a violation of this right because of the application of the principle of non-discrimination, this is the case *Inze*, sentence of the 28 of October 1987, that it was considered discrimination the fact makes a difference between inheritance rights if the natural and legitimate children.[42]

The CFR enshrines some guarantees for the rights of the tax obligated, from which it is important to highlight the following:

- Art. 17. Right to property
- Arts. 20 and 21. Equality before the law and non-discrimination
- Art. 41. Right to good administration
- Art. 42. Right of access to documents
- Art. 47. Right to an effective remedy and to a fair trial
- Art. 48. Presumption of innocence and right of defense

[42] Instituto de estudios fiscales. (2014). Crónica tributaria. P. 148- 153

- Art. 49. Principles of legality and proportionality of criminal offences and penalties.

- Art 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

There are not references to conventions on human rights, IIAs nor the Covenant in the preparatory documents of EU tax legislation. The main documents used to prepare EU legislation, produced during the various stages of the legislative and budgetary process are the Commission legislative proposals, Council common positions, European Parliament legislative and budgetary resolutions and initiatives, European Economic and Social Committee opinions and the Committee of the Regions opinions.[43]

Where national tax legislation comes within the scope of EU law, it must be compatible with the principle of the rights of the defence, as developed by the Court of Justice of the European Union in its case law and found in the Charter of Fundamental Rights of the European Union. The rights of the defence proclaimed by the European Convention on Human Rights (ECHR) is also applicable in tax matters when a tax dispute involves a criminal charge.

For the European taxpayer it may not be clear when the principle of the rights of the defence can be invoked or how the rights of the defence in EU law and the rights of the defence of the ECHR influence domestic tax proceedings. Broadly speaking, customs duties, harmonized indirect taxes and to some extent direct taxes, fall under the EU rights of the defence, while the ECHR applies to tax matters in which punitive measures occur or criminal prosecution takes place.
EU law dictates that in domestic administrative procedures regarding tax and taxation the EU rights defence principle is only applicable if the tax matter in question falls within the scope of EU law. Article 51(1) EU Charter prescribes that the Charter's provisions are addressed to the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. The words 'implementing Union law' equates to 'acting in the scope of EU law'.

Regarding the consequences of a breach of the EU rights of the defence, in domestic administrative (tax) procedures the infringement results in annulment of the decision taken by the authorities only if, had it not been for such an irregularity, the outcome of the procedure might have been different.

Here it should be noted that it cannot be deduced from the CJEU's case law that these consequences of a breach of the rights of the defence in tax matters differ between indirect taxes and direct taxes, or between tax disputes with and without a punitive tax surcharge

[43] Eur-lex.europa.eu

or fine. When in criminal proceedings in a Member State the taxpayer is prosecuted for tax offenses, he can rely on the minimum procedural rights for suspects or accused persons in criminal proceedings as enforced by EU legislation, such as the right to have a lawyer which applies across the EU as of 27 November 2016.

Furthermore, the criminal defence rights in Article 48 EU Charter apply. An important issue that the CJEU examines in such criminal cases is whether when executing a European arrest warrant by the national judicial authorities the rights of the defence would be violated. For instance, in the case Dworzecki, regarding the conditions under which a summons is served on a person to appear before a criminal court, the CJEU sets out how the executing judicial authority can be assured that the rights of the defence were not breached.

Article 6 ECHR confines the employment of its defence rights to situations concerning the determination of a person's civil rights and obligations or involving a criminal charge, hereby excluding pure tax disputes. Its scope does cover criminal prosecution of tax offences and also administrative tax proceedings but only when they involve punitive tax surcharges or fines constituting a criminal charge.

The dissimilarity between indirect taxes and direct taxes does not seem to be of relevance for the application of the ECHR rights of the defence principle in criminal procedures for tax offences and in administrative procedures in which punitive tax surcharges or fines are imposed. The relevant question is whether a criminal charge has occurred. When the ECtHR establishes a breach of Article 6 ECHR, it holds that there has been a violation of the right concerned and affords just satisfaction to the injured party. Therefore, the state must pay amounts in respect of non-pecuniary damage and costs and expenses.[44]

The ECHR and the Charter influence international tax coordination at the level of the OECD. In cross-border tax procedures they are focused in addressing taxpayers' rights, mainly on the right to an effective legal remedy taking into account the dialogue among courts in respect of legal values contained in national Constitutions of European Union Member States, the EU Charter of Fundamental Rights and the European Convention on Human Rights.

There are references to convention on human rights, International Investment Agreements and the International Covenant on Economic and Cultural Rights within the guidelines issued by the OECD. This can be seen for example, in the Update of the OECD Guidelines on 25 May 2011 for Multinational Enterprises in which the OECD references International Investment Agreements.[45]In this update the OECD makes recommendations for responsible business conduct in a global context.[46]

[44] RICHARDSON, M. The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences. EC TAX REVIE 2017-6.
[45] Van der Zee, E. (2013). *Legal Issues of Economic Integration.* Wolters Kluwer.
[46] Organisation for Economic Co-operation and Development. *2011 Update.* (2011).

b. Applying and interpreting tax legislation.

In the ECHR there are rights that do not affect EU tax legislation but there are others' rights that can be challenge by a determined tax rule. Arts like 2, 3 or 4 of the Convention do not make any change in tax legislation.

On the other hand, it is different when it comes to the rights enshrined in art. 6 (right to a fair trial), art. 7 (equality principle) and art. 1 of the Protocol 1 (right to respect of property).[47]

These three rights can influence tax legislation in matters of state aid or infringement procedures. The above-mentioned instruments are referred to in peer review reports on the implementation of various international tax standards set by the global forum. An example of this, is the peer review process of the global forum on transparency and exchange of information for tax purposes, which refers to the European Convention on Human Rights.[48]

Recent case law of the ECtHR indicates the increasing importance of the Convention in (international) tax matters. Del Frederico notes that 'in the last 10 years, the ECtHR has had an unstoppable force in tax matters. Also, Hinnekens observe in this respect that 'there are signals that a greater impact in terms of protection may be on the way'.[49] The conventions on human rights, International Investment Agreements and the International Covenant on Economic Social and Cultural Rights are frequently applied by international and EU courts in tax matters.

One of the most relevant cases it is the Case of Ferrazzini v. Italy. The applicant and another person transferred land, property and a sum of money to a limited liability company, A., which the applicant had just formed and of which he owned – directly and indirectly – almost the entire share capital and was the representative. The company, whose object was organizing farm holidays for tourists (agriturismo), applied to the tax authorities for a reduction in the applicable rate of certain taxes payable on the above-mentioned transfer of property, in accordance with a statute which it deemed applicable, and paid the sum it considered due.

The present case concerns three sets of proceedings. The first concerned in particular the payment of capital-gains tax and the two others the applicable rate of stamp duty,

[47] DIAZ RAVN, N. FISCALIDAD Y DERECHOS HUMANOS ANÁLISIS DEL SISTEMA TRIBUTARIO ESPAÑOL DESDE EL PUNTO DE VISTA DEL CONVENIO EUROPEO DE DERECHOS HUMANOS.

[48] Leo E.C. Neve. (2022) The peer review process of the global forum on transparency and exchange of information for tax purposes.

[49] VAN DE VIJVER, A. Peer-reviewed Article. International Double (Non-) taxation: Comparative Guidance from European Legal principles.

mortgage-registry tax and capital-transfer tax, and the application of a reduction in the rate. In the first set of proceedings, the tax authorities served a supplementary tax assessment on the applicant on 31 August 1987 on the ground that the property transferred to the company had been incorrectly valued.

They requested payment of an aggregate sum of 43,624,700 Italian lire comprising the tax due and penalties. In a decision of 21 March 1998, the text of which was deposited on 4 April 1998, the District Tax Commission struck the case out of the list. In the other two sets of proceedings, the tax authorities served two supplementary tax assessments on A. on 16 November 1987 on the ground that the company was ineligible for the reduced rate of tax to which it had referred. The tax authorities' note stated that the company would be liable to an administrative penalty of 20% of the amounts requested if payment was not made within sixty days.

The applicant alleged that there had been a violation of Article 6 § 1 of the Convention on account of the length of three sets of tax proceedings to which he was a party. He also complained of a violation of Article 14 on the ground that he had been "persecuted by the Italian courts". The Court in its final decision unanimously joins to the merits the Government's submission as to the applicability of Article 6 § 1 of the Convention and, accordingly, declares admissible the complaint based on that Article.

However, holds by eleven votes to six that Article 6 § 1 of the Convention does not apply in the instant case. Declares inadmissible by sixteen votes to one the complaint under Article 14 of the Convention.[50]

Another relevant case, is the case S.A.Dangeville v. France. In this case the applicant company, a firm of insurance brokers whose commercial transactions were subject to value added tax (VAT), paid 292,816 French francs in VAT on its operations in 1978. The provisions of the Sixth Council Directive of the European Communities, which should have been applied from 1 January 1978, exempted from VAT "insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents".

However, France was granted an extension of time for implementing that directive. The applicant company sought reimbursement of the amount of VAT it had paid or, failing that, the amount attributable to the period from 1 January 1978 to the date the directive entered into force. The Conseil d'État dismissed its application. The applicant also lodged an application with the tax authorities requesting them to review their position. Those proceedings were dismissed by the Conseil d'État, which held that the application for a tax refund had already been the subject of a final judicial decision.

[50] Case of Ferrazzini v. Italy. Judgment Strasbourg. 12 July 2001. (Application no. 44759/98)

However, ruling that same day on an appeal by another company, whose commercial activity and claims were identical to those of the applicant, the Conseil d'État, in a decision that represented a departure from its previous case-law, accepted that there was an obligation on the State to reimburse the sums that had been unduly paid. The applicant alleged in particular a violation of the right to property, as it considered that it had been definitively deprived of money owed to it by the State by the decisions of the Conseil d'État dismissing its claims.

The Court held that there had been a violation of Article 1 (protection of property) of Protocol No. 1. It noted in particular that on both its applications the applicant company was a creditor of the State on account of the VAT wrongly paid for the period 1 January to 30 June 1978 and that in any event it had at least a legitimate expectation of being able to obtain a refund.

The Court found that the interference with the applicant's possessions did not satisfy the requirements of the general interest and that the interference with the applicant's enjoyment of its property was disproportionate because its inability to enforce its debt against the State and the lack of domestic proceedings providing a sufficient remedy to protect its right to respect for enjoyment of its possessions upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Court decided that France was to pay the applicant company 21,734.49 euros in respect of pecuniary damage.[51]

Another relevant case is the sentence of the European Court of Human Rights of the case Melo Tadeu v. Portugal. This case concerned a tax enforcement procedure initiated against the applicant to collect a tax debt owed by a company of which she was regarded as de facto manager, the procedure having continued despite her acquittal in criminal proceedings for tax fraud and having resulted in the attachment of a shareholding interest that she held in another company. The applicant complained that she had been treated, in a tax enforcement procedure, as guilty of an offence for which she had been acquitted.

She further alleged that the attachment of her interest in the other company constituted an unjustified interference with her right to the peaceful enjoyment of her possessions. The Court held that there had been a violation of Article 6 § 2 (right to a fair trial – presumption of innocence) of the Convention, finding that the tax authorities and the administrative courts hearing the case had disregarded the applicant's acquittal in criminal proceedings, thus casting doubt on the well-foundedness of her acquittal in a manner that was incompatible with her right to be presumed innocent.

The Court also held that there had been a violation of Article 1 (protection of property) of Protocol No. 1, finding that, by refusing to release from attachment the applicant's interest in another company, in spite of her acquittal in criminal proceedings, the

[51] Case S.A. Dangeville v. France

Portuguese authorities had failed to strike a fair balance between the protection of the applicant's right to the enjoyment of her possessions and the requirements of the general interest.[52]

Human rights conventions have an impact on tax cooperation procedures at international and EU level when it comes, for example, to exchange of information. A fair balance between the rights of the tax authorities and the rights of taxpayers should always be maintained. However, so far this has not been the case for the exchange of information in direct tax matters. The possibilities and instruments for tax authorities to exchange information have been steadily increasing, but a corresponding increase of taxpayer protection has been absent.

On the contrary, as automatic exchange of information has become the new standard, several existing safeguards have been removed to improve the efficiency of the exchange process. The protection offered by human rights might prove to be a counterweight in this respect, but it is clear that the application of human rights to EOI is currently still in an embryonal stage. We submit that in order to establish the aforementioned fair balance (at least absent a coherent framework for protection derived from human rights), it is necessary to develop tailor-made safeguards for exchanging information.[53]

There is a very closed relationship between the Charter and the ECHR, there is a symbiosis between both legal texts, as also an influence of the ECHR and of the case-law of the European Court of Human Rights in the content of the Charter; it can be added to that the said explanations assume with the European constitution, a very qualified interpretative character, the relation between both texts allows the entry of the Charter, and its following symbiosis, in the system of fundamental rights enshrined in arts. 14 and 53 of the Spanish Constitution.

An structural conflict can flourish in the simultaneous game of the three fundamental rights agreements mentioned, that have three different interpreters in order to pronounce about the same rights (Constitutional Court, the European Court of Human Rights and the High Cout of Justice of the European Community).

However, this multiple constitutional framework that the European integration forms, constitute by the Charter, the correspondent catalogues of the Constitutions of member states and the ECHR, will bring them to a dialogue between the supreme interpreters, that will be lead by common principles and values, like the one enshrined in the Preamble of the Charter, to a "closer union" of the European countries, sharing "a pacific future" which last beneficiary will be the person of the said union.[54]

[52] Case Melo Tadeu v. Protugal.
[53] Diepvens, N. and Debelva, F. The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure.. P. 218-219
[54] ALONSO GARCIA, R. and SARMIENTO, D. La Carta de los Derechos Fundamentales de la Unión Europea.(2006) Navarra. Pp. 56-58

Before the entry into force of the Charter, CJEU relied on unwritten fundamental rights (general principles of EU law). However, the ECHR was an important 'source of inspiration' for CJEU when defining those principles. This is reflected in Art. 6 (3) TEU, which refers to ECHR: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

Furthermore, Art. 52 (3) CFR stipulates that as a minimum standard: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'[55]

Moreover, the International Covenant on Economic Social and Cultural Rights and the Covenant on Political and Civil Rights have practically the same content.[56] These different treaties can interact between each other in tax matter due to the fact that that they share content and they are even mentioned in each other's legal text, like in the case of the CFR and the ECHR.

[55] Explanation. Relationship of the Charter to the ECHR and national human rights provisions. Dr Tobias Lock.
[56] Corriente Córdoba, J.A. España y los Convenios internacionales de Protección de los derechos humanos. P. 132-133

III. DOMESTIC

a. Designing tax legislation

In Spain, laws are generally adopted by the ordinary legislative procedure, which has three phases: the initial phase, the constitutive phase, and the final phase.

The first of them consists in the presentation of a legislative initiative that it is called, depending on the author, "bill" if the author is the Government or "proposed bill" if the author is the Congress, the Senate, an AACC or 500.000 citizens.

Although the general form is the "bill" of the Government and the "proposed bill" presented by the Congress, it is also possible to present "proposed bill" by the Senate (by a Parliamentary Group or twenty-five senator) (article 108.1 of the Senate Regulation).

In this case, once they have been published a period of fifteen days is opened in which other proposition of alternative laws can be presented. Once this period has concluded "the proposed bills" are included in the agenda of a plenary session to take it into consideration (article 108.3 of the Senate Regulation). In the plenary session intervenes the person that proposes its defense, followed by two turns in favor and two against, followed also by a turn of representative of the parliamentary groups that could not exceed ten minutes (article 108.4 of the Senate Regulation).

After this the taking of consideration of the law project its voted, and if this is approved, "proposed bill" its sent to the Congress to its processing. If it's not approved its processing ends. The constitutive phase it's the part that has the aim to determine the content of the future law, which is done after several deliberations and voting, that take place in the Chambers.

The final phase consists in the approval, promulgation, and publishment of the law (article 91 of the Spanish Constitution). The approval and promulgation by the King are formal acts, that have to take place in the following fifteen days. The king nor the Government can vary its content, suspend its processing nor give it back to the General Courts to take it into new consideration. Finally, the law is published in the Official Gazette.57

The General Courts have the legislative competence, and they control the action of the Government according to article 66 of the Spanish Constitution. The Parliament has the competence to pass, modify or derogate organic laws with the absolute majority of the

[57]Senado de España. Procedimiento legislativo ordinario. https://www.senado.es/web/conocersenado/temasclave/procedimientosparlamentarios/detalle/index.html?lang=en&id=PROCLEGORD

Congress. (art. 81 CE) The Government, the Congress and the senate, the Autonomous Community Assemblies and the citizens have the right to present the legislative initiative. (art. 87 CE). The General Court could delegate in the Government the competence of elaborate provisions which have the value of a law in certain subject which are not included in art. 81 CE. (Art. 82 CE).

In Spain, there are some specialties when it comes to the adoption of state tax laws. It is important to highlight that there is an exclusion of the popular initiative to the presentation of a bill when it comes to tax laws.

In second place, the prohibition to create taxes by the State General Budget Law or to introduce tax modifications by means of the mentioned law when a substantive law did not foresee it. There is also the existence of some limits of the legislative initiative when it comes to the approval of the laws that affect income and budget credit.

On the other hand, when it comes to the adoption of autonomic tax laws, there are some specialties like the fact that in the relationship between the ordinary state law and the autonomic the hierarchy principle is not applied but the competence one. In second place, the autonomic legislation should respect some constitutional principles like the unity of the Spanish nation principle, equality, solidarity, territorial limitation of free movement of people and goods.

Finally, when the Government impugns a regional law, the suspension of the disposition impugn is produced automatically. However, the Constitutional Court should ratify or lift the suspension in a period not superior to five months.[58]

The legislative procedure at domestic level does not include the consultation with NGOs when legislating on tax matters. On the other hand, the Committee in order to be as well informed as possible provides opportunities for NGOs to submit relevant information to it.[59]

The courts in Spain do not suggest or impose the need for new legislation to comply with constitutional or international commitment. Its function is to guarantee the obedience of the law of the citizens and the institutions.[60] The resolutions made by the courts can be used to complement the law but they will not impose the need of new legislation. The role is not different in tax matters.

[58] Luis María Romero Flor. (2014). Manual de Derecho financiero y tributario: Parte general.

[59] Annual Report. Committee on Economic, Social and Cultural Rights. Sixty-ninth session (15 February-5March 2021). Seventieth session (27 September-15 October 2021). Economic and Social Council. Oficial Records, 2022. Supplement No.2

[60]Gobierno de España. Poder judicial. https://administracion.gob.es/pag_Home/espanaAdmon/comoSeOrganizaEstado/Instituciones_Estado/PoderJudicial.html

On the other hand, there is a specific control of the constitutionality of the treaties in order to not find contradictions between international and national law. This control is exercised by the Constitutional Court. This is regulated in article 95.2 and 161.1 a) of the Spanish Constitution and in articles 78 and 27 of the Organic Law of the Constitutional Court. Moreover, this control of constitutionality is also exercised to control if the legal acts exercised by public powers are according to the Spanish Constitution, deciding its not application or nullity.[61] This role is not different in tax matters.

The legislator does refer directly to its international commitments during the drafting and the process of the approval of tax legislation in its preparatory documents. The legislator also make reference to international treaties and communitarian law, like in the General Spanish Tax law 58/2003, 17 December.

International conventions have an infraconstituional and supralegal character in the hierarchy of norms in our legal system. This means that international treaties have a supremacy position when adopting or modifying laws. This is enshrined in art. 96.1 of the Spanish Constitution which affirms that the dispositions of the treaties "could only be derogated, modified or suspended because of the reasons enshrined in the treaties or in the agreement with the general rules of international law".

The supremacy of international treaties is also affirmed by the case law even before the Spanish Constitution of 1978. As a general rule, the Supreme Court has declared that the supremacy of the agreements corresponds to "the common Spanish legal, jurisprudential and doctrinal tradition and it is accepted implicitly in the final paragraph of article 96.1 of the Constitution, being applied, for example, in the case of collision between a treaty and posterior law.

Furthermore, the Constitutional Court in the resolution 28/1991, of 14 of February, declares that in case of contradiction between a law and a treaty, the treaty has preference.[62]

There two kinds of procedures in order to ratify international treaties in Spain: the normal procedure and the urgent procedure. In the normal procedure, the deadline after the sign of the treaty (because of its authentication, with which is closed the initial phase of the process of celebration) until the manifestation of the consent to be oblige is between eight and eleven months. The process is structured in the following way:

Firstly, there is a phase of consultation and judgement of the State Council in order to the qualification of the treaty. This phase lasts two months.

[61] Aragon, M. El control de la constitucionalidad en la Constitución española de 1978. P.172

62 Servicio de Estudios del Parlamento Europeo. La ratificación de los tratados internacionales, una perspectiva de Derecho Comparado. España. EPRS.. p 21-22

Secondly, it is send an emission record to the General Courts and there is an authorization to give the consent to be oblige. This phase lasts one month.

Finally, there is a processing in the Congress and in the Senate. This phase lasts from five to eight months.

On the other hand, the urgent procedure of ratification oscillates between four and five months. This process is structured in the following way:

Firstly, the phase of consultation and judgement of the State Council in order to the qualification of the treaty lasts two weeks.

Secondly, the phase of filing the emission record to the General Courts and the authorization to give the consent to be oblige lasts two weeks.

Finally, the processing in the Congress and in the Senate lasts from two to three months.[63] The process is not different for tax matters when it comes to the ratification of international treaties.

In Spain, international treaties do not need any internal act of introduction or transformation of the international norm in domestic law. Its reception is produced by the official publicity (art. 96 SC) in the Official Gazette (art. 1.5 Civil Code and art. 23 LTOAI).

From this it can be affirmed that the Spanish legal system follows the monist position but "a "moderate" monism because of the requirement of the official publicity of the treaty", being of "automatic reception, or semiautomatic reception characteristic of the monist systems". Therefore, the publicity "operates at the same time to comply with the constitutional mandate of the publication of the legal norm – art. 9.3 SC-, and as a requirement for the integration of international norms or as a condition of the compulsion of such norms".[64]

Tax matters can be covered by IIAs. However, there can be some problems for the solution of controversies between receptor and investor in the arbitrations process because of the possible arbitrariness of the process. This kind of matter must be analyzed and foresee If the controversies should be solved independently. There is specific legislation for the regulation of this kind of agreements. Among these laws there is the

[63] Servicio de Estudios del Parlamento Europeo La ratificación de los tratados internacionales, una perspectiva de Derecho Comparado. España. EPRS.. p. 65

[64]Servicio de Estudios del Parlamento Europeo. La ratificación de los tratados internacionales, una perspectiva de Derecho Comparado. España. EPRS.. p. 29

Royal Decree 664/1999, 23 April, about abroad investments, and the law 19/2003, about the legal regime of capital movements and abroad economic transactions.[65]

There is a current debate of the reform of the arbitrage system of investment in which Spain participates actively. Understanding that this system must be coherent, foreseeable, impartial, transparent and accessible to every enterprise, PYMES included. [66]

The intra-EU treaties that affect Spain are the treaties signed by Canada, Singapore and Vietnam. There have been a public debate on these specific treaties about the possibility that these treaties could be applicable provisionally, that is to say, before the ratification process has ended and its compatibility with the EU legal order.[67]

There has been a huge debate especially about the treaty between Canada and the EU, the so-called CETA. There was a discussion about the huge repercussion that will have in our economy but also about how it will affect some social, labor, and environmental rights.

Moreover, the Canadian Council, the bigger organization of social action of Canada, added that "CETA will provoke a decline of the 0.5% of the gross domestic product of the EU and a decline of the 1% in Canada. And it will cause the loss of 230.000 employs from 2017 to 2023, most of them in Europe, and will pressure the decrease of salaries".[68]

There are some general principles, in tax matters that can be highlight that affect tax legislation. These principles are the principle to not stablish discriminatory taxes, so any State can charge directly or indirectly the products of the rest of the State with internal taxes that will charge less for national products.

Secondly the prohibition of protectionist taxes, directed to directly support the national products.

Thirdly, the principle of harmonization of the indirect imposition, this is to say, a VAT communitarian common to the member States; the normative principle of the elimination of the double imposition inside the community and the interdiction of the taxes that can affect the principles non fiscal, like the principle of freedom of establishment of the enterprises.[69]

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[65] GARCIA RODRIGUEZ, I. La protección de las inversiones exteriores. Los acuerdos de promoción y protección recíproca de inversiones celebrados por España. 2005. Valencia. Pp. 95.

[66] Ministerio de industria, comercio y turismo. Acuerdos de Promoción y Protección Recíproca de Inversiones.https://comercio.gob.es/InversionesExteriores/AcuerdosInternacionales/Paginas/APPRIs.aspx

[67] Guamán, A. (2016). El acuerdo con Singapur abre otro frente contra el CETA y el TTIP. https://ctxt.es/es/20161221/Politica/10186/UE-TTIP-CETA-acuerdo-Singapur-competencias-ratificacion-Abogada-General.htm

[68]Perales Poveda, M. (2017. El CETA: Un debate pendiente. https://www.informacion.es/opinion/2017/06/29/ceta-debate-pendiente-5910940.html

[69] Luis María Romero Flor. (2014). Manual de Derecho financiero y tributario: Parte general.

The Spanish legislator has supported since the beginning the existence of a mechanism to assure the compliance of the economic, social, and cultural rights and that allows a solution for its possible violations, understanding that human rights are considered indivisible.[70]

The Committee receives information from international and national NGOs on the status of the implementation of economic, social and cultural rights by:

a) States parties that have not submitted a report since their ratification of the Covenant and its entry into force;

(b) States parties with long-overdue periodic reports.

In both cases, the failure of States parties to comply with their obligations under the Covenant and, in particular, with their reporting obligations, has made it impossible for the Committee to monitor effectively the implementation by those States of the economic, social and cultural rights set forth in the Covenant, in accordance with the mandate conferred on the Committee by the Economic and Social Council.

At its thirtieth session, in May 2003, the Committee, in a spirit of open and constructive dialogue with States parties, decided that, in both of the cases referred to above, the Committee may, through a letter from the Chair, bring to the attention of the State party concerned the information received and urge the State party to submit its overdue report without further delay and to address therein the issues raised in the submissions of NGOs. That letter would also be made available to the NGOs concerned, upon request.[71]

There have been comments and reports with respect to the implementation of the Covenant in Spain made by Spain and other alternative reports made by the organizations of the civil society. The alternative report presented by the organizations of the civil society offers complementary information to the report presented by the Spanish State in June 2009 and highlights the unfulfilling of the Covenant by the Spanish State.

The most worrying fact for the organizations that file the report is: the regressive protection and enjoyment of the economic, social and cultural rights that can be a consequence of the political measures adopted because of the economic crises ; the unequal distribution of the income in the State that can lead to differences and violation of the economic, social and cultural rights: and the lack of social measures of protection

[70] Ministerio de asuntos exteriores, Unión Europea y Cooperación. (2013). Entrada en vigor del Pacto Internacional sobre Derechos Económicos, Sociales y Culturales.

[71] Annual Report. Committee on Economic, Social and Cultural Rights. Sixty-ninth session (15 February-5 March 2021). Seventieth session (27 September-15 October 2021). Economic and Social Council. Oficial Records, 2022. Supplement No.2

to deal with the impact of the crisis in the rights of the individuals or more vulnerable persons like disable people.

The reports also recognize the deficient accountability of the State and the lack of mechanisms for the real and effective participation of the civil society in the adoption of economic and social decisions. The report presented by Spain to the Committee recognizes the improvements that have been produced in Spain since the exam of 2004 in matters of economic, social and cultural rights. However, as a difference from what the Committee ask in these periodical reports, the Spanish State does not show the current situation of the economic, social and cultural rights neither explains its effective guarantee by the public policies.[72]

Each of the States, which are part of the Covenant, must present a periodical report about the improvements and the current situation of economic, social and cultural rights. This report must be presented to the Committee of Economic, social and cultural rights in order to control the effective exercise of this rights and that there is not a breach of the Covenant.[73] IIAs are also control by the Administrations of each state in order to control the movement of capitals. The competence of tis control has its power in the ministry of tax administration.

Regarding the reports of the Committee of economic, social and cultural rights there are deficiencies in our legislative processes. The main reason of this is that the policies adopted for the management of the income do not effectively follow the Covenant. This fact does not affect the legitimacy of the laws produced because of the automatic reception of these treaties that in order to be incorporated to the domestic legal system the international treaties have to respect international norm (like, for example, the Vienna Convention) and domestic laws (like the Constitution).[74]

The Government does not regularly review its policies for the compliance with its international commitments. There can be a possible overlap or collision of the posterior laws that are approved after the international treatments have been ratified. This could have been easily solved by the addition of a new report of articles 22 and 23 of the Government Law, in relation with the lack of conformity of the new legislation and the international obligations that Spain is bound to. This report should be a competence of the Ministry of exterior matters and cooperation. The aim of this is to take into account the effects that the approved provisions have in relation to international treaties.[75]

[72]Centro por los Derechos Económicos y Sociales, el Observatori DESC y otras 18 organizaciones de la sociedad civil española. (2012). *Informe conjunto al Comité de Derechos Económicos, Sociales y Culturales de Naciones.*
[73] CESR y Observatori DESC, (2012)
[74] Santaolalla López, F. (s.f). Los tratados como fuente del derecho en la constitución. P. 15
[75] González Garcia, Julio. (2022) Comentario a los artículos 3 a 6 de la ley de tratados.

As far as I know the government refers in its documents to reports and other documents that reflect the expectations of the international community and to the compliance of communitarian law and its international obligations. On the other hand, there are international bodies like the Committee of economic, social and cultural rights that pressure our government in order to follow effectively economic, social and cultural rights in tax matters.

The Government works alongside the legislative branch to ensure international commitments. According to article 97 of the Spanish Constitution the Government "manages the internal and exterior politics". On the other hand, the state according to article 149.1.3 has the exclusive competence of the international relationships. The competence in the matter of treaties will be implicit in the management of the exterior politics due to the fact that one of the basic instruments is constituted by international agreements, of several kinds, subscribed by the State.[76]

In Spain, there is an institution that defend the fundamental rights and public freedoms enshrined in title I of the Spanish Constitution by supervising the activity of the Spanish public administrations. This is the so-called Ombudsman. It is enshrined in article 54 of our Spanish Constitution. The Ombudsman is chosen by the Congress and the Senate, by a majority of three fifths. He or she is chosen for five years and does not receive orders or instructions by any authority. The functions of the Ombudsman are carried out with independence, impartiality, and autonomy. In addition, has inviolability and immunity during his or her mandate.

Any citizen can ask for the intervention of the Ombudsman, to investigate any irregular action carried out by the Spanish public administration or its agents. This intervention is totally free. The Ombudsman can also act ex officio in cases that he knows which anybody has claim against. The Ombudsman informs the General courts about in an annual report of his action and he can also present monographic reports about matters that he considerers serious, urgent or that require special attention.

Moreover, the Ombudsman supervises that the collection of taxes and the applicable procedures are fair. The main reason of this is that our tax system must be fair due to the fact that our system is based in the economic capacity of the individuals and the principles of justice, generality, equality, progressivity, equal distribution of the tax and non-confiscation.[77]

There is a specific institution in Spain that addresses rights of taxpayers, this institution it is the so-called "Council for the Protection of Taxpayers". This institution has the juridical nature of a collegiate body of the State Administration, being part this Ministry and assigned to the "the tax office's secretary of the state". The Council for the Protection

[76] González García, Julio. (2022) Comentario a los artículos 3 a 6 de la ley de tratados.
[77]Defensor del pueblo. (2022).https://www.defensordelpueblo

of taxpayers will safeguard the effectivity of taxpayer's rights, will attend the complaints produced by the application of the tax system by the organs of the State and will make suggestions and propositions, in the form and with the effects stated by law.[78] This institution has to elaborate an annual report with the complaints and suggestions received and processed.[79] This institution takes into account the list of taxpayer's rights enshrined in article 34 of the law 58/2003.

As far as I know the government does not actively participate in reviewing peers with respect to the adherence to international commitments, including in international tax matters. In deed there are bodies like the Committee on economic, social and cultural rights that have mentioned its deficiency in the compliance with the commitments of the ECHR.

The Government with IIAS tries to attract investments by ensuring a favorable and balance environment that allows the decrease of political and legal uncertainty that sometimes affect investment projects. The internationalization of the Spanish enterprise is supported by this basic instrument of institutional action of the State Secretary of Commerce.[80]

Private investors cannot abuse or pressure governments by using IIAs due to the fact that the Tax administrations of the members of this agreements are in charge of controlling the movement and make sure that the individuals that are beneficiating form them are not abusing taxes with its use.

b. Applying and interpreting tax legislation

The most relevant competence in the negotiation and tracking of an international treaty is owned by the Ministry of abroad matters and cooperation. According to article 4 of the LT the Ministry of abroad matters and cooperation is in charge of the exercise of the general competence of international treaties and the attributions that do not correspond to the other ministries and the coordination with the public administration. So, implicitly, this ministry will be taken into account conventions on human rights when drafting administrative guidelines and circulars on the application of tax law.[81]

There are deficiencies when it comes to human rights of taxpayers and the cooperative compliance. There are deficiencies in matters of exchange of information, the rights that

[78] Art. 34 Royal Decree 58/2003, 13 November
[79] https://www.hacienda.gob.es
[80] Ministerio de industria, Comercio y turismo. (2022). Acuerdos de Promoción y Protección Recíproca deInversiones.
[81] González García, J. (2022). Tratados internacionales y el gobierno: competencias administrativas. https://www.globalpoliticsandlaw.com/2022/04/04/tratados-internacionales-competencias/

are challenge mainly are the right to privacy or the right to data protection. There is a debate about this in the public because a fair balance between the rights of the tax authorities and the rights of taxpayers should always be maintained. In order to stablish a fair balance, it is necessary to develop a tailor-made safeguard for exchanging information.[82]

The are some problematic areas in the cooperation with other tax administrations in which the human rights of taxpayers are challenged. The main areas in which they are exposed is in the exchange of information between the tax administrations of the different countries. The rights that are challenged are mainly data protection and privacy. There is current debate in this matter and the difficulties that are found in order to stablish a balance between the rights of tax authorities and taxpayers' rights.[83]

The tax administration in order to remedy the deficiencies of their action in regard to the human rights of taxpayers confers the right to the interested parties to know information about the treatment of their data. This action is carried out by the tax administration. The interested parties can also exercise with the responsible authority their right to access, rectification, suppression and portability of their data, limitation, and opposition of the treatment, as the right to not be the object of decisions based only in the automatic treatment of their data.

The interested party can also claim in front of the Spanish Agency of Data Protection. Furthermore, before lodging this claim, the interested party can also address himself or herself to the delegate of data protection of the tax administration. This action is enshrined in article 37.1 of the organic law 3/2018 of data protection and guarantee of digital rights.[84]

In the crisis of 2008, the tax administration does not totally comply with the economic, social and cultural rights of the Covenant due to the emergency of the situation. The Government adopted some politics that in order to improve the economic situation and overcome this huge crisis. However by adopting this new political measures some rights of taxpayers were not respected.

The domestic court system is established by different judicial orders, which are specialized in different matters, these orders are the civil, criminal, administrative, labor and military order.[85]

[82] Diepvens, N; Develva, F. (2015). The Evolution of the exchange of information in Direct Tax Matters: The Taxpayer`s Rignsts under Pressure**.**
[83] Diepvens, N; Develva, F. (2015). The Evolution of the exchange of information in Direct Tax Matters: The Taxpayer`s Rignsts under Pressure**.**
[84] Ministerio de Hacienda y función pública. (2022). Protección de datos. x
[85]Ministerio de Justicia. Órdenes jurisdiccionales. https://www.mjusticia.gob.es/ca/justicia-espana/organizacion-justicia/organizacion-juzgados/ordenes-jurisdiccionales

They are distributed all over the national territory, with a specific territorial competence – one all over the Spanish territory and other only in one part of it. In addition, they are organized in different levels or instances. In this way, cases can be reviewed by the superior court in some cases. The Supreme Court is the superior court, and it exercises its competence all over the national territory.[86]

There is not a separate tax court from tax matters but a special administrative organ which is the so called the "Economic-administrative Court". Although this organ has functional independence, it is integrated in the "Tax office Ministry", specifically in the "tax office State secretary" and inside this one, in the "General Secretary of the tax office" (Secretaria General de Hacienda).

This special organ has the competence of solving the economical-administrative complaints, which for one hundred years have constituted in Spain a special complaint to challenge tax acts in front of their own Administration. The economical-administrative complaints constitute a necessary instrument to the individuals that want to challenge the acts of the "Tax Administration" and access *a posteriori*, the judicial channel.

The economical-administrative channel has some advantages for the citizens compared to other legal channels, which are the following:

Firstly, the decision corresponds to a separate organ from the one that rendered the act that is going to be revised which will confer more objectivity compared to the appeal that is going to be revised by the higher competent court.

Secondly, in the cases, which are more complex, are solved by majority of the collegiate body which is going to confer a higher probability of rightness.

Thirdly, its members are experts in the subject refer in the complaints, which confers a high degree of specialty.

The last advantage, but not least, is that this procedure is free for citizens and does not require legal assistance but does not impede the citizens that voluntarily acquires this assistance.

It is important to highlight that there are economical-administrative organs in the AACC and that recently, there have been created some organs for the resolution of the economical-administrative complaints in the municipalities of large population. They receive numerous denominations and there are not integrated in the Tax office Ministry

[86]Gobierno de España. Poder Judicial. https://administracion.gob.es/pag_Home/espanaAdmon/comoSeOrganizaEstado/Instituciones_Estado/PoderJudicial.html

but in the Tax Administration of the AACC and local entities, being regulated by their specific rules.[87]

The judiciary refer in its decision in tax matters to international conventions on human rights like the European Convention on Human Rights. An example of this is the resolution of "Padilla Navarro c. Spain" (34302/16) or the resolution of Manzanas Maartín c. Spain (3rd of April 2012).

In the first sentence mentioned the claim was not admitted, this the claimant invokes article 1 of the Protocol nº1 of the ECHR (protection of property) when It comes to the reduction of the motivated pension by the measures agreed in the Royal Decree 28/2012. The claimant particularly alleges that he has lost 1 percent in terms of acquisitive power in 2013 due to the fact that the pension increased only 1.9 percent when the IPC increased 2.9 percent.

In the second resolution mentioned it appreciates a discrimination of the ministers of the evangelic cult in relation to the priests of the Catholic Church, applying article of the Protocol nº1. This is because they have not integrated in the Social Security System, a transitory system that permits counting the periods worked in their ministry prior to that integration as contributed to the effects of the retirement pension.[88]
The judiciary refers in its decisions in tax matters to reports or other documents issued by human rights organizations or bodies related to human rights treaties, IIAs or the Covenant.

For example, in the Sentence of the Constitutional Court 14/2020 of 28 January 2020 which tackles the fact that the appeal was lodge against the royal decree 7/2019, 1 of March, because of not respecting the prepared budget of article 86.1 of the Spanish Constitution and of not complying also with the requirement of "not affecting…the rights, duties and freedoms of citizens regulated in title I (Art. 8.1 SC), in specific with the duty to pay taxes of art. 31.1.SC.

In this sentence, it is mentioned the compliance of international compromises and the report of the Committee of Economic, Social and Cultural rights pf the economic and social Council of the United Nations of the 20 June 2017.[89]

There are not specific cases in Spain where the Covenant has been applied in tax matters. On the other hand, there are many cases in which the European Court of Human have applied the Covenant in tax matters in which Spain is a party. And specific case of this is the Melgarejo Martinez de Abellanosa v. Spain.

[87]https://www.hacienda.gob.es/esES/Areas%20Tematicas/Impuestos/TEAC/Paginas/Estructura%20y%20Organizacion.aspx
[88] Mjusticia.gob.es
[89] STC 14/2020, 28 January 2020

This case concerned administrative proceedings in which the applicant, after seizure of his assets to pay a tax debt of 296,031 euros that included, in addition to the main debt, a surcharge for late payment and default interest, lodged two separate applications for undue payment, one in respect of the main debt and the other in respect of the surcharge and interest. The one in respect of the main debt was allowed, while the one in respect of the surcharge and interest was dismissed. The applicant appealed to the Audiencia Nacional.

In the ensuing judgment no reply was given to his allegation that the surcharge and interest should be declared null and void as a result of the annulment of the main debt. By contrast, two months later, the Audiencia Nacional allowed his siblings' appeals, who had been subjected to similar and parallel tax claims, for that very reason. The Court held that there had been a violation of Article 6 § 1 (right to a fair trial) of the Convention as regards the insufficiently reasoned judgment of the Audiencia Nacional.

It found that, despite the argument concerning the ancillary nature of the surcharge and interest being potentially decisive for the outcome of the case, the Audiencia Nacional's lack of reasoning meant that it was impossible to ascertain whether that submission had been examined at all, or whether it had been assessed and dismissed and, if so, what had been the reasons for doing so. The Court further held that there had been no violation of Article 6 § 1 of the Convention as regards the alleged breach of the principle of legal certainty.

Lastly, regarding just satisfaction (Article 41 of the Convention), the Court held that in this case, a retrial or the reopening of the case was a possibility under the domestic law and that that would constitute the most appropriate form of redress.[90]

[90] European Court of Human Rights. (2022). *Taxation and the European Convention on Human Rights.* https://www.echr.coe.int/documents/fs_taxation_eng.pdf

IV. CONCLUSION

The truth is that Spain is bound to many conventions on human right and investment agreement that can affect its tax legislation. The same happens at a European and international level.

By the ratification of this international instruments many state obligations arise. There have been ratified many human rights conventions that have been mentioned during in the essay. Among these different conventions, like the ECHR arise obligations of protecting, respecting and to achieve the rights.

International Investment Agreements take a very important place in cross border investments as already has been talked about to give legal certainty and minimize the political risks of the investments abroad.

As explained, there are bodies that control and ensure the compliance of this conventions like the Committee on Economic, Social and Cultural rights by writing reports to ensure that states comply with them when elaborating their legislation. Sadly, Spain has received some regular reports about the implementation of the ECHR.

It can be concluded that when designing and applying legislation at an international and European level there are some rights that are more relevant than others in the different conventions for tax legislation, as they are some rights that cannot be linked with this subject.

There is many case-law in which conventions on human rights have been applied in tax law case but mainly in the European Court of Human Rights.

As it has been seen there are some problems finding a fair balance between taxpayer's rights and the cooperation between states in operations like for example, exchange information. But there are some bodies like the Spanish Agency of Date Protection that can help with this problem.

It can be concluded that it is undeniable the closed relationship between the conventions on human rights and the primacy level that they have in our legal system.